88TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

This Appeal concerns an amended notice of assessment to capital gains tax in the sum of €5,137,310. The assessment, dated 7 August 2014, was raised in relation to the sale of a department store and other land and buildings, (hereafter 'the property') which sold on 4 July 2007 for a sum in excess of €40,000,000 (hereafter referred to as '€40m').

The Respondent took the view that the disposal constituted a disposal of development land pursuant to section 648 of the Taxes Consolidation Act 1997 ('TCA 1997'). The Appellant submitted that the proceeds of sale of €40,000,000 did not exceed the current use value ('CUV') of the land and that as a result, the land did not constitute development land.

For the purposes of this appeal, the matter in dispute is the valuation in respect of the current use value of the land at the date of disposal on 4 July 2007.

The Appellant bears the onus in this appeal and in order to succeed, he must show that the current use value of the land on 4 July 2007, was equal to the consideration for the property disposed of, namely €40,000,000.

Background

On 4 July 2007 a memorandum of agreement was signed by the Appellant and [name redacted] Limited (hereafter 'the Company') as the vendors ('the vendors'), and [name redacted] Holdings Limited, [C.D.] and [E.F.] as the purchasers ('the purchasers') whereby it was agreed that the vendors would sell and the purchasers would purchase the property for €40,000,000.

The property sold by the Appellant comprised five separate commercial buildings comprising retail property plus a car park and included; ' [PREMISES 1]' (a department store in a five storey building), ' [PREMISES 2]' (a discount store), a former [Food Retail] premises (a hardware store in a single storey retail space previously owned and occupied by [Food Retailer]), a former [Clothing Retail] premises (a single storey retail space formerly leased by [Clothing Retail]) and a restaurant premises (a two storey premises used as a restaurant).

By letter dated 19 June 2009, the Respondent notified the Appellant of the commencement of a Revenue audit of the Appellant's capital gains tax returns for 2006 and 2007.

By letter dated 20 July 2012, the Respondent stated: *'I have reviewed your computation of the gain on the sale of the premises .... and the documents forwarded to me. I believe that the disposal is of Development Land as defined in Section 648 of the Taxes Consolidation Act 1997. Please arrange for a current use valuation of the property disposed of to be carried out as at the date of disposal of 4 July 2007.*

Under the provisions of Section 653 of the TCA 1997, losses cannot be used against development land gains. Please provide a revised calculation of the Capital Gains Tax due of 2007 together with interest and penalties.'

A valuation report was not submitted by the Appellant. The Appellant's position was that the current use value of the land was €40,000,000. By e-mail dated 7 August 2014, the Respondent issued an amended notice of assessment to capital gains tax for the tax year of assessment 2007, showing CGT due and payable of €5,137,310.

Legislation

- Section 5 TCA 1997 - Interpretation of Capital Gains Tax Acts
- Section 548 TCA 1997 – Valuation of assets
- Section 648 TCA 1997 – Interpretation (Chapter 2 – Capital gains tax: disposals of development land)
- Section 653 TCA 1997 – Restriction of relief for losses, etc. in relation to relevant disposals
- Section 949I TC 1997 – Notice of appeal
- Section 955 TCA 1997 – Amendment of and time limit for assessments

In accordance with section 648;

"current use value" –

(a) in relation to land at any particular time, means the amount which would be the market value of the land at that time if the market value were calculated on the assumption that it was at that time and would remain unlawful to carry out any development [(within the meaning of section 3 of the Act of 1963, or, on or after 21 January 2002, within the meaning of section 3 of the Act of 2000)] in relation to the land other than development of a minor nature, …]

"development land" means land in the State the consideration for the disposal of which, or the market value of which at the time at which the disposal is made, exceeds the current use value of that land at the time at which the disposal is made, and includes share deriving their value or the greater part of their value directly or indirectly from such land, other than shares quoted on a Stock Exchange

Submissions in brief

Development land

The parties took opposing positions on the issue of whether the property constituted development land pursuant to section 648 TCA 1997 with the Respondent taking the view that the property constituted development land and the Appellant taking the view that this was not the case.

Additional ground of Appeal

The Appellant sought amendment of his grounds of appeal while the Respondent opposed this amendment pursuant to section 949I(6) TCA 1997.

Limitation Period

The ground of appeal which the Appellant sought to have included pursuant to section 949I TCA 1997 was that the assessment raised by the Respondent was out of time in accordance with section 955 TCA 1997. The Respondent submitted that the proper interpretation of section 949I precluded amendment of the ground of appeal in the first instance but the Respondent submitted that the Respondent was within time to amend the assessment in accordance with section 955(2)(b) on grounds that the return filed by the Respondent did not contain a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period.

EVIDENCE

Documentary evidence

Documentary evidence furnished in this appeal included *inter alia*; the [Auctioneer] valuation report dated 25 March 2014, *inter partes* correspondence and documentation in relation to the sale of the property including deeds, contracts and maps. Relevant excerpts of these documents are cited in the analysis below.

Witness evidence

Evidence on behalf of the Appellant was provided by the Appellant in person by [Witness Z] and by [Witness Y]. Evidence on behalf of the Respondent was provided by [Witness X]. The evidence is summarised in general terms and also by topic below. [Witness X]

General

<u>The Appellant</u>

The Appellant provided evidence in relation to the history of the business, the manner in which it grew over the years, its importance to the town and its value to him personally. He also gave evidence in relation to the layout of the building and to changes which had taken place after the disposal in 2007.

The Appellant's recollection in relation to the details of the sale (approximately ten years hence) was incomplete. He was unclear on the sequence of events and of when he entered into a binding contract with the purchaser, [C.D.]. He gave conflicting evidence in relation to whether he met [C.D.] in advance or whether he met him by surprise.

A number of questions were put to the Appellant in relation to his tax returns. He stated that he did not know the answers and that his accountant, [Witness Y] would deal with these questions.

[Witness Z]

[Witness Z], an estate agent based relatively proximate to the property, gave evidence on behalf of the Appellant. [Witness Z] did not state whether he had formal qualifications in the area of valuation. He stated that he had been retained recently, for the purposes of this appeal. He stated that he had not been requested to value the building and that he had not measured the building. [Witness Z] spoke of the Department store, its location and the state of the market in 2007. He discussed other commercial buildings which were sold in the town and compared figures to the figures contained in [Witness X]'s valuation report. [Witness Z] did not submit a valuation report in evidence.

[Witness Z] was in agreement with the Respondent's valuer, [Witness X], on a number of matters, namely;

- He agreed with the general approach of valuing retail property on the basis of estimated rental value.
- He accepted that a larger property was harder to let than a smaller retail unit.
- He accepted that the market for a very large property would be more limited, with a lower price per square foot and a lower rental yield.
- He agreed with the estimated rental value of €25 per square foot that [Auctioneer] used for the ground floor of [PREMISES 1].
- In the case of a multi-storey retail property he accepted the principle of progressive discounting of floors as one moved up storeys.
- He stated that the level of discount applied by [Auctioneer] was a bit higher than he would have allocated, namely a difference of between €5 per square foot in [Witness X]'s report and €7.50 per square foot in his opinion.
- There was no significant disagreement by [Witness Z] with the values that [Auctioneer] put on the two smaller units in the property, which were the restaurant, [PREMISES 2] and the former [Food Retail] property.
- The methodology used in the [Auctioneer] report was largely agreed by [Witness Z] though he disagreed with some of the application of that methodology.

[Witness Y]

[Witness Y], a chartered accountant and chartered tax advisor, whose firm was tax advisor to the Appellant, gave evidence on behalf of the Appellant. He stated that the business generated losses in 2006 and 2007. [Witness Y], whose firm prepared the Appellant's tax return for 2007 accepted during cross examination that there were errors in the return including;

i. The figure for aggregate consideration in respect of commercial premises was not included. The figure inserted was net of disposal costs and was too low. In addition, in relation to residential premises, he acknowledged that there were properties included which did not belong to the tax year in question and as a result of both of these errors, the figure for 'total consideration on disposals' was incorrect.
ii. The acquisition of the restaurant for €1.25m by the Appellant by contract dated 1 May 2007, was omitted from the return.
iii. [Witness Y] stated that the return was completed on the basis that the sale of the property was not a sale of development land.

On 23 September 2013 and 10 March 2014, the Respondent wrote to the taxpayer's agent, [Accounting Firm], requesting that they '*forward any documents prepared in advance of the sale such as a brochure or schedule of particulars outlining details of the building'*. [Accounting Firm] responded with '*The property was not advertised and no brochure was prepared*.' [Witness Y], when asked why the reply stated that there was no brochure when there was a brochure, said that he had not seen the brochure at the time, that he did not write the letter himself and that he could not explain why his colleague had replied in these terms.

<u>[Witness X]</u>

[Witness X], a chartered surveyor by qualification and profession, specialised in the valuation of commercial property. He stated that he had been working in the field for approximately 20 years. He stated that his work was predominantly Dublin based but with countrywide experience. He stated that he spent five years working in Northern Ireland. At the time of the hearing [Witness X] was working for [Auctioneer] and had been with [Auctioneer] for approximately 6 years.

In carrying out his report [Witness X] set out the basis of the valuation at page seven of his report. He stated that the valuation was prepared in accordance with section 648 TCA 1997 i.e. current use value. Thus, [Witness X] did not assess planning potential but carried out a

valuation of current use value. [Witness X] in carrying out his valuation, made an assumption that planning would not be permitted (other than development of a minor nature).

In carrying out his valuation [Witness X] made a number of positive assumptions, namely, that the buildings were readily usable and readily lettable.

[Witness X] visited the site and inspected and measured the property. He valued the buildings as at 4 July 2007 and on the assumption that they were readily available for beneficial occupation.

[Witness X] stated that his methodology was an established one for commercial valuations, namely, that he assumed a hypothetical tenant at a market rent for each property (which was based on comparable evidence of similar transactions). [Witness X] then took the rental value of each property and applied a yield that a potential investor would expect. This gave him the estimated rental value ('ERV').

Witness evidence by topic

1. [PREMISES 1]

In relation to [PREMISES 1], a five-storey detached building extending to a gross internal floor area of 37,635 sq. ft., [Witness X] observed that '*the upper floors which have a restricted floor to ceiling height of approximately two metres are serviced by both an escalator and staircase*.' He stated in evidence that the floor to ceiling heights were '*about two metres on average to the upper floors'.*

The property on the valuation date of 4 July 2007, was in use as a department store. He made an assumption about the tenure namely, that there was good and marketable freehold or long leasehold title.

He stated that it is practice in surveying and valuing retail properties that the upper floors are less valuable than the ground floor. He stated that it would have been very difficult to secure a tenant for this quantum of space in its then format. He stated that he valued [PREMISES 1] based on its central location. He stated that the profile of the building (the building frontage) did not face onto a main street.

He calculated the ERV at €432,803 per annum, assumed a new twenty-five year lease, letting costs of 15% and valued the ERV into perpetuity at 5.75% which resulted in a current use value for [PREMISES 1] of €6,240,000.

The [Food Retail] building as measured by [Auctioneer] was 21,613 square ft. and according to [Auctioneer], 14,250 square ft. of that was retail space. The Appellant gave evidence that the storage area was 2,500 square ft. as opposed to 6,329 sq. ft. Leaving aside the car park, the 2004 price for the former [Food Retail] premises equates to €88 per square foot which is substantially less than the €285 that was achieved in the same year for [Fast Food retailer] . It is less, by a factor of almost ten, than the price achieved by [BANK]. It is also significantly less than the [Pharmacy] price of €340 per square foot which [Witness Z] stated was not on the main street but on a subsidiary shopping street.

Working back from the capital price of €88 per square foot (bearing in mind that the real figure is likely to be less as this does not attribute value to the car park) and applying a rental yield of 6% (which is what [Auctioneer] applies in 2007) this would equate to a rental yield of €528 per square foot and an ERV of €114,000 for the entire property. If one assumed a rental yield of 4% ([Witness Z] referred to properties achieving sub 4 percent yields i.e. the local Bank of Ireland) the ERV would be down to €3.52 per square foot. While these figures relate to 2004 and the sale did not take place until 2007, these figures are remarkably close to the values that the Appellant submitted were too low in the [Auctioneer] valuation, namely €5 for the top floor in [PREMISES 1]. In fact, in the [Auctioneer] figures for 2007, they attributed €5 per square foot to loading storage and office in this building and €13.50 per square foot to retail space and they came out with a capital value of just over €3m assuming it's a 6 percent yield. Again, that is without regard to the car park. Therefore, [Witness X] in his valuation report assumed a significant increase on the 2004 value namely, an increase of approximately 50% on the capital value. The former [Food Retail] premises is one of three large buildings on the site and it is mainly ground floor retail. There is a small element of second storey but it is mainly ground floor. The Appellant stated in evidence that he was very keen to get this premises, that he always paid over the odds and that he was particularly keen to get this premises because he knew [High Street Retailer] were interested and he wanted to pre-empt [High Street Retailer] and did pre-empt [High Street Retailer] . Thus, I am satisfied that the Appellant paid full market value in 2004.

Returning to [PREMISES 1], I am satisfied that the ERVs allocated by [Witness X] were fair and reasonable. [Witness X] did not accept the suggestions put to him by the Appellant that his description of the ceilings of the upper floors being "*approximately two metres*" were

inadequate and/or erroneous and [Witness X] stated repeatedly that he was satisfied with his description and did not wish to reassess his valuation in respect of [PREMISES 1].

2. [PREMISES 2] and mezzanine

Valuation figures

The Appellant complained that the ERV in [PREMISES 2] retail showroom was too low when compared with [PREMISES 1] ERV. [Witness X] identified a number of relevant factors which resulted in the lower ERV, namely; that [PREMISES 2] was not a purpose built retail unit whereas [PREMISES 1] was, that the floor area space was much larger than in [PREMISES 1] and that it would be *'extremely difficult to secure a tenant to take space of this nature and this quantum'.* [Witness X] also stated that the building had a secondary profile.

Retail v storage

The valuation of [PREMISES 2] was carried out on the basis it was part retail showroom and part warehousing/storage.

[Witness X] visited the site and inspected and measured the property. He was unable to gain access to part of [PREMISES 2] building, comprising approximately one sixth of the property and he did not see the mezzanine floor. He valued the area behind the locked door and new wall as a storage area, rather than a retail area and he acknowledged that he would have put a higher value on it had he been aware that it had been retail. However, he questioned what area was being used for storage if this area was not storage. He stated: *'So in total you have I think something like 60 to 70,000 square feet of retailing space wherein you didn't have any storage space and that would be quite unusual in my opinion not to have any storage space to service such a quantum of retail space .... unless the storage was somewhere else*.' He also stated: *'You have over 27,000 square feet, which is a very large retail unit for this location…. If the rear section was used as retail and usable as retail, yes, we possibly would revise our view on that, but as I say we didn't access it at the time.'*

Based on the valuation of [PREMISES 2] as part retail and part storage, [Witness X] valued the current use value of [PREMISES 2] at €3m.

However, [Witness X] stated that if he had known it was a retail area, he would have valued the entire building as retail but would have used a slightly reduced ERV per square foot of €11.50. This would have given an ERV per annum of (27,754 x €11.50 = €319,171)

The mezzanine

The Appellant submitted that the [Auctioneer] report omitted to include the mezzanine level which was 5,000 square feet which was a retail area in the rear of [PREMISES 2] that was not accessed by [Witness X]. He stated; *'I wouldn't be attributing much value to a mezzanine floor which I assume is probably a timber structure. I don't know I haven't seen it.*' In evidence [Witness X] stated that he would have made '*possibly a small increase*' in relation to the mezzanine retail floor if he had seen it.

In the circumstances, I propose adjusting the CUV in respect of [PREMISES 2] to include the Mezzanine level of 5,000 sq. ft. at an ERV of €7 per square foot.

3. The Former [Food Retail] Premises

[Witness X] in his valuation report valued the [Food Retail] property as having a current use value of €3,150,000.

[Witness X] made an assumption that the two separate areas which were situated on the southern and northern ends of the [Food Retail] property and which were separated from the main retail section by concrete block walls were storage areas, totalling 6,329 square feet. The Appellant in evidence stated that the walls referred to were built subsequent to the sale of the property and that they were not storage areas at the time the property was sold. The Appellant stated that the storage area was approximately 2,500 square feet.

The Appellant stated that [Witness X] incorrectly ascribed a large area in the [Food Retail] buildings as stores when it was used as a retail sales area. The Respondent accepted that there was a difference of between 3,000 and 4,000 square feet between what [Witness X] described as stores and what the Appellant stated was stores which the Appellant stated was 2,500 square feet. The Respondent questioned whether the Appellant had in fact measured the space but accepted that there was a difference.

In the circumstances, I am satisfied that the CUV of the former [Food Retail] premises should be recalculated to reflect the following adjustments; .

- Reduce '*loading/storage*' from 6,329 sq. ft. to 2,500 sq. ft. Revised ERV per annum is calculated as follows; 2,500 x €5 = €12,500
- Increase '*retail*' by 3,829 sq. ft. Revised ERV per annum is calculated as follows; 18,087 x €13.50 = €244,066.50

Total revised ERV per annum is €256,566.50

4. The car park

The Appellant gave evidence that the carpark had been a paying carpark prior to the sale. This indicated there was an error in [Witness X]'s report as [Witness X] stated that he had assumed that the car park was ancillary to the retail space, namely, that it was not a source of income in its own right. [Witness X] stated that he valued the buildings on the basis that they were buildings which had car parking available or adjacent and that he reflected the value of the car park in the buildings.

While the accounts and information specific to the carpark were available to the Appellant, the Appellant did not adduce this documentation in evidence and, as stated above, the Appellant did not furnish a valuation report in evidence.

Rather, the Appellant's witness, [Witness Z], during his oral evidence suggested that [Witness X] did not allow value to the carpark in excess of one acre with 282 car parking spaces. [Witness Z] stated that on a 50% occupancy for 313 days per annum at one euro per space for seven and a half hours per day, the car park would generate approximately €330,000 per annum, giving the car park a capitalised value of approximately €4m.

It would have been preferable had the Appellant taken a formal approach to proving the value of the car park by furnishing car park accounts and documentation and by evidencing the car park earnings. In particular, evidence was led that the department store made losses in the final years of its operation and without accounts which detail car park earnings, I cannot assess the extent to which the car park was impacted.

However, as [Witness Z]'s calculation was accepted by [Witness X] in evidence who described [Witness Z]'s approach as '*prudent*', I consider it appropriate that additional value in respect of the car park be reflected in the overall current use value based on [Witness Z]'s figure of €4m. However, I will note that I accept the expert evidence of [Witness X] that had there not been car parking available, the valuation pertaining to the buildings in respect of the ERV would have been lower.

I accept the figure of €330,000 as income generated by the car park on a per annum basis and I accept the sum of €4m as capitalised value of that sum.

In the circumstances, I am satisfied that the overall CUV should be adjusted to reflect the capitalised value of the car park of €4m.

5. The former [Clothing Retail] premises

This property comprised a single storey terraced ground floor retail unit extending to a net internal floor area of approximately 1,063sq ft.

[Witness X], in carrying out the valuation assumed a twenty-five year lease, a rental void period of three months and a rent free period of three months.

[Witness X] valued the unit on the assumption that there was a freehold/long leasehold title and vacant possession. [Witness X] stated that the ERV per sq. ft of €30 was higher because the unit was smaller. He valued current use value at €555,000.

I accept this evidence on behalf of the Respondent.

6. The Restaurant

The Appellant leased a premises to his brother, from which his brother ran a restaurant.

On 1 May 2007, the Appellant purchased the restaurant from his brother. The Respondent submitted that this was an attempt by the Appellant to put together a development site.

[Witness X] attributed a current use value of €820,000 to this property based on an assumed freehold/long leasehold interest subject to and with the benefit of the occupational lease therein as of 4 July 2007.

I accept this evidence on behalf of the Respondent.

7. The brochure

On 23 September 2013 and 10 March 2014, the Respondent wrote to the taxpayer's agent, [Accounting Firm], requesting that they '*forward any documents prepared in advance of the sale such as a brochure or schedule of particulars outlining details of the building'*. [Accounting Firm] responded with '*The property was not advertised and no brochure was prepared*.' This was untrue.

The Appellant denied that the brochure which was used to advertise the property to potential buyers, was an attempt to market the property as a development opportunity.

I am satisfied, based on the evidence, that the property was advertised as a development site in the brochure. The brochure contained details of the land zoning and there were no photographs or area details of the buildings. It is clear from the evidence that the brochure was an attempt to market the property as a development opportunity, namely, an opportunity to demolish and reconstruct the existing buildings.

[Witness X] stated that in his view, the brochure offered the property for sale as a development site as the brochure did not outline or summarise the respective buildings situated on the site.

I accept this evidence on behalf of the Respondent.

8. The whole is greater than the sum of its parts

The Appellant consistently argued that the whole was greater than the sum of its parts and that [Witness X] did not allow any premium for the property as a whole. and that this was a flaw in the [Auctioneer] valuation.

However, [Witness X]'s evidence was that a collective valuation of the buildings could be less than valuing the buildings individually. He stated that there was a disconnection within the buildings, with two adjoining but with the others somewhat dispersed. He stated that a purchaser buying all of the buildings might in fact hope to achieve a discount and for this reason, he did not allocate a premium.

[Witness X] stated that the current use value of the site as a whole was likely to be less than the current use value of the aggregate of the buildings on the basis that it would be more difficult to find one tenant in respect of all the properties, given the scale of the said properties.

The Appellant did not furnish a valuation report in evidence and as a result, there is no competing expert testimony and therefore I accept the evidence of [Witness X] on behalf of the Respondent.

9. The involvement of [High Street Retailer]

Evidence was led by the Appellant that the purchaser told the Appellant that [High Street Retailer] were interested in the property.

Even if the purchaser told the Appellant that [High Street Retailer] were interested in the property, there was no evidence that [High Street Retailer] themselves were involved. On behalf of the Appellant, newspaper articles were furnished which suggested that the purchaser was trying to get [High Street Retailer] as an anchor tenant in a revised development or in a development for which a revised planning application was being submitted. However, there is a significant difference between [High Street Retailer] being an anchor tenant in a new development and [High Street Retailer] owning and occupying the property as it then stood and trading from the property as it then stood, as a retail occupier. Even if I were to accept that [High Street Retailer] were interested in acquiring the property, it does not necessarily follow that they would wish to trade out of the existing buildings that were on the site in 2007.

10. Whether the property had development potential

In relation to the alleged planning difficulties regarding the property, the Appellant stated that [PREMISES 1] had a protected façade. However, no documentary evidence of this was produced and it is at variance with the fact that a planning application was subsequently granted which says nothing of the façade being protected.

The Appellant never suggested that he got to the point of making a planning application. He stated that he had several meetings with the planning authorities and that he was given the impression that he would not get planning permission for the kind of development that he wanted. He took the view that there was no point in submitting a planning application. He stated that the council wanted a theatre and a tower block and an underground carpark and possibly a flyover and a road going through the site. Ultimately, the evidence was *not* that the council were opposed to development of the site but that the Appellant wanted to carry

out a relatively modest development and that the council wanted a much more ambitious development. This is not consistent with the submission of the Appellant that planning would never be granted for this site

In addition, on 23 May 2008, approximately ten months after they signed the contract for sale, the purchasers submitted a planning application for a proposed development, a retail development, comprising the demolition of existing retail units and measuring in excess of 10,000 square metres.

The submissions of the Appellant were that the property did not have development potential. The valuation report prepared by [Auctioneer] was challenged on that basis. However, the evidence of the Appellant did not accord with the submission that the property did *not* have development potential. The Appellant's evidence was that the council turned down his development plans as being too modest. Thus, his evidence was that the council wanted the site redeveloped, they just did not want it redeveloped in the limited way that the Appellant himself was proposing. Further, within a year, the purchaser had submitted a planning application and he subsequently had it approved and, at the time of the hearing, was seeking revised permission.

The suggestion on behalf of the Appellant, that the reason he could not obtain planning permission was because the Council were hostile to his proposals does not amount to evidence that they were hostile to development of the site *per se* or that the site was not capable of development or that it lacked development potential, rather, the evidence of the Appellant was that the Council wanted a more ambitious development than that proposed by the Appellant himself.

11. Comparators.

I am satisfied that the kind of discounting that [Witness Z] suggested must be viewed in light of the fact that he had not inspected the property nor had he measured the property nor was he purporting to put an alternative valuation report in evidence. Even if I applied the type of discounting suggested by [Witness Z], the current use value would still be a great deal less than the price achieved in respect of the property.

[Witness Z] introduced eleven comparator properties located in the same area which were sold between 2004 and 2007. Numbers 1,3,4 and 5 were [Fast Food retailer],the former [BANK], the [Pharmacy] and the [Building Society] building and they were sold in 2004. The

price per square foot varied between €285 and €875. Higher prices per square foot were achieved in subsequent years. It was submitted that none of these sites had development potential given the very large prices per square foot and that the current use value in respect of the Appellant's buildings in 2007 should have been comparable and that the price that was achieved, the €40m, represented no more than current use value.

[Witness X] identified a significant amount of overlap between the comparators used by [Witness Z] and those that he used. The Respondent submitted that he did use his own comparators but he did not consider them directly comparable. He stated in his evidence that retailers are increasingly seeking modern units possibly on the outskirts of a town in purpose-built shopping centres. He explained the differences between the Appellant's property and the relevant comparators and stated that one needed to adjust for a number of factors, including; the size of the property, the location of the property and the vintage of the property.

I am satisfied that these adjustments were reasonable and that same are supported by the analysis in relation to the sale of the local [Food Retail] building in 2004. [Witness X] stated in re-examination that it was not essential under RCIS guidelines that comparisons be used at the time he carried out his report.

On the subject of comparators, I accept the expert evidence adduced on behalf of the Respondent.

12. Other evidential matters

a. Senior Counsel for the Appellant, on the first day of the hearing suggested that [Witness X] took '*a desktop approach'* to the report, namely, he suggested that the report was written in Dublin based on maps. However, [Witness X] visited the property and he spent approximately one day inspecting and measuring it. I accept the evidence of [Witness X] and the submission of the Respondent that the valuation report was not a desktop exercise.
b. The Appellant suggested that [Witness X] did not have sufficient experience of the local property market. [Witness X] in evidence stated that he had significant experience in the Irish property market generally. He also spoke with local valuers and used local comparators in his report. I am satisfied that [Witness X] had ample and sufficient valuation experience.

c. The Appellant suggested that [Witness X] erroneously described the business centre of the town where the property was located however, [Witness X] acknowledged that the property was in the town centre. He stated that it was not located in the prime retail sites and that it had a '*secondary profile*'. [Witness X] explained that the '*profile*' of a building is what it fronts onto. Insofar as the main buildings fronted onto a carpark rather than a main street, they had a secondary profile. This does not mean that they had a secondary location.
d. The Appellant complained that [Witness X] did not contact him to obtain information in relation to the property when compiling his report. [Witness X] stated that if he needed access to a property to value it he would normally contact the owner. He stated that he would not contact the previous owner. There was no evidence given that it would be normal practice to contact the prior owner of a building in carrying out a valuation.
e. The Appellant submitted that [Witness X] did not have access to the legal maps and did not request any from the Appellant prior to completing his report. The Respondent accepted that this was correct. The Respondent stated that [Witness X] had sought individual maps from the purchaser but that the purchaser did not have them. The Respondent submitted that it was significant that the purchaser was looking at the property as a whole and was not concerned with the maps. [Witness X] stated that at the bottom of page 9 of his valuation report he was provided with a legal map pertaining to the overall site area of approximately 3.60 acres. He stated that while he did not have the legal maps which set out exactly the demesne of each of the individual properties, he made assumptions in that regard which affected the overall valuation positively and that there was absolutely no question of the valuation being reduced because of the maps available. The Appellant objected to the fact that [Witness X] did not have proper maps of the individual parts of the properties that were separately valued. The Respondent submitted that [Witness X] was unaware of the exact boundaries of the individual properties which were individually valued. The Respondent stated that [Witness X] inspected and measured the buildings in person and that he assumed that the buildings ended where they seemed to end and that it was not unreasonable to adopt this approach and I accept this submission on behalf of the Respondent.
f. The Appellant complained that [Witness X] did not speak to the planning authorities in respect of the planning permission available at the time of the sale of the property and did not access or attempt to access the full planning file available in the office in the town. The Respondent stated that the planning file was not relevant to a valuation

of current use value. The Respondent stated that [Witness X] was not involved in the assessment of planning potential, he was simply assessing current use value. I accept this submission on behalf of the Respondent. The Respondent added that [Witness X] made an assumption that the buildings were in compliance with existing planning laws and regulations and that that was an assumption which was favourable to the Appellant because, had there been non-compliance with planning requirements, that would have reduced the value of the buildings and I accept this submission on behalf of the Respondent.

g. The Appellant submitted that [Witness X] did not give any value to the garden centre. The evidence in relation to the garden centre was that it was partly outdoors and [Witness X] did not value the outdoor space. On behalf of the Respondent it was submitted that it was unclear that a value would be ascribed to this space by a potential tenant. As there was no competing expert evidence, I accept the valuation report of [Witness X] and I do not determine that an adjustment is required in respect of the garden centre.
h. The Appellant submitted that [Witness X] erroneously described the entrance to the carpark as reached from [name of street redacted] . [Witness X] acknowledged that he misnamed the street.
i. The Appellant stated that he incorrectly attached zero value in respect of goodwill attaching to the property. However, as the goodwill belongs to the business and the purchaser did not purchase the business, the purchaser did not purchase the goodwill. Simply put, the purchaser of the property did not acquire the goodwill of the Company and I am satisfied that no point arises here.
j. The Appellant submitted that [Mr. G] had an input into the valuation report but had not been to the property and had not inspected it. [Mr. G]'s role (as head of the professional services valuations department in [Auctioneer]) was to look at the methodology applied and to countersign. He assumed the facts were correct and that he was reviewing the report on that basis. I am satisfied that no issue arises here.
k. The Appellant complained that [Witness X] claimed that the report was not concerned with development land but that it contained the statutory provision in respect of development land. I am satisfied there is no issue here. The report was not concerned with development land but with the current use value of the land.
l. There was a suggestion by the Appellant that [Witness X] did not adequately understand the concept of current use value. However, [Witness X] set out clearly in his report that he valued the property on an existing use basis. The land sold for €40m and this is not in dispute. In order to ascertain whether land is development land one

does not need to assess its development value. What is required is that its current use value be ascertained and then that value is compared with the price achieved on sale of the land. This is the exercise that [Witness X] carried out. [Witness X] in evidence stated that he did not consider development value and did not try to estimate development value. [Witness X] stated repeatedly that he carried out his valuation on an existing use basis and that he was not concerned with development potential. I am accepting the evidence of [Witness X] in this regard.

m. The Appellant submitted that [Witness X] was unduly influenced by the condition of the premises at the date he inspected them. [Witness X] did not accept this. He stated he assumed that the building had been in a much better condition when it was sold in 2007 and that in estimating the ERV he assumed good condition and that it was readily lettable. The relevant assumptions are listed in [Witness X]'s report.

n. The Appellant stated that the ERVs were extremely low however, this is not consistent with the evidence in relation to the analysis concerning the sale of the former local [Food Retail] property in 2004 and I do not accept the Appellant's submission in this regard.

Analysis and Findings

On the issue of whether the disposal was a disposal of development land pursuant to section 648 TCA 1997, the question is whether the consideration received exceeds the current use value of the land. This is essentially a question of fact.

In cases where a valuation of a property is contested as in this case, each party would normally produce its own valuation of the property and would call the author of the report to provide expert evidence at hearing in relation to the valuation carried out and the report compiled.

The Respondent emphasised the fact that the Appellant in this appeal did not produce a valuation report as at the date of disposal even though he was invited to by letter dated 20 July 2012 from the Respondent. While the Appellant called [Witness Z], to give evidence. [Witness Z] had not carried out a valuation in respect of the property, had not inspected or measured the property and did not produce a valuation report which could be tested in evidence.

The Respondent's [Auctioneer] report was furnished to the Appellant and his agents in 2014. At that stage, they wrote a letter saying that the report contained numerous errors. However,

the Appellant's agents did not identify the errors and did not engage with the report until the hearing of the appeal.

The proceeds of sale of this property amounted to €40m. The onus to show that that sum constituted market value, rests squarely with the Appellant. Yet the Appellant, who was requested in 2012 for the first time to furnish a valuation report to the Respondent, has never done so. Instead, the Appellant focused on the Respondent's valuer and in identifying the errors in his report. In closing, the Appellant through his Senior Counsel, submitted that these errors and the evidence called on behalf of the Appellant '*show that the current use value was the market price of the property when it was sold'.* The Respondent described this submission as '*a huge leap'* and as '*lacking a logical link'.*

The law on expert evidence

In cases involving expert evidence there are often two experts of approximate weight giving evidence which differs in certain respects. That is not the case in this appeal. Here, there is one expert, [Witness X] who has furnished a report on behalf of the Respondent and who has been examined and cross-examined in relation to that report. The Appellant has not furnished a counter report in evidence but has instead called [Witness Z] to comment on [Witness X]'s report and to comment on comparators.

The expert evidence in this case is the evidence of [Witness X]. A court or tribunal is not obliged to accept expert evidence however, there must be good reason if it is to be rejected. An adjudicator must consider what weight of expert evidence there is on each side. It is clear in this appeal that there is more on the Respondent's side than on the Appellant's side.

On the matter of expert evidence, Senior Counsel for the Respondent opened the dicta of Judge Bingham in *Eckersley v Binnie* [1987] 18 ConLR 1 on page 77, as follows;

> *'If all the evidence on a point is one way, good reason needs to be shown for rejecting that conclusion. If the overwhelming weight of evidence on a point is to one effect, convincing grounds have to be shown for reaching a contrary conclusion. Where the trial judge has founded on a witness's oral evidence, the court will not uphold the finding if persuaded that it is not justified on a fair construction of what the witness actually*

said. The court will not support the dismissal of a witness's evidence where this rests on what is shown to be a misunderstanding, or a wrong impression.

In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason.'

The Respondent also opened the judgement of Mr. Justice Clarke in the Supreme Court in *Donegal Investment Group plc v Danbywiske and others* [2017] IESC 14 where Mr. Justice Clarke at paragraph 5 of the judgment stated;

'5. Findings based on expert evidence – The role of an appellate court

5.1 A starting point has to be to identify the proper role of a trial judge in assessing expert evidence. Charleton J. explained that role in James Elliott Construction Ltd v Irish Asphalt Ltd [2011] IEHC 269 (para.12 of the judgment) in the following terms:

> *"Every expert witness has to be evaluated on the basis of sound reasoning. An expert witness is, however, no different to any other witness simply because he or she is entitled to express technical opinions; all of us are subject to human frailty: exaggerated respect based solely on a witness having apparent mastery of arcane knowledge is not an appropriate approach by any court to the assessment of expert testimony. Every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability."*

5.2 In setting out the reasons why he preferred certain expert testimony over others in that case Charleton J. went on to say that:

> *"Of these criteria, the most important reasons whereby I have chosen one expert over another have been the manner in which an opinion has been reasoned through and the extent to which opposing views have been genuinely and objectively considered on the basis of their merit. A judge must bear in mind that,*

> *notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team. Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view. As with demeanour, this is not readily demonstrated on a transcript of evidence. Rather, to a trial judge, it can be possible to see the degree to which a witness is thinking through the potential for an opposing theory before giving a reasoned answer. Experience in other cases demonstrates that there is a danger that experts may erect a barrier of apparent learning in order to disguise what would be an answer awkward to their side were it to be expressed plainly. Apart from the attractions of logic and reasoning, therefore, assessing an answer based on what is seen and heard in the courtroom remains important."*

5.3 It follows that the assessment of expert testimony does require a trial judge to assess the way in which that testimony is given. As Charleton J. pointed out, the way in which an expert responds to questioning or to the views of an expert witness tendered by the other side, can play an important role in the assessment by the trial judge of the extent to which the expert's views may truly be said to be uninfluenced by the case which his or her side is seeking to put forward. Furthermore, experience has shown that it is much easier to engage with the detail of evidence which is explored and explained (and, indeed, challenged) at an oral hearing by being present at that hearing rather than reading a transcript of what transpired.

5.4 For those reasons it seems to me that counsel on both sides were correct to accept that the principles in Hay v O'Grady do apply to the role of an appellate court in scrutinising findings made by a trial judge with the assistance of expert testimony.

5.5 However, as Charleton J. also pointed out in Elliott*, an important part in the assessment of any evidence is the application by the trial judge of logic and common sense to the testimony heard. That approach is particularly relevant in the context of expert evidence. Where experts differ the position adopted by the other side will be put to each of the experts in cross-examination. Their reasons for maintaining their view can be examined in some detail. The trial judge can, therefore, assess whether the reasons given by one expert or the other stand up better to scrutiny.*

5.6 While it is true, therefore, that the assessment of all evidence, whether expert or factual, requires both the application of logic and common sense, on the one hand, and an assessment of the reliability or credibility of the witness gleaned from having been in the courtroom, on the other, it may be fair to say that it is likely that a decision based on expert evidence will be significantly more amenable to analysis on the basis of the logic of the positions adopted by the competing witnesses and the assessment of the trial judge of their evidence on that basis.

5.7 Precisely because a decision to prefer the evidence of one expert over another is likely to be influenced, to a much greater extent than might be the case in respect of factual evidence, by the rationale put forward by the competing witnesses, there may be somewhat greater scope for an appellate court to assess whether the reasons given by a trial judge for preferring one expert over another can stand up to scrutiny. That being said it must remain the case that an appellate court should show significant deference to the views of a trial judge on the question of findings based on expert evidence because the trial judge will have had the opportunity to see the competing views challenged and scrutinised at the hearing.'

I am satisfied that the methodology and substance of [Witness X]'s valuation report was correct. To the extent there were deficiencies, I am satisfied that these represented deficiencies in the information available to [Witness X] at the time he carried out his report. For example, he received incorrect information about the car park and in relation to the [Food Retail] building and [PREMISES 2] building, he made assumptions about what he saw. I am satisfied that his approach in this regard was reasonable.

With reference to paragraph 5.2 in the *Donegal Investment Group* case and the statement that: '*Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view'* I am satisfied that [Witness X] fairly accepted that there were a number of adjustments which he would have made to his report had he been aware of some of the factual material which emerged for the first time at the hearing.

Findings, including material findings of fact

i. I find as a material fact that the property sold by the Appellant on 4 July 2017 constituted development land.

ii. I find that [Witness X] had ample valuation experience and that his valuation methodology was sound and reliable and that his valuation report was fair and reasonable. [Witness X] conceded the errors that existed in his report and accepted in principle that adjustments might arise in respect of those errors.

iii. I find, and am satisfied that [Witness X] valued the current use value of the property based on existing use value as at the valuation date of 4 July 2007.

iv. I find as a material fact based on the evidence, that no adjustment arises in respect of the valuation attributed in the [Auctioneer] report to [PREMISES 1], to the former [Clothing Retail] premises and to the restaurant.

v. I find as a material fact that a valuation adjustment is supported by the evidence of [Witness X] in relation to [PREMISES 2], the Mezzanine, the former [Food Retail] premises and the car park. The detail in respect of these adjustments is set out below.

vi. I find that the brochure was used to advertise the property to potential buyers and that the property was advertised in the brochure as a development site.

vii. I find that the property was not greater than the sum of its parts and that a premium did not arise, as per the evidence of [Witness X].

viii. I find that there was insufficient evidence to support the submission of the Appellant that [High Street Retailer] were interested in acquiring the property with a view to trading out of the existing buildings that were on the site in 2007.

ix. I find that there was insufficient evidence to support the submission of the Appellant that [PREMISES 1] had a protected façade.

x. I find that the submission made on behalf of the Appellant that the property did *not* have development potential, was contradicted by the evidence of the Appellant himself on the basis that the Council turned down the Appellant's planning proposals as they considered his proposed development too modest. The suggestion on behalf of the Appellant that the reason he could not obtain planning permission was because the Council were hostile to his proposals does not amount to evidence that they were hostile to development of the site *per se* or that the site was not capable of development or that it lacked development potential.

xi. I accept the evidence of the Respondent in relation to comparators namely, that one needed to adjust for a number of factors, including; the size of the property, the location of the property and the vintage of the property. I am satisfied that these adjustments were reasonable and that same are supported by the analysis in relation to the sale of the local [Food Retail] building in 2004.

xii. I find that the Appellant's 2007 return contained several errors in addition to the main error, being the omission of the sale of development land in respect of the property.

Valuation adjustment

On the authority of *Donegal Investment Group* I am satisfied that I have jurisdiction to adjust the valuation of the CUV as long as the adjustment is supported by the evidence adduced.

I determine that no adjustment arises in respect of the valuation attributed in the [Auctioneer] report to [PREMISES 1], to the former [Clothing Retail] premises and to the '' restaurant.

I determine that the CUV be adjusted to reflect the following;

a. <u>[PREMISES 2] and mezzanine</u>

I determine that the 27,754 sq. ft. of floor space identified by [Witness X] in relation to [PREMISES 2] should, on the evidence of [Witness X], be allocated an ERV of €11.50 per square foot resulting in an ERV per annum of €319,171. This adjustment should be reflected in a revised current use value figure in respect of [PREMISES 2].
I determine that the current use value in respect of [PREMISES 2] should also be adjusted to include the Mezzanine level of 5,000 sq. ft. which I allocate an ERV of €7 per square foot on the evidence of [Witness X] that he would have made '*possibly a small increase'* in relation to the mezzanine retail floor if he had seen it. This results in an ERV per annum of €35,000.

b. <u>The Former [Food Retail] Premises</u>
I determine that the CUV of the former [Food Retail] premises should be recalculated to reflect the following adjustments;
   - Reduce '*loading/storage'* from 6,329 sq. ft. to 2,500 sq. ft. Revised ERV per annum is calculated as follows; 2,500 x €5 = €12,500
   - Increase '*retail'* by 3,829 sq. ft. Revised ERV per annum is calculated as follows; 18,087 x €13.50 = €244,066.50

Total revised ERV per annum is €256,566.50

c. The car park

I determine that the overall current use value should be adjusted to reflect the capitalised value of the car park of €4m.

Additional ground of Appeal

Section 949I(2) TCA 1997 provides that a notice of appeal shall specify, *inter alia;*

> *'(d) the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds'*
>
> Section 949I(6) provides; *'a party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.'*

[emphasis added]

The Appellant's notice of appeal which was delivered on 22 October 2014, does not contain a ground of appeal in relation to the limitation period. The Respondent by letter dated 26 September 2014, drew the Appellant's attention to section 957(5) and (6) TCA 1997.

The Appellant did not seek to raise a limitation period issue in this appeal until January 2017. The Appellant first raised the limitation period issue with the Tax Appeals Commission on 3 February 2017.

The Respondent contended that the time-limit ground of appeal is one which could reasonably have been included in the notice of appeal and accordingly, that it is not now possible to allow the ground of appeal to be relied upon by the Appellant in the appeal. The Respondent submitted that if the Appellant wished to include the time-limit in his grounds of appeal, there was no reason why he could not have done so in 2014.

The Appellant in his submission referred to a number of cases indicating that a Court has a broad discretion to allow pleadings to be amended and a new ground of appeal to be added. While this submission may carry merit in the context of an application pursuant to the Rules

of the Superior Courts or other Court rules, the case law does not address the provisions particular to section 949I and/or section 957 or a similarly worded statutory provision.

It is important to observe that the powers of the Commissioners derive from statute and that the test contained in section 949I(6) must be met if an additional ground is to be permitted. I am satisfied that I have no jurisdiction to admit the new ground of appeal unless the test contained in s.949I(6) has been satisfied. Thus, the Appellant will be prohibited from relying on a new ground of appeal unless he can satisfy the requirements of section 949I(6), that the new ground '*could not reasonably have been stated in the notice*' of appeal.

The Appellant relied on *Hans Droog v Revenue Commissioners* [2016] IESC 55 which dealt with the question of whether time limits in section 955 TCA 1997 apply to the formation of an opinion in accordance with section 811 TCA 1997. However, there is nothing in the *Droog* decision to suggest that the Court was revising or clarifying the law in relation to assessments.

The Appellant opened a number of other authorities which related to the power and discretion of the Superior Courts in amending pleadings, however the jurisdiction of the Tax Appeals Commission is statutory in nature. The jurisdiction of the Commission being statute based, is limited to the express provisions contained in statute, namely the statutory requirements of sub-section 6 of section 949I TCA 1997.

Senior Counsel for the Respondent stated that if the Appellant's argument was that a court could never reject a time limit ground of appeal, then the Statute of Limitations would not exist. Senior Counsel emphasised that the Statute of Limitations is regularly applied against litigants and that there was and is no universal principle that a time limit cannot be applied against a party.

In conclusion on this point, the Appellant was unable to identify a basis upon which the ground could not reasonably have been stated in the notice of appeal and for this reason, I determine that the statutory requirements of section 949I(6) have not been met and that the Appellant shall not be entitled to rely on the additional ground of appeal.

Although I have not acceded to the Appellant's application to amend his grounds of appeal, I will for completeness address the statute issue.

Limitation Period

The Respondent in this appeal raised the amended assessment approximately seven years after the relevant tax year, being 2007. The Appellant contended that the amended assessment was out of time in accordance with section 955 TCA 1997.

The Respondent claimed that it was entitled to raise an amended assessment in accordance with s.955(2)(b) on the grounds that the 2007 return filed did not contain a full and true disclosure of all material facts.

In this regard the Respondent, referring to the evidence of [Witness Y], stated that there were a number of serious errors which [Witness Y] acknowledged and that those errors were such as to disapply the time limit. The Appellant in respect of these errors, sought to rely on a claim that these were errors of his agent and that they could not be attributed to the Appellant. This submission is contradicted by the express provisions of section 951(5) TCA 1997, which treat a return filed by an agent as if it had been prepared and delivered by the chargeable person himself. In addition to the errors detailed by [Witness Y] in his evidence, the most serious error was the failure to disclose the disposal of the property as one of development land.

The submissions of the Appellant raised questions in relation to whether the Appellant could be considered to have been negligent in circumstances where he sought out and relied upon professional advice. However, Senior Counsel for the Respondent submitted in closing, that neither fraud nor negligence was part of the applicable statutory test and that there was no allegation of fraud, negligence or neglect being made by the Respondent in this appeal.

The wording of section 955(2)(b) does not refer to negligence nor does it require that a finding of negligence be made as a condition of its application. It relates to the matter of whether the chargeable person has made in the return, a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period. In this appeal, the return contained a number of errors, the most serious of which was that it did not identify the 2007 disposal as a disposal of development land. In these circumstances it is clear that the return did not contain *'a full and true disclosure of the facts'* in accordance with section 955(2)(b).

In conclusion, I determine that the Respondent was entitled to amend the assessment in accordance with the provisions of section 955 TCA 1997 and that the amended assessment was not out of time.

Conclusion

In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellants who must prove on the balance of probabilities that the assessments to tax are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated:

> *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

Thus, the onus of proof is on the Appellant and the question in this appeal is whether the Appellant has discharged the onus to demonstrate that the sum of €40m paid in respect of the property was equal to the current use value of the property.

Having considered the evidence and facts, the relevant legislation and case law, I determine, for the reasons set out above, that the Appellant has not succeeded in proving that the current use value of the property sold equalled the sales proceed received, namely €40m and has not discharged the onus of proof.

I determine therefore, that the property sold constituted development land in accordance with section 648 TCA 1997.

As regards the valuation of the current use value of the land, the Respondent's valuer accepted that it would be appropriate to make changes to his valuation report in certain respects. Based on [Witness X]'s evidence in this regard I have set herein, the adjustments to be reflected in an amended figure for the overall current use value of the property. Even with these adjustments there will remain a significant difference between the current use value of the property and the sales proceeds received in respect of the sale of the property, upon which, capital gains tax will arise.

Determination

I determine that the sale of the property on 4 July 2007 constituted a sale of development land in accordance with section 648 TCA 1997.

I determine that the amended assessment to capital gains tax dated 14 August 2014, in the sum of €5,137,310 and in respect of the tax year of assessment 2007, shall be reduced to a sum which reflects an increase in the current use value of the land based on the following adjustments;

- I determine that the 27,754 sq. ft. of floor space identified by [Witness X] in relation to [PREMISES 2] should, on the evidence of [Witness X], be allocated an ERV of €11.50 per square foot resulting in an ERV per annum of €319,171. This adjustment should be reflected in a revised current use value figure in respect of [PREMISES 2].
- I determine that the current use value in respect of [PREMISES 2] should also be adjusted to include the Mezzanine level of 5,000 sq. ft. which I allocate an ERV of €7 per square foot on the evidence of [Witness X] that he would have made '*possibly a small increase*' in relation to the mezzanine retail floor if he had seen it. This results in an ERV per annum of €35,000.
- I determine that the CUV of the former [Food Retail] premises should be recalculated to reflect the following adjustments;
    - Reduce '*loading/storage*' from 6,329 sq. ft. to 2,500 sq. ft. Revised ERV per annum is calculated as follows; 2,500 x €5 = €12,500
    - Increase '*retail*' by 3,829 sq. ft. Revised ERV per annum is calculated as follows; 18,087 x €13.50 = €244,066.50
      (Total revised ERV per annum is €256,566.50)
- I determine that the overall current use value should be adjusted to reflect the capitalised value of the car park of €4m.

I determine that the statutory requirements of section 949I(6) have not been met and that the Appellant shall not be entitled to rely on the additional ground of appeal.

I determine that the Respondent was entitled to amend the assessment in accordance with the provisions of section 955 TCA 1997 and that the amended assessment was not out of time.

This appeal is hereby determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

16th day of January 2019

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.