

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF AN APPEAL
VR/8/1997
BETWEEN
NEWRY BUILDING SUPPLIES LTD - APPELLANT
AND
THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND - RESPONDENT

Lands Tribunal - Mr Michael R Curry FRICS FSVA IRRV ACI.Arb

Belfast - 26th January 1999

This was an appeal by Newry Building Supplies Ltd (the Company) against a decision of the Commissioner of Valuation to refuse industrial relief.

C M Lavery QC instructed by Eamonn McEvoy & Co appeared for the Appellant. R Weatherup QC instructed by the Crown Solicitor appeared for the Commissioner. Mr Lavery called Mr Ciaran Murdock, Managing Director of the Company to give factual evidence and written expert evidence by Mr Robert Watson was accepted. Mr Weatherup called Mr William Alan Hanna to give expert evidence. Both Mr Watson and Mr Hanna were experienced Chartered Surveyors.

Background

Although a family firm, the company employed 88 people, including 5 sales representatives, and they generated about 75% of the total sales. At the relevant time (1996), 67% of turnover related to manufactured products and 33% to bought-in products.

Of the Company's total sales, 93% were credit sales to customers, whom they regarded as trade customers ('builders' for convenience) and to whom a trade discount of approximately 25% was allowed. Of the remainder, about half were cash sales to builders or builders who had not been given a credit account. The balance was sales to what Mr Murdoch described as 'ordinary members of the public'. A fleet of lorries delivered about 77% of the total sales.

The hereditament was on an industrial estate about 1 mile from the centre of Newry. The premises comprised a large site of approximately 3.44 hectares on which there were two main blocks of buildings, two smaller buildings and extensive yard areas.

There was a showroom that was open to the public. That was in one of the main blocks, which also included stores, a sawmill and canteen and administrative offices, the other contained stores and offices. One of the smaller buildings was used for pressure treatment of timber and the other was a security/despatch office at the entrance. The rest of the site was largely concreted and provided open storage, parking and access.

Much of the business carried on at the hereditament was the importation of timber and processing of that for sale and there was substantial and expensive saw mill machinery and a timber treatment plant. Mr Murdoch divided their timber production into three categories: sawn timber, machined timber and joinery. The work done to the timber involved some cutting to length but mostly reducing width and thickness. In terms of relative volume the greatest proportion would be sawn timber followed by machined, then joinery. About 60% of the timber was put through a treatment plant to impregnate it with preservative.

The Company also supplied other, mainly bulky or heavy, building materials: plaster, cement, piping and steel products. They cut steel mesh from 16 feet by 8 feet grids as required. It was unusual to process sewer piping, and insulation was simply sold from stock. They did not sell plumbing or electrical products but they did display and sell small items, including architectural furniture and tools, in the showroom.

The Issues

The Commissioner accepted that the hereditament was occupied and used as a factory but refused industrial relief on grounds that it was primarily occupied and used for the purposes of a retail shop (Rates (NI) Order 1977 Schedule 2 para 1(b)(ii)). The Company agreed that there was a retail shop and that retail trade was carried on from the premises, so the net issue for the Tribunal was whether the hereditament was primarily occupied and used for the purposes of a retail shop; that would include premises of a similar character in which retail trade or business is carried on. As the Commissioner had accepted that it was an industrial hereditament, the onus lay with him to show that it was primarily occupied and used as a retail shop.

The lengths to which the parties had gone, to crystalise primary issues and to deal with secondary issues in a proportionate way, was of considerable assistance to the Tribunal. Three core issues were raised:

- ◆ Were the sales, in particular those through the sales representatives, retail trade?
- ◆ Were the sales representatives the equivalent of roundsmen?
- ◆ What was the effect of having the showroom open to the public?

The building supply industry deals with a broad spectrum: part is undoubtedly retail trade, part is not, part is doubtful. At one end of the scale, a home owner may buy materials for a DIY project (Do It Yourself - do the work yourself rather than employ a business or tradesman to do it) and, in everyday language, that would be a retail purchase. At the other extreme, a large construction company may place a large order, with a sawmill, for materials for use in a substantial project such as a shopping centre or a call centre and few would call that a retail purchase. But, there are many colours in between: for example, a tradesman may be employed by a home owner to do a small alteration, and buy what materials are needed for the project from a DIY store, a sawmill or builders' suppliers. He may be acting, in practice, as no more than an agent for the owner and many might regard that as a retail purchase, but others would argue that it was a trade purchase. A large company may, from time to time, buy a few small items from a DIY store; no one would say that would take the DIY store out of the retailer category.

Sales representatives, retail trade?

At the Hearing it became apparent that a crucial issue, if not the crucial issue, was whether the representatives' sales were retail trade. The vast bulk of the business was done through them and unless that was retail trade, an essential step, towards establishing the Commissioner's contention that the premises were primarily of a retail shop character, would fail.

The representatives were allocated to individual territories and each day they called at building sites and builders (generally established customers) taking orders. These customers generally did not call at the company's premises. The representatives were expected to visit about 10 sites per day, sell to the foremen and phone in orders to the Despatch office at the hereditament. Their top ten customers accounted for 25% of the business: these were very large construction firms, including a number of the most substantial construction companies in the province and their sites would be visited every second day.

The issue is very much one of impression and the conclusion the Tribunal draws from the facts must be approached in a common-sense way. In Almond v Heathfield Laundry (Birmingham) Ltd [1960] 3 All ER 700, Harman LJ warned against "sliding slowly down the slippery path of authority" towards a conclusion which common sense dictated to be ridiculous.

Finn v Kerlake (1931) AC 485, is at the root of much of the legal debate on this type of issue but, here, the Tribunal considers that it is better to begin with Dolton Bournes & Dolton Ltd v Osmond [1955] 2 All ER 258.

In the latter, the Court of Appeal considered whether the customers of that company (of timber importers, merchants and sawmillers) were the members of the general public or were a limited class, trade customers. As indicators, Jenkins LJ adopted -

- ◆ the scale of purchases, and
- ◆ whether customers were purchasing
 - for their own use or
 - for the purposes of their respective trades or business.

So far as the representatives' sales are concerned, those indicators seem to have the advantages of allowing the application of common-sense tests that get to the heart of the question and of being less reliant on some of the difficult distinctions made elsewhere.

He concluded that:

“... the customers are not members of the general public in this case: they are a limited class, and, with exceptions so small as to be negligible, they consist entirely of trade customers, ie, builders and merchants and factories, who purchase timber **in substantial quantities for the purposes of their respective trades or businesses**”.

(Tribunal's emphasis)

Evershed MR classed “builders” as “members of the public” but distinguished them from the ordinary man in the street. Later, he continued:

“Whether the sales to builders can be for any purposes regarded as “retail” sales or not (and on that I express no concluded view), and whether builders can be fairly regarded (as I assume for most purposes they can) as “members of the public” ... ”

Romer LJ distinguished between “the public as a whole” and:

“... a small section of the public, viz, builders. Their potential customers do not, in those circumstances, constitute the “people” to whom Greene LJ referred in Ritz Cleaners Ltd v West Middlesex Assessment Committee (3) ([1937] 2 All ER at p 376), or “the public” to whom Lord Dunedin referred in the Turpin case (1) ([1931] AC at p473), but constitute merely a small section, and a specialised section, of the public as a whole.”

The builders, with whom this Tribunal is concerned, included some of the largest construction companies in the province, were buying substantial components, through sales

representatives (rarely over the counter) for delivery by lorry, and to be adapted or incorporated in building projects, for the purposes of their respective trades or business to generate further profits. They could not, by any ordinary use of language, be considered to be retail customers. If there had been evidence that the products and scale of purchases had been small or customers had been purchasing for their own personal use, that could have led to a different conclusion. The Tribunal concludes that unless the representatives' sales are to be viewed in the same light as those of the roundsmen in Finn v Kerlake, they cannot be taken as an indicator of a retail shop character.

Showroom and roundsmen

So, there was a showroom on the premises and that raised the questions of whether this gave retail shop character to the whole hereditament and whether the role of the representatives may be equated with that of the roundsmen in Finn v Kerlake.

In that case, the House of Lords concluded that orders given to the home bakery roundsmen were just part of the ordinary business of a small retail bakers' shop as a unified ordinary retail business. In a passage that has caused some difficulties for rating practitioners and which began "for it cannot be doubted that" the House of Lords concluded that sales of bread and cakes to hotels, clubs and restaurants etc were typical retail trade and, similarly, that orders given to roundsmen were just part of the ordinary business of a small retail Bakers' shop. In Dolton Bournes Ltd v Osmond, Finn v Kerlake clearly was in the forefront of that Court's mind and, without, in any way, resiling from the core conclusion, they, and also later Courts, had reservations about the general applicability of some of the findings, which related to the particular circumstances of that small home bakery.

Here, the representatives' sales operation was not integrated with the showroom on the premises: neither the orders obtained by them, nor the products sold by them passed through it. The Tribunal is not persuaded that its presence in some way colours their sales so as they become retail trade. Finn v Kerlake must be confined to the facts of that case and comparison with, presumably, small scale purchases through the roundsmen of a small unified home bakery business must be treated with caution, otherwise few industries, selling their products, could obtain relief.

To have retail shop character, the premises need not look like a shop but there was a showroom here and it was more than the basket in a hall in Almond v Heathfield Laundry (Birmingham) Ltd [1960] 3 All ER 700. Mr Weatherup placed considerable importance on the facts that, unlike Dolton Bournes, Ltd v Osmond, there was a showroom, there was resort by the general public and the company encouraged the general public to visit. Mr Lavery referred the Tribunal to Harron v The Commissioner of Valuation for Northern

Ireland [1996] VR/10/1994, in which it had cited with approval the question posed by Lord Evershed in Almond v Heathfield Laundry (Birmingham) Ltd:

“Is the presence of this place of public resort the so called shop such as to give the shop colour and character to the whole premises or is it a case in which you can fairly ask: looking at the business as a whole, is it primarily one conducted for the purposes of that shop or is it not”.

There were 5 counter sales persons, about 25% of total sales were made through the showroom and, from inspection, this closely resembled a DIY retail store. Both some builders and what Mr Murdoch described as ‘ordinary members of the public’ were dealt with in the showroom: about 4% of total sales were sales to the latter. The showroom was a very small proportion, less than 2% (about 372 square metres), of the total area of the premises.

There must be a presumption that sales over the counter, in something like a shop, have the character of a retail shop trade and it is probable that a number of builders who did business through the showroom were buying on a small scale and that trade may be regarded as contributing something of the character of a retail shop.

But, that presumption may be displaced when the activity is considered under the two limbs of the tests of Jenkins LJ in Dolton Bournes, Ltd v Osmond i.e.

- ◆ the scale of purchases, and
- ◆ whether customers were purchasing
 - for their own use or
 - for the purposes of their respective trades or business.

Here, much of the product range was heavy and bulky and generally speaking, would likely be sold to customers, not for their own use but rather, for the purposes of their respective trades or business. That may not be retail trade but, there was no clear evidence before the Tribunal of the scale of those sales.

The Tribunal concludes that some sales from the showroom, over and above those to “the general public” were also retail sales, some probably were not but it cannot say whether that was 5% or 20% of the total sales. However, as representatives’ sales accounted for the vast bulk of the business (some 75%), even if all the showroom sales were regarded as retail sales, less than a quarter of sales would be retail shop trade.

The Tribunal finds that, although there was a retail shop on the premises, it did not give retail shop character to the whole hereditament and the role of the representatives is not equivalent to that of the roundsmen in Finn v Kerslake.

Summary

The Tribunal has found the approach of Jenkins LJ in Dolton Bournes Ltd v Osmond to be particularly helpful in the circumstances of this appeal.

There is little in common between the role of an ordinary sales representative and the special character of the roundsmen in Finn v Kerslake and, although there was a shop on this hereditament, the Tribunal finds the representatives' activities were not part of a retail shop trade.

Having considered the nature of the representatives' sales and whether customers were purchasing for their own use or for the purposes of their respective trades or business, the Tribunal is not persuaded that those sales were retail trade. That trade amounted to 75% of the total.

A shop or something like a shop with access by, and invitation to, the public is a clear indicator of retail shop character but that may not be a conclusive test in all cases. Some of the showroom sales, including some to builders, were retail shop trade but, taking the hereditament as a whole, the Tribunal concludes that those were not sufficient to establish the primacy of that trade.

As the Commissioner had accepted that this was an industrial hereditament, the onus lay with him to support his conclusion that the hereditament was primarily occupied and used for the purposes of a retail shop, or premises of a similar character in which retail trade or business is carried. For the reasons set out above, the Tribunal finds that the hereditament was not primarily so occupied and used: the Appeal succeeds.

In the absence of agreement, the parties may apply to the Tribunal to fix the apportionment of NAV.

Costs

At a further hearing, on 4th June 1999, Mr Eamonn McEvoy appeared for the Appellant and Mrs Ann Kyle appeared for the Respondent.

Mrs Kyle accepted that the Appellant had been successful but applied for an Order that each party pay its own costs or, if the Tribunal was not minded to agree with that, the Appellant should not receive any costs relating to the period prior to January 1999.

Mrs Kyle referred the Tribunal to a previous decision Oxfam (BT/3/1995) and to a decision of the Lands Tribunal for England and Wales Hospital Plan Insurance Services Ltd v Persaud (VO) [1998] RA 230 at page 288 which in turn cited Jafton Properties Ltd v Prisk (VO) [1997] RA 137 at page 206.

Mrs Kyle submitted that information which provided the foundation for the eventual success of the Appellant's case, about how the sales representatives operated, was not volunteered on the appeal to the Commissioner and not in the early stages of the Appeal to the Tribunal. It was not substantially disclosed until the end of 1998 following directions from the Tribunal.

Mr McEvoy submitted that, if the Commissioner had elected to decide the appeal with incomplete information then, that was a matter for him and not something that could be laid at the door of the Appellant. If the information, about the salesmen, had created a sea change in the Commissioner's thinking then he could have put up a white flag there and then, but he did not do so and the matter proceeded to a full hearing.

He submitted that there had been nothing in the conduct of the case by the Appellant that would distinguish it from the ordinary rule that costs follow the event.

In much of the work of the Tribunal there is an exchange of facts followed by experts' reports and that encourages "cards on the table". However, it is a peculiarity of the Rating Rules that the parties proceed in serial steps rather than parallel and often a party, on whom the burden lies, has difficulty in establishing relevant facts from his opponent.

It goes without saying that a successful party may be deprived partly or wholly of his costs as a result of his conduct but, to avoid satellite litigation, it is important that a reasonably robust view is taken. The Tribunal is not persuaded that the conduct of the Appellant was such as would justify a departure from the ordinary rule that costs follow the event.

The Appellant has been wholly successful and the Tribunal awards the Appellant its costs, such costs to be taxed on the High Court Scale, in default of agreement.

ORDERS ACCORDINGLY

10th March 1999

**Michael R Curry FRICS FSVA IRRV ACI.Arb
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Mr C M Lavery QC instructed by Messrs Eamonn McEvoy & Co for the Appellant.

Mr R Weatherup QC instructed by the Crown Solicitor for the Respondent.