

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF AN APPLICATION
BT/37/1996
SAVE SERVICE STATIONS LIMITED - APPLICANTS
AND
RAVENSEFT PROPERTIES LIMITED - RESPONDENTS

RE: ARDS AUTOPOINT, ARDS SHOPPING CENTRE, NEWTOWNARDS

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

Belfast - 4th November 1997

The application arose from a renewal of a lease of a petrol filling station, under the Business Tenancies Act (Northern Ireland) 1964. Agreement had been reached for the terms of a new lease and the only issue for the Tribunal was the commencing rent, on a 5 year rent review pattern, for a term of 20 years from the 1st November 1996.

Mr Roger Nixon of Carson and McDowell appeared for the Applicants and called Christopher John Callan as an expert witness. Mr Leo Brown of Elliott Duffy Garrett appeared for the Respondent and called Kenneth Crothers as an expert witness. Both experts were experienced Chartered Surveyors.

The filling station ('Ards') was located within a car park on the campus of an edge of town shopping centre (Ards Shopping Centre, Newtownards), about half a mile from the town centre. This was a filling station developed not with roadside presence in mind but instead as part of a shopping centre. Visibility from the main road was quite good but there was no direct roadside access and the permitted user, for other than petrol sales, was restricted. The layout was modern but had not been brought up to state of the art standards.

Some disputes may be resolved by a compromise but others require choices to be made. Although there was a consensus between the valuers that the mode or category of operation would not be, to use convenient terminology, a 'Supermarket' operation, there was a fundamental issue that was this. Would it be a 'Discount' operation, aggressively cutting prices to achieve high volume throughput, or would it be a 'Roadside' operation, relying on passing and local trade and facing strong competition from other local Roadside operations? Mr Crothers thought a Discount operation would succeed but Mr Callan thought the opposite.

The context in which the rent fell to be assessed was unusual and it is important that the conclusions of the Tribunal should be seen in the proper perspective. Although most operators discount from time to time, the Tribunal was informed that the advantages of a Supermarket operation in a shopping centre or supermarket environment arise from the synergy of the station being adjacent to the parent supermarket. The benefits may be more to do with customer loyalty and loyalty schemes and the benefit of cross merchandising with the store, than simply with price cutting.

The reasons why this station would not attract a Supermarket operation at the relevant date, were these. Neither of the NI supermarket chains, which were major occupiers of the shopping centre, operated filling stations and so they would not have been in the market. At the date of Hearing, major UK national food stores, who were also filling station operators, had entered the Northern Ireland market and two had replaced the supermarkets at Ards Shopping Centre. They may be hypothetical tenants now, and it is a reasonable assumption that they are likely to be so by the first review date. However, at the relevant date, they were agreed not to be in the market and neither their bid nor the prospect of their interest was to be taken into account.

The filling station was about half a mile from the town centre and within the overflow car park. That was severed from the principal shopping centre car parks by a main road, Nursery Road, and access to and from the centre was by an vehicular underpass. There were 3 other access points to the car park, including one from the main road.

The station was originally developed in 1976 and had a full cover canopy, a restricted shop or kiosk facility, 12 pumps (with 24 nozzles) and a jet car wash area. There were four 8,000 gallon storage tanks and one 4,000 gallon tank. Under the terms of the current lease the tenant had covenanted to erect a petrol service station, so it was agreed that the rent on renewal must reflect the reality of the existence of the filling station. In 1982 the site was extended, for valuable consideration, to include space for a car wash. In 1983 the permitted user was widened to include sales of car accessories, cigarettes and confectionery. After two changes of tenant, in 1987 and 1989, in September 1995 there was a further assignment, to the Applicant, for a consideration of £10,000. Neither valuer encouraged the Tribunal to rely on that transaction as an indication of value. As there was no obligation to construct a car wash, the rent must disregard the car wash.

Actual forecourt throughput for the years 1992 to 1996 was agreed but what trends were shown and what conclusions should be drawn?

1992	368,300 gallons
1993	458,600 gallons
1994	552,900 gallons
1995	752,600 gallons
1996	339,900 gallons

On one view the figures for 1992 to 1995 represented 'clear and dramatic evidence of an upward trend'. From another perspective the underlying trend from 1994 was a downwards spiral.

The Landlords knew or ought to have known the circumstances at the last rent review in 1991 but, although their expert did rely on the rent determined, he was unable to assist the Tribunal with any information about the throughput then. In those circumstances the Tribunal has looked elsewhere. It is interesting to note that at Lisnagelvin, which was also on a shopping centre campus but now abandoned, the August 1992 rent review was fixed at £21,000 a year as a cleared site and with a throughput of 500,000 gallons a year. On a simple comparison, the 1991 rent at Ards was likely to have been based on a maintainable throughput at Ards of between 425,000 and 450,000 gallons. Certainly it does not suggest that the throughput at Ards was much greater or much less just before then or that it was a Discount operation, and it was not a Supermarket operation.

The throughput for the first 8 months of 1997 was 135,950 gallons; the applicant's projection for the full year was 204,000 gallons.

Whether Ards was in the Discount or Roadside category, throughput cannot be considered in isolation from pricing policy and competition. Mr Callan produced a comparative monthly survey of pump prices in Newtownards, from January 1996 to August 1997 at 9 filling stations nearby. Three of these - Hartford Link (Maxol), Scrabo (Texaco) and Brae (Texaco) stations - were also to the West, on the Belfast side, of the town centre and quite close, with Scrabo very close.

The Applicant might reasonably be expected to have been aware of pump prices, at Ards if not the others, in the period just before taking the assignment, but the Tribunal was given no evidence of those prices.

Mr Callan summarised the competing stations in Newtownards. Hartford Link opened in 1995 and had a 2,000 sq. ft. supermarket, high-tech car wash and state of the art forecourt with starting gate layout. It was one of the most modern filling stations in the province and had a wide range of ancillary facilities. Scrabo shared much of the same passing traffic and included a small Convenience shop but was a restricted, old style 14 pump forecourt. Brae

was state of the art with starting gate 26 pump layout and good-sized, 1,200 sq. ft. Convenience shop. At Ards, the Applicants had invested in re badging and pumps but the layout was still that of 1976 and there was no Convenience shop unit.

Mr Callan said that it was a reasonable assumption that the exceptionally high sales volume of 1995 was attributable to an undercutting of competitors' prices by up to 3p per litre but he accepted that that opinion was based on a knowledge of price cutting only at the end of the year. He concluded that the 1995 figure was unique and he thought 450,000 gallons would have been a more appropriate figure to adopt.

The Tribunal accepts Mr Callan's conclusion that, on the balance of probabilities, there was aggressive price cutting reflected in the throughput at Ards about 1995 because:

- a. The January 1996 survey shows unleaded at Ards undercutting Scrabo by 3p per litre and Hartford Link and Brae by 0.5p.
- b. February 1996 shows the gap at Scrabo narrowed to 2p and no change in the others.
- c. From January 1989 until September 1995 the outlet was operated by Burmah. The Applicants took the assignment of the premises in September 1995. By March 1996, there was no differential with Scrabo and the others were 0.5p cheaper. In May, Ards was 1p more than the others and from then, relative prices fluctuated but were much the same for all four.
- d. Although other factors may have had an effect, the pattern of the throughput figures is consistent with that view.

Adopting these figures and adding them to the undisputed evidence produces the following picture:

1991	425,000/450,000 gallons (Tribunal's estimate)
1992	368,300 gallons
1993	458,600 gallons
1994	552,900 gallons
1995	450,000 gallons (Applicant's non-discounted estimate)
1996	339,900 gallons
1997	204,000 gallons (Applicant's estimate)

The Tribunal was given no evidence of patterns of throughput at other stations in Newtownards or elsewhere.

The valuers drew very different conclusions from their figures. Their valuations were poles apart and, with some licence, may be compared as follows:

Mr Crothers' valuation was:

Forecourt throughput		
(a) Core anticipated	550,000 gallons @ £0.04	£22,000.00
(b) Prospect of additional	200,000 gallons or more	say £1,200.00
Kiosk	243 square feet @ £5.00	£1,215.00
Store	38 square feet @ £2.00	£76.00
Car Wash site only		say £500.00
		£24,991.00
	Total (say)	£25,000.00

Mr Callan's valuation was:

Forecourt throughput		
(a) Core anticipated	340,000 gallons @ £0.04	£13,600.00
(b) Prospect of additional	0 gallons	£ nil
Kiosk	243 square feet	£ reflected
Store	38 square feet	£ reflected
Car Wash site only		£ reflected
	Total	£13,600.00

The level of throughput probably had consequences for all the other items in the valuations, as the value added by the ancillary facilities, although themselves an attraction, may depend on the volume of traffic, as indicated by the throughput, attracted to the premises.

About the Kiosk, Mr Crothers said it was important to set Ards in the proper context; it was different from a road side filling station, it was on a shopping centre campus and unlikely ever to perform a conventional shop function, so there was a distinction. The Tribunal agrees but considers that distinction affects the whole of the premises.

The Tribunal concludes that there was no Discount operation, in the market at the relevant date, which would outbid the Roadside operation market for the following reasons.

Recently, Shell, at the shopping centre site at Lisnagelvin, had chosen not to renew their lease. That had been the only other filling station at any Northern Ireland shopping centre occupied by anybody other than one of the major national food chains in the centre.

In the course of their mainstream valuation work, valuers may acquire some expertise in related fields; sometimes it is difficult but it is important to distinguish between what is real expert evidence in those related fields and what amounts to no more than speculation dressed up as expertise.

Mr Crothers said that, because sufficient extra trade would be generated, reduced margin would not necessarily translate into reduced overall profit and, in the context of petrol filling stations, increased profit was not a straight line but exponential and would have a large impact on the bottom line. Even if that is so, the evidence before the Tribunal showed that it was not a long term strategy chosen by any other operation either in Newtownards or at shopping centres elsewhere in NI, in recent years.

In Mr Callan's view the local petrol retail market had seen a sea change in recent years. He attached great importance to the effect of the Esso "Price Watch" campaign and considered the impact of the campaign that began in 1996 effectively was to eliminate significant price cutting and, since January 1996, it had permanently depressed retail prices and margins. He accepted that he was not aware of any attempt to cut pricing and see what Esso's reaction would be. The Tribunal considers the Esso Price Watch campaign may have been a symptom rather than a cause, or may have been a catalyst. Although there was no Esso station in Newtownards and no objective evidence that the campaign had directly influenced the local market, the evidence was that significant price cutting was eliminated in Newtownards after 1996. However the Tribunal could not safely conclude that retail prices and margins were depressed.

The Applicants had very extensive experience in retail operation, operating 412 filling stations throughout the UK selling 725 million litres of fuel a year, which represented 2% of the UK market. Turnover in 1996 was £430 million with a profit after tax of £10.4 million. The Applicants had ceased that pricing policy; they were a major petrol company; and no one else was operating that policy either at roadside or at shopping centres anywhere in NI. Mr Callan said the Applicant had pursued normal prudent trading practices. On balance, the Tribunal accepts that but has reservations because no one from the company gave evidence to help the Tribunal understand their marketing strategy, perhaps particularly considering their trading name, and the cessation of discounting about 1996.

The Tribunal agrees with Mr Callan's view that there was no evidence that the real market for Ards was anything other than for operations competing with the surrounding Roadside operations in Newtownards, with whom it was in direct competition, and all had priced at a similar level.

The Tribunal has concluded that a Discount operation would be in a different category to a Roadside operation and, as there was no evidence of actual operations in that Discount category, there were no relevant comparables that would assist the Tribunal to determine an appropriate rent.

Mr Callan, adopting the Valuation and Lands Agency definition, relied on maintainable throughput which he took as the volume of fuel sales which is capable of being achieved by the hypothetical tenant, pursuing trading practices having regard to the trading policies of other, competing stations in the locality. He began by looking at the actual sales generated at the premises and in normal circumstances accepted that it would be correct to take the average of the 3 most recent years' sales as a starting point. However, he considered circumstances were not normal because there was a dramatic fall in throughput that had continued beyond the relevant date. The position more than 3 years away from the relevant date became too remote, it was too difficult to recall and understand the circumstances then. It was suggested that was too fine a focus and he was asked whether he had any great difficulty with Mr Crothers 5 year approach. He accepted that, if in doubt, it would be prudent to take a wider look. The problem was that it reflected figures from before the price watch campaign and that campaign had changed the market. He also relied on the 8 months' figures for 1997 extrapolated for the full year.

In arriving at his opinion of rent, Mr Callan adopted the 1996 throughput figure. He assessed the maintainable throughput for the subject at 340,000 gallons.

In the ordinary course of events, the experts' analysis of common comparables would help point to a solution but the Tribunal was not given the benefit of the assistance of reports that included each valuer's analysis of the other's comparables.

There was only sparse open market rental evidence of filling stations in Northern Ireland but there was evidence from the recent renewal of the lease of Scrabo, which was very close. Mr Crothers had placed some reliance on that, although he said it was quite different in character to the subject property. It was let for a term of 10 years from May 1997 at an initial rent of £15,000 a year and on a 3 year review pattern. The premises comprised a small forecourt with 7 pumps (14 nozzles) under a full cover canopy and with a small Convenience shop, jet wash and other facilities. The shop traded as a Mace outlet selling a wider range of products (including convenience goods) than those permitted under the lease of the subject. He based his analysis of Scrabo on a throughput of the order of 275,000 gallons a year and analysed the transaction as follows:

Forecourt Throughput	275,000 gallons	@	4p per gallon	£11,000
Shop	554 square feet	@	£5.00	£2,770

Office and Kitchen	117 square feet	@	£2.00	£234
Car wash facility				<u>£1,000</u>
				£15,004
		Say		£15,000

Mr Callan analysed 4 transactions. They were all far away from this location. At Knockhill the forecourt element was taken as 270,000 gallons at 3p per gallon (reflecting the kiosk), at Lisnagelvin 500,000 gallons at 4.2p, at Dunluce 341,600 gallons at 3.1p and at Castlewellan 236,026 gallons at 2.9p (reflecting the kiosk). These comparables showed, in his view, a sliding scale of pricing reflecting the economies of scale. He considered the comparable that was most relevant was Dunluce; but that was a rent review of a cleared site and so adjustment would be necessary to reflect the completed filling station. The Tribunal finds these generally support the Scrabo lease renewal. The Tribunal was not given any details of the previous rent or throughput on which it was based.

To some extent, Mr Crothers had based his approach on the previous, 1991 rent review at Ards.

The reviewed rent from November 1981, under the current lease, was £15,500 a year, from November 1986, £17,000 a year and from November 1991, £18,500 a year. As mentioned earlier, although he relied on the 1991 review, Mr Crothers had no idea of the throughput then nor did he know whether the site of the car wash had been included.

He thought the November 1996 rent should be greater than the 1991 review. The shopping centre had been refurbished since 1991, there were new access points to the car park and a new Kentucky Fried Chicken outlet had been opened near the filling station. The Tribunal was not given any information about the terms of that deal.

The rent review was on the unattractive assumption of a cleared site available on a 5 year lease only as compared with a completed filling station on a 20 year lease. That would make it a much less valuable proposition. He did not put forward any quantified expert opinion on what effect these assumptions had at the time. He thought that was a helpful base but there was no mathematical approach to be used to arrive at a precise figure for the rent in 1996.

In Mr Callan's opinion the presence of the modern convenience stores at other stations and in particular the opening of Hartford Link in 1995 had clearly, adversely affected Ards. Mr Crothers accepted that the additional filling station at Hartford Link would have some effect on Ards but, although Ards was not as modern, it was not significantly deficient. The Ards

Kiosk was modestly sized and certainly smaller than the trend today, and he accepted that the trend was to include branded modern shops.

The Tribunal accepts that the increased and stronger competition would have tested customer loyalty and had some effect on throughput but not anything like sufficient to explain the recent decline. Mr Crothers suggested that the down side of a discount scheme is that removal may send out a negative message and that may explain the 1996 figures. That may or may not be so but if it is, judging from the results so far for the following year, the effect will take some time to remedy.

In response to a question from the Tribunal, Mr Crothers said that if Scrabo had introduced price cutting, the effect would have been minimal because it was frequently congested and had a limited capacity to do business. There were no proper queuing facilities and he doubted whether it would have had a strong effect. The Tribunal has viewed all the Newtownards filling stations on a number of occasions and found no significant congestion at current levels of trade.

Mr Crothers maintained that the landlord and tenant would have concluded a core turnover of 550,000 gallons and that there was clear and dramatic evidence that with more aggressive pricing 750,000 gallons were achievable. He said that in circumstance where gallonage was volatile one might expect the market to be cautious and that the figure adopted would be towards the bottom of the range. Taking a broad view of the question he concluded they would settle at £25,000 a year. Looking at that relative to £18,500 a year 5 years earlier and at Scrabo he thought the subject was much superior to Scrabo and he felt comfortable with the relativity between £15,000 at Scrabo and £25,000 at Ards. He could not square Mr Callan's valuation with 3 previous rent reviews at Ards nor Scrabo. He thought it was inconceivable that the 1996 value was less than the 1981 value in a cleared site state.

Initially the Tribunal shared Mr Crothers' concern at being led towards the, most unusual, conclusion that the rent should have moved downwards. But, looking at the evidence in the round its doubts are dispelled. There were special circumstances at the relevant date and the most important was that the Supermarket operations were not, and were agreed not to be in the market. Although Mr Crothers thought the Applicant should have made a quantum leap downwards in pricing to take them into the category of a Discount operation, the Tribunal is not persuaded that it should replace the reality of their strategy with one based on Mr Crothers' speculation. He did not criticise their pricing strategy in the context of the local Roadside operations and it is clear from the evidence that they faced improved and greater competition. Also they were at a real disadvantage in terms of access and, of increasing importance, restrictions on the complementary facilities they were permitted to

provide. Although market evidence was sparse, there was a comparison in the same local market, Scrabo, close by and its forecourt rent did not appear to be out of line with more remote comparisons. The throughput figure adopted by Mr Callan was not inconsistent with either the actual trading at Ards or the volume adopted by Mr Crothers at Scrabo.

In Mr Callan's view and experience a kiosk up to about 250 sq. ft. in size would be reflected in the price per gallon. That was the approach he had adopted in his analysis of his comparisons at Knockhill and Castlewellan. Mr Crothers said it was important to set Ards in the proper context; it was different from a road side filling station, it was on a shopping centre campus and unlikely ever to perform a conventional shop function, so there was a distinction. Mr Crothers also believed that it was a question of character and role rather than size. If the unit was simply a kiosk for collecting money it should be reflected but if the use went beyond that a separate pricing was appropriate.

Whatever difference the distinction may have made, in Mr Crothers' valuation he adopted the same pricing for the Kiosk and store as for his analysis of Scrabo, a Roadside operation. In cross-examination he suggested that the shop might be regarded as a half-way house between a kiosk and a proper shop. The Tribunal has adopted a half-way house as a rough and ready way of reflecting the restricted user at Ards.

At the nearby comparable, Scrabo, Mr Crothers attributed no value to the car wash in his analysis. It is not clear whether that car wash was a matter to be disregarded at the lease renewal of that station but, even if it were, its site would not fall to be disregarded and so the Tribunal considers it is not appropriate to add anything for the car wash site at Ards.

So, in these special circumstances, the conclusion of the Tribunal is that, at the relevant date, for the time being, the premises fell between two stools, on the one hand they had shortcomings as a roadside operation and on the other, bidders for a more valuable arrangement were not in the market. For the reasons outlined above, the valuation of the Tribunal is as follows:

Forecourt Throughput

(a) Core anticipated	350,000 gallons @ £0.04	£14,000.00
(b) Prospect of additional	0 gallons	say £ Nil
Kiosk	243 square feet @ £2.50	£607.50
Store	38 square feet @ £1.00	£38.00
Car Wash site only		say <u>£ Reflected</u>
		£14,645.50
	Total (say)	£14,650.00

The Tribunal determines the rent in accordance with the Act to be £14,650 a year (Fourteen thousand six hundred and fifty pounds).

The Tribunal, having determined the substantive issue of rent then, on 10th March 1998, heard an application for costs, Mr Nixon relied on a Calderbank letter, dated 12th September 1997, in which the Agents for the Tenants had offered "without prejudice save as to costs" to accept a new lease at a rent of £16,000 per annum. He referred to Oxfam v Earl BT/3/1995, accepted that it was a case in the "no fault nor principle" category, submitted that they had clearly beaten their own Calderbank and there had been significant consequences at stake.

Mr Brown also referred to the Tribunal's decision in Oxfam v Earl BT/3/1995 and accepted that it was within the category. He submitted that the reasonableness of the Respondent's position must be considered in the light of the full content of this decision that had made clear it was an unusual case involving special circumstances and the Tribunal should not consider that the Respondent acted unreasonably in these most unusual circumstances. He further pointed out that at the date of the offer the valuers had a common misapprehension regarding the proposals for rent review in the new lease and that issue, although eventually settled, had not been resolved even by the date originally fixed for the hearing. Finally, although the Calderbank offer remained on the table after the 26th September 1997, there was no provision for resolving any disputed costs after that.

The Applicants had contended for a rent of £13,600, the Respondents £25,000. The Tribunal determined the rent at £14,650. The initial conclusion must be that the Respondents were the losers and that is reinforced by the Calderbank offer from the Applicants to settle at £16,000. The Tribunal now turns to the question of whether it is persuaded by the Respondents to depart from a preliminary view that the Applicants' application for costs be granted.

There was misapprehension about the rent review proposals, but the test of whether it was reasonable to refuse a Calderbank is to be applied on the basis of the information available at the time the offer was made. Even if that were not so, the Tribunal notes that the expert evidence was not revised as a consequence of the resolution of the rent review differences and does not accept that as a good reason to not rely on the refusal of the offer.

If the offer were to be accepted at some later stage, the Calderbank made no express provision for resolving any disputed costs and, although, on mature consideration, the Tribunal doubts whether its Rules provide adequate machinery for taxing costs in those circumstances, the Tribunal finds that is not a sufficient reason to displace the effect of the

Calderbank in this instance. An offer was made, it was capable of acceptance at the time, and it was declined.

The Tribunal accepts that the circumstances were unusual but not so exceptional as to deprive the Calderbank of its effect.

The Applicants applied for their costs from the time of the Calderbank Offer and the Tribunal therefore grants the application.

ORDERS ACCORDINGLY

24th February 1998

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

Appearances:-

Mr Roger Nixon of Messrs Carson & McDowell, Solicitors for the Applicants.

Mr Leo Brown of Messrs Elliott Duffy Garrett, Solicitors for the Respondents.