

AYRSHIRE VALUATION APPEAL PANEL

Secretary to the Panel:

Alan M. Urquhart LL.B

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22nd May, 2018

J Michael Rose, Esq.,
CBRE Ltd.,
7th Floor,
Sutherland House,
149 St Vincent Street,
GLASGOW
G2 5NW

Dear Sir,

Ayrshire Valuation Appeal Committee Hearing – 17th May, 2018

Your Clients: Galanty Properties Ltd/Moredun

Subjects: Shop, 1 Bridgegate Square, Irvine; Valuation Roll Reference: 07/01/D03690/0001

Subjects: Shop, 2 Bridgegate Square, Irvine; Valuation Roll Reference: 07/01/D03690/0002

Subjects: Shop, 3 Bridgegate Square, Irvine; Valuation Roll Reference: 07/01/D03690/0003

Subjects: Shop, 5 Bridgegate Sqaure, Irvine; Valuation Roll Reference: 07/01/D03690/0005

Subjects: Shop, 6 Bridgegate Sqaure, Irvine; Valuation Roll Reference: 07/01/D03690/0006

Subjects: Shop, 7 Bridgegate Sqaure, Irvine; Valuation Roll Reference: 07/01/D03690/0007

I refer to your appearance before the above Meeting of the Ayrshire Valuation Appeal Panel on behalf of your above clients when you appealed against the Assessor's Rateable Value for the above Shops in Bridgegate Square, Irvine. The Assessor was represented by Mr Brian J Gill, Advocate, assisted by and instructed by Magnus Voy, Divisional Assessor with his witness Ms Lynda McConville, Principal Valuer within the Assessor's Office at Ayr. The Valuation Appeal Committee was chaired by Neil Shedden, Panel Chairman and attended by 4 Panel Members. I was in attendance as Panel Secretary to give guidance, legal or otherwise, to the Committee throughout the proceedings. The Appeal Committee has ruled as follows:

A THE FACTS

1. The appeal properties as detailed above comprise 6 purpose built retail units constructed in Bridgegate Square, Irvine adjacent to the local authority owned offices and shops at Bridgegate, Irvine. The shops were constructed in 1982 with either basement or upper floor (all with exclusive internal stair access) used as a storage area in addition to the principal floor used as retail space.
2. The shops occupy a central location within the commercial part of Irvine town centre and lie between Bridgegate and the Rivergate shopping centre. Bridgegate, in turn, leads onto Irvine High Street.
3. All shops were upgraded some 6 years ago.
4. While there had been some initial minor disagreement between the parties on detail, prior to the hearing, agreement had been reached on the principal facts as follows:
 - (a) Shop 1 Bridgegate Square, Irvine has a measured area of 131.90 sq.m, and a reduced area of 74.97 sq.m. The premises are currently let to Cancer Research under a lease running from 1st May, 1983 for 36 years. The current rent of £28,000 pa. was that fixed on 1st May, 2008 subject to upwards only rent reviews on 1st May 2013 and 1st May, 2018. At both these dates, a nil uplift was applied. The "Current NAV/RV" shown in A5 below is based on a Zone A Rate of £335, which the Assessor, prior to the Hearing, has agreed to reduce to £300.
 - (b) Shop 2 Bridgegate Square, Irvine has a measured area of 203.10 sq.m., and a reduced area of 80.69 sq.m. The premises are currently let to Cash Convertors under a 10 year lease commencing on 29th September, 2009, subject to an upwards only rent review on 29th September, 2014. At that date, no rent uplift was applied. The "Current NAV/RV" shown in A5 below is based on a Zone A Rate of £335, which the Assessor, prior to the Hearing, has agreed to reduce to £300.

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(c) Shop 3 Bridgegate Square, Irvine has a measured area of 269.94 sq.m., and a reduced area of 126.64 sq.m. There is currently no formal lease in existence but the premises are let on a licence to Bali Scot Ltd., commencing in September, 2014 at a rate equivalent to £15,000 pa. The “Current NAV/RV” shown in A5 below is based on a Zone A Rate of £335, which the Assessor, prior to the Hearing, has agreed to reduce to £300. This shop also benefits from a 4% quantum allowance.

(d) Shop 5 Bridgegate Square, Irvine has a measured area of 278.58 sq.m., and a reduced area of 119.89 sq.m. The premises were until recently let to Ladbroke Ltd, their lease expiring on 1st April 2017. The rent under that lease had been £43,500 pa subject to upwards only rent reviews in November 2007 and November 2014. At both these dates, no increase in rent payable was agreed. The “Current NAV/RV” shown in A5 below is based on a Zone A Rate of £335, which the Assessor, prior to the Hearing, has agreed to reduce to £300. This shop also benefits from a 4% quantum allowance but has an addition for air conditioning.

(e) Shop 6 Bridgegate Square, Irvine has a measured area of 195.72 sq.m. and a reduced area of 87.17 sq.m. The premises are occupied by Forum Gifts and Cards Ltd on a licence commencing on 16th September 2016 at a fee equivalent to £12,000 pa, exclusive. The “Current NAV/RV” shown in A5 below is based on a Zone A Rate of £335, which the Assessor, prior to the Hearing, has agreed to reduce to £300. This shop has an addition for air conditioning; and

(f) Shop 7 Bridgegate Square, Irvine has a measured area of 326.12 sq.m. and a reduced area of 149.96 sq.m. The premises are occupied by Caversham Finance Ltd. t/a Brighthouse under a sub-lease on identical terms to the head lease. The rent commenced at £45,000, was reviewed to £49,800 at the 2005 review and thereafter, despite an upwards only rent review clause, has remained at £49,800 pa. at two subsequent rent reviews. The “Current NAV/RV” shown in A5 below is based on a Zone A Rate of £315, which the Assessor, prior to the Hearing, has agreed to reduce to £245. This shop also benefits from a 4.5% quantum allowance but has an addition for air conditioning. This shop differs from the other 5 appeal subjects as its situation and visibility to members of the public is partially masked by the adjacent shop at 2 Rivergate, Irvine occupied by Santander Bank.

(There was no disagreement between the parties as to the application of the zoning method of ascertaining the reduced area of a property. In brief, SAA Commercial Properties Committee Practice Note 1 entitled “Valuation of Shops”, continued the recognised practice of treating the first 9m of retail space as the most valuable. This is known as Zone A where the area measured is treated at 100%. Further zones are applied as the depth of the shop increases, each being valued on full measurement at 50% rate of the one before. Further allowances are made for specific disabilities eg structural walls impeding movement and use, with extra value being added for the additional facilities such as air conditioning.)

5. The 6 appeals seek to challenge the Assessor's published and negotiated NAV/RV as follow

Shop Number	Current NAV/RV	Assessor's Offer prior to VAC Hearing	Appellants' suggested NAV/RV
No.1	£25,000.00	£22,250.00	£18,250.00
No. 2	£27,000.00	£24,000.00	£20,000.00
No. 3	£40,500.00	£36,250.00	£24,250.00
No.5	£39,500.00	£35,500.00	£24,000.00
No. 6	£29,750.00	£26,750.00	£18,000.00
No. 7	£46,750.00	£36,000.00	£26,250.00

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B. CONTENTIONS (for the appellant per Mr Rose acting as advocate for the appellants and as expert witness)

1. You contended that the Assessor's valuation figures for the shops as detailed in paragraph A5 above are incorrect and that the values shown in the fourth column thereof should be entered instead for each property. The Assessor, who has a duty to justify her valuation figure has failed to do so during lengthy discussions prior to today's hearing.

2. A revaluation is a fresh start and no reference to a previous valuation is lawful. The statutory basis of valuation is the Net Annual Value (NAV) which is the hypothetical rent which the hypothetical landlord would demand and the hypothetical tenant would pay for a property. This is defined in section 6(8) of the Lands Valuation and Rating (Scotland) Act 1956 as:

“the rent at which the lands and heritages might reasonably be expected to let from year to year if no grassum other than the rent was payable in respect of the lease and if the tenant undertook to pay all rates and to bear the cost of repairs and insurance and other expenses, if any, necessary to maintain the Lands and Heritages in a state to command that rent”.

“Hypothetical rent”, you contended was defined in R v Paddington ex parte Peachey Corporation Ltd by Lord Denning as “the rent which an imaginary tenant might reasonably be expected to pay an imaginary landlord for a tenancy in this locality, on the hypothesis that both are reasonable people, the landlord not being extortionate, the tenant not being under any pressure”. However, you contended, this requires the further application of reality, ie that although the parties to the lease are imaginary, the conditions in which an agreement on rent is to be reached are not. There must be actual conditions affecting the property to be let which will assist parties in determining what is the appropriate rent for same.

3. You made reference to 2 further cases from England being:

(a) Dennis & Robinson Ltd v Kiossos Establishment (1987 1 EGLR 133) where the Court of Appeal held that it was to be assumed that the willing tenant would pay no more for the premises than the market required him to pay. It was for the Valuer (ie the Assessor) to determine the strength of the market and to say, if such were his opinion, that having regard to the state of the market and the condition of the premises, that a tenant, though willing, would not take on a lease of the premises except at a low or nominal rent; and

(b) Telereal Trillium v Hewitt (VO)2018 EWCA Civ 26, where Lord Justice Henderson stated that “on the agreed factual basis that nobody in the real world would have been prepared to occupy the premises (at the tone date) and to pay a positive price for doing so, it is impossible to say that there was any actual demand. In the absence of actual demand, there is no principle of law which requires such a demand to be assumed.”

In this regard, you conceded that none of the shops was being let on a nominal rent but the cases just quoted reinforced your view that the Assessor required to take account of the market conditions for the appeal properties and to agree new NAV figures based on the difficult market conditions prevailing, not just either the headline rent actually passing or the rent which the Assessor assumes would be paid were a willing tenant to be found. Therefore, it must not be assumed that where actual rent is passing, that figure represents the market for a rental of that premise. Where there have been 1 or more rent reviews on a nil uplift basis with no actual uplift being applied, it must lead to the conclusion that the actual market rent for such premises is certainly no more than the rent agreed but may indeed be less than that figure. The Assessor has therefore failed, in fixing the NAV/RV for all the appeal subjects to take into account the prevailing market conditions and has relied to an unacceptable extent on rent actually passing.

4. There is, you contended, a “hierarchy of valuation” where evidence must be weighed by locational, physical, occupational and temporal similarity and relevance. In your opinion, the heirarchy applicable to rating in Scotland is;

(a) Open market lettings;

(b) Rent reviews to open market rental value as agreed between parties;

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- (c) Rent reviews determined on arbitration;
- (d) Lease renewals including tacit relocation; and
- (e) Rent review arbitration awards.

The Assessor, in these appeals, has failed to take account of the hierarchy when formulating her basket of evidence. The absence of any evidence from categories (a) and (b) demonstrates a paucity of tenant demand in the market to support historic levels of rent in the market. Therefore, where evidence is only available from categories (c), (d) and (e), it cannot be used to support valuations as it only serves to demonstrate that historic levels of rent value can no longer be substantiated. In that circumstance, the proposed NAV/RV for all appeal properties must be too high and must be reviewed and reduced.

5. The Assessor's original valuations for the appeal subjects (£335/sq.m for shops 1,2 3 5 and 6, and £315 for shop 7) reflect the 2010 Revaluation figures ie were based on rental values as at 1st April, 2008 and totally fail to take into account the dramatic change in the retail world since 2008 caused by firstly what is called "the Amazon effect" where a substantial amount of retail trade is conducted on-line without recourse to a retail shop; and secondly the economic circumstances which have applied since 2008, ie property crash, near recession, government austerity policies. All this has resulted in a substantial diminution in demand for retail space which is naturally reflected in a downturn in the rent levels being achieved. In line with rating law, if rent levels are reducing, then NAV/RV levels should similarly reduce. Therefore, to maintain the same NAV/RV levels as were achieved in 2010 is erroneous and wholly flawed. Indeed, the very fact that the Assessor has made substantial reductions in the square metre pound rate during pre-hearing discussions reinforces this submission.

6. Bridgegate Square is a different trading locus from a rental perspective from Bridgegate. Pedestrians walking from the Rivergate Centre towards High Street will clearly see the shops at Bridgegate right in front of them, while the appeal subjects are off to the left over the shoulder of the walking pedestrian. The appeal subjects do not attract the same level of trade, cannot therefore attract the same rental value as the shops in Bridgegate and cannot therefore have the same square metre rate applied.

7. In summary, you contended that the NAV/RVs being applied to the appeal subjects are wrong. You seek, based on all the above evidence and reasoning:

- (a) For Shop No. 1, a rate/square metre of £250.00 resulting in an overall NAV/RV of £18,250.
- (b) For Shop No. 2, a rate/square metre of £250.00 resulting in an overall NAV/RV of £20,000;
- (c) For Shop No. 3, a rate/square metre of £200.00 resulting in an overall NAV/RV of £24,250;
- (d) For Shop No. 5, a rate/square metre of £200.00 resulting in an overall NAV/RV of £24,000;
- (e) For Shop No. 6, a rate/square metre of £200.00 resulting in an overall NAV/RV of £18,000; and
- (f) For Shop No. 7, a rate/square metre of £175.00 resulting in an overall NAV/RV of £26,250.

C. CONTENTIONS (for the Assessor per Mr Gill with Ms McConville as witness)

1. Prior to dealing with the Assessor's evidence, Mr Gill contended that valuation levels in Scotland were set by the local Assessor, subject to an appeal by a dissatisfied ratepayer to the local valuation appeal committee and thereafter to the Lands Valuation Appeal Court. There is no recourse to any higher court such as the UK Supreme Court. There is a plentiful basket of case law from the LVAC such that reference in this hearing by Mr Rose to 3 cases decided in English Courts and his seeking to persuade the Valuation Appeal Committee of the merits of dicta by judges from a foreign jurisdiction is wrong and should be ignored by the VAC.

2. Mr Gill advised the VAC that all 6 appeals were lodged by CBRE Ltd on behalf of the client Landlord of all these premises Galanty Ltd. In addition however, tenant appeals were lodged by professional surveyor agents acting for the occupiers of Nos.1,5 and 7 Bridgegate Square. Prior to today's hearing, all these appeals were settled after discussion and negotiation at £300 per square metre for Zone A for Shops 1 and 5, at at £245 per square metre for Zone A for Shop No.7. The Assessor contended that such agreements with professional agents

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were note worthy and could be relied upon. As such, the appellants' agents' argument for lower rates for all 6 shops is out of line with tone date rental evidence which has been properly analysed in accordance with SAA Basic Principles Committee Practice Note No.1 Adjustment of Rents and is at odds with said agreements with other professional agents.

3. The Assessor has a duty to determine, for every rateable property within her locality, the Net Annual Value which is defined as quoted in B2 above. The NAV is therefore a reflection of the rent which a tenant would pay to a landlord where the tenant pays all rates, insurance costs and all repairs (known commonly as a FRI lease). The best means of determining NAV is through analysis of actual rental evidence for that locality. The actual rent payable is but one factor and may not be conclusive in itself. The Assessor must determine the hypothetical level of rent from an analysis of all rents passing in that locality and all pertinent circumstances. The Assessor also requires to taken into account any extraneous factors such as the lease not being fully FRI; or the landlords making a capital payment to induce the tenant to enter into the lease. The above Practice Note, at paragraph 13 states that "after (any adjustments) to rent have been made, the figure obtained is the adjusted rent. That rent may be considered, together with other rents for similar properties in similar localities in order to ascertain the hypothetical level of rental value". It was contended therefore, in line with the Practice Note, that the weight to be attached to the rents payable for the appeal properties in arriving at the hypothetical level of rental value must ultimately depend on the skill and experience of the valuer handling the subjects after taking into account all relevant circumstances. Mr Gill contended that his witness Ms McConville, who had worked for the Assessor for 34 years and is presently attending to rating matters for her 5th consecutive Revaluation has all necessary skills and experience to properly analyse all evidence to enable her to reach a valid decision on rental value and NAV/RV.

4. Mr Gill challenged Mr Rose's definition of and description of "heirarchy of evidence" (see B4 above) which was, he alleged, simply a definition of his own construction. Mr Gill referred the Committee, as a more plausible alternative, the above Practice Note which states:

(a) "At the commencement of a Lease, the tenant does not know the trading potential or return which will be realised. The offer of rent is based on expectation of the likely return. At review, the review clause normally requires the rent to be agreed "as an amount equal to the market rent at the review date" or some similar wording" In Mr Gill's view, therefore, the reviewed rent is deemed to be on the same basis as the rent at the commencement of the lease and is surely a true reflection of the market conditions prevailing at the review date.

(b) New Lettings are to be considered the most reliable form of evidence but, nonetheless, they must be considered in conjunction with other types of rent.

(c) Rents on Lease renewals are described in the Practice Note, where the basis of renewal is open market rent, as "reliable evidence".

(d) "Upward only "review clauses may not be reliable evidence as the Practice Note states that, where there has been little growth in the market, or in fact a fall, the rent passing may be in excess of the open market rent; and

(e) "Licences" are generally short term in nature and do not confer the same control or security of tenure as is provided in a formal lease. Such arrangements, Mr Gill contended, cannot be considered when considering the basket of evidence as licences come and go and do not properly reflect the surrounding rental market.

In summary on this point, Mr Gill contended that the Assessor had valued the appeal properties in accordance with the said Practice Note and the local Ayrshire Practice Note based thereon and is therefore soundly based.

Mr Gill further contended that the valuations now offered reflect the rental values in the retail area known as Bridgegate, Bridgegate Square and the immediately adjacent shops at Rivergate. At 2017 Revaluation, the Zone A rate applied to all shops was £335/m² with the exception of 7 and 9 Bridgegate Square which were entered as £315/m² and £245/m² respectively. However, after reflection, the Assessor has considered that Bridgegate Square and the 3 adjacent shops in Rivergate are an inferior location to Bridgegate and has reduced the entered values to £300/m² for the appeal subjects except No. 7 which is now entered at £245/m². This is very much based on the rental evidence. No1 Bridgegate Square has an analysed rent after review in 2013 of £373/m². No2

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Bridgegate Square has an analysed rent after review in 2014 of £278/m². The rent for No.3 was set at a new rent in 2013 at £167/m² but this is considered far out of line with other rents passing and must be treated with suspicion. No5 Bridgegate Square has an analysed rent after review in 2012 of £380/m². No6 Bridgegate Square has an analysed rent after review in 2011 of £433/m². No2 Rivergate was reviewed in 2011 at an analysed rate of £433/m², while 6a Rivergate was set in 2014 at the renewal of a lease at a rate analysing to £360/m². The lower rate of £245/m² for No. 7 Bridgegate Square reflects its position as partially masked or shadowed by 2 Rivergate which reduces its attractiveness to any hypothetical tenant. The Assessor is therefore satisfied that the new rate of £300/m² for Shops 1,2,3,5 and 6 Bridgegate Square and £245/m² for 7 Bridgegate Square is fair and reasonable and reflects the general rental market in this location.

6. Lastly, Mr Gill contended that the Committee requires to pay heed to settlements achieved with other agents. Of the appeal properties, appeals were lodged by professional agents on behalf of 3 tenant occupiers and had been settled and agreed at the figure quoted above, ie £300/m² for Shops 1 and 5 Bridgegate Square and at £245/m² for No.7 Bridgegate Square. In addition, no appeal was lodged by either landlord or tenant for No. 9 Bridgegate Square, while Nos 2, 6A and 6D Rivergate, (the shops immediately adjacent to the Bridgegate Square location) had all been agreed at £300/m² following discussions with professional agents. Mr Gill therefore contended that Mr Rose was wholly out of line with the prevailing market and rental levels and the view thereon taken by his professional surveyor colleagues. The Assessor's evidence and scheme of valuation must be preferred.

D. THE LAW/PRACTICE

1. In valuing a shop, the Assessor must comply with section 8 of the Valuation and Rating (Scotland) Act, 1956, which requires the Assessor to determine the rent at which a particular subject might be let from year to year, ie the rent which might be paid by a hypothetical tenant to a hypothetical landlord, subject to certain statutory assumptions. The Assessor can only do so by looking at comparable subjects in the general locality and analysing rent at which shops let, and by that method, producing a scheme of valuation for that locality.

2. A scheme of valuation produced by the Assessor is considered to be sound, or perhaps less subject to challenge, if it has received general acceptance from other ratepayers in that locality, more so if level of values have been challenged and then accepted after discussion, rather than just general acquiescence.

3. In producing a scheme of valuation, the Assessor must make a valid judgment based on all factors available to him. Rent as analysed is the most important but other factors eg location, market trends are also important and require to be considered by the Assessor in formulating the final scheme.

D. THE PANEL DECISION

The Valuation Appeal Committee was grateful to parties for their detailed exposition of evidence. However, in truth, the case before the Committee came down to a simple argument between parties over the appropriate Zone A rate. Based on all the above, the Panel has decided:

(a) that the Assessor has satisfied the Committee that there is a valid and generally accepted scheme of valuation in place for shops in this locality, the scheme showing a clear distinction between Bridgegate and Bridgegate Square and in turn distinguishing Nos 7 and 9 Bridgegate Square.

(b) that you failed to provide compelling evidence of the proposed lower valuation rates being suggested for the appeal subjects. In particular, you failed to provide any comparisons where such lower rate per square metre figures applied.

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Accordingly, the evidence from the Assessor is preferred by the Committee, resulting in all your appeals being dismissed.

The valuations, effective from 1st April, 2017 are confirmed as follows:

A. 1 Bridgegate Square, Irvine, £22,250

B. 2 Bridgegate Square, Irvine, £24,000

C. 3 Bridgegate Square, Irvine, £36,250

D. 5 Bridgegate Square, Irvine, £35,500

E. 6 Bridgegate Square, Irvine, £26,750

F. 7 Bridgegate Square, Irvine, £36,000

I have copied this letter to the Assessor. If you are dissatisfied with this decision, you may appeal to the Lands Valuation Appeal Court but require, if you intend to do so, to lodge grounds of appeal with me within 14 days of today's date.

Yours sincerely,

Alan M. Urquhart