

LANARKSHIRE VALUATION APPEAL PANEL

STATEMENT OF REASONS

RELATIVE TO APPEALS

by

- (1) Wincanton Group Ltd relative to Warehouse, 21 Coddington Crescent, Eurocentral, Holytown.
- (2) Wincanton PLC relative to Warehouse, Apollo, 2 Dovecote Road, Eurocentral, Holytown ML4
- (3) Wincanton PLC relative to Warehouse, Apollo, 2 Dovecote Road, Eurocentral, Holytown ML4
- (4) Next PLC relative to Warehouse, Plot L Eurocentral, Woodrow, Eurocentral, Holytown ML4
- (5) Wincanton Group Ltd relative to Warehouse, Plot E North and South, Brittain Way, Eurocentral, Holytown ML4 4JX
- (6) Lightbody of Hamilton Ltd relative to Warehouse, Plot D South Eurocentral, Brittain Way, Eurocentral, Holytown ML1 4XJ
- (7) Lightbody of Hamilton Ltd relative to Warehouse, Plot D South Eurocentral, Brittain Way, Eurocentral, Holytown ML1 4XJ

The 7 appeals in respect of the above subjects were heard together. The grounds of appeal were as follows:-

Those appeals which proceeded on the basis of material change of circumstances under Section 3(4) of the Local Government (Scotland) Act 1975 Act were based on Section 20 of the Rating and Valuation (Amendment) (Scotland) Act 1984, the argument being that due to the recession there had been a fall in rental levels within Eurocentral below the rental levels existing at 1<sup>st</sup> April 2003, being the tone date for the 2005 Revaluation.

Those appeals which proceeded on the basis of new entries or new interest under Section 3(2) and Section 3(2A) of the 1975 Act were based on Section 15 of the Local Government (Scotland) Act 1966, the argument being that the

rental values within Eurocentral as at the effective dates were lower than those prevailing at 1<sup>st</sup> April 2003, being the tone date for the 2005 Revaluation.

In considering its approach to the matter the Committee had regard particularly:-

- to the commentary contained in Armour on Valuation for Rating (5<sup>th</sup> Edition), paragraphs 3-12 to 3-31 inclusive and to the cases and legislation referred to therein including the definition of material change of circumstances contained in Section 20 of the Rating and Valuation (Amendment) (Scotland) Act 1984 (Armour, paragraph 3-27) and the provisions of Section 3(4) of the Local Government (Scotland) Act 1975; to be a material change of circumstances the change must be one which affects the value of the appeal subjects; the burden of proof was on the Appellants to satisfy the Committee that a material change of circumstances had occurred (Armour, paragraph 3-19).
- to the commentary contained in Armour, paragraphs 3-44 to 3-45 and to the cases and legislation referred to therein including the provision for valuation according to the tone of the roll contained in Section 15 of the Local Government (Scotland) Act 1966.
- to the commentary contained in Armour, paragraphs 17-11 to 17-17, and to the cases and legislation referred to therein including the definition of net annual value contained in Section 6(8) of the Valuation and Rating (Scotland) Act 1956.
- to the commentary contained in Armour, paragraphs 19-07 to 19-12 and to the cases referred to therein on actual rent as evidence of annual value; the actual rent passing under a lease is not conclusive or determinative of actual value; it is the rent which a hypothetical tenant might reasonably be expected to pay which has to be ascertained; the rent payable under an existing lease may be found fairly to represent the rent which a hypothetical tenant may be expected to pay for the subjects, or, it may not.
- to the commentary contained in Armour, paragraphs 19-13 to 19-18 and to the cases referred to therein on adjustment of the actual rent.

Counsel for the Assessor raised a preliminary point concerning the competency of the appeal for 21 Coddington Crescent. This had been brought as a new interest appeal only rather than as a new interest appeal and an appeal based on material change of circumstances. He argued that there was no fair notice of the grounds as required by Regulation 10(1)(a) of the Valuation Appeal Committee (Procedure in Appeals under the Valuation Acts) (Scotland) Regulations 1995, and that the appeal was therefore incompetent.

Counsel for the Appellants submitted that it was not necessary to appeal on the specific grounds of material change of circumstances under Section 3(4) of the Local Government (Scotland) Act 1975 when an appeal already exists under the provisions of Section 3(2A) of the 1975 Act. He lodged a memo re New Interest setting out his arguments. He cited in particular the case of *The Sports Shop (Fife) Ltd v The Assessor for Grampian Region*, Interlocutor June 20, 1990, an appeal before a Lands Valuation Appeal Court in 1990, where a similar issue had arisen. The Committee's

view had been that a lower level of value could only be reflected if there was an appeal made upon the basis that there had been a material change of circumstances. On appeal the view of the Committee was not supported by the Assessor. The appeal was not opposed and had been allowed. Counsel for the Appellants stated that the Committee was bound by the precedent. Counsel for the Assessor attempted to distinguish this case on the basis that a different set of procedural rules would have applied then.

The Committee noted the difference in approach between the agents concerned in relation to the appeals for 21 Coddington Crescent and 4 Brittain Way, and was in no doubt that the proper approach was to lodge appeals on both grounds. The Committee also noted that the provision contained in Regulation 10 (3) of the 1995 Regulations to the effect that if an appellant fails timeously to furnish a statement of grounds for his appeal, the assessor may apply to the Committee to have the appeal dismissed and the Committee may grant that application if it thinks fit, did not appear in The Valuation Appeal Committee Procedure (Scotland) Regulations 1984 which would have applied when The Sports Shop (Fife) Ltd was decided. However, in terms of the 1995 Regulations the matter was one for the Committee to decide in the exercise of its discretion. The Committee took the view that there was no prejudice to the Assessor in the circumstances of the present case where grounds had been lodged albeit in relation to a new interest appeal only, and where the issue before the Committee in relation to either a new interest appeal or a material change of circumstances appeal was in effect the same ie whether there had been a reduction in rental values since the tone date. The Committee accordingly found this appeal to be competent.

The Committee heard evidence and submissions over a period of 3 days. The Appellants' case was based on an analysis of the rents for the appeal subjects and the Appellants' comparisons within Eurocentral. The analysis showed headline rates with arithmetical deductions made for lengthy rent free periods. The Appellants argued that if you compare the 2005 rateable values to the recent rental evidence as adjusted and agreed with the Assessor, this demonstrated a fall in rental values since the tone date.

The Assessor's position was to cast doubt on this simple arithmetic. With the exception of 10 McNeil Drive, the Appellants' comparisons did not satisfy the statutory hypothesis. They were affected by complex financial transactions. Essentially, Eurocentral was a tax vehicle for the rich investor. The valuer should look to see what drives any inducements, then stand back to see if this makes any sense. To have Eurocentral, arguably the best industrial location in Scotland, valued at less than the surrounding, poorer, locations made no sense. The Assessor put forward as comparisons subjects within Eurocentral and outwith Eurocentral. He argued that these comparisons were at arm's length and not driven by tax incentives and did not show any fall in rental values.

The rents for the appeal subjects had been analysed in accordance with the Assessor's scheme for the adjustment of rents and the arithmetic calculations had been agreed in principle between the parties as detailed within G L Hearn's Appendix 1. The point of dispute was over the inclusion of incentives in the analysis. The Appellants' approach was that the incentives in the form of the lengthy rent free periods should be included. They did not adopt any alternative approach.

The onus of proof, in so far as concerned those appeals based on material change of circumstances, lay with the Appellants.

The Committee required to decide whether the Appellants' approach to the rental analysis was correct.

The Committee considered the evidence led by the Assessor regarding the background to Eurocentral. The Committee felt that the background to Eurocentral, initially as part of Lanarkshire Enterprise Zone and then with the benefit of Golden Contracts, was pertinent. The tax advantages arising from this had given rise to the complex financial arrangements referred to by the Assessor. The financial incentive to a developer if he can let the subjects to a Qualifying Tenant and thereby access his developer's profit; the role of the developer in brokering the lease; the existence of the Rent Guarantee Fund whereby the Landlord receives the headline rent for a certain period from the date where the deal is signed even before the subjects have been built, were likely to have an effect on the resulting lease transactions. The likelihood was that long rent free periods would be offered to secure a Qualifying Tenant and the Tenant's professional adviser would be fully aware of this. The Committee agreed that this was not the traditional inducement as between a landlord and tenant which should as a matter of arithmetic be reflected in an adjusted headline rent.

The Committee considered the case of *Renfrewshire Assessor v W Muir Goodfellow & Co. Ltd* 1962 RA 239 cited by Counsel for the Appellants as authority that factory rent rebates on new tenancies should be taken into account if general on an industrial estate but noted that Lord Hunter did not think that this was a suitable case in which to express a concluded opinion as to the effect to be given to rent rebates. They considered that the case fell to be distinguished in any event on the basis that lengthy rent free periods within Eurocentral appeared to be general only in relation to properties which were still subject to the complex financial structure which existed there.

The Committee accordingly took the view on balance that the Appellants' approach to the rental analysis could not be supported. The Committee therefore considered that the rental analyses put forward by the Appellants in relation to 4 Brittain Way, 21 Coddington Crescent, and 2 and 5 Dovecote Road were incorrect. For this reason the Committee did not accept the adjusted rentals as evidence of actual rentals for 2 Dovecote Road and 4 Brittain Way nor did they consider that 2 and 5 Dovecote Road, and 4 Brittain Way could be accepted as valid comparisons based on the adjusted rent.

The Committee had similar reservations about the rent for 21 Coddington Crescent. It accepted that the lease to Morrisons was as a result of a transaction which was subsequent to the original letting. It agreed with the Assessor however that it remained a tax driven arrangement given the retention of tax benefits by the landlords and residual opportunity to sell on the investment. It noted also the particular circumstances of the transaction whereby as part of the arrangement ground was retained for further development which would also have enabled further tax incentives to be accessed arising from the arrangements pertaining to Eurocentral and felt this was likely to have had an effect on the terms of let. For this reason it decided that this detracted from the weight to be placed on this as evidence of actual rental and meant that it could not be accepted as a valid comparison.

As regards 10 McNeil Drive, both parties agreed that this was a valid comparison. The Committee noted that the rent of £350,000 for these subjects took effect from 4<sup>th</sup> April 2010 ie ostensibly within the period of the 2010 Revaluation but agreed that it assisted to show what the position was as at the relevant dates. There had been a transaction subsequent to the original letting. There was no rent free period. The 2005 RV was £470,000. The figure of £671,000 for the 2005 Revaluation referred to in the Appellants' productions had been the figure before the property was split. According to the Assessor's witness, Mr Neason, this had always been a low rent, analysing to £29.88psm for the 2005 Revaluation. The current rent analysed to £29.38 psm, a slight reduction, being 74.3% of 2005 Rateable Value. The Committee concluded that this was evidence of a low rent but not in itself conclusive evidence of falling rentals.

The Appellants led evidence of empty units at 6, 7 and 12 Dovecote Road, but the Assessor's witness Mr Neason gave evidence, which the Committee accepted, that the occupancy rate in the industrial units in Eurocentral was similar to that in nearby industrial estates.

In relation to Plot E north and south and Plot L Woodrow, Counsel for the Assessor argued that unlike for the other appeal subjects no rental evidence or analysis had been produced for these two and that irrespective of the argument on the merits these appeals must fail on the basis that there was no evidence before the Committee to entitle it to take any view. Counsel for the Appellants argued that there had been no recent rental transactions for either set of subjects which was why no evidence had been produced. The Committee took the view that that the lack of rental evidence or analysis for these appeal subjects was not fatal to the Appellants' case in circumstances where the Appellants had produced comparisons which they argued showed a pattern of falling rentals. It decided therefore that the Assessor was incorrect in arguing that these appeals must fail for this reason alone.

The Committee then examined the Assessor's comparisons set out in the Assessor's production 8a. It agreed that in view of the complex financial structure affecting properties within Eurocentral and its probable effect on market rental it was appropriate to look at suitable comparative properties both within and outwith Eurocentral. The best evidence was evidence of an open market transaction relating to comparable subjects concluded at arm's length, and substantially on the terms of the statutory hypothesis, at or near the valuation date. The Committee considered whether in relation to the Assessor's comparisons a sufficient degree of comparability existed so as to enable a value on the comparative principle to be made and whether there were particular factors affecting the weight to be attached to these.

The subjects at 3 North Caldeen Road, Coatbridge were accepted by the Committee as a suitable comparison. It was a factory not a warehouse, but was a similar industrial property. It was 4 miles from Eurocentral but the Committee accepted the Assessor's evidence that industrial units were less sensitive when it comes to location. Less weight should be placed on this given that the rent review took place in July 2008 but this was still of relevance as a comparison given that the effects of the financial upheaval which gave rise to the recession were already being felt by then.

The subjects at 25 Coddington Crescent, Eurocentral were also accepted as a suitable comparison. The rental had been struck in May 2007 but this could still be considered as a valid comparison given that the tenants had a break option in 2009 but did not see fit to exercise this. The Committee however treated this with some caution in the absence of a proper rent analysis.

The Committee had reservations about the suitability of 50 Condor Glen given this was a sale and leaseback transaction and did not consider this to be a valid comparison.

As regards 401 Edinburgh Road, Newhouse the Committee also accepted this as a suitable comparison. They acknowledged that the effective date of 25<sup>th</sup> August 2010 was post the 2005 Revaluation Roll and would not normally have been considered but felt that this was still relevant given that the deal appeared to have been struck earlier than this in July 2009 and that the Appellants' argument was based on an ongoing decline in rental levels. It was larger than anything at Eurocentral but could have been located there; the Committee accepted the Assessor's submission that the larger a building is the lower its valuation rate tends to be.

The Committee acknowledged that 2 Lancaster Avenue, agreed in 2010 was remote in time but accepted the submission by Counsel for the Assessor that it was relevant to the extent that it had lain dormant for 13 years and was outwith Eurocentral but the Landlords' had nevertheless been able to agree a let with a passing rent in excess of the NAV.

The Committee concluded from its consideration of the Assessor's comparisons that these did not disclose evidence of a fall in rental levels below those existing at the tone date nor of rental levels which were lower than those prevailing at the tone date. They accepted the Assessor's argument that if the Appellants were correct in their analysis and submissions with regard to falling rentals in Eurocentral, the effect would be to value Eurocentral at less than the surrounding, poorer locations which did not appear to make sense. From its consideration of the Appellants comparisons, the Committee concluded that with the exception of 10 Mc Neil Drive these were influenced by the complex financial transactions already referred to and could not safely be relied upon; and that whilst 10 McNeil Drive was evidence of a rental which was below the tone of the roll it was not of itself evidence of falling rentals nor was a single rent in itself conclusive. For these reasons, the Committee did not consider on the basis of the evidence presented that rental values within Eurocentral as at the effective dates were lower than those prevailing at the tone date. Counsel for the Assessor cited the case of *Argos Distributors and Others v Fife Council Assessor* (2010 CS1H 92) as a case where there was a recognition of the economic recession affecting rentals, and leading to a material change of circumstances. The Committee were not persuaded in the present case that there had been a fall in rental levels within Eurocentral since the tone date, whether as a result of the economic recession or otherwise.

Having given careful consideration to all of the evidence and submissions, the Committee accordingly concluded that no material change of circumstances in terms of the legislation had taken place nor were rental levels lower than those prevailing at the tone date and the Committee refused the appeals.