

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF AN APPEAL
VR/10/1994
BETWEEN
GRAHAM HARRON - APPELLANT
AND
THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND - RESPONDENT

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

Belfast - 14th February 1996

The appellant was a well known goldsmith and jeweller, but not a "high street jeweller", whose business was based on designing and producing individual articles, using precious metals and stones, to suit the requirements of individual clients. He occupied ground floor premises at 336 Lisburn Road, Belfast which were described in the valuation list as a shop and workshop.

Hereditaments, if they are factories or workshops which qualify as industrial hereditaments in accordance with the requirements of the Rates (Northern Ireland) Order 1977, are entitled to relief from rates (broadly, 100% relief on the industrial element plus 10%) commonly known as industrial derating. But if a hereditament, which contains a factory or workshop, is primarily occupied and used for one or for any combination of the purposes enumerated in the proviso in the Order, the whole hereditament is excluded from the benefit of derating. Those purposes include the purposes of a retail shop which is given an extended definition in the Order.

This is an appeal against a decision, dated 17th November 1994, by which the Commissioner of Valuation declined to treat the hereditament as entitled to industrial relief from rates (on appeal against a Certificate of Net Annual Value dated 15th November 1993) on the grounds that "the hereditament is primarily occupied and used for the purposes of a retail shop and is not entitled to be distinguished as industrial".

Hugh Kennedy QC instructed by the Alex Stewart Partnership appeared on behalf of the Appellant and called George Graham Harron, the ratepayer, and Samuel Alexander McCausland, an experienced chartered surveyor.

Ronnie Weatherup QC instructed by the Crown Solicitor appeared on behalf of the Respondent and called Alan Hanna an experienced chartered surveyor from the Valuation and Lands Agency.

The Statutory Provisions

Schedule 2 to the Rates (Northern Ireland) Order 1977 sets out definitions relating to industrial hereditaments which are the same as those in equivalent English and Scottish legislation:

"1. In this Order -

"factory", subject to the provisions of this Schedule, has the meaning assigned to it by section 175 of the Factories Act (Northern Ireland) 1965;

"industrial hereditament" -

a. means a hereditament, which is occupied and used subject as provided in this Schedule, as a factory;

b. does not include a hereditament occupied and used as a factory if it is primarily occupied and used for any of the following purposes

(i)

(ii) the purposes of a retail shop;

(iii) ...

(iv) ...

(v) ...

(vi) any other purposes whether or not similar to any of the foregoing, which are not those of a factory;

"retail shop" includes any premises of a similar character where retail trade or business (including repair work) is carried on."

(Note: In "The Statutes Revised" the opening bracket is missing.)

The Issues

The appeal was pursued on two levels, general and specific. On the general level the wholly understandable concern that a manufacturer, if he had a retail shop on the same premises as his factory, may thereby lose the derating advantage enjoyed by his competitors, who differ only in that they have no shop there. If the underlying purpose of the Order was to aid manufacturers but exclude merchants and dealers, how was that to be achieved in these circumstances?

The more specific issue was whether the issue, of the hereditament being primarily occupied and used as a retail shop or not, had been correctly addressed. Were these the proper questions and had they been properly considered: Was there a retail shop on the

hereditament? If there was, did it so colour the hereditament that it became mainly a retail shop? Was this a unified business of a type of which dissection was inappropriate or prohibited as a matter of law? Did a blind application of the tests produce an answer that failed the 'shipyard' test?

The respondent accepted that the hereditament was occupied and used as a factory within the definition contained in the Order but did not accept that it was an "industrial hereditament". He said that the hereditament was primarily occupied and used for one of the excluded purposes, namely "the purposes of a retail shop" in that, in accordance with the extended definition of retail shop in the Order, the premises were either a retail shop in a narrow sense or they were at least premises of a similar character to a retail shop where retail trade or business (including repair work) was carried on.

The appellant contended that the premises were not a shop and neither occupied or used, primarily or otherwise, for the purposes of a retail shop. Even if the reception/workshop area at the hereditament were regarded as being occupied and used for the purposes of a retail shop, its function was ancillary to and supplementary to the main occupation and use which was that of a factory.

In broad terms the Tribunal has first considered the business activities and the character of the hereditament and then stepped back to review the overall impression.

The hereditament and the business

The hereditament consisted of premises at No 336 Lisburn Road, Belfast. It was in an established retail location on a major arterial route and one of a row of seven shop units, the others were all retail outlets.

The premises occupied a ground floor street-front site, with a frontage of about 4 metres and a total depth of some 20 metres, and had a display window and shop front which displayed the appellant's name and business. There were goods (unpriced) displayed in the window and the hereditament had the external general appearance of a retail outlet.

The accommodation was considered in 5 blocks for convenience, numbered 1 to 5, starting from the frontage to Lisburn Road.

Block 1 was a reception/workshop area to which access was gained from the street by a single door. For security reasons and to deter unwelcome callers, visitors to the hereditament had to ring a bell and then either the administrative assistant or Mr Harron admitted them. It contained shelves and display cabinets in which illustrations of his craft were on display. There was also a large heavy rolling mill which was bolted to the floor and

a barrel polishing machine: both were used in the appellant's production process. This area comprised approximately 32% of the entire area of the hereditament. There was no counter.

Block 2 was separated from Block 1 by a partition of about three-quarters height with two doors: that visually screened the clutter of the workshop, reduced dust if not noise, allowed the appellant to dress to suit the work in the workshop areas and was also a safety precaution because of the use of acid in manufacturing. Block 2 contained a variety of facilities including a small desk from which the business was administered, office furniture and equipment, a small reference library and equipment for manufacturing. The telephone was situated here, and generally the part time administrative assistant worked here. This block also contains a drawing bench and a work bench at which the appellant worked from time to time. Moulds were made here.

Blocks 3 and 4 contained work benches and the greater part of the manufacturing equipment and machinery including equipment for casting, sandblasting, cutting, grinding, welding, polishing and finishing, and compressors and vacuum pumps. They were also used for the storage of raw materials: precious metals, gold, silver, precious and semi-precious stones, and materials used in the process such as sand, abrasives, acids and cleaning materials. There were heavy safes for the secure storage of the more precious articles and materials.

Block 5 contained toilet and washing facilities.

"It is unnecessary and undesirable to consider specifically the subjective intention of the occupier. The purpose for which the hereditament is used should be ascertained from an objective consideration of the activities carried on in it." UTV v Commissioner of Valuation (HL) [1981] NILR 130. However some background or historical evidence from an appellant may help to illustrate, explain and define the nature of the business, provided that it is related to the hereditament in question. Although the Tribunal accepts that subjectively the Appellant saw his own aims as those of a designer and craftsman and not a merchant, the test must be an objective test.

Mr Harron had studied at the College of Art and then set up as a goldsmith about 1964 in the basement of a friend's house in Belfast. He had for many years specialised in designing and producing individual articles, eg personal jewellery, presentation gifts, prizes and trophies, to suit the requirements of individual customers. He now designed and made them on this hereditament. Some years ago, he had moved to a workshop in the out buildings of a stately home, owned by the National Trust, some distance from Belfast. Later

he had moved to Hillsborough and rented premises, from a potter friend, following which he bought premises and worked there until 1987. As a result of demonstrations against the Anglo Irish Agreement being focused on Hillsborough, car parking was difficult for customers and so he looked to Belfast for new premises. There was no special reason why the business had located on Lisburn Road and when he had first moved there it was not as busy as it was now. From a security point of view it suited to be on a main road close to a police station rather than in a back street location. It was convenient for customers since it was on a major arterial route in the principal City in Northern Ireland.

After first discussing the customer's requirements he would prepare a design and either send it to the customer or the customer would arrange to call. Following further discussion he would make a wax model which would then be either posted to or collected by the customer. The final design was then agreed and executed. Pieces were either collected personally or sent by registered post.

The manufacturing process was largely carried out by the appellant himself, who spent all his working hours at the hereditament. The greater part of his time was taken up with researching, designing and manufacturing the various pieces commissioned. He had an assistant in the workshop.

The business relied on reputation, referrals and repeat business rather than passing trade: any goodwill in the business was personal to the goldsmith, as he put it "he was the business".

The market for the business was diverse, brooches for clubs, engagement rings, jewellery (some for resale), work for churches, trophies etc. He had no separate wholesale and retail price lists, he worked out a price and if a purchaser chose to sell on what he made, that was a matter for him.

The premises were open to the public Tuesday to Saturday 9.00 am to 5.00 pm. but there was little or no "passing trade" as such. Potential customers mostly made initial contact by telephone. The majority of what was made was made to the requirements of individual customers, whom he met personally on the hereditament and who, generally speaking, would not be selling on to others. The great majority of persons coming to the hereditament did so by prior arrangement. Part of the premises was used to some extent as a reception area for clients and intending customers to meet with the appellant in person. It was convenient because he could spend time with a customer, but with the minimum interference to what he spent most of his time doing ie designing, and making pieces. There was no price list on display and no counter staff as such. At the time of assessment,

there were articles displayed in the 'shop window' and in display cases within the reception/workshop area. The Tribunal accepts they were not displayed for sale (except some watches and watch straps not made by him which were available for sale: the volume of this business was less than 10%). It suited to meet on the premises because it was an atmosphere over which the Ratepayer had control and, when discussing ideas, he could refer to drawings, models and photographs. Meeting with the customer and establishing a relationship was an important aid to producing a design and product to suit their appearance, personality or special requirements, and for the customers to see whether he could design and supply a product to suit their individual needs.

There was a part-time administrative assistant who carried out the administrative work, answered the telephone and generally first received any client who called. She was also responsible for sifting out unwelcome visitors who would be likely to waste his time. The business with the customers was not conducted through her: she was not suitably qualified or experienced in that role.

Payment usually would be by cash or cheque, sometimes by post, but he had a credit card facility (not swipe card). He had no counter or cash register. The credit card logo's which were displayed in the glass door at the time of assessment had been removed some time later but must be taken to indicate an invitation to do the type of business for which credit cards were used. So, there were facilities for customers to pay for pieces they ordered and bought, on the hereditament.

The Tribunal considers the manner in which the business classified itself in "yellow pages" as "Jewellery Manufacturer" is of little or no assistance on the real issues.

The Tribunal attaches no significance to the Ratepayer's membership of the National Association of Goldsmiths and little to the Association of Lisburn Road Retailers because it comes very close to depending on an analysis of the subjective intentions of the Appellant ie what he hoped to achieve from membership. Trade 'networking' could just as readily indicate an interest in retailers as an interest in retailing and the local lobby as much an interest in security and bin collection as parking for shoppers.

Between the time to which this appeal relates and the time of the inspection by the Tribunal the appearance of the shop window display had changed. It is of course open to a ratepayer to take whatever proper steps, and if he wishes to do so, make whatever changes he considers may help, to contain his rates liability. He is not obliged to continue 'to arrange his coal store' in a particular way if he thinks it may mean that 'the Rate

Collector can insert the largest possible shovel' and the Tribunal draws no inference, either way, from the fact of change.

The Tribunal accepts that the business could do without a showroom, as such, and some customers never visited the hereditament. The Tribunal accepts that, to an extent, items on display within the accommodation would help clients to identify the type and nature of pieces they wished to be designed and made for them but cannot accept that to be the function of the show in the 'shop window'. On any objective view the whole purpose of the latter and part of the purpose of the former was to attract business, including sales of the product, to the hereditament.

Whether or not the business carried on here is a unified business of a type of which dissection is prohibited, there is a difference between an analysis of the distribution of the output and a dissection of the activities of the business. The former generally is permitted, the latter may not be. It is legitimate to use the subsequent history of an article (ie after it leaves the hereditament) to test the true character of the process to which it is subjected on the hereditament: Wilson Brothers Ltd v Edwards (VO); [1958] 3 All ER 243. On very broad estimate, some 10% to 15% of the trade was wholesale to retailers. 10% to 12% was sales of items which were bought in by the Appellant for resale. The balance was sales of items produced by the Appellant on the hereditament. These were designed and made to order and not supplied ex-stock.

Expert witnesses may assist by providing the Tribunal :

"..... with the necessary expert criteria for testing the accuracy of their conclusions, so as to enable the Tribunal to form its own independent judgment by the application of these criteria to the facts proved in evidence."

Davie v Edinburgh Magistrates [1953] SC 34

The attention of the Tribunal was drawn to other, apparently similar, hereditaments and businesses, including hereditaments previously occupied by the appellant, which the Commissioner had treated as entitled to derating. Because of the need for careful enquiry into the true nature of the businesses at the other premises, as against the necessarily limited evidence before the Tribunal (in particular the absence of first hand factual evidence of the details of the trade or business, the issue on which the rating treatment appeared to have turned in most cases), the Tribunal derives little assistance from them except to this extent. The Commissioner does appear to have accepted that something like this business in something like this hereditament may be entitled to derating. However, the Tribunal was left with a strong impression from the expert witness for the Commissioner that inadequate

importance may have been attached to the "primacy" test in applying the appropriate criteria to the facts. In view of the implications for derating for the ratepayers in these other hereditaments the Tribunal prefers not to, and does not need to take the discussion of their treatment any further than that.

Mr Hanna said that at the Appellant's previous holding at Hillsborough, it had been accepted that he had been entitled to industrial derating because there was no passing trade and all customers were referrals from other clients or previous clients returning and this was treated as not involving resort by the public. In the absence of public resort, the premises did not qualify as a retail shop. The Tribunal will return to this approach later. Mr Harron said that in his view there was no material change in the type of business he had been conducting over the years.

Mr McCausland did not regard the hereditament as a shop. Externally it may have had the appearance of a shop but not internally. It was not used for the purposes of a shop and in his view the primary purpose was that of a specialist craftsman who designed and manufactured jewellery. That was how the appellant and his workshop assistant spent by far the greater part of their time.

Mr Hanna said "there was shop or something like it and retail trade on the retail hereditament, therefore it was retail and not industrial". He accepted that there could be a dispute as to whether it was a shop but in his view there was a shop and there was retail trade. He was very slow to do so but eventually did acknowledge that there was still an overriding test of primacy.

He accepted that there was no apparent invitation to passersby to call apart from the external appearance and retail location and he thought that to sell his product the appellant really did not need anything other than the telephone. The sign on the outside which said "Graham Harron Goldsmith" was unlikely to attract casual callers. He accepted that the ratepayer was mainly employed in designing and making jewellery but considered that the reason for that was the sale of the goods. The decided cases had to be considered in determining what was primary. He said that Mr Harron worked to supply the retail side of the business, it was a unified use and the primary use was to manufacture to sell.

The general issue

There is a sandstorm of cases which at first sight clouds the issues in cases concerning retail shops. The Tribunal has relied on two principal sources to provide guidance and direction. The first is the judgment setting out his review of the authorities by Lord Evershed MR in Almond v Heathfield Laundry (Birmingham) Ltd [1960] (CA) 3 All ER 700.

The second is Ryde on Rating (the old 10th Ed 1956 with Supplement 1959). Both were published shortly before industrial derating ceased in England and Wales. Although derating continued, to a reduced extent, until recently in Scotland, the Tribunal would have some reservations about the assistance to be derived from Scottish textbooks in this jurisdiction. Some policies of the Scottish Courts have, on occasion, appeared to have diverged in their reasoning from the approach of the Courts in Northern Ireland and England and the latter is, of course to be preferred if there appears to be a difference.

"In considering the decisions of the Courts below the House of Lords it is necessary to have regard to the date of the decision owing to the fluctuations in the apparent policy of the law": Ryde. The cases must also be considered against the background that if an occupier proves, or it is admitted that, the hereditament is a factory and the occupier has said that it is not occupied primarily for any of the excepted purposes, the burden of proof to show the contrary passes to the opposing party, Moon v London County Council [1931] AC 151, HL.

In the derating context the word "primarily" is equivalent to "mainly" and the phrase "for the purposes of" might perfectly well be expressed by the one little word "as", Moon's case. The vitally important effect of the latter conclusion is to confine the enquiry in the rating cases much more than may be appropriate in other cases.

The fundamental approach is

".... simply a question of attributing an everyday meaning to the words used in the definition"

Turpin v Middlesbrough Assessment Committee & Bailey [1931] All ER 255

In this appeal the Tribunal also considers whether an 'everyday people' test may be relevant.

Ryde:

"In examining the relevant facts in order to decide whether the "primary" or "main" purpose of the occupation and user of a hereditament is "for the purposes of" or "as" a factory or for one of the excluded purposes, no one test has been found to serve as a universal criterion. Ultimately the question must be determined by the tribunal of fact according to the general impression left by the evidence, and unless it has misapplied any of the principles of law which have been laid down in the cases.... its decision cannot be challenged on appeal."

Although a question which is mainly one of impression may be difficult, it is an approach which occurs in other fields, for instance the VAT cases. The derating cases often give little positive amplification of the test but instead mark points on the boundary of the envelope of permitted conclusions.

Achieving the underlying purpose

The Tribunal was referred to a Scottish case, Inland Revenue Officer v Gunn, Collie and Topping 1930 SC 389 which concerned a firm of tailors who carried on a high class business in making clothes to the order of customers. The premises, which were situated in an important street in a city, consisted of five storeys. The ground floor was used for the display of cloth, taking of orders, measurement, cutting and fitting, and it also contained the business office. The four other storeys accommodated the working tailors. Eighty employees were engaged within the premises which were registered as a workshop under the Factory and Workshop Acts. Lord SANDS held:

"The object of the legislation with which we are here concerned was to derate productive industry. It was not to derate business premises generally. ... It was not within the scope of the Act to derate merchants in respect of their business premises, and retailers and wholesale distributors are merchants, not persons engaged in productive industry. It might happen, however, that certain parts of premises occupied by merchants, such as retail shopmen or persons engaged in the wholesale distributive industry, were technically factories or workshops under a Statute passed for another purpose, the definition of which was adopted for derating purposes. Accordingly, it was deemed necessary to exclude from the scope of the Act the premises of these merchants occupied by them *primarily* for their business as merchants or dealers....

In my view, the intention of the Act was to derate premises which, regarded in relation to their use and occupation as a whole, are used for the purposes of industrial manufacture, and not to derate premises which, regarded as a whole, are used for the purposes of dealing."

Lord Fleming agreed.

"The retail shop where orders are taken from the customers and the upper floors in which the garments are made are of equal importance, and are really complementary to one another. It is, of course, quite true to say that no clothes could be made if orders were not taken from the customers in the retail

shop, but is equally true to say that no orders could be taken from the customers if clothes were not made in the upper floors..... The purpose of the Act is to relieve the productive side of industry, and the proviso ... makes it clear that the distributive side of industry - whether wholesale or retail - is not to receive the benefits of derating ... The terms of the subsection do not appear to me to justify the view that, where the process of manufacture and ... the process of retail trading are carried on as one business and in premises forming a *unum quid*, the premises, in so far as they are used for manufacture, must necessarily lose the benefits of derating. In the complex organization of business which exists today, the lines which divide these different compartments of trade and industry are not rigid, and there must be many cases where they overlap Here, however, the industrial use seems to me as important as the non-industrial. I accordingly am of opinion that the subjects, taken as a whole, fall to be treated as industrial subjects."

Those opinions represented a view with which many would agree but there was another view. Lord Hunter gave a dissenting opinion:

"It may be contended with force that, if a large part of the premises is devoted to the purposes of manufacture or adaptation of goods for sale, all that you can affirm is that the premises are partly used for the purposes of retail business. On the other hand, it may be said that, as nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the building as a whole is used is the carrying on of a retail business. My own view is in favour of the latter construction. The manufacture or adaptation for sale of the cloth by making it into suits appears to me to be ancillary to the retail business of selling suits of clothing. I think the subjects ought to be treated as a retail shop, and ought not to appear in the Valuation-roll as industrial subjects."

No appeal lay from the Scottish Lands Valuation Appeal Court to the House of Lords. But this case was considered by the House in Finn (Wimbledon Revenue Officer) v Kerlake [1931] 242 and the dissenting opinion of Lord Hunter was preferred. Viscount Dunedin:

"The decision in the Court of Appeal, in agreement with the reasoning in some Scottish cases, to which we were also referred, was based on a separation of the bakehouse from the shop, and the inability to determine that the shop was the primary purpose. As already stated, I am of opinion

that the dissection of a unified business such as is in fact carried on here is not justified. I prefer the reasoning of Lord HUNTER in his dissent (as set out above) in Inland Revenue v Gunn, Collie and Topping."

In Assessor for Aberdeen v Collie 1932 SC 304, which again concerned bespoke tailors, the Court of Session had the opportunity to consider the speeches of the House of Lords in Finn v Kerlake. Lord Hunter:

"...I would refer to the case of Finn v Kerlake. In that case the House of Lords rejected the view that we had followed in the case of Gunn, Collie & Topping, and held that, where you have a retail shop and a workshop that supplies articles that are sold retail in that shop, there is no room for separation of the workshop from the shop, and that the premises must be treated as a retail shop, which falls under one of the exceptions of premises not entitled to the benefits of derating.

It may be that the Valuation Committee were right in holding that they were bound by our decision. It is true that a decision given by this Court is a final decision, and is not subject to review by the House of Lords. But last year we deliberately postponed giving a decision upon a question as to derating because we were informed that the same question was about to come under consideration in the House of Lords; and we indicated then, quite clearly, that, if there was a House of Lords decision on the statute - the English statute is practically identical upon this matter with the Scots statute - we should follow the decision arrived at by the House of Lords, even if it involved going back upon a decision already given by us. Unless we adopted that policy a most anomalous result would ensue. There is nothing to justify the derating of premises in Scotland which, had they been in England, would not have received the benefit. The result is, I think, that the conclusion reached by the Aberdeen Committee cannot be justified."

The importance of the underlying message of the following passage from Lord Sands' judgment risks being overpowered by its vivid imagery but it does capture a reaction that will be recognised by many:

"It is quite true that we are a supreme tribunal in valuation matters, and our judgments are not subject to review by the House of Lords; and , accordingly, in a technical sense, the judgments of the House of Lords may not be binding upon us. But there is one thing that is binding upon us and that is the law, and the House of Lords is an infallible interpreter of the law. A batsman, who, as he said, had been

struck on the shoulder by a ball, remonstrated against a ruling of lbw; but the wicket-keeper met his protest by the remark: "It disna' maitter if the ba' hit yer neb; if the umpire says yer oot yer oot." Accordingly, if the House of Lords says "this is the proper interpretation of the statute," then it is the proper interpretation. The House of Lords has a perfect legal mind. Learned Lords may come or go, but the House of Lords never makes a mistake. That the House of Lords should make a mistake is just as unthinkable as that Colonel Bogey should be bunkered twice and take 8 to the hole. Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault."

The Court of Appeal in Wilkinson (Taunton Revenue Officer) v Sibley and Donovan [1931] All ER 187 also had some difficulty with the decision in Finns case. Scrutton LJ:

"The decisions of the Court of Appeal on fact are not binding on any other court of appeal, or, indeed, on anybody. The decision of the House of Lords on fact is not binding on the House of Lords, or on anybody else. The decision of the House of Lords on law is binding on the House of Lords itself, and, of course, on any subordinate tribunal. While I have great difficulty, if I may very respectfully say so, in understanding the decision of the House of Lords, I take them to be deciding as a matter of law, because they have no power to make any finding on matters of fact, that when there is a workshop and a shop on the same hereditament you cannot dissect them - to use the language used, ie, "the dissection of a unified business is not justified." What the House of Lords will say when they get a case of a large factory which sends its goods to other shops to be sold, but has a small shop on the premises which sells a part of them, I must leave to their Lordships to determine. They will probably discover some satisfactory way of explaining the language which has been used in this case, but as the judgment stands it appears to me to bind us in the present case, because the present case is this: Shops in a street at Taunton, one of which is an outfitting shop and adjoining it a shop to which customers come to give orders for bespoke tailoring. Orders may also be given by post to that shop. The upper floors of that shop are occupied by the workmen, who cut the goods according to order. A finding of fact by quarter sessions was that the hereditament was occupied and used partly as a retail shop, but mainly as a workshop. I think that the decision of the House of Lords must be that as a matter of law you cannot dissect the hereditament in that way. There being what the House of Lords calls a unified business on it, namely, taking orders for bespoke tailoring and making the things so bespoken, you cannot dissect that, and you

must treat the workshop as ancillary to the retail trade or business. That, as a matter of law, binds us, and it is not of much use for any individual member of the court to say he does not understand it, still less to say he does not agree with it, and I think in those circumstances the decision of the House of Lords compels us to allow this appeal."

Greer LJ:

"I think we are compelled by the decisions of the House of Lords in Finn v Kerlake and Turpin v Middlesbrough to hold that this appeal must succeed.... They must be treated as judgments on questions of law. In the case most like the present one - Finn v Kerlake the law laid down appears to me to be this. Upon the facts there stated no court could, as a matter of law, come to any other conclusion except the conclusion that the premises in question were primarily used as a shop. If that is accurate, as a matter of law in relation to the facts stated in Finn v Kerlake, it is, in my judgment, a fortiori applicable to the facts stated in the present Case."

Slesser LJ agreed:

"In the present case the facts which are found show, without any question, that the whole of the product of the workshop was used, to use Lord Dunedin's words, "for the purposes of a retail shop". It is true, as is stated in the Case, that some of the customers give their orders and are fitted at their own residences, and repeat orders are received by post, but the earlier words indicate that such orders are given through the shop, and there is no finding of fact that any of the products of this workshop are used except for the purpose of supplying the shop or orders which come through the shop.

It seems to me that it has now been laid down by the House of Lords as a matter of law that where on a hereditament a product comes from a factory or workshop and is then disposed of through a retail shop, the hereditament is occupied and used for the purpose of the retail shop. In their Lordships' view, the question whether it is primarily occupied or not does not now seem to arise. Once you have what their Lordships call a unified business, they hold that the dissection of such a unified business, such as would be necessary were one to consider which purpose was primary and which secondary, is not justified. That is, therefore, entirely a matter of law. The facts of this case on these essential matters differ in no way from those of the Scottish case of

_____, nor from the bakery case of Finn v Kerlake. That being so, we are bound by the decision of the House of Lords to hold that this is of necessity occupied and used for the purposes of a retail shop. That is a matter of law and not of fact, and consequently this appeal must be allowed."

This Tribunal is of course bound by decisions of the House of Lords on questions of law. In this appeal, as a matter of law, if the facts cannot be distinguished, it must follow Finn v Kerlake and cannot adopt the approach of the majority in the Court of Session in Gunn, Collie & Topping. Although later decisions to which the Tribunal was referred may have refined the reasoning they have not struck at the heart of Finns case (they could not do so) or Collie or Wilkinson v Sibley.

Finn v Kerlake although the cornerstone of much that followed, was controversial in some aspects. One was the view taken of the sales by the bread roundsmen. That controversy does not directly concern the Tribunal in this reference but needs to be borne in mind when reading some later judgments. Another was the difficulty in drawing the line between questions of fact and degree and points of law and yet another, that does directly concern the Tribunal in this case, was the opinion that the dissection of the unified business such as was in fact carried on, was not justified..

The authorities were reviewed in Almond. LORD EVERSHED MR:

"The definition [in the Order] contains two qualifications; first, the hereditament must be or contain a retail shop so called and understood, or premises of a similar character thereto, and, second, the hereditament must be primarily occupied and used for the purposes of a retail shop. In these cases, I think, it is plain that there has at times been a conflict between what has been said to be a question of fact and what has been said to be a matter of law.

In Dolton Bournes & Dolton Ltd v Osmond [1955] 2 All ER 258 (CA), it was pointed out by this court that, although it was not necessary that the premises should look like a shop as that phrase is used when applied to premises in an ordinary shopping street, still there must be the characteristic that the public do resort to it and are invited so to do, see the judgment which I delivered . That case was perhaps an extreme one because it was made plain that the occupier discouraged the public from coming to the premises though the necessities of business prevented him from making it impossible that they should."

The Tribunal returns to Dolton Bournes & Dolton, Ltd v Osmond later. LORD EVERSHED MR continued in Almond:

"There is no doubt that the addition in the definition of the words "including repair work" has necessarily expanded the meaning of the word "shop" so as to cover premises which are not at all like the ordinary shop in a shopping street where one goes in to buy cigarettes or books or whatever it may be.

The group of cases which came before the House of Lords in 1931 included Turpin v Middlesbrough Assessment Committee [1931] All ER 242; which related to a hereditament used for the repair of motor cars, and the language used by VISCOUNT DUNEDIN said:

"Nor do I agree with the view that has prevailed as to the effect of the words 'of a similar character'. For myself I am unable to state what are the physical features, the existence of which are essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows, but I am equally familiar with retail shops where no such features exist. In my opinion, it is not possible to say that the words 'of a similar character', even if they include, are limited to physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now, if we compare the hereditament here in question with a retail shop, do we find any common characteristics? I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein".

I have read that passage because it has been much relied on by the valuation officers to support a proposition put sometimes as broadly as this; that, if on the premises in question there is a place to which the public can resort for the purpose of having particular services rendered, then there is there a retail shop. I venture to recall what VISCOUNT DUNEDIN had said only a few pages previously, that you must treat these decisions as relating to the particular facts of the particular cases. It is no doubt established in Turpin's case (and has been followed recently in this court in Meriden R D C v Standard Motor Co Ltd [1957] 3 All ER 222) and it is now clear that premises where the public are invited to go and do go with their motor cars for repair will be treated as a retail shop. But I am unwilling and quite unable as a matter of the sense of the statutory language to say that it follows that, if once one finds

on a hereditament a place, room, open space or what you will, to which the public can resort for services rendered, it therefore follows of necessity that there is a shop."

The Tribunal also notes that Lord Dunedin continued in Turpin, after the passage quoted above:

"Moreover, once you include repair work in the words, 'retail trade or business,' it can be truthfully said there is a similarity between the type of business carried on in this building and the type of business carried on in a retail shop. These common characteristics are, in my opinion, sufficient to satisfy the requirement that the premises should be of a character similar to the character of a retail shop. It was said that this view would deprive the words of all effect. I think not. They would operate to exclude from the definition the extreme case put in argument and referred to in the judgments of the shipbuilding yard, which no one would dream of calling a retail shop."

LORD EVERSHERD MR continued, in Almond:

"Having referred to what LORD DUNEDIN said in Turpin's case, it will be convenient to refer to Finn v Kerlake decided at the same time, the speech in which shortly follows that which I have just read. That is undoubtedly of more direct importance to this case. The precise facts in Finn v Kerlake remain, to my mind, still a little obscure and it seems to me that judges in later cases have not always taken entirely the same view of what the facts were. Broadly this much is clear. The hereditament was that of a baker. He had on the hereditament and as part of it a baker's shop well set up - a baker's shop in the ordinary everyday acceptance of that word. He also had behind it a bakery where he baked his bread and cakes, and it appears from what is stated in the lower courts that there was no direct access between the bakery and the shop. The question which we are now debating arose in that case: Was this hereditament primarily used for the purposes of a retail shop? The House of Lords, reversing the view taken in this court, said that it was and again (because this is so much relied on by the valuation officers) I shall read a short passage from VISCOUNT DUNEDIN's speech:

"In the present case, the hereditament is all occupied and used for the one trade or business, namely, retail trade or business in bread and confectionery".

The argument for the valuation officer has gone the length of saying this. When there is, as there is here, a single unified business and when on part of the premises there is a shop or its equivalent, then one can no longer dissect the subject-matter being dealt with; the conclusion is inevitable as a matter of law that the whole hereditament is occupied and used for the purposes of a retail shop. It is submitted that, even though the conclusion appears entirely to make nugatory the use of the adverb "primarily", still the decisions which bind this court compel the conclusion. Particularly it is suggested that the result follows from the Ritz Cleaners Ltd v West Middlesex Assessment Committee [1937] 2 All ER 368 (CA) case to which I have briefly alluded already, and further reliance is placed on Finn's case which I have also mentioned, and the tailors' case, Wilkinson v Sibley & Donovan;

"It is true that in those cases one does get statements which at first blush seem to support the argument. SCRUTTON LJ said that once there is a single business you cannot dissect it and that the workshop must, to use his language, be treated as ancillary to the trade or business. My first qualification on the prima facie effect of those words will be based on the later decision - that is later than Wilkinson v Sibley & Donovan - of the House of Lords in Toogood & Sons, Ltd v Green [1932] 1 KB 204 (CA); it related to a business, admittedly a retail business, of selling seeds which had to be prepared in various ways before sale. The bulk of the business was done direct with the customer by correspondence, the seeds being dispatched through the post; but there was an arrangement and a place at which customers could call and buy their seeds from the hereditament and it was said that one or two such persons called every week. Nevertheless, the House had no difficulty in concluding that, looked at sensibly, broadly and according to the facts of the case, it could not properly be said, notwithstanding the presence of this place of public resort, that the business, this single business, was conducted on premises which were primarily used and occupied for the purposes of a retail shop."

The Tribunal notes in passing that in Toogood, Lord THANKERTON left unanswered an important question:

"While it may be a question whether market gardeners are retail customers or not, it is common ground that at least half of the amount sold is sold to retail customers."

LORD EVERSHED MR continued, in Almond:

"[In Toogood] reliance was placed on Finn's case and on the conclusion expressed in the passage in VISCOUNT DUNEDIN'S speech which I have read. But LORD THANKERTON, who delivered the leading opinion in the House, in the presence and with the assent of LORD DUNEDIN, said this:

"I may pause here to point out, first, that the test, as laid down in Moon's case [another of the 1931 cases] is as to what is done on the hereditament in question, irrespective of what is done outside the hereditament, and secondly, that the test is not whether the hereditament is mainly occupied and used for the purpose of 'a retail business', but whether it is mainly occupied and used for the purposes of a 'retail shop'."

Then a little later he takes up the argument presented on Finn's case

"I observe a tendency in certain of the judgments in the courts below to put a wider construction than is justified on the views expressed in this House in Finn's case whereas those views - eg as to dissection of a unified business - are expressly confined to the facts of that case. Admittedly, there was a retail shop on the hereditament in that case through which the whole production was disposed of".

Ryde comments:

"After pointing out that in Finn's Case, it was therefore unnecessary to consider the extended definition of "retail shop" and after citing the passage from Viscount DUNEDIN'S judgment in the Middlesbrough Case already referred to, Lord THANKERTON continued by observing that the true element of similarity to a retail shop lay in the provision of accommodation in the premises for any of the public who might resort there and that in Toogood's Case no such accommodation was provided.

The effect of this decision upon the attitude taken by inferior courts in cases concerning mixed factories and retail shops was considerable. The tendency to regard all businesses with a substantial retail side as "unified businesses" which could not be dissected, was checked and the tendency to determine such questions as questions of degree and fact returned."

This Tribunal notes that to the extent dissection was permitted, it was not a dissection of the activities or steps of production but was instead a dissection of the final stage only - the link with the customer. It is to be expected that businesses show a degree of unity, some common thread to their activities. In the view of the Tribunal it is important not to apply the term 'unified business' too readily to any business that can be called a single business or, looking at the matter another way, the bar on dissection should be applied only to particular types of unified business ie the phrase 'unified business which it is not appropriate to dissect' should be considered as a whole.

LORD EVERSHERD MR continued, in Almond:

"I think that, if that passage is read in conjunction with the passage in Finn's case from LORD DUNEDIN'S speech, the conclusion is clear. There a retail baker's shop was being dealt with, what LORD DUNEDIN called an ordinary retail baker's shop, and once that conclusion had been reached it followed that the place where the bread was actually baked was part of the shop, an ancillary part of it. One applied the ordinary standard and said: Here is an ordinary retail baker's shop and, as pointed out by LORD DUNEDIN, through that shop the whole production was disposed of. The fact that the greater part of the bread was sent by van to the customers and not actually disposed of over the counter of the shop no more derogated from the general proposition than would the fact, eg, that goods ordered from Harrods Stores will be sent in Harrods' van to one's premises derogate from the fact that the whole of the business of Harrods in Knightsbridge is that of a retail shop. I think that is fundamental to the conclusion in Finn's case and the deductions which ought to be drawn from it, and it does not mean and cannot involve the result that the mere presence on the hereditament of a place to which the public may resort inevitably converts the whole of the hereditament into a retail shop or its equivalent, although the business is a single business.

In the passage already read from SCRUTTON LJ, there is left for consideration the case where there is a single business which may have on part of the hereditament and as an adjunct of the business a retail shop in the sense of being a place to which the public can go and buy goods or services if they want; but, as he said, what the result would be if the facts were as I have stated them is a question for further decision when it arises."

Lord Eversherd then posed a question of considerable relevance to this appeal:

"Unless one is going to disregard and treat as no longer present the word "primarily", one must, so it seems to me, in a case such as this still ask the question: Is the presence of this place of public resort, this 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?"

and continues:

"It only remains for me to refer, as I should do, to the Ritz Cleaners case because it was so much relied on

So, as I read the real ratio of this court's decision in the Ritz Cleaners case, it can be stated thus; that, when one looked at the facts found as to how the business was done, the truth was that the hereditament was a hereditament used only for the purposes of a retail dyers' and cleaners' shop, just as the hereditament in Finn's case was used exclusively as an ordinary bakery shop. If that is right, then it follows no doubt that the dyeing and cleaning machines become necessarily ancillary to the main purpose, viz, that of the shop."

The Specific Issues

The Tribunal now turns to the case before it.

Retail trade?

Articles, most of the production of the business together with goods not made on the hereditament, were sold here. Those sales were, in everyday language, retail sales, part of a retail trade. The Tribunal has no difficulty in concluding that, attributing an everyday meaning to the words used in the definition, the hereditament was used, to an extent, for the purposes of a retail trade or business.

A select band?

In Dolton Bournes & Dolton Ltd v Osmond, a case concerning a sawmill, the customers resorting to the premises were (to quote the headnote) "a limited class of trade customers".

Sir Raymond Evershed MR referred to what Greene LJ said in Ritz Cleaners Ltd:

"as a foundation for any application of the words to particular facts in particular cases, you may safely start by bearing in mind that the essential characteristic of a shop is that people can shop in it".

Evershed MR emphasized that in the statute:

"A double requirement is, however, postulated : there must be a 'retail shop', or something like it, and 'retail trade or business' must be 'carried on' at the 'retail shop'."

and went on to say

"..to any appreciable extent members of the public (as ordinarily understood) are not invited I am not thereby saying that builders are not 'members of the public'; no doubt they are: but when Lord Dunedin spoke, in Turpin's case, of members of the public he meant to refer, I think, to what one might call the ordinary man in the street - that all and sundry were invited to come."

Jenkins LJ referred to the builder customers as "not members of the general public 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." Romer LJ referred to them as not constituting "the people" or "the public" but "merely a small section, and a specialised section..."

Later, unfortunately in the opinion of the Tribunal, too much prominence may have been given to "all and sundry" and not enough to "the ordinary man in the street" or perhaps the everyday person. The latter may be rich or poor, sophisticated or unsophisticated and male or female and it is not, in the ordinary meaning of words, an essential characteristic, fatal if it is not there, of a retail shop that it should actually attract all these categories ie "all and sundry". The question is one generally to be determined from the facts, and each tribunal of fact must reach its conclusions on the evidence before it and which will reflect local circumstances. For example, it may be that in a rural area, it would not be a surprising finding that it was common for the ordinary man to be a farmer and own a tractor and it may be that Henderson Ltd v Assessor for Dumfries and Galloway [1962] 238 SC should be viewed in that light.

Although, in this appeal, there might be a question mark over whether bulk sales to a club could truly be considered to be retail sales, it was accepted that only a small proportion of articles was sold to the trade. Although Mr Harron made it clear that he did not care

whether his customers were retail or trade, selling on to another, the Tribunal cannot rely on his subjective intentions, and finds that, in fact, in the main the customers were not 'trade', they were 'retail'.

The Tribunal does not accept the approach, which appears to have been the basis of the decision in the Appellant's former premises at Hillsborough, that a hereditament, if it would otherwise be a retail shop, loses that character for the reason alone that its customers are referrals and repeat business.

Although most persons coming to the hereditament did so by appointment, and often came to discuss the article and design required, they did so with a view, at the start and at the finish, to a retail purchase. The everyday person, perhaps richer than some and more sophisticated, who was interested in buying the articles made, was invited to come and there was an area set aside for him. Orders were taken from him and articles were sold to him. The limited class of customers dealt with at the premises does not take them out of the category of retail shop.

Retail shop?

Many of the traditional indicators, of whether a hereditament is a retail shop, are inconclusive, either by their presence or by their absence. For example, these days, when even professional firms, such as solicitors, have premises with shop fronts, the presence of a shop front, considered in isolation, may be no more than an indicator of retail trade or business rather than conclusive evidence of a retail shop.

These premises were in an ordinary shopping street and they had a shop front and shop window with a display. But clearly this was not a high street jewellery retailer, buying pieces from manufacturers and wholesalers and carrying a stock for sale from the largest possible window and counter displays. Nor was it a watch repair business. This was a high class goldsmith and jeweller, designing and making almost all the pieces sold, using precious metals and precious stones, in a workshop. The sign "Goldsmith" on the front of the shop would not put off passersby looking for such a business but it would help to indicate that the business was not that of an ordinary jewellery retailer.

Here, there was a security system on the door but that is not wholly exceptional for retailers of high value goods in these times. Passing trade was little, but potential customers were encouraged to come to the premises, directly by telephone and that invitation was reinforced by the location and external appearance of the premises. That was in addition to any signal sent by these features independently. The articles in the shop window were not for sale and not priced but that, although unusual, did not, in the view of the Tribunal

eliminate its role as an indicator of a retail shop. In contrast to the external appearance, internally the premises lacked some physical features of a retail shop. There was no counter and no cash till and no display of a price list and no counter staff as such - but clearly there were display cases, seating in an area set aside, but not exclusively, for callers, facilities for selling articles to customers, for them to pay for them and such retail transactions, or trade, took place on the premises.

In the opinion of this Tribunal, the absence of any substantial passing trade, the fact that the goods on display were not displayed for sale, the hand-crafted, individually designed and expensive nature of the trade did not exclude it, just as it would not (and it appears did not in Gunn, Collie and Topping) exclude a tailors with a shop of similar character from the category of retail shop. People could shop here.

The Tribunal finds that the business did rely on invitation to the general public to come to the hereditament for the purposes of the retail trade which was conducted from the hereditament. Having regard to the conduct of retail trade on the hereditament, together with the presence of something of this character, physical appearance and layout the Tribunal concludes that there was here a retail shop within the definition of a retail shop, which includes any hereditament of a similar character where retail trade or business (including repair work) was carried on.

The Primacy Test

But that is not the end of the matter. The Tribunal returns to the question posed by Lord Evershed:

"Is the presence of ... this 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 was a factory and a retail shop on the premises. This was not a 'factory shop' disposing of a small proportion of the articles produced. Retail trade was not discouraged. The proportion and character of the retail trade was not insignificant or casual or incidental. Although a proportion of the business was wholesale, the Tribunal finds that the vast bulk of the production here was disposed of, by way of retail transactions, through the public area, the reception/workshop area.

The Tribunal accepts there was a difference with a bakery, in that the ordinary baker will bake "to stock" and anticipate the trade, but doubts whether that difference is significant

and in any event finds a close analogy with a bespoke tailor making high class suits to the order of individual customers such as in Gunn, Collie and Topping, Collie and Wilkinson v Sibley & Donovan ie the bespoke tailors' cases. If one views this hereditament against the background of those cases and the subsequent cases, what is found?

In the context of an examination of the entire hereditament did the shop, or what had the character of a shop, so colour the hereditament that it became mainly a retail shop? It was not an ordinary retail trade but, in that it comprised the creation of articles to suit each retail customer who called, the business began and ended as parts of a complete retail transaction on the premises. The hereditament was all occupied and used for the one trade or business, namely, retail trade or business in goldsmithery and jewellery. As Lord Hunter put it "As nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the building as a whole is used is the carrying on of a retail business." This was a unified business of a type which was not to be dissected. The comparison with the high class bespoke tailors is irresistible. Taken as a whole the unified business was that of a retail shop. Looking objectively at the business as a whole, the premises were primarily occupied and used for the purposes of a retail shop

The Shipbuilders Test

Taking one step back (something surveyors are often counseled to take in the context of valuations sometimes known as the 'four foot rule' but, in this context, the 'shipbuilders test') checking that these views are not artificial and giving every day words every day meanings, the Tribunal concludes that it would not offend common sense to come to this conclusion and the Commissioner has succeeded in showing, on the balance of probabilities, that the hereditament is excluded from industrial derating.

The hereditament is primarily occupied and used for the purposes of a retail shop and is not entitled to be distinguished as industrial.

At a further Hearing on 10th March 1997, the parties reached agreement on costs.

ORDERS ACCORDINGLY

19th September 1996

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

Appearances:-

Hugh Kennedy QC (instructed by Alex Stewart Partnership Solicitors) for the Appellant.

Ronnie Weatherup QC (instructed by the Crown Solicitor) for the Respondent.