

Appeal No. VA10/3/020

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Square Management Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property No. 5002418, Car Park (Retail) at Square Management Car Parks, Square Shopping Centre, Tallaght, County Dublin

B E F O R E

Fred Devlin - FSCS.FRICS

Deputy Chairperson

Fiona Gallagher - BL

Member

Brian Larkin - Barrister

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 4TH DAY OF FEBRUARY, 2011

By Notice of Appeal dated 5th day of August, 2010 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €1,796,000 on the above described relevant property.

The grounds of appeal are set out in the Notice of Appeal and a letter attached, copies of which are attached at Appendix 1 to this judgment.

1. This appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 8th and 15th day of November and the 3rd day of December, 2010. At the hearing the appellant was represented by Mr. Owen Hickey, SC, instructed by Ms. Alannah Smyth, Alburn Management Services. The Commissioner of Valuation was represented by Mr. David Dodd, BL, instructed by the Chief State Solicitor.

Appellant's Witnesses

2. Mr. Robert McHugh, BSc (Surv), MRICS an Associate Director of DTZ Sherry Fitzgerald gave evidence of fact and valuation on behalf of the respondent.
3. Mr. Eamonn Furlong, MIPFMA, the Centre Director gave evidence in relation to his role in managing the centre and in particular the events that led to the introduction of an electronic controlled barrier and a time-based fee paying regime for the carpark, which came into effect on 1st September 2009. Mr. Furlong gave evidence touching on the management accounts in respect of the carpark for the 12 month period from 1st September 2009 to 31st August 2010.

The Respondent's Witnesses

4. Mr. Denis Maher, MSCS, MRICS, a valuer in the Valuation Office gave evidence in relation to the carrying out of a revision of valuation in accordance with Section 28 of the Valuation Act, 2001 on foot of a request made by South Dublin County Council pursuant to Section 27(2) of the said Act.
5. Mr. Pat Kyne, a valuer in the Valuation Office, gave evidence regarding his role in valuing the various retail units in the Square Shopping Centre as part of the 2007 revaluation of all relevant property in the South Dublin County Council rating authority area prepared in accordance with Section 19 of the Act.
6. Ms. Carol Spain, a valuer in the Valuation Office, outlined her role as the officer assigned by the Valuation Manager to value carparks in the South Dublin County Council area as part of the 2007 revaluation programme.

Facts

7. The Tribunal has carefully considered the evidence adduced by the witnesses appearing on behalf of the parties and has perused the various documents and maps introduced by them and makes the following preliminary findings of fact:

(i) The Square Management Limited (“Management”) are the registered owners of the freehold interest of a site of c.10 acres on which the Square Shopping Centre (being the three storey structure referred to in paragraph (ii) was constructed, subject *inter alia*, to the 1988 lease (referred to in paragraph (iv)).

“Management” are the owners of the common areas of the Square Shopping Centre - (which includes, *inter alia*, the service roads and service yards, lifts, stairs, escalators, malls passageways, roads) the management offices, staff rooms, plant, equipment and machinery, the conduits and the main structure of the Centre. However the “Management” does not own the retail units within the Square Shopping Centre.

(ii) The Square is a three-storey structure with retail units at each level. Vertical movement within the centre is by way of escalators, travelators, lifts and staircases. The centre is so designed that there is direct access to each mall level from the surface car parking areas.

(iii) The Square is the product of a joint venture arrangement between Dublin Corporation (now Dublin City Council) and Dublin County Council (now South Dublin County Council) and L and C Properties Limited, predecessors in title to Square Management Ltd. whereby certain lands were made available for the construction of the Square Shopping Centre subject to the terms and conditions provided for in a lease between the parties.

(iv) The said lease is dated 8th September, 1988 and is for a term of 10,000 years. The lease “*inter alia*” contained a rent sharing arrangement and provides that the joint landlords shall receive a specified percentage of the rents payable under the various sub leases granted to the occupiers of the units within the centre. In 1990, the joint landlords transferred the c.10 acre site to “Management” for a capital consideration in lieu of the rent sharing provisions in the 1988 lease.

- (v) Under the third and fourth schedules of the lease the lessees (now “Management”) were granted an irrevocable licence to enter upon lands surrounding the centre development for the purpose of “*constructing, maintaining and servicing the car parking facilities, service roads, pedestrian malls, footpaths, kerbs, lighting, adequate landscaping*” to be provided by the lessee (now “Management”). As part of the works the lessee (now “Management”) enclosed the licensed area by way of a perimeter fence and hedge which incorporated a number of gated access and egress points. Within the licensed area the lessee (now “Management”) laid out traffic circulation routes, parking bays and an area reserved for bus termini.
- (vi) The licence provided that certain lands within the licensed area were reserved by the lessors for future building and development. It is specifically stated in the licence that the licence “*shall not be deemed to confer exclusive possession on the Lessee [now “Management”] and the Lessee [now “Management”] hereby acknowledges that so long as this Licence subsists in relation to the lands or any part thereof hereby licensed, the Corporation.....shall be entitled to share the possession of the said lands together with all others so authorised by the Corporation.*”
- (vii) In due course part of the licensed area was demised to Lowe Taverns (Tallaght) Limited (now Tuansgate) for the purpose of carrying out a scheme of development comprising apartments and commercial units.
- (viii) By an indenture dated 25th October 2001, made between the County Council of the County of South Dublin (SDCC) and Lowe Taverns (Tallaght) Limited, now Tuansgate, “*its servants, agents, licencees, invitees, tenants, under-tenants, assigns and successors in title*” were granted an irrevocable licence to “*enter upon and use solely for the purpose of carparking the Licensed Area*” subject to the payment of “*an annual service charge in respect of the maintenance, security, insurance and other costs relating to the use by it of the Licensed Area.*” The annual service charge referred to in this indenture is payable to SDCC and not “Management”.
- (ix) The Square provides some 150 retail outlets of various sizes including three anchor tenants (Dunnes, Tesco and Debenhams) and a multi-screen cinema complex. The units are occupied under individual sub lease arrangements. *Inter alia* each sub lease

provides that the sub lessees, licencees and invitees are entitled to use the car parking and to avail of a range of common services provided by the lessee/landlord (now “Management”). The costs incurred by the lessee/landlord (now “Management”) in providing and maintaining these common services are recouped from the tenants by way of an annual service charge. The amount due by each tenant is apportioned on a formula basis, by reference to the lettable area of the unit concerned and the total lettable area of all the units.

- (x) The total number of car parking spaces provided in the surface car parking areas within the licensed area is 1,361. In addition 733 spaces are provided at 6 levels in a 5 storey car park structure built by the lessee (now “Management”). A further 302 spaces are available at roof level of the main shopping centre building. Access to these additional spaces is from within the licensed area.
- (xi) Of the 302 spaces at roof level 197 spaces are reserved for the use of centre staff and access to these spaces has at all times been controlled by a barrier system.
- (xii) For a period after the centre was opened the lessee (now “Management”) had a policy of closing the gated access points during non trading hours. In time this practice was abandoned so that car parking became available to all, at all times, free of charge, as set out in paragraph 12 in letter from Square Management.
- (xiii) With the opening of Tallaght Hospital and the onset of other developments in the immediate vicinity which operated fee paying car parking regimes, the lessee (now “Management”) became aware that users/visitors to these facilities were availing of the free car parking at the Square to the detriment of its customers. This situation was exacerbated by the opening of the Luas Red Line which terminates adjacent to the north-west corner of the enclosed car parking area.
- (xiv) In an effort to address the problem, the lessee (now “Management”) introduced a warden controlled system to limit/discourage all day parking – particularly by Luas users – but to no avail. Consideration was given to implementing the use of clampers but this was not proceeded with.

- (xv) In due course and following discussions with interested parties, “Management” introduced a barrier and time based fee paying regime which came into effect on 1st September 2009. The barrier system is not in operation between midnight and 6am.
- (xvi) As part of the new regime the lessee (now “Management”) have granted permits to 250 taxis and 250 permits to occupiers of the Tuansgate development allowing them free access to the car park. Under this system the taxi permit holders pay to Square Management an annual fee of €50 to cover the administration costs associated therewith. Centre staff are also issued with permits subject to the €50 administration charge. In this regard, the designated parking at roof level is subject to the existing secondary barrier control system. The staff utilise the designated roof car park and when this is full level 5 and level 6 of the multi-storey car park.
- (xvii) Management accounts in relation to the operation of the car parking for the 12 month period ending on 31st August 2010 were provided to the Tribunal. These accounts show that the capital cost of installing the barrier control system came to €1,682,750. The total income for the year net of VAT came to €746,430 and total costs including depreciation of €168,275 came to €1,053,094. Disregarding depreciation and bank interest costs of €75,724, the operating loss for the year amounted to €138,388.
- (xviii) Under the new regime all the costs associated with the car parking are being directly borne by Square Management and no longer form part of the service charge. This change in structure should result in a reduction to the annual service charge to be paid by each tenant.
- (xix) It is common case that the only physical change in relation to the car parking between the 2007 Revaluation and the 2010 Revision is the installation of electronic barriers at eight entrance/exit points around the perimeter fence.

Rating History

8. On 7th November 2005, the Commissioner of Valuation made an order under Section 19 of the Act specifying South Dublin County Council rating authority area as being an area in relation to which an officer of the Commissioner was appointed “to organise and

secure the carrying out of the valuation of every relevant property situate in that area.”

Under the Act the officer who was appointed is referred to in the Act as “*a valuation manager*”. 30th September 2005 was specified as the date by reference to which the value of every relevant property was to be determined (Section 20). In due course the new Valuation List was published and came into effect for rating purposes on 1st January 2007. Under the Act the value of each relevant property is to be determined in accordance with Section 48 thereof. Once the revaluation is completed the valuation of each relevant property remains unaltered until the next revaluation unless a revision of the valuation is carried out in accordance with section 28 of the Act.

9. Mr. Kyne in his evidence given under oath said that he was nominated by the Valuation Manager to value all relevant property in the Square Shopping Centre. In carrying out this exercise he was conscious of the fact that there were car parks within the curtilage of the centre and that the use of this car parking facility was free to all, at all times. In the circumstances, he formed the view that neither “Management” nor anyone else were in rateable occupation of the car park. Nonetheless in arriving at the valuation of each unit within the Centre Mr. Kyne said he had regard to the fact that there was car parking available at the Centre. Under cross-examination Mr. Kyne acknowledged that the availability of car parking at a shopping centre of the scale and nature of the Square was essential and went on to say that without car parking, the rental values of the retail units within the centre would be nil.

10. Ms. Spain said that as part of her role in the 2007 revaluation she was assigned the task of valuing six car parks contained on a list given to her by the Valuation Manager. This list did not include the car park at the Square. Ms. Spain said that the six car parks on the list were all subject to a fee paying regime and hence, relevant property under the Act. In her opinion, car parks that did not operate a fee paying regime were not relevant property. This opinion, Ms. Spain said, was in line with the policy of the Valuation Office not to value such car parks and that this policy was informed by previous decisions of the Valuation Tribunal.

The Appellant’s Grounds of Appeal

11. The appellant’s grounds of appeal as submitted may be summarised as follows:

- a) The appellant contends as a preliminary issue there has been no “material change of circumstances” as required under Section 28 of the Valuation Act, 2001 and as defined in Section 3 of the Act that warrants the carrying out of the revision which resulted in the car park being valued at the sum of €1,796,000.
- b) Without prejudice to a) above the appellant contends that the valuation of the car parks is contained in the valuation of the various units within the Square resulting from the 2007 revaluation. Any attempt by the Commissioner to attribute a separate valuation to the car park on foot of the revision process would represent double counting and double valuation in valuation terms and constitute double taxation.
- c) Without prejudice to a) and b) above the appellant contends that it is not in rateable occupation of the car park by virtue of the fact that the appellant has no effective control over the simultaneous use of the car park by others (including those who have rights to use the car park under the license granted to Lowe Taverns) and to the exclusive use of 197 spaces allocated to shopping centre staff at roof level. The appellant, therefore, is not in permanent occupation of the spaces and accordingly is not in rateable occupation thereof.

Preliminary Issue

The parties have agreed that the first issue to be determined by the Tribunal is whether or not the introduction of the electronic controlled barrier and time based regime which came into effect on 1st September 2009 represents a “material change of circumstances” as defined in Section 3 of the Act.

The Valuation Act 2001

The Valuation Act, 2001 which came into effect on 2nd May 2002 provides for the revaluation of all relevant properties in a Rating Authority area on a periodic basis (Section 19 and Section 25). The Act also provides that the valuation of a relevant property appearing on the valuation list may be subject to revision in circumstances where “a material change of circumstances” as defined in Section 3 has occurred (Section 28).

The definition of “a material change of circumstances” is contained in Section 3 of the Act which states as follows:

“material change of circumstances” means a change of circumstances which consists of—

- (a) the coming into being of a newly erected or newly constructed relevant property or of a relevant property, or*
- (b) a change in the value of a relevant property caused by the Pt.1 S.3 making of structural alterations or by the total or partial destruction of any building or other erection by fire or any other physical cause, or*
- (c) the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property, or*
- (d) the happening of any event whereby any relevant property begins, or ceases, to be treated as property falling within Schedule 4, or*
- (e) property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties, or*
- (f) property previously valued as 2 or more relevant properties becoming liable to be valued as a single relevant property;”*

Paragraph 1 of Schedule 3 defines the various categories of property, which if they meet the conditions down in paragraph 2 thereof, are relevant properties for the purposes of the Valuation Act, 2001. In the context of this appeal Paragraphs 1(a) and 1(b) and Paragraph 2 are relevant, and state as follows:

“1.—Property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in paragraph 2 of this Schedule shall be relevant property for the purposes of this Act:

- (a) buildings,*
- (b) lands used or developed for any purpose (irrespective of whether such lands are surfaced) and any constructions affixed thereto which pertain to that use or development,”*

“2.—The condition mentioned in paragraph 1 of this Schedule is that the property concerned— (a) is occupied and the nature of that occupation is such as to constitute rateable occupation of the property, that is to say, occupation of the nature which, under the enactments in force immediately before the commencement of this Act (whether repealed enactments or not), was a prerequisite for the making of a rate in respect of occupied property, or

- (b) is unoccupied but capable of being the subject of rateable occupation by the owner of the property.”*

Legal Submissions

Counsel on behalf of the appellant and the respondent made comprehensive submissions in written format which were elaborated on at the oral hearing in relation to the preliminary issue and other matters. Counsel in their submissions referred the Tribunal to a comprehensive range of authorities including a number of decisions of the Valuation Tribunal in relation to car parks attaching to shopping centre premises. Copies of the written legal submissions are attached to this judgment at Appendix 2.

Conclusions

1. It is common case that the car parks which are the subject of this appeal are those which existed at the time of the 2007 revision. It is also common case that the only change is the installation of electronic barriers at the entrance/exit points and the introduction of a fee paying regime.
2. It is common case that it is the policy of the Valuation Office not to attribute a separate valuation to car parks which form part of a shopping centre complex and which are free to users who are not necessarily customers of the centre. Equally it is the policy of the Valuation Office to attribute a separate valuation to car parks which form part of the shopping centre complex and which operate a fee paying regime.
3. It is common case that the subject car parks at the time of the 2007 revaluation operated a non fee paying regime.
4. At the 2007 revaluation, and at the time of the 2010 revision, the subject car parks fell within categories (a) and (b) of Paragraph 1 of Schedule 3 of the Act.
5. The Square Shopping Centre is the focal point of what is now the new town centre for Tallaght.
6. Pursuant to the lease dated 8th September, 1988 L & C Properties Limited predecessors in title to “Management” undertook to construct and complete “the approved development” being the shopping centre complex including the Ring Road, car parks, etc. in compliance with all the necessary planning permissions and other statutory

consents. L & C also undertook to maintain and keep in repair the “approved development.”

7. Under the sub leases entered into with the various occupiers of premises within the shopping centre the freeholder (“Management”) covenanted to maintain the main structure of the shopping centre together with the common areas, roads, footpaths and car parks. Under the sub leases the freeholder has the right from time to time to make rules and regulations for the proper operation, management and maintenance of the centre including those for *“the control, regulation and limitation and parking of traffic vehicular and otherwise into, from and within the Centre.....”* The freeholder also has the right to make rules and regulations *“designating, varying, altering, changing the use of, closing or controlling access to the whole or any part of the Common Areas including control by way of imposition of car-parking charges or otherwise provided that the Freeholder shall, where appropriate and feasible provide reasonable alternative access to the Demised Premises.”*

8. Under the various sub leases the tenants are by way of a service charge responsible for the payment of a proportionate part of the expenses and outlay incurred by the freeholder for providing a range of services including the maintenance of the main structure of the centre, the common areas and car parks etc.

9. Under each sub lease the tenant thereof is granted a licence to the following effect.

“subject to the provisions of the Third Part of this Schedule the right of the Tenant, its permitted Successors, Assigns, Licencees and Invitees to use the car parking spaces as designated for such use by the Freeholder during the term hereby granted.”

The premises demised under the sub leases do not include any specific car parking spaces.

10. It is clear from the above that the freeholder, ie. “Management” was at all material times in control of the car parks and their operation. The degree of control exercised is manifest by its decision to introduce the barrier and time based fee paying regime which came into effect on 1st September, 2009. The Tribunal accepts that this change in car parking arrangement was introduced on the basis of good estate management, the benefits of which would accrue to the tenants and their customers alike. The Tribunal

Determination

In arriving at its determination the Tribunal would like to express its gratitude to counsel and the witnesses who gave evidence on behalf of the appellant and the respondent. In regard to the former, the submissions – written and oral – made by Mr. Hickey and Mr. Dodd were comprehensive, detailed and of considerable substance which, together with the range and extent of authorities introduced, were of great assistance to the Tribunal in its deliberations. Similarly, it must be said that the evidence adduced by Mr. McHugh, Ms. Smyth, Mr. Kyne, Mr. Maher and Mr. Furlong was clear, concise and helpful, particularly that of Mr. Furlong which gave the Tribunal an insight into the operation and management of the Centre.

Having carefully considered all the submissions and arguments adduced and evidence introduced on behalf of the appellant and the respondent the Tribunal finds that the introduction of the electronic controlled barrier and time based fee paying regime constitutes a material change of circumstances as defined in Section 3 of the Valuation Act, 2001 and specifically subparagraph (c) thereof. In arriving at this conclusion the Tribunal has had regard to the fact that “Management” has assumed full and direct responsibility for all costs associated with the continuing provision and maintenance of the car parks. In effect “Management” has created an income producing relevant property that did not hitherto exist as such.

And the Tribunal so determines.