The subject of this appeal is an office block described in section 2 of the respondent's submission as Block 1 at West Pier Business Park, Dun Laoghaire, newly constructed office development in three blocks on Dun Laoghaire Road enjoying views of West Pier in Dun Laoghaire Harbour from the upper levels.
The floor areas are agreed as, 2795.79 m^2 on five levels comprising 222.13 m^2 on ground floor, 663.95 m^2 on each of the first, second and third floors, with 581.81 m^2 at fourth floor or penthouse level.
The details of the rent, while they are stated to be €828,130.79 (£652,206) per annum have been amended by agreement as a result of Mr. Brooks' intervention to €891,617.69 (£702,206) nothing turns on that amendment in relation to this appeal.

Valuation History

The valuation history is relevant to the extent that the property has been valued for the first time at the 2000/04 Revision, which issued on 8 November 2000. An RV €2324.89 (£1831) was determined by the Commissioner of Valuation. An appeal was lodged against this RV and the RV was reduced to €2204.27 (£1736). It is against this decision of the Commissioner of Valuation that an appeal lies to the Tribunal.

The Grounds of Appeal

The grounds of appeal as set out in section 4 of the respondent's précis are set out as follows:
By letter of the 4th December 2000 Mr. Brooks lodged first appeal against revised valuation "on the grounds that same is excessive and inequitable and is incapable of beneficial occupation at the moment and will not be occupied until the beginning of February at the earliest". By notice of the 17th October 2001 Mr. Brooks lodged an appeal to the Valuation Tribunal on the grounds that "Valuation excessive unable to occupy building due to ingress of water on all floors, defective glazing of roof, staff had to be moved. Power isolated at glazed areas (Health and Safety). Insurance no cover."

The oral hearing proceeded on the 6th of February 2002. The appellant was represented by Mr. Owen Hickey B.L. instructed by Mason Hayes and Curran Solicitors, and the

respondent was represented by Mr. Dan Feehan B.L. instructed by the Chief State Solicitor. The evidence given on behalf of the appellant commenced with the evidence of Mr. Justin Tracey architect, of Horan Keogan Ryan, architects for Marconi Ireland, who referred to the report and block of photographs which were taken by his colleague Ms. Flynn on the 8th of November and these photographs describe and the evidence given in connection with them describe the damage which was done to the subject premises on the 5th and 6th of November. The photographs set out in very graphic terms just what the extent of the damage and flooding was to what was a new building.

The difficulty in this case arises from the fact that the appellants were in actual use of the property at the time of the damage and the case being made against them is that their actual use was in technical terms, rateable occupation and beneficial occupation within the meaning of the rating code. Mr. Tracey gave evidence that the certificate of practical completion was given in respect of the premises in April 2000 and the agreement for lease apparently was made some time in March of 2000. Further evidence was given by Mr. Gwyn Jones, the property manager. He gave evidence in relation to the projected timescale of occupation and it appeared that there was a target to occupy some of the premises in August and the three other floors of the premises were targeted to be occupied sometime after the date of the flooding in November possibly the 10th or 11th of November.

The evidence of Mr. Jones, showed that a letter was written by him dated the 10th of August 2000 signaling to the developer that there were a number of snags but of most relevance were the leaks mentioned in points 1 and 2 on the first page of the letter and also difficulty with the fit out on the penthouse floor arising from flooding and structural difficulties. Notwithstanding the fact that the building was occupied in August and notwithstanding the fact that there appeared to have been some indication that there were difficulties with the building, it appears that neither Mr. Jones nor any of the management of the subject property were aware that there was in fact a fairly fundamental or latent structural defect arising from windows and the placing of windows and what was described as the finish of the outer envelope of the building. And that while it had the

potential to give rise to flooding apparently did not give rise to any serious flooding to cause any major apprehension on the part of the appellant over the Summer period but that all changed on the onset of Autumn and on the 5th and 6th of November there was extensive flooding throughout the building and certainly there was very significant dangerous interference with the periphery of the building surrounding the outer envelope. The point was made by Mr. Feehan in cross examination throughout, against all the witnesses, that in relation to the floor which was occupied from around August 2000 it was possible to move these occupants inside the badly damaged or flooded area so as to cater for their safety requirements. The question of finding alternative accommodation and abandoning the building was canvassed in cross examination by Mr. Feehan also and it appears that the building was commenced in relation to its use in August, by reason of the termination of another lease in another building and the position it seems that the appellant found itself in, at the end of 2000 after the serious flooding of the 5th and 6th of November was that they were somewhat in a dilemma in relation to continuing with the use of the building for such staff as they had there. Mr. Feehan in cross examination and in his submissions argued that they continued to be in occupation *simpliciter* and that occupation should be taken to be occupation in the technical rating sense, but the Tribunal is more inclined to the view that the occupants or the appellants were placed in a dilemma and that their occupation in the factual sense was occupational only of a forced kind and not such that would be expected of a tenant in an open market situation, in a situation of full knowledge. It can be very strongly argued that if a tenant such as Marconi knew from the outset that this problem was going to be one of the major teething problems of the building, far beyond the ordinary envisaged snag list and that in fact they would be dealing with a major latent defect in the building, that even the initial occupation might not have started.

So on that basis the Tribunal finds as a fact that the occupation was not such as would be found in the ordinary course even in relation to a building occupied in the course of its final fitting out. It also emerged in the evidence of both Mr. Jones and Mr. Cronin the Services Manager elsewhere described as the Managing Director of the appellant company, that of the four floors of the building only one was in fact occupied and that the

target date, for the final fitting out of the whole building was sometime around the 10th or 11th November and it is noteworthy that that target date in relation to final fitting out was after the date of the damage to the building as a result of flooding.

Mr. Brooks gave evidence firstly in relation to the nature of the occupation and his evidence reflected the evidence given by Messrs. Tracey, Jones and Cronin and he also gave his view as a professional valuer that the value of the premises on the relevant date of 8th November when the Revision issued, was nil and by that it would be understood that no tenant would take the building in its existing state with full knowledge of the defects that finally manifested themselves. It seems that by February or March of 2001 the building had been put into very good shape and it appears now that the building is of a standard of excellence which the appellants would have expected when they were taking the building initially and that the subsequent inspection of Mr. Sweeney (District Valuer in the Valuation Office) in or around May of 2001 with Mr. Brooks, was in relation to a building which bore no resemblance to the shattered structure that was presented after the 5th/6th of November.

The case was very strongly urged by Mr. Feehan that the occupation of the appellants was that which they targeted and programmed from the very outset and the fact that they had occupied the building in accordance with their plans which they appear to have formulated in early 2000 meant that they were happy tenants in relation to their occupation of the building and hence it should be taken as beneficial occupation insofar as was required and within the contemplation and plans of the appellants. The structure of Mr. Feehan's intense cross examination elaborated on that theme from beginning to end and it had been set up as the essential issue of fact affecting and leading into the legal issue affecting rateable occupation. There is no gainsaying that there was a plan of occupation by the appellants and that they followed on documentary material such as practical completion notice etc. such as would indicate *prima facie* an occupation, but nevertheless the Tribunal is satisfied with the view it takes in relation to the occupation as being essentially one which was a forced one, which was the result of a dilemma and which was based on faulty knowledge through no fault perhaps of the appellant and

perhaps of anyone else. Nevertheless it was not a standard occupation by any means and not an occupation which in hindsight could be regarded as free and related to the normal type of occupation which one would associate with free-market activity of willing tenants and willing landlords.

Mr. Sweeney's evidence, was given in accordance with his précis and following his cross examination, the parties gave legal submissions and authorities to the Tribunal. The appellant rested its case on the judgment of Henchy J. in the Harper case **Harper Stores Ltd. v. Commissioner of Valuation 1968 IR Pg. 173**, when the learned Judge referred to the judgment of Lord Radcliff in **Arbuckle Smith & Co. Ltd. v. Greenock Corporation 1900 A C 813, 828** where he approved of the following approach by Farwell L.J., in **Rex v. Melladew 1907** 1 K.B. 192, 203

" The test in a case like the present, of business premises appears to me to be: has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it?"

The appellants also urged the cases **Carrigaline Hotels VA99/3/013 and Wyeth Medica Ireland for Polaroid Ireland Ltd. VA94/2/006** as cases in which the Tribunal set out the criteria for unfinished buildings in relation to the beneficial occupation test and the Tribunal was referred to page 11 in the Wyeth case where it stated:

"*An unfinished new building cannot be said to be in beneficial occupation."*

And the appellant further referred to the Carrigaline judgment again on page 11 in relation to the question of rateable occupation:

"*The question therefore to be answered is whether the premises were capable of beneficial occupation or in the beneficial occupation of Carrigaline Hotels Ltd. on the 9th of November1998. The respondent has claimed that since the appellants were prepared to go to the licensing court on the 5th of November 1998, albeit that the case was adjourned because of the outstanding fire officer's certificate and they did go to the licensing court on the 11th November 1997only two days after the issuing of the revision lists, that the appellants must have regarded the premises as being in a state of practical completion and therefore capable of beneficial occupation on that date, it was further*

submitted that for the purpose of the license that the appellants had been in occupation of the premises."……

The quote continues on page 12, *"While it is accepted that the premises was in the occupation of the appellants from the afternoon of the 11th of November 1998 and they were effectively trading in the entire of the premises by the commencement of the rating year, nevertheless sufficient evidence was given that on the 9th of November 1998 the contractors were still in occupation of the premises and they had not been handed over to the appellants…… Evidence was given that the premises was not capable of being let on the date of the revising valuer's inspection and the revising valuer also stated that immediately before the 9th of November 1998 the premises was not lettable."*

Mr. Feehan on behalf of the respondent submitted that the quote from the Harper's Stores Ltd. case already cited was the basis upon which he would argue that the premises was in fact in the ratable occupation of the appellant and argued that the test was in the actual use of the premises and pointed out to the manner in which he elicited from the appellants that they were on the face of things, in occupation of the premises as planned. Mr. Feehan also argued that the Carrigaline case could be distinguished from the present subject case insofar as the premises in the Carrigaline instance could not be used as a hotel in the technical sense of the word and that the situation was completely different.

In reply Mr. Hickey on behalf of the appellant submitted that the Harper Stores Ltd. case related to an old building whereas the subject was a new building, and he also again submitted in relation to the facts of the situation that of the 30,000 approx, square feet, involved in the subject premises, only part of this area was in fact used to use a neutral term, at the relevant time.

The further issue if issue it was, certainly wondered at by the Tribunal itself, was in relation to the valuation date but the parties were agreed on that and the case was argued on the basis of the date of the publication of the list, on the 8th of November and it is noted by the Tribunal not withstanding their comments during the hearing that this was recognized implicitly and expressly elsewhere in the Carrigaline Judgment.

In the light of the evidence and the conclusions of the Tribunal in relation to the evidence, the Tribunal is of the view that the appellants property was not in rateable occupation for two reasons. Firstly such use as was being made of the premises was as indicated by the Tribunal in this judgment, one which was essentially forced, which was not the result of a free market decision and was the result of what was essentially a latent defect in the building, which if known at the commencement of the actions of the appellant would probably have led to different consequences and certainly would have led them not to be willing tenants in any usually accepted sense of the term. The Tribunal is also persuaded by the last submission of the appellants counsel Mr. Hickey, that only part of the property was being used and only part of the property was actually fitted out. In view of the fact that the Harper Stores decision would indicate that beneficial occupation is to be determined with the particular needs of the appellant in mind, that when the premises was not fully fitted out it appears to the Tribunal that the premises ought not to have been valued as a complete unit on the basis that it was completed to the satisfaction and the business requirements of the appellant. On that basis the Tribunal decides that the valuation should be struck out.

Issue of Costs

Mr. Owen Hickey: Thank you Chairman, I would apply for my costs Chairman. I think the position has been that in quantum cases the Tribunal has not awarded costs but in points of law cases that it had mentioned the Tribunal it does award costs.

Mr. Henry Abbott: It does appear to be the position Mr. Feehan that you can argue and tell us about the circumstances envisaged by the Act where we shouldn't.

Mr. Dan Feehan: I have grave difficulty in doing that given the terms of the Act in relation to the matter I can't put the *manner*……to the Tribunal and I accept that however I would say that the points in law were unusual and the particular circumstances of the nature of the occupation of the office in this instance made it extremely difficult for the Commissioner to come to a conclusion other than that which he did because from the business point of view the occupation of the premises did appear to be beneficial to the applicant and consequently it was necessary that the Tribunal should make a determination in relation to the matter. I will formally object to the finding of the Tribunal but I would say that the costs should be in these particular circumstances payable by both parties their own costs rather than going with the cause, because I think with the nature of beneficial occupation in circumstances such as these are unusual and had to be argued before the Tribunal and a determination reached.

Mr. Abbott: What do you say to that Mr. Hickey? Basically Mr. Feehan is saying that if Mr. Sweeney had been faced with the great premier championship team that you've produced today when he went out doing his last inspection he might have been able to make better case to the Commissioner to forget about the whole thing.

Mr. Hickey: I think Chairman that's entirely a matter for Mr. Sweeney, all these points of law, I haven't seen a simple one yet Chairman, they're all matters of some complexity and you'll see that I and my team have been brought here and had to address it with some force and with many personnel. But I think the net point is apart from all that I think the statute speaks for itself Chairman so I would urge that you would award me my costs.

Mr. Abbott: Ok we'll consider it and get back to you.

The normal rule applying if the appellant is successful the appellant would get the costs in a…….. quantum case and while the Tribunal has some sympathy for the fact that a very strong case was put forward here today on behalf of the appellant which perhaps

would not have been available with such force when Mr. Sweeney was considering the matter initially. Nevertheless the Tribunal is mindful of the facts on which the case has been made on behalf of the appellant were available and would have been reasonably to hand and were available in outline of principle at the time that Mr. Sweeney was making his report and the matter was being considered by the Commissioner and in those circumstances the Tribunal awards the costs to the appellant in accordance with the statute.

Mr. Hickey: Thank you Chairman, may it please the Tribunal.

Mr. Abbott: So Mr. Feehan is noted as expressing dissatisfaction with the judgement, I suppose in relation to the costs issue as well.

Mr. Feehan: Absolutely.