

Appeal No. VA02/2/091

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

Shoezone Ltd., t/a Tylers

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Shop at Map Reference: 314 Unit 314, The Square Towncentre, Tallaght, Springfield,
Tallaght West, County Dublin

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Fred Devlin - FRICS. FSCS

Deputy Chairperson

William K. Nowlan

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 19TH DAY OF MAY, 2003

By Notice of Appeal dated 25 April 2002 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €144.41 on the above described relevant property.

The Grounds of Appeal as set out in the Notice of Appeal are that:

- "(1) The Valuation is excessive and inequitable
- (2) The Valuation is bad in law.

This appeal proceeded by way of oral hearing held in the Ormond Hotel, Ormond Quay Upper, Dublin 7, on 2nd September 2002. At the hearing the appellant was represented by Mr. Owen Hickey BL and expert valuation evidence was given by Ms Sheila O Buachalla

BA ASCS of GVA Donal O Buachalla. Mr. Brendan Conway BL instructed by the Chief State Solicitor appeared on behalf of the respondent and Mr. Denis Maher ASCS gave expert valuation evidence.

The subject of this appeal is a standard unit on level 3 of the Square Town Centre (The Square), which is located at the junction of the Belgard Road and the old Blessington Road close to Tallaght Village. The Square was completed towards the end of 1990 and comprises an enclosed shopping centre on three levels with access and car-parking facilities at all three levels. The Centre was extended in 1996 (phase 2) and presently provides a total of 136 retail outlets, a 12 screen multiplex cinema and several restaurant and fast food outlets together with extensive car parking facilities. The anchor units are occupied by Dunnes Stores (Levels 2 & 3), Roches (Level 1) and Tesco (Level 3). The unit/shops are occupied by a wide variety of UK and national multiples and locally based traders.

It is common case that the original development was tax driven in accordance with the then current urban renewal legislation under which owners and occupiers alike could avail of tax allowances. In particular occupiers were allowed to claim double rent allowance against tax and remission from rates for a ten-year period. Occupiers in the Phase 2 extension were entitled to double rent allowance only. It is also common case that the Square was the first regional centre to be built in the greater Dublin area. Blanchardstown Shopping Centre and the Liffey Valley Shopping Centre were opened in or about 1996 and 2000 respectively. Both these Centres are located just off the M50 and lie about 3 and 5 miles north of the square respectively.

The subject property is occupied by the appellant company trading as Tyler's and has agreed accommodation as follows.

Ground floor retail 138.49 m² (1,490 square feet)

Mezzanine store 71.30 m² (767 square feet).

The unit is occupied under a 35-year lease from October 1990 with provision for rent reviews at five yearly intervals at an initial yearly rent of €78,088.89 (£61,500). This rent was increased at the 1995 review to €81,263.24 (£64,000) per annum and further increased to €9,833.16 (£78,625.00) at the second rent review in 2000. The letting it would appear was

on a shell basis and excluded the mezzanine store area which is in the nature of being a tenant's improvement.

The Rating History

The subject property was first valued in 1991 and its rateable valuation assessed at £350 i.e. €444.41. No appeal was lodged against this assessment. In 2001 applications for revision were lodged in respect of 56 properties in the centre including the subject. No change was made at the revision stage and at the subsequent first appeal stage and it is against this decision that the appeal to this Tribunal lies.

The Appellant's case

Ms. O Buachalla having taken the oath adopted her précis of evidence which had previously been received by the Tribunal as being her evidence in chief. Ms. O Buachalla in evidence said that in arriving at her opinion of net annual value she had carried out an analysis of the relationship between the rents and net annual values of a number of shops in Liffey Valley and Blanchardstown Shopping Centres. The purpose of this analysis was to establish the relationship between actual rents passing adjusted to the year 2000 (by reference to the Jones Lang La Salle retail index) and NAV's and to then apply the resultant percentage to the 2000 rent agreed for the subject property.

The analysis carried out indicated that NAV's in Blanchardstown vary between 27% and 35% of adjusted 2000 rental levels whilst in Liffey Valley the figure varies between 32% and 44%. In regard to the subject property the existing NAV was equivalent to 70.06% of the 2000 revised rent. Accordingly she came to the conclusion that the levels of assessment in the Square were out of line and in order to maintain a fair relationship between all three shopping centres she put forward her opinion of net annual value at set out below.

2000 rent = €9,833.16 per annum

NAV @ 32% = €3,146.61

Mezzanine space 71.3 m² @ €41.00 /m² = € 2,923.00

NAV = €3,869.61

Rateable Valuation @ %.63 = €219.67 but say €220.00.

A copy of Ms O Buachalla's analysis for Blanchardstown and Liffey Valley Shopping Centres is attached at Appendix 1.

Ms O Buachalla in her evidence said that the initial rent payable under the lease was influenced by the availability of double rent allowances and rates free period. In her opinion the 2000 revised rent was representative of open market value and hence more reliable for arriving at net annual value. In her opinion the distortion caused by the availability of tax breaks was recognised by the Valuation Tribunal in the case *Irish Pension Trusts Limited v Commissioner of Valuation* (VA94/3/097). Under cross examination Ms O Buachalla said that most tenants in the Square at the 1991 revision were not overly concerned with the level of their assessments as they were conscious of the fact that they had a rates free holiday for ten years. Nonetheless she acknowledged that a number of occupiers had lodged appeals and following discussions between a number of consultants (including GVA Donal O Buachalla – but not her) an agreed basis of assessment had emerged viz NAV = 85% of 1990 rents. The 15% adjustment represented a 7% allowance for rent inflation from November 1988 and 8% for the beneficial affects of designation.

Mr. Hickey in his submission contended that the ending of the benefits accruing from designation represented a change in underlying circumstances, which rendered a revision of valuation necessary in order to maintain equity as between ratepayers in the area. The indifference shown by occupiers at the 1991 revision could not be relied upon as an acceptance of the levels of assessment. It was clear from Ms O Buachalla's evidence that a tone had been established for similar regional shopping centres in the greater Dublin area and it was only fair that this established tone should now apply to the assessments in the Square. In support of his contention he relied upon the findings of the Valuation Tribunal in the case VA95/1/104 *Champion Sports v The Commissioner of Valuation*.

The Respondent's Case

Mr. Denis Maher having taken the oath adopted his written précis, which had previously been received by the Valuation Tribunal, as being his evidence in chief. Mr. Maher in his evidence outlined the rating history of the Square and in particular referred to the negotiations at the 1991 first appeal stage. In his opinion these negotiations and agreements with a number of rating consultants acting for a wide variety of occupiers at that time established the tone for the centre. These agreements were based on a reduction factor of 15% on the

passing rents in order to arrive at the NAV. This 15% was made up of 7% to reflect inflation from November 1988 and 8% to reflect the distortion caused by the non-payment of rates for ten years. No allowance was made he said for double rent allowance. As far as he was concerned the 1991 revision and subsequent appeals established the tone for the Square and so it should remain until such time as a revaluation took place. If and when that occurred it would be appropriate to look at other centres including Blanchardstown and Liffey Valley and all other intrinsic and extrinsic factors that could have a bearing on rental values.

In relation to Ms O Buachalla's analysis of Blanchardstown Mr. Maher said that the information contained therein should be treated with some caution. Net annual values in Blanchardstown were based on 1995 rental levels that were increased by 120% and 140% at the 2000 rent review stage.

Mr. Maher said that in arriving at his opinion of Net Annual Value he had accepted the tone established at the 1991 First Appeal Stage. Accordingly he put forward the following valuation:

Actual Rent Passing 1991	=	€78,088
Agreed 15% adjustment	=	€1,713
Nett Annual Value	=	€66,375
Add for Mezzanine		
87.3m ² @ €68.34	=	<u>€ 5,966</u>
Nett Annual Value	=	€72,341
Rateable Valuation @ 0.63%	=	€455.75
But Say No Change		€444.41

Under cross examination Mr. Maher said that when valuing property for the first time it was a useful exercise to analyse the passing rent and adjust it to 1988 rental levels in order to arrive at an estimate of net annual value. However where there was an existing tone in the vicinity the tone took precedence and this he said was the finding of the Tribunal in the Champion Sports case already referred to. In his opinion there was no valid reason for the 2001 revision to disturb the tone that was now well established in the Square, with the new units added at the 1996 extension valued on the same basis as the original units in 1991. While he agreed with Mr. Hickey that designation had an affect on rental value, the 8% allowance made at the 1991 first appeal stage, Mr. Maher said, dealt with this matter once and for all. He was

confirmed in this view by the fact that a number of appeals were agreed with several rating consultants at the time.

In answer to further questions from Mr. Hickey, Mr. Maher agreed that the passing rents at the Square were not analysed in order to arrive at a common basis for valuation purposes. He further agreed that in some instances this method produced differentials in value for similarly sized units in the centre but argued that as a general rule the differentials were not significant and did not undermine the tone established for the centre as a whole.

Closing submissions

Mr. Hickey in his submission contended that designation distorted rental values and hence net annual values. It followed therefore that the 1991 rents must be considered as an unsafe basis for valuation purposes.

Mr. Hickey said the ending of designation represented a “fundamental change in underlying circumstances that prevailed at the time when the tone of the list was established” in accordance with the findings in the Champion Sports case. In such circumstances it was proper to look at the situation afresh at the 2001 revision. This being the case the best evidence available at that time was the actual rent fixed at the 2000 rent review and in line with the accepted practice to adjust the rent to 1988 levels by using the Jones Lang La Salle retail index. The rents agreed at the 2000 rent review reflected the open market value at that time and could not be ignored.

Mr. Conway in his closing submission said that Mr. Maher’s valuation approach was correct. The 1991 revision and first appeal stage established the tone of the list for the Square. It is common case that the net annual values for units in the centre were based on 1990 passing rents adjusted for inflation and designation. The absence of designation at 2001 revision did not represent a material change in circumstances sufficient to warrant a realignment of the values in the Square. He agreed with Mr. Hickey when he said that the best evidence available for the purpose of valuation is the passing rent and this was the basis for the 1991 revision and first appeal valuations. In accordance with the findings of the Valuation Tribunal in the case *Ray Murray v The Commissioner of Valuation VA96/4/035* the Tribunal must have regard to the tone established at the 1991 revision and “the greatest weight must be

attached to premises which have been through the entire appeal process”. The tone already established in the Square could not, Mr. Conway said, be set aside without good reason. The evidence put forward by the appellant was not sufficient to upset the existing tone and hence should be disregarded.

Findings

1. This appeal is one of several references to the Tribunal arising out of the 2001 First Appeal stage and the parties are agreed that it is in the nature of being a test case for the reasons set out below.
2. On the face of it the nature of the appeal is purely one of quantum of valuation. It is clear however that the specific issue raised in this case will affect valuations of other units within the Square in Tallaght.
3. The Valuation Act 2001 came into effect on the 2nd May 2002. It provides for regular general revaluations; it also provides for new revision procedures. However until such time as a general valuation (pursuant to a Valuation Order) has been carried out under Section 19 of the 2001 Act and is in force, revisions shall be carried out in accordance with (inter alia) Section 49 (2)(b) of the Valuation Act 2001. This section applies where there are no comparable properties situated in the same rating area, and where an existing valuation list is in force in the area in question This section provides that the net annual value of a relevant property shall be determined by the means specified in Section 48(1), and “by reference to the net annual values of properties (as determined under the repealed enactments) on 1st November 1988, but the amount estimated by those means to be the property’s net annual value shall, in so far as it is reasonably practicable, be adjusted so that the amount determined to be the property’s value is the amount that would have been determined to be its value if the determination had been made immediately before the commencement of this Act”, Section 49(2)(b).
4. In essence therefore the net annual value in an appropriate case is to be determined in accordance with Section 11 of the Valuation (Ireland) Act 1852 as amended by Section 5 of the Valuation Act 1986.
5. The effect of Section 49(2)(b) is to give a statutory basis to what is known as “ the tone of the list” although these words are not specifically mentioned in the Act nor

indeed in any of the repealed enactments. “Tone of the list” as a concept is widely understood by Rating Practitioners. In essence the concept means that the Net Annual Value of a property listed for revision should be determined by reference to the valuation of comparable properties appearing on the current Valuation List. “It is accepted practice that the tone of the list once established prevails until such time as either a general revaluation or a fundamental change in underlying circumstances that prevailed at the time when the tone of the list was established, occurs” (**Champion Sports v Commissioner of Valuation VA95/1/104** at page 8).

6. In summary, therefore, the principles to be applied when ascertaining net annual value at revision until such time as a general revaluation is carried out under Sections 19 & 20 of the 2001 Act, are as follows:
 - a. The Net Annual Value is to be determined in accordance with Section 11 of the Valuation (Ireland) Act 1852 as amended by section 5 of the Valuation Act 1986 and Section 49(2)(b) of the Act of 2001.
 - b. In order to ensure equity between ratepayers all available relevant evidence may be considered, including evidence of actual rents (if available). It may also be appropriate to consider the position of comparable properties that are in the same state and circumstance as the property to be valued.
 - c. Having assembled all evidence the valuer must exercise his skill and judgement in order to arrive at an estimate of Net Annual Value in accordance with the statutory provisions. The Tribunal recognises the difficulties this poses to the valuer, which is made even more difficult the longer the period between the base valuation date i.e. the 1st November 1988 and the date of assessment.
7. Two different approaches have been adopted by the valuers in arriving at their respective opinions of Net Annual Value of the property under consideration:
 - (a) For the Appellant, Ms. O Buachalla submits that there is a direct relationship between the Net Annual Value of units in the Liffey Valley and Blanchardstown Shopping Centres and those in the Square (such as the instant case) by reference to rental values in the three centres either agreed at first lettings or at rent reviews in the years 2000 and 2001. Effectively, she suggests that one should look at and compare

values of units in those other centres in order to determine what the appropriate valuation for properties in the Square should be.

(b) For the Respondent, Mr. Maher relied upon what he described as the “tone of the list” of the units in the Square. He submits that the “tone of the list” in the Square was established when the rateable valuations of several units within The Square were agreed in 1991 at the First Appeal stage.

8. It is right to point out that the Tribunal had considerable assistance from each valuer. Both sides were represented by Counsel, and the Tribunal is indebted to them for their careful arguments. Nevertheless, it is clear in the present case that it would be inappropriate to seek to meld the two approaches together; they are different methods of valuation, each of which produce different results. The Tribunal therefore has to determine which method is the best and fairest method of determining the Net Annual Value of the relevant property.
9. Having considered all the evidence adduced and the arguments put forward by the parties, the Tribunal is of the view that it is appropriate to utilise the “tone of the list” to ascertain the value of the property under consideration, having regard to all the circumstances of this appeal. In arriving at this conclusion the Tribunal notes the following:
 - a. At the 1991 First Appeal stage agreements were reached between the Commissioner of Valuation and several rating consultants (including GVA Donal O Buachalla but not Ms. O Buachalla) that the Net Annual Value of a number of units within the Square be based upon the actual rents being paid, adjusted by 15% to reflect (i) inflation from November 1988 (7%) and (ii) the distortion caused by the benefit of designation (8%). The Tribunal is satisfied that the levels of value as agreed at that time established the tone of the list for the Square and that unless a substantial change of circumstances occurred, the level of values so established should endure until such time as a general revaluation in the area takes place.
 - b. It is the Appellant’s case that the ending of designation represents a material change in circumstance, which must be taken into account in arriving at the estimate of Net Annual Value. In support of this contention we were referred to the Determination of the Tribunal in the case **Irish Pensions Trust Ltd. v**

Commissioner of Valuation (VA94/3/097) and in particular the following statement (at page 6 thereof) “ the Tribunal notes that the Commissioner accepts that the position may be reviewed after the period of rates relief and tax breaks passes”.

- c. “Material change of circumstances” is defined in Section 3 (the interpretation section) of the 2001 Act 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 the relevant property caused by the 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;
- d. In this regard whilst Section 28(4) deals with the powers of the revision officer in relation to the ‘property concerned’ following a valuation carried out pursuant to Section 19 of the Act, Section 44(2) extends the powers to revisions of valuation carried out under the repealed enactments.

It is common case that the only physical change in the relevant property that has occurred since the subject property was first valued at the 1991 revision is the addition of the mezzanine storage space which both valuers included in their description of the property and which ultimately formed the basis of their respective estimates of Net Annual Value.

10. The issue that arises however is whether the expiry of designated status is to be regarded as a “material change in circumstances”. In this regard it may be noted that the Determination in the **Irish Pension Trust** case noted the acceptance by the

Commissioner of Valuation that “the position may be reviewed after the period of rates relief and tax breaks passes.” That does not mean that automatically a material change of circumstance will be presumed to exist simply by virtue of the expiry of the designated status described. At that expiry, rents may rise, fall or stay the same. So the expiry of designated status does not necessarily mean that the outcome of such a review would lead to a reduction of Net Annual Value. At the time of such review the Commissioner of Valuation should determine the Net Annual Value in accordance with the law, having regard to all evidence of rental value and all other considerations available to him at that time, both in relation to the subject property and other comparable properties.

11. The Appellant argues that the initial rents in the Square were distorted by the availability of rates relief and double rent allowance. The Tribunal accepts, as indeed did the Respondent, that this may well have been the case. However the Tribunal is satisfied that such distortion as there may have been was fully taken into account by the 8% adjustment arrived at following negotiations at the 1991 first appeal stage. In effect therefore the Net Annual Values agreed at that time and which established the tone of the list for the Centre were based on an estimate of rental value which took into account all benefits arising from the available tax breaks available at the date of assessment. In this regard, it may be noted that it is accepted by the Appellant that the designated status of the Square was taken into account in 1991; the Appellant argues, however, that this was in effect a legal fiction and cannot now be safely relied upon. It is not without significance that a number of valuations were agreed at the 1991 first appeal stage with the assistance of valuers. The evidence suggests that the designated status was taken into account by the valuers (who must be presumed to have advised their clients in this regard) in coming to the figures agreed. No doubt the Appellants and their valuers would have hoped that a greater allowance might have been made for the designated status of the property. Be that as it may there can be no doubt from the evidence that the designated status of the property was taken into account by the parties involved in arriving at the figures agreed in 1991 and thus established the tone for the Square.
12. The Appellant’s contention that the relationship between passing rents and Net Annual Values in Liffey Valley and Blanchardstown should be the basis for determining the Net Annual Value of the subject property by reference to the 2001

rent reviews so as to ensure uniformity is persuasive but not conclusive. The function of this Tribunal is to examine all methods of valuation and to select the one that provides the fairest approach. In accepting the “tone of the list” method in the instant case (and having regard to the relevant sections of the legislation), the Tribunal takes the view that a Net Annual Value deduced from a rent which was fixed in 1990 is much more reliable in accordance with Section 5 of the 1986 Act than one which was agreed in 2001. Property by its very nature is not homogenous and over a period of years relative values change (often significantly) between different categories of properties and within the categories themselves. It is the recognition of this fact that renders periodic revaluations necessary in order to ensure equity between ratepayers. The longer the period between the revaluations the more likely it is that the Valuation List will include anomalies which will continue until such times as a general revaluation is completed. The Appellant’s underlying argument is that the “tone” now established in Blanchardstown and Liffey Valley should form the foundation of a new “tone” in The Square. However, the Tribunal is of the view that the Square has effectively had its own “tone” already established. In these circumstances there is no need to consider what the rents as of 2001 are in another shopping centre. It may be noted in this regard that in the Determination in the **Bay Trading** case (VA00/3/022) (delivered 4th October 2001) the Tribunal observed (at page 8) “the Square Shopping Centre in Tallaght though in no way inferior generally, nevertheless suffers by comparison with its two newer neighbours (being Liffey Valley and Blanchardstown) and is thus less satisfactory for comparison purposes.” While perhaps of only limited assistance, this suggests that an examination of the Square’s own “tone” (if such exists) may be preferable to seeking comparisons in Blanchardstown or Liffey Valley in the instant case.

13. In passing the Tribunal notes the difficulties experienced by valuers in attempting to adjust actual rents to 1988 levels. It is common to use the Jones Lang La Salle and/or the IPD index or the CPI notwithstanding the fact that none of these indices are altogether appropriate. The first two are narrow based indices based on a basket of investment properties that are prime both in terms of location, physical attributes and covenant strength whilst the CPI is a broadly based index with little relevance to property. In the circumstances whilst actual rent is the best but not necessarily the only method of determining Net Annual Value, in accordance with the relevant sections of the Valuation Acts as mentioned heretofore, the valuer’s task becomes

more difficult the longer the period from November 1988. It is indeed a tribute to the valuers' skill (both in the Valuation Office and private practise) that in general there is equity of treatment between ratepayers.

- 14.** Having regard to the foregoing the Tribunal affirms the Rateable Valuation of €444.41.