

Appeal No. VA08/5/125

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

Marks & Spencer (Ireland) Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property No. 1544774, Department Store at Store 1, Liffey Valley Shopping Centre, Quarryvale, County Dublin

B E F O R E

Fred Devlin - FSCS.FRICS

Deputy Chairperson

Brian Larkin - Barrister

Member

Frank O'Donnell - B. Agr. Sc. FIAVI.

Member

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 9TH DAY OF APRIL, 2009

By Notice of Appeal dated the 7th day of August, 2008 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €4,784,000.00 on the above described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are:

"The assessment is excessive and bad in law and should be reduced."

1. The oral hearing in relation to this appeal was held in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 13th day of January, 2009.
2. At the hearing the appellant was represented by Mr. Owen Hickey, SC, instructed by Mr. Michael Carrigan of Eugene F. Collins, Solicitors and the respondent was represented by Mr. James Devlin, BL, instructed by the Chief State Solicitor.
3. On the face of it the only issue in this appeal appears to be solely in relation to the quantum of the valuation of the property concerned as determined by the Commissioner of Valuation following an appeal under section 30 of the Valuation Act, 2001.
4. At the oral hearing Counsel for the appellant sought to have introduced evidence of the rental value of properties in the Blanchardstown Centre and Dundrum Town Centre which were considered to be comparable to the property concerned in this appeal.
5. Counsel for the respondent submitted that the rental evidence the appellant sought to introduce was neither relevant nor admissible in that it does not refer to the rateable valuation of comparable properties located in the same rating area as the property concerned. Counsel further submitted that it is also not admissible on the grounds that it was not previously raised by the appellant at an earlier stage in the proceedings.
6. The above is but a very brief summary of the very detailed and substantial oral and written submissions made by the appellant and the respondent respectively. For the sake of completeness the written submissions prepared by Counsel are attached to this judgment, at Appendix 1 hereto.
7. Having considered the argument and submissions made by Counsel for both sides the Tribunal finds as follows:

The Valuation Act, 2001

1. The Valuation Act, 2001 which came into effect on 2nd May, 2002 is the sole statute dealing with the valuation of relevant properties for rating purposes. All previous subsisting Valuation Acts have been repealed.

2. *Inter alia* the Act provides for the revaluation of all properties in the State on a regular basis and also makes provision for the revision of an entry in the Valuation List between revaluations. It is the Tribunal's view that there is a distinct difference between the valuation principles applied to a revaluation process and a revision of valuation under Section 28.
3. It is clear from the Act that it is not the intention of the Commissioner of Valuation to carry out a general revaluation of all properties in the State, but that the revaluation will be rolled out over a period of years on a rating authority area by rating authority area basis in accordance with section 19 of the Act. South Dublin Rating Authority area was the subject of the first revaluation programme and the new Valuation List came into effect on 31st December, 2007.
4. Section 25 of the Act provides that subsequent revaluations will be carried out within ten years of the previous revaluation.
5. Section 19 of the Act provides that the Commissioner of Valuation after consultation with the Minister for the Environment and Local Government and the rating authority concerned may make an order "*specifying a rating authority area as being an area in relation to which the Commissioner proposes to appoint an officer of the Commissioner under subsection 2 to organise and secure the carrying out of a valuation of every relevant property situate in that area...*"
6. Under section 20 the section 19 order shall "*specify one date by reference to which the value of every relevant property, the subject of the valuation mentioned in that order, shall be determined*". In relation to the South Dublin Rating Authority Area the specified date is 30th September, 2005.
7. Section 21 provides that the Commissioner of Valuation shall publish "*a list comprising every relevant property that has been the subject of the valuation mentioned in the order, and the value of that property as determined by that valuation*" within three years from the date on which the order was made. The list above referred to shall be known as the "Valuation List" and this list shall remain in place until the next section 19 revaluation, but subject of course to the proviso that individual entries in the list may be subject to revision under sections 27 and 28 of the Act.

8. Section 48 of the Act provides that the value of a relevant property shall be determined by estimating its net annual value as at 30th September, 2005. Subsection (3) sets out in some detail the valuation assumptions upon which the estimate of net annual value is to be determined. It should be said that the definition of net annual value contained in the 2001 Act is substantially the same as that contained in section 11 of the Valuation (Ireland) Act, 1852.
9. During the revaluation process it is to be assumed that the Valuation Office will firstly assemble and analyse all the rental evidence available at or about the specified valuation date drawn from a wide range of properties in the different use classes situated in the rating authority area concerned or from other rating authority areas if appropriate. The information so assembled and analysed will then be applied directly to the property being valued and not by way of comparison. In those circumstances where there is evidence of the actual rent payable at or about the revaluation date on terms similar to the hypothetical terms contained in section 48, whilst such evidence will be compelling, but not conclusive, it does not necessarily follow that such a rent equates to net annual value as defined in the section.
10. The decision taken by the Commissioner of Valuation to roll out the revaluation of all relevant properties in the State over a period of years means that in time each rating authority area may have its own specified valuation date under section 20 and consequently its own unique “tone of the list”. In such circumstances it is only right and proper that where a revision of valuation is carried out under section 28 between one revaluation and the next the relevant properties concerned have their net annual values determined as provided for under Section 49 in order to maintain a consistency of assessment and equity between ratepayers in the rating authority area concerned. Section 49 provides *“If the value of a relevant property (in subsection (2) referred to as the ‘first-mentioned property’) falls to be determined for the purpose of section 28(4), (or of an appeal from a decision under that section) that determination shall be made by reference to the values, as appearing on the valuation list relating to the same rating authority area as that property is situate in, of other properties comparable to that property”*.
11. At this juncture the Tribunal feels it may be of assistance to set out its views on the principles to be applied to a revaluation under section 19 and subsequent revisions under sections 27 and 28.

12. In the circumstances of a revaluation under section 19, the valuation of “every relevant property” is to be individually assessed in accordance with section 48 as at the date specified in the valuation order. At the time of assessment in respect of each and every relevant property there is no Valuation List in existence nor will there be until all relevant properties in the rating authority area concerned have been valued. Consequently at the time of assessment there are no “other properties comparable” in the list. Section 49 which is based upon the concept of net annual value being determined by reference to comparables or more commonly referred to as the “tone of the list” cannot have any role to play in the revaluation process and only comes into effect when a revision of valuation is carried out in accordance with sections 27 and 28.

13. On the day a new Valuation List is published a preliminary “tone of the list” is originated, but little weight, if any, can, for comparison purposes, be attached to any of the assessments contained therein as they are as yet unchallenged. After the 40 day appeal period, as provided for under section 30, the situation changes somewhat, in that there is then in the list a substantial number of entries whose assessments have been accepted (or perhaps in some instances agreed at the representation stage under section 29) or otherwise unchallenged.

14. At the time of an appeal to the Tribunal under section 34 the situation will have moved on significantly, in that by far the greater percentage of entries in the list would have been accepted, agreed or determined at section 30 appeal stage and hence representative of an as yet emerging tone of the list. When an individual appeal comes before this Tribunal for determination the Tribunal must consider and evaluate the evidence then put before it, be it the actual rent of the property concerned, the rents of other properties of a size, use and location similar to the property concerned and last, but by no means least, the assessment of properties which are truly comparable in all respects to the property concerned and which are currently in the Valuation List and attach such weight to this evidence as is considered appropriate. Finally a stage will come – but only when all the appeal procedures under sections 30 and 34 are completed – when the tone of the list will finally become established and thereafter cannot be challenged. From this point onwards section 49 will come into play and rental evidence as such will be of lesser importance in the assessment process. Furthermore the valuation of each property currently in the list cannot be altered until the next revaluation under a new section 19 order is completed except in those instances where a

revision of valuation under section 28 is carried out and it is found that a material change of circumstances as defined in section 3 has occurred.

15. When the valuation of a property concerned is subject to revision, or when a new relevant property is first valued under section 28, then these assessments will be determined under the provisions of section 49, i.e. by reference to the values of similar properties appearing on the Valuation List for the rating authority area concerned in which the property is situated – in other words in accordance with the “tone of the list”. This is the fundamental difference between a valuation carried out under section 19 which is to be determined solely by reference to section 48(3), and not by reference to rateable valuations of other properties on the list, as is the case under sections 27 and 28.

Appeal Process

16. The 2001 Act is somewhat unique in the number of opportunities it affords to the occupier and other interested parties of appealing against the valuation of a relevant property. In the first instance the occupier of the property concerned may make representations under section 26 or 29, as appropriate, before the valuation certificate is issued. After the valuation certificate is issued the occupier, or other interested parties specified in section 30, may appeal the determination made under section 19 or section 28 as appropriate and in the event of the appeal being disallowed by the Commissioner of Valuation, there is provision for a further appeal to this Tribunal under section 34.

17. *Inter alia* section 31 provides as follows:

“An appeal made under section 30 shall, as appropriate—

(a) specify—

(i) the grounds on which the appellant considers that the value of the property, the subject of the appeal (in this section referred to as “the property concerned”), being the value as determined under section 19 or 28, is incorrect, and

(ii) by reference to values stated in the valuation list in which the property concerned appears of other comparable properties, what the appellant considers ought to have been determined as the property’s value,”

The wording of section 31(a)(ii) is similar to that contained in section 49(1) and appears to limit the appellant to submitting a valuation “*by reference to values stated in the valuation list in which the property concerned appears of other comparable properties*”.

18. In the event of an appeal being made by a person other than the occupier of the property concerned, the Commissioner under section 32 is required to serve on the occupier a copy of the appeal and a notice to the effect that the occupier may make a submission in writing to the Commissioner in relation to the appeal within the specified period of 28 days. Under section 33(3) the Commissioner must, in determining the appeal, consider any submission made under section 32(2).
19. Section 33(2) provides that the Commissioner must consider the appeal made under section 30 and take such action as is considered relevant or necessary in the circumstances of the appeal and to advise the various interested parties accordingly.
20. Section 33(5) permits the Commissioner of Valuation to *“employ such procedures as he or she considers appropriate for the purposes of the consideration of the appeal”*.
21. Section 34 provides that the occupier or other parties specified in section 30(1) may appeal in writing to the Tribunal against the determination of the Commissioner to allow or disallow an appeal under section 30, within 28 days from the date on which the Commissioner’s determination is issued.
22. Section 35 provides that:
 - “An appeal made under section 34 shall, as appropriate—*
 - (a) specify—*
 - (i) the grounds on which the appellant considers that the value of the property, the subject of the appeal (in this section referred to as “the property concerned”), being the value as determined or confirmed by the Commissioner under section 33, is incorrect, and*
 - (ii) the value the appellant considers the Commissioner ought to have determined under section 33 as being the value of the property concerned,*
 - (b) specify the grounds on which the appellant considers any detail in relation to the property concerned (other than the property’s value) as stated in the valuation certificate concerned issued under section 33 (2) or in the notification concerned made under that section is incorrect,”*

23. Whilst the wording of section 31 and section 35 is somewhat similar, there are some differences particularly at section 35(a)(ii) where there is no specific reference to the appellant's value of the property concerned being determined by reference to the values of comparable properties. The reason for this being presumably that the Commissioner in considering the appeal was bound, as was the appellant, by the restrictions imposed by section 31(a)(ii).
24. In the context of a revaluation, an appellant under section 30 would have no way of knowing which entries, if any, had been agreed at representation stage, accepted and not appealed, or are similarly subject to an appeal under section 30. In such circumstances it can be difficult for an appellant to make any meaningful reference to the assessments of other properties in the list, which may, or may not, be considered comparable to the property concerned unless the appellant was fully aware of the facts in relation to those other relevant properties. Accordingly, therefore it would in our opinion be appropriate for an appellant to rely on or have regard to market rental evidence of properties which are similar in all material respects to the property concerned, even if some of those properties were located in a different rating authority area. After all, it would have been open to the Valuation Office to have regard to this type of evidence when first preparing for the revaluation programme. It is not unusual for a property to be of a size and type for which there are few, if no, truly comparable properties in the relevant rating authority area. In a revaluation situation it would be entirely appropriate to investigate if there are any relevant comparable properties in other rating authority areas, and obviously the closer they are to the property concerned in physical terms, the more helpful they will be in the assessment process. In the case of a revision valuation, section 49(2) recognises this possibility and in such instances it would be impossible for an appellant therefore to comply fully with the requirements of section 30(a)(ii).
25. In accordance with section 5 of the 2001 Act the Commissioner may issue forms in a specified style. The appeal form issued by the Valuation Office and which accompanies the Valuation Certificate in respect of a property concerned contains a number of sections to be completed by the appellant. Sections 3, 4, 5 and 6 of the form specifically deal with the quantum of the valuation of the property concerned, and ask the appellant to state why the valuation is considered to be excessive (No.3); what the valuation should be (No.4); the comparative evidence relied upon (No.5); and any other factors for consideration (No.6).

26. Section 5 of the form which asks for details of the comparative evidence does not place any restrictions on the evidence to be introduced and to that extent is not in compliance with section 30(a)(ii) of the Act.

27. Section 11 of the Act gives power to the Commissioner to delegate in writing a specific function of the Commissioner under the Act to any officer of the Commissioner. According to section 11(3) *“any function, when performed by an officer to whom it has been delegated under this section, shall be deemed to have been performed by the Commissioner.”*

The Subject Appeal

28. In the context of this appeal and in accordance with section 11 of the Act, Ms. Orlaith Ryan was the Revaluation Officer, Ms. Olivia Bellamy the Appeal Officer and Mr. Jim Gormley the Appeal Manager.

29. The appeal application form issued by the Valuation Office and dated 31st December, 2007 was completed by the appellant’s agent on 7th February, 2008. At section 4 of the form the appellant’s valuation and method of valuation was set out in detail. The areas stated therein are different to the areas now before the Tribunal. At Section 5 of the form in response to a requirement to *“detail the comparative evidence on which you rely”* the appellant stated: *“The subject store is more than 3 times the size of the next largest store (Boots) and warrants an additional allowance for quantum. There is no direct evidence for department stores of this size within SDCC. By comparing the M&S and Next rents in Dundrum Town Centre (which shows a 50% allowance) and apply this ratio to the rent on Next in Liffey Valley justifies a rate of €200 per square metre”*. If what the appellant contends is true, how then could the appellant make a valuation by reference to comparable properties as required by section 31(a)(ii) if there are no comparable properties in the Valuation List? The making of a valuation is a skilled exercise based upon knowledge and experience, and if there are properties in another rating authority area then surely it must be open to the appellant to have regard to those properties which are truly comparable albeit located in a different rating authority area from the property concerned.

30. The appeal report form contains three sections (a copy of which is attached at Appendix 2 hereto) which appear to have been completed by the Valuation Officer, the Appeal Officer and the Appeal Manager. The section appearing over Ms. Ryan’s name and dated 26th June,

2008 deals firstly with the appellant's grounds of appeal, the Valuation Office comparisons and a schedule of contacts made by email between Ms. Ryan and the appellant's agent between 16th April and 25th June, 2008 at a time when the appeal was in the hands of the Appeal Officer. Under the heading 'VO Comparisons' Ms. Ryan made the following comments "*I arrived at the valuation using extensive market research and the subject was valued in line with rental evidence within the shopping centre and with reference to inferior retail warehousing in the locality. Specific details of this research include confidential information which can be disclosed only on a confidential basis to the Chairman should the case proceed to the Valuation Tribunal. The subject is valued in line with all other similar units.*"

31. The report of the Appeal Officer, Ms. Olivia Bellamy, is dated 4th July, 2008 and is as follows: "*I am satisfied that the property has been valued in line with market rents in this shopping centre and with reference to inferior retail warehousing in the locality. I recommend making no change.*"
32. At Paragraph 22 in an earlier case before this Tribunal (**VA06/2/045 - Orange Tree Ltd.**) the Tribunal commented as follows: "*An appeal is defined in Black's Law Dictionary as being 'a proceeding undertaken to have a decision reconsidered by a higher authority.'* Any appeal process must procedurally be and be seen to be carried out in a transparent manner and in compliance with the principles of fairness and in accordance with the law."
33. The Appeal Officer's report in this case makes no comment as to whether or not the appeal made by the appellant in the first instance is in conformity with the provisions of section 31, particularly section 31(a)(ii). Nor indeed is there anything in the Appeal Officer's report to indicate the thought process behind the decision to "make no change", and what considerations has been given to the appellant's grounds of appeal, valuation methodology and the comments at section 5 of the appeal application form. Similarly, there is no comment on the difference in areas between the appellant and the Revaluation Officer, or to "*the extensive market research used*" by the Revaluation Officer which "*included confidential information which can be disclosed only on a confidential basis to the Chairman should the case proceed to the Valuation Tribunal*". Whilst we have no doubt that the Appeal Officer considered all these matters above referred to it would enhance the appeal process if the conclusions and thought processes leading to the decision of the Appeal Officer who is after

all considered to be acting in a quasi-judicial capacity in the name of the Commissioner were fully set down for the benefit of all concerned, including the Appeal Manager who ultimately makes the final decision in the name of the Commissioner.

34. The Appeal Manager's decision in this appeal was to make no change and this decision was dated 4th July, 2008, that is the same date as the Appeal Officer's report.

Conclusion

Having regard to the submissions made by Counsel on behalf of the appellant and the respondent and a perusal of the various appeal documents in this case, we are of the opinion that it is appropriate for the appellant to introduce market rental evidence of properties situated in an adjoining rating authority area, having regard to the size and mode of use of the property concerned. Furthermore, it is clear from the appeal application form submitted to the Commissioner dated 7th February, 2008 that the appellant was relying on this evidence in arriving at his estimate of net annual value of the property concerned.

The Tribunal is grateful to Counsel for the detailed submissions, both written and oral, on behalf of the parties which were of immense assistance to us in arriving at our determination.

And the Tribunal so determines.