Appeal No. VA08/5/219

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Marks & Spencer **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Property No. 2191096, Department Store at Tallaght Cross, Belgard Square West, Tallaght, County Dublin

B E F O R E

Fred Devlin - FSCS.FRICS	**Deputy Chairperson**
Brian Larkin - Barrister	**Member**
Fiona Gallagher - BL	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 27TH DAY OF FEBRUARY, 2009

By notice of Appeal dated the1st day of September, 2008 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €1,176,000.00 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. This appeal proceeded by way of an oral hearing held in the Tribunal Offices, Ormond House, Ormond Quay Upper, Dublin 7 on the 10th and 13th February, 2009. At the hearing the appellant was represented by Mr. Owen Hickey, SC, instructed by Mr. Michael Corrigan of Eugene F. Collins Solicitors. The respondent, the Commissioner of Valuation, was represented by Mr. James Devlin, BL, instructed by the Chief State Solicitor. Expert valuation evidence was given by Mr. Thomas MacLynn, MRICS, of RHM Commercial and Mr. Patrick Kyne, MSc, BE, MRICS, ASCS, of the Valuation Office on behalf of the appellant and respondent respectively.

Property Concerned

2. The property concerned in this appeal is a department store occupied by Marks & Spencer located within the Tallaght Cross Town Centre development. The Tallaght Cross Town Centre is a substantial mixed use development scheme located on the east side of Cookstown Road extension in that section between Tallaght Hospital and the Belgard Square development, close to the intersection with the Tallaght bypass. The Square Town Centre is close by as is the terminus of the Red Luas Line. The development forms part of the Tallaght Town Centre core area which serves an urban population of over 100,000 people.

3. Tallaght Cross Town Centre is a large mixed use development scheme that includes two hotels, the department store occupied by the appellant, 50 retail units of various sizes, several blocks of apartments and 2,500 car parking spaces at two basement levels. The scheme is laid out in two sections on either side of Belgard Square West and that section which contains the subject property is built around an open air Civic Square which is also fronted by a library, the Glashaus Hotel and other retail outlets.

4. The Square Shopping Centre which is close by is an enclosed regional shopping centre with retail space at three levels anchored by Debenhams Department Store at Level 1, Tesco Supermarket at Level 2, and Dunnes at Levels 2 and 3. The centre also includes 160 retail outlets, 11 restaurants and a 12 screen multiplex cinema.

5. There are pedestrian entrances into the centre at each of the 3 retail levels and over 2,000 surface car parking spaces are provided, together with 770 spaces in a multi-storey car park adjacent to the entrance on Level 1. Car parking is free to the patrons of the centre.

6. The subject property is a department store at ground floor level with storage at basement level connected by service lifts. The main entrance into the store is from the Civic Square and there are two other additional entrances at the rear of the store – one from Cookstown Way and the other at the junction of Cookstown Way and Belgard Square West opposite to the entrance into Tallaght Hospital. The main entrance from the Square has five steps and a ramp for invalid users inside the main entrance due to a change of floor level.

7. This store has been fitted out by the landlord to a good quality with a tiled floor and exposed services including air conditioning units suspended from the ceiling.

Accommodation

8. The accommodation measured on an gross internal area basis in accordance with the code of measuring practise published by the Society of Chartered Surveyors has been agreed as follows:

Department Store	3,988 sq. metres
Service Bay/Storage	1,238.94 sq. metres
Transformer Room/ Store	128 sq. metres
Level 1 Lift & Lobby	40 sq. metres
Level 2 Lift & Lobby	42 sq. metres

Tenure

9. The property concerned is occupied under a full repairing and insuring lease for a term of 20 years from 5th March, 2007 at an initial headline rent of €861,256.00 per annum. The lease provides for rent reviews at 5 yearly intervals, but any increase at review is capped at 27.63% of the then existing rent, i.e. 5% per annum compound. The lease also provides for a break in favour of the tenant at the end of year 10 and year 15, subject to 12 months prior notice in writing and a payment of a penalty of 1 year's rent.

10. As part of the agreement for lease the landlord made an inducement payment to Marks & Spencer in the sum of €3.75 million. The lessor also agreed to pay the cost of supplementary works (in the nature of fit-out) to the demised premises, which works are intended to enhance the value of the demised premises. The costs of these supplemental works being €3.75 million. It was further agreed that the value of these works would be disregarded at future

rent reviews dates. In addition the landlord agreed to reduce the rent payable under the lease as follows:

- By 50% until 4 specified units in the development are *bona fide* let to approved tenants for a period of not less than 10 years.
- By 25% until the date on which more than 4 but not less than 6 specified units are *bona fide* let to approved tenants for a period of not less than 10 years.
- A list of approved tenants which is not intended to be exhaustive is contained in Appendix 10 of the agreement for lease.

11. In the event Marks & Spencer are at the date of the hearing only paying 50% of the reserved rent of €861,256.00.

12. The landlord also granted a 6 months rent free period from handover of the premises for fit-out works.

13. The landlord has agreed that not less than 330 spaces in the basement car park will be made available to shoppers who shall get 2 hours free parking for the first five years of the lease. The ground floor transformer room is let under a separate lease at a rent of €10,000.00 for years 1 and 2, €15,000.00 for years 3 and 4, and €18,500.00 for year 5, and thereafter subject to review at 5 yearly intervals.

Rating History

14. On 12th December, 2007 a Valuation Certificate signed by Mr. Patrick F. Cooney, Valuation Manager was issued to the effect that the value of the property concerned had been determined at €1,187,500.00. Following an appeal under section 30 a Valuation Certificate dated 6th August, 2008 and signed by Mr. Jim Gormley, Appeal Manager was issued wherein the valuation of the property concerned was reduced to €1,176,000.00. It is against this determination by the Commissioner of Valuation that the appeal to this Tribunal lies.

The Appellant's Evidence

15. Mr. MacLynn having taken the oath adopted his précis and valuation which had previously been received by the Tribunal and the respondent as being his evidence-in-chief.

16. In his evidence Mr. MacLynn contended for a rateable valuation of €780,000 calculated as set out below:

Floor	**Description**	**Sq. metre**	**€ psm**	**€ per annum**
Ground	Department Store	3,988.00	167.50	667,990.00
Ground	Transformer Room	128.00	95.00	12,160.00
Level -1	Lifts & Lobby	40.00	20.00	800.00
Level -2	Lifts & Lobby	42.00	20.00	840.00
Level -3	Service Bay/Storage	1,238.94	70.00	86,726.00
Add For Licence				10,000.00
Total:		5,436.94		778,516.00
RV Say €780,000.00				

17. Mr. MacLynn said that in arriving at his estimate of net annual value he had taken the rent payable of €861,256 under the lease as his starting point. This rent, he said, was agreed in March, 2007 and in order to bring it back to the relevant valuation date of 30th September, 2005 he had adjusted the rent by reference to the Jones Lang LaSalle Retail Index and this gave him a figure of €757,000. Mr. MacLynn said that he also had regard to the assessment of the Debenhams store at Level 1 in the Square Shopping Centre, details of which are set out in Appendix 1 attached to this judgment.

18. Mr. MacLynn said that at the relevant valuation date Marks & Spencer were engaged in a period of aggressive expansion in Ireland and had identified Tallaght as a location in which it wanted to have a presence. Since they were unable to secure a store within the Square Shopping Centre the decision was taken in 2006 to take a lease in the Town Centre development which was under construction at that time. Following protracted negotiations Marks & Spencer entered into the existing lease arrangement and an agreement for the payment of substantial inducements by the landlord.

19. Mr. MacLynn said that in taking the lease Marks & Spencer believed that it would be able to attract a substantial flow of shoppers into the Tallaght Cross from the Square Shopping Centre, but to date this has not materialised. The fact that only nine of the other retail units in the Tallaght Cross development were occupied, despite the presence of Marks & Spencer,

was a clear indication that the development, from a retailing point of view, was not an attractive location.

20. Mr. MacLynn said that rents paid by anchor tenants in retail developments must be treated with some caution because they are often concessionary deals agreed well in advance of the opening of the centre. In arriving at his estimate of net annual value he had taken the view that the rent payable under the lease was a “fair rent” which reflected its inferior trading location relative to the Square Shopping Centre. Such a view, Mr. MacLynn said, was more than reasonable given the scale of the capital inducements made by the landlord, the reduced rental arrangement and the high vacancy level for other retail units in the Tallaght Cross development. In such a situation there were good grounds for arguing that the passing rent was, if anything, in excess of open market rental levels.

21. When questioned about the comparisons introduced by the respondent, Mr. MacLynn said that Citywest and Ashleaf Shopping Centres, from a purely retailing point of view, were better locations than the property concerned, which was overshadowed by the Square Shopping Centre. Little weight, he said, should be given to the retail warehouse assessments inasmuch as they were not department stores. In relation to the information on the Aldi letting, which had only just come to hand, this letting Mr. MacLynn said had taken place some three years after the relevant valuation date. Furthermore, he said, the facts as provided may not fully reflect all aspects of the letting. In any event the Aldi supermarket was less than half the size of the property concerned.

22. Under cross examination Mr. MacLynn agreed that at section 30 appeal stage he had put forward a net annual value of €850,000 based on a sq. metre rate of €200 per sq. metre for the retail space on a shell basis.

23. Since then he had changed his opinion due to the additional information in relation to the letting that was not in his possession in February, 2008 when the appeal was lodged. Mr. MacLynn agreed that in circumstances where the landlord wanted an anchor tenant the probability was that the tenant would get a concessionary rent, i.e. a rent below prevailing market levels. Mr. MacLynn said that in this case Marks & Spencer wanted a store in Tallaght and the deal agreed with the landlord was a market transaction which represented the relative strengths of both parties and in his opinion the rent of €861,256 was an open market

rent. The rent reduction provision and the inducements were made in order to encourage Marks & Spencer to come into the scheme in the hope that their presence would attract other tenants.

24. When asked to comment about the Square Shopping Centre, Mr. MacLynn said that he did not share the respondent's view that Level 1 was of lesser value than Levels 2 and 3. Mr. MacLynn said that he had looked at the Debenhams assessment in order to draw conclusions for the assessment of the property concerned. In his opinion it was a much superior retailing location than Tallaght Cross and he considered a 40% reduction factor was warranted when comparing the Debenhams unit and the property concerned and this was borne out by an analysis of the rent payable under the leases in respect of the two properties.

25. When asked about Mr. Kyne's comparisons Mr. MacLynn said that it had to be remembered that Tallaght Cross was not a shopping centre as such, but a mixed use development within the Tallaght conurbation. Citywest Shopping Centre and Ashleaf were enclosed neighbourhood/district centres, each with its own catchment area where there was little, if any, competition. As far as comparisons 6 and 7 were concerned, these were retail warehouses and hence not to be considered as comparables when valuing department stores.

26. When asked why he had made no allowance for fit-out, Mr. MacLynn said that the rent payable under the lease reflected the fact that the landlord had paid for the fit-out. Since his estimate of net annual value was based on the actual rent payable under the lease, it would not be appropriate to make such an allowance.

The Respondent's Evidence

27. Mr. Kyne having taken the oath adopted his précis and valuation which had previously been received by the Tribunal as being his evidence-in-chief.

28. Mr. Kyne in his evidence contended for a rateable valuation of €1,176,000.00 calculated as set out below:

Department Store	3,988.00 sq. metres	@ €240.00 per sq. metre	= €957,120.00
Basement (-3) Stores	1,238.94 sq. metres	@ €75.00 per sq. metre	= € 92,920.50
Basement (-2) Lift/Lobby	42.00 sq. metres	@ €75.00 per sq. metre	= € 3,150.00

Basement (-1) Lift/Lobby	40.00 sq. metres	@ €75.00 per sq. metre	= € 3,000.00
GF External Store	128.00 sq. metres	@ €115.00 per sq. metre	= € 14,720.00
Addition for off-licence			€10,000.00
Addition for fit-out 10% of NAV			
	(3,988 sq. metres	@ €240 per sq. metre)	= €95,712.00
Total NAV			€1,176,662.50

Valuation Office Estimate of NAV €1,176,000 per annum

29. In support of his opinion of net annual value Mr. Kyne introduced seven comparisons, details of which are set out in Appendix 2 attached to this judgment. In addition to the above Mr. Kyne at the hearing introduced information in relation to a letting that had taken place for a supermarket at Tallaght Cross. This information was in relation to an Aldi supermarket let under a 25 year full repairing and insuring lease from November, 2008 at a rent of €625,480. The lease provides for rent reviews at 5 yearly intervals.

30. This property extends to a ground floor retail area of 1,571 sq. metres and a mezzanine area of 216 sq. metres, giving a total area of 1,787.90 sq. metres measured on a gross internal area basis.

31. Mr. Kyne in his evidence said that he was the person designated by the Commissioner of Valuation to be the person responsible for the valuation of all retail premises in the South Dublin Rating Authority area for the revaluation programme.

32. Mr. Kyne said that the Tallaght Cross site was one of 24 sites designated for development as part of the Integrated Area Plan for Tallaght and had the benefit of Section 23 allowances. The property concerned, he said, was located adjacent to the Square Shopping Centre, which was the first regional centre in Ireland and was essentially the core of Tallaght. The Square, Mr. Kyne said, had been developed in two phases and planning permission had recently been obtained for phase 3 which would include a 10,000 sq. metre Penney's store at 3 levels.

33. In relation to the property concerned, Mr. Kyne said that the rent payable under the lease was a concessionary rent and could not in any way be considered as being an open market rent. The developer in this instance, he said, was intent on getting a prime anchor tenant into the scheme in order to attract other tenants into the unit shops so as to create a shopping

environment and hence make the development economically viable. The attraction of a tenant of the calibre of Marks & Spencer, he said, was crucial to the success of this scheme and in most instances it would be surprising if the rent paid by Marks & Spencer was a true open market rent. The fact of the matter, Mr. Kyne said, was that Marks & Spencer as a prime anchor tenant was in a position to negotiate a very favourable deal and this was clear from the levels of inducements made in order to attract them into the scheme.

34. Mr. Kyne said that in arriving at his estimate of net annual value he had attached little weight to the passing rent but relied upon the assessments of the department stores within the Square Shopping Centre, which, he said, represented the tone for valuing department stores in the Tallaght area. In his opinion there was little to choose between the location of the Debenhams unit at Level 1 in the Square Shopping Centre and the property concerned.

35. Under cross-examination Mr. Kyne agreed that the property concerned was to be valued *rebus sic stantibus* as at December, 2007 at rental levels prevailing at 30th September, 2005. He agreed that as a matter of valuation practice the passing rent was the best evidence of market rent unless it can be proved to be otherwise. Mr. Kyne said that when it came to valuing the property concerned he had looked at the rent payable under the lease and at the rents payable for other department stores and had come to the conclusion, for reasons already mentioned, that it was not a market rent in the true sense of that expression. Mr. Kyne said that in his opinion Marks & Spencer was the only tenant available at the time and was in a position to dictate terms. Mr. Kyne also said that there was a general view that the rents payable for suitable anchor tenants at the commencement of a development scheme were of little assistance in arriving at an estimate of net annual value under rating law.

36. Mr. Kyne agreed that since the landlord had paid for the fit-out of the store it was correct to say that the rent payable under the lease was not a shell rent, but a rent for a fully fitted out department store. When it was put to Mr. Kyne that Tallaght Cross was a "white elephant", he said that he would not share such a view.

37. When asked if he had taken future events into account when arriving at his assessment of net annual value, Mr. Kyne said that he had regard to them insofar as they were relevant. For example, he said he would have been aware of the fact that the new library was opening in 2008 and that other prospective tenants were showing an interest in moving into the Tallaght Cross development, and indeed the upcoming development of phase three of the Square

Shopping Centre. Mr. Kyne said that he understood Marks & Spencer were influenced in taking the lease of the property concerned by the fact that planning permission had been obtained for phase three of the Square Shopping Centre.

Findings

1. The statutory basis of valuation is set down in section 48 of the Valuation Act, 2001, wherein at section 48(3), the net annual value of a property is defined as being, *"the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant".*
2. The onus of showing that the valuation of the property concerned, appearing in the Valuation List is incorrect is on the appellant.
3. The valuation approach adopted by Mr. MacLynn and Mr. Kyne are diametrically opposed to each other. Mr. MacLynn based his valuation on the rent payable under the lease, whereas Mr. Kyne disregarded the rent completely and valued the property concerned by reference to assessments of other department stores/supermarkets in the greater Tallaght area, and more particularly those within the nearby Square Shopping Centre. All of these assessments have been agreed with rating consultants including the Debenhams store at Level 1 in the Square Shopping Centre, which had been agreed with Mr. Nicholas Rose, a colleague of Mr. MacLynn's.
4. As a general statement where the property being valued is let then the rent passing should be the starting point for the assessment of net annual value. The closer the rent commencement date is to the relevant valuation date and the more the covenants of the lease accord with the provisions of section 48, the greater shall be the weight attaching to that evidence; provided that the rent payable under the lease is truly representative of the market for similarly circumstanced properties occupying similar locations at the valuation date.
5. The rent payable by the appellant for the property concerned is undoubtedly the outcome of protracted negotiations between the landlord and Marks & Spencer. It is clear from the evidence tendered that Marks & Spencer wanted a presence in Tallaght and the preferred location would have been within the Square Shopping Centre. Since no suitable units were available Marks & Spencer turned their attention to what is undoubtedly the only

development adjacent to the Square which contains a department store. It is equally clear that the developer wanted an anchor tenant for the Tallaght Cross scheme and in the hierarchy of such anchor tenants none ranks higher than Marks & Spencer, who are one of the largest retailers in the world. Thus we have a situation where there exists a prime tenant looking for suitable premises in the Tallaght area and a developer seeking an anchor tenant for a large mixed use development scheme.

6. Whilst the subject property was not precisely what Marks & Spencer wanted in terms of location, it was in Tallaght and built and finished to a specification which met the standards that they set for their stores. It is clear in such circumstances that both parties entered into the negotiations with a view to obtaining the best possible deal that they could. Looking dispassionately at the outcome it would appear that Marks & Spencer had the stronger hand and this is evident from the level of inducement in one guise or another granted to Marks & Spencer in return for them taking the lease, and the other provisions for reducing the rent payable under the lease and the capping of rental increases in future rent review dates. In the light of all these matters it cannot be said that the rent payable under the lease is an open market rent as generally understood, nor does it accord with the definition of net annual value set down in section 48.
7. Mr. Kyne in support of his opinion of net annual value relied upon the assessments of other department stores and supermarkets in the Tallaght area and specifically those in the nearby Square Shopping Centre. In his opinion the Debenhams unit at Level 1 occupied an inferior location within the Square compared to those at Levels 2 and 3. In his opinion from a locational point of view there was little to choose between the location of the Debenhams store and the property concerned. The other assessments including the Dunnes Stores outlets at Citywest Shopping Centre and Ashleaf Shopping Centre supported his estimate of net annual value.
8. At this stage the Tribunal feels it may be of assistance to express some views of a general nature in relation to the current entries in the Valuation List. When the Valuation List is first published little weight can, for comparison purposes be attached to any of the assessments contained therein which 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 representation stage as provided for under section 29. However an appellant when lodging an appeal under section 30 would have no way of knowing which entries, if any, had been agreed at representation stage, or otherwise

accepted or indeed were similarly subject to an appeal under section 30. In such circumstances it is difficult for an appellant to make meaningful reference to the assessment of other properties which may, or may not, be considered to be comparable. At the time of an appeal under section 34 the situation will have moved on once again, in that by far the greater percentage of all the entries on the list will have been agreed or accepted and hence very representative of an as yet emerging "tone of the list". When an individual appeal comes before the Tribunal for determination it is up to the Tribunal to evaluate all the evidence put before it at that time, including the actual rent of the property concerned (if indeed there is a rent payable), the rents of other properties of a similar size and location to the property concerned and last, but by no means least, the assessments of properties which are truly comparable and which are currently in the Valuation List and attach such weight to this evidence as appropriate. Finally a stage will come (when the appeal processes under section 30 and section 34 are completed) when the tone of the list *will become established and thereafter cannot be challenged*. From this point onwards section 49 will come into play and rental levels as such will be of lesser importance in the assessment process.

9. In the circumstances of this appeal the Tribunal is of the view that little weight can be attached to the headline rent payable under the lease, having regard to the scale and nature of the various inducements made by the landlord to Marks & Spencer. Accordingly therefore we feel it appropriate to look at the assessments of other stores of a similar size located in the Tallaght town centre area, and in particular those within the Square Shopping Centre which is located close to the property concerned.
10. Mr. MacLynn's firm was involved in the appeal in relation to the Debenhams store at Level 1 in the Square and agreed its net annual value of €1,459,000.00 equivalent to €250.00 per sq. metre on the retail space valued on a shell basis. Mr. Kyne was of the opinion that the property concerned occupied a location of similar value to the Debenhams store, whilst Mr. MacLynn was of the view that the property concerned occupied a much inferior location and considered a reduction of about 37% to the sq. metre price to be appropriate, i.e. €152.00 per sq. metre plus 10% equals €167.50 on a fitted out basis.
11. Of all the categories of property retail is undoubtedly the one which is most location sensitive, so that even a short distance "off pitch" can have a significant effect on rental value. For example one has only to look at the differences in Zone A rates between Grafton Street and Duke Street, and Henry Street and Liffey Street, to see the importance the market attaches to location from a retailing point of view.

12. The property concerned is the anchor store in what is an as yet unestablished retail location and this is borne out by the fact that only nine of the other retail units in the overall scheme are currently occupied. On the other hand, the Square is an established enclosed retail centre with three anchor stores, 160 retail units, 11 restaurants and a large multiplex facility. It is self evident that in terms of Tallaght the Square is the place to be from a retailing point of view. Accordingly the Tribunal has come to the conclusion that the Tallaght Cross development occupies a vastly inferior location from a retailing point of view than the Square Shopping Centre and this would be manifest by substantially lower rents and by extension net annual values. In relation to the property concerned Mr. MacLynn considered the differential in rental values would be in the order of 37% while Mr. Kyne thought otherwise.
13. Of all the seven comparisons put forward by Mr. Kyne, the Tribunal considers the three major stores in the Square to be the most relevant, in that they are in the same use category as the property concerned, and are located close by within the Tallaght town centre nucleus. The Dunnes Stores outlets at Citywest and Ashleaf are not considered to be truly comparable, in that they are within relatively small neighborhood/district shopping centres with their own local customer base and located some considerable distance from Tallaght. The other two comparisons, which are retail warehouses, fall into a different use category and hence cannot be considered as being truly comparable despite the fact that they are relatively close to the property concerned. The Aldi comparison is of limited assistance in that it is a letting of a supermarket considerably less than half the size of the property concerned. In short the Tribunal attaches most weight to the agreed assessments in the Square, but is of the view that the levels of value established therein must be discounted when valuing the property concerned to reflect its locational disadvantages inasmuch as it is not within an established enclosed shopping centre, but in a mixed use development that as yet has not proven itself to be a successful retail destination.

Determination

Having regard to the above findings the Tribunal determines the net annual value of the property concerned to be as follows:

Department Store	3,988.00 sq. metres @ €185.00 per sq. metre	= €737,780.00
Add 10% for fit-out		= € 73,778.00
Service Bay/Store	1,238.94 sq. metres @ €75.00 per sq. metre	= € 92,920.00

Transformer Room/Ext Store	128 sq. metres say	= € 13,000.00
Level 1 Lift /Lobby	40 sq. metres and	
Level 2 Lift/Lobby	42 sq. metres Say	= € 2,000.00
Add for Licence		= € 10,000.00
Total		€ 929,478.00

Net Annual Value Say €930,000.00

And the Tribunal so determines.

NOTE:

The Tribunal would like to express its appreciation to counsel for the depth of their argument and quality of their submissions, which were of great assistance to the Tribunal in its deliberations and determination.