

Appeal No. VA10/3/020

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

Square Management Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

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

B E F O R E

Fred Devlin - FSCSI, FRICS

Deputy Chairperson

Brian Larkin - Barrister

Member

Fiona Gallagher - BL

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 27TH DAY OF OCTOBER, 2011

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

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

This appeal first came before the Tribunal by way of an oral hearing held on the 8th and 15th November and 3rd December, 2010. Following the oral hearing referred to above, the Tribunal issued a written determination on 4th February, 2011 dealing solely with the agreed preliminary issue identified by the parties. The issue so identified being, whether or not the introduction of the electronic control barrier and time based fee paying regime which came into effect on 1st September, 2009 represented a material change of circumstances as defined by Section 3 of the Valuation Act, 2001.

Since neither party to the appeal expressed dissatisfaction with the determination issued on the 4th February, 2011 the Tribunal contacted representatives of the parties with a view to agreeing a date for the resumption of the oral hearing in order to receive such additional evidence and submissions the parties considered necessary or appropriate.

Following receipt of correspondence from the appellant and Chief State Solicitor's Office, the Tribunal set down the 7th June, 2011 as the date for the resumption of the oral hearing. At this hearing the appellant was represented by Mr. Owen Hickey, SC, instructed by Ms. Alannah Smith of Square Management Services. Mr. Robert McHugh, BSc (Surv), MSCS, MRICS, an Associate Director of DTZ of Sherry Fitzgerald gave expert evidence on behalf of the appellant. The Commissioner of Valuation was represented by Mr. David Dodd, BL, instructed by the Chief State Solicitor. Mr. Denis Maher, MRICS, Grade 1 Valuer, in the Valuation Office, gave expert evidence on behalf of the respondent.

At the commencement of the oral hearing, the Chairman of the Tribunal addressed the parties in the following terms.

1. *This is a resumed hearing.*
2. *Following the previous hearing (held in November and December 2010), the Tribunal issued its determination on 4th February, 2011 to the effect that a "material change of circumstances" had occurred. As a consequence the car parking at the square shopping centre was found to be a relevant property under the Act of 2001 and the Commissioner of Valuation was correct in valuing it in accordance with the provisions of Section 49 of the Valuation Act, 2001. No dissatisfaction was expressed by either party to this determination.*

3. *At the previous hearing, evidence was given by the Commissioner's witness that the value of the car park was €1,757,000. The appellant's valuer put forward a valuation of €59,900 albeit on a "without prejudice" basis. This valuation had regard to the accounts submitted which were included in his written précis of evidence.*
4. *The purpose of this hearing is to enable both parties to put forward such additional evidence and submission as they consider appropriate in relation to the valuation of the property concerned i.e. the car parking at the Square Shopping Centre in accordance with Section 49 of the Valuation Act, 2001.*

Submission on behalf of the Appellant

Mr. Hickey, in his opening submission, contended that the Tribunal in its determination of 4th February, 2011 had not dealt with the issue of "*double counting*" and should now do so as a second preliminary issue. In regard to double counting, Mr. Hickey drew the Tribunal's attention to a statement made by Mr. Kyne under cross-examination at the earlier oral hearing to his evidence that the rental value of the individual units in the centre would be "*nil*" without the availability of the car parking which is the subject of this appeal. Furthermore, Mr. Kyne said, that in valuing the units in the centre, he had regard to the fact that there was parking at the centre which was an essential element of the Square Shopping Centre scheme. In light of Mr. Kyne's evidence, Mr. Hickey submitted, that the value of the car parking at anything other than nil would amount to double counting and double valuation and consequently, unlawful double taxation. Mr. Hickey further submitted that nothing contained in the Tribunal's determination in relation to the preliminary issue could take from Mr. Kyne's evidence in relation to the car parking nor undermine the appellant's argument that the car parking is contained in the valuation of the units in the centre. That being the case, the value of the car parking must be nil, as to do otherwise would amount to double counting and would constitute double taxation.

Mr. Hickey also said Mr. McHugh's valuation evidence would be "*without prejudice*" to the appellant's contention that the valuation of the car park should be nil. If the Tribunal rejected this contention, Mr. McHugh's evidence would be that the proper basis of valuation would be that contained in Section 49 (2) (a) of the Act as there were no properties on the valuation list for South Dublin County Council which were comparable to the property concerned, that is car parking forming part of a regional shopping centre. Mr. McHugh would also outline why he was of the opinion that only 242 spaces should be valued.

The Appellant's Submission

Mr. Dodd in response contended that the issue of double counting did not arise and that the only matter to be now decided by the Tribunal was the question of the valuation of the property concerned in accordance with Section 49(1) of the Act.

Mr. Hickey in his closing submission said the Tribunal must first deal with the issue of double counting and for the Tribunal to receive evidence at this stage in relation to the quantum of the valuation could be prejudicial to the appellant.

Ruling of the Tribunal

At this stage the Tribunal rose in order to consider submissions made by Counsel and in due course ruled orally as set out below:

- (1) *Firstly, we wish to deal with the matter of correspondence received from the appellant and respondent (the parties) dated the 19th April and 27th May respectively. It is our considered view that it was not appropriate for the parties to submit these letters in the first instance. Accordingly, we do not intend to have any regard to the contents of these letters in our consideration of the matters raised before us, that is, the issue of double counting, the basis of the valuation, should it be, Section 49 (1) or 49 (2)(a) and finally of course the quantum of the valuation itself.*
- (2) *In light of our determination dated 4th February, 2011, we are of the view that the matter of double counting is to be addressed in the quantum of the valuation. We accept as a matter of fact and valuation that the rents paid for the individual units within the centre reflect the availability of the car parking but do not necessarily include any specific amount allocated to the car parking itself. In our opinion the availability of car parking at the Square Shopping Centre is not dissimilar in some respects to the availability of car parking in the city centre where the rents paid for the retail units reflect the availability of car parking and all other intrinsic and extrinsic factors which would have a bearing on rental value.*
- (3) *In relation to quantum, we are of the view that the property concerned in this appeal consists of a surface car park, a multi-storey car park and parking at roof level providing in total 2,396 car parking spaces as agreed by the parties. In arriving at our determination we shall value the car parking in accordance with Section 49 (1) or Section 49 (2)(a) as we consider appropriate in light of the evidence and submissions adduced. In arriving at our determination we shall also have regard to such other*

considerations as we consider appropriate in the circumstances in the light of the evidence and submissions adduced.”

Since neither party expressed dissatisfaction with the above findings, the Tribunal proceeded to receive further evidence and submissions from the parties.

Evidence of Mr. McHugh

Mr. Robert McHugh, BSc (Surv), MSCS, MRICS, an Associate Director of DTZ of Sherry Fitzgerald having taken the oath adopted his written précis which had previously been received by the Tribunal and the respondent as being his evidence-in-chief. At the outset and in light of the findings of the Tribunal above referred to, Mr. McHugh sought leave to amend his valuation of the property concerned as set out below:

Car parking 2,396 spaces at €150 per space = €359,400

In support of his opinion of net annual value Mr. McHugh introduced a number of comparisons, details of which are contained in Appendix 2 attached to this judgment. Mr. McHugh said that the property concerned was the car parking at the Square Shopping Centre which in his opinion was a regional shopping centre by virtue of its size and range of shopping and other facilities available to its customers and visitors. The only other such centre in the South Dublin County Council rating authority area, he said, was Liffey Valley where the owners operated a “free to all” car parking policy. Such car parks, Mr. McHugh, said were not considered to be rateable by the Valuation Office. In the circumstances, therefore, since there were no properties on the valuation list comparable to the property concerned he came to the conclusion that the proper basis of valuation was that contained in Section 49(2)(a) of the 2001 Act.

Mr. McHugh said that the management accounts included in his précis for the 12 month period ending the 31st of August 2010 did not include any payment of rates. If they had it would have the effect of increasing the operating loss from circa €382,000 to circa €482,000.

Under examination Mr. McHugh said that in arriving at its determination of net annual value the Tribunal must have regard to the fact that the individual lease arrangements for all of the retail units therein contain the following proviso, *“the right of the tenant, it’s permitted*

successors, assigns, licensees and invitees to use the car parking spaces as designated for such use by the freeholder during the term hereby granted.” Regard must also be had to the fact that the rents paid took into account the availability of the car parking and the tenants’ rights under the leases to use the car park. In this respect the situation was different to that of retailers in the city centre where tenants had no such rights under their lease arrangements to use the car parking in the vicinity.

Mr. McHugh said that in the absence of comparable properties in the South Dublin County Council rating authority area he had primarily relied on evidence drawn from Fingal County Council and the Dun Laoghaire/Rathdown County Council rating authority areas. This evidence he said was in respect of car parking attached to other regional shopping centres and which were valued as part of the revaluation of all relevant properties in the rating authority areas concerned. The relevant valuation date for these revaluations was the same as that for South Dublin County Council rating authority area, that is the 30th September, 2005. Accordingly, therefore, these were valid comparisons by virtue of the fact that they were similar in nature, location, situated relatively closely to each other and share a common revaluation date.

Mr. McHugh said that he had also included in his evidence details of the valuation of other car parks in the Tallaght area. This information, he said, was provided on a without prejudice basis to his stated opinion that the proper basis of valuation was contained in Section 49(2)(a).

When questioned about the respondent’s comparisons, Mr. McHugh said they were not truly comparable in that they were all car parks forming part of mixed-use development schemes none of which could in any circumstances be described as being a regional shopping centre. To that extent, therefore, they were of no assistance in determining the net annual value of the property concerned in accordance with Section 49(1) where *“like must be compared with like”*. It was, he said, for this very reason that he had looked outside the South Dublin County Council rating authority area for relevant comparisons.

Under cross-examination Mr. McHugh conceded that he had changed his opinion of net annual value in the light of the Tribunal’s findings referred to earlier in this judgment, but not

his opinion that the proper basis of valuation was Section 49(2)(a) due to the absence of relevant comparisons required when using Section 49(1).

When questioned about Section 49, Mr. McHugh agreed that the underlying purpose of this section was to ensure that all valuations made on foot of a request for a revision of valuation were assessed in such a manner as to maintain equity between ratepayers in the rating authority area. In most instances, Mr. McHugh said that, the proper basis of valuation was Section 49(1). Nonetheless, Section 49(2)(a) was there to enable valuations to be made by other means, in those unusual circumstances where there were no properties on the relevant valuation list truly comparable to the property concerned. Section 49(2)(a) permitted the valuer in such instances to value the property concerned in accordance with Section 48(1) using whichever of the approved methods of valuation considered to be most appropriate having regard to the nature of the property concerned.

When questioned about Mr. Maher's comparisons, Mr. McHugh agreed that they were all car parks and that some of them were in fact located quite close to the property concerned. He also agreed that some of these car parks (in particular comparison no's. 1, 4, 5 and 6) were used by customers of the retail units which formed part of mixed-use development schemes. When asked why he could disregard the values of these properties which were generally similar in use to the property concerned, Mr. McHugh said that whilst they shared common characteristics, they were fundamentally different to the property concerned, which was car parking attached to and forming part of a regional shopping centre.

When asked how he arrived at his valuation of €150 per space in light of the evidence adduced by Mr. Maher and indeed by himself in respect of car parks in the Tallaght area and the evidence drawn from other rating authority areas, Mr. McHugh said that it was the opinion he formed after taking into account the differences in location and all other factors which would have a bearing on rental value. In particular he had regard to the fact that the Square Shopping Centre was much older than his other main comparisons such as the Dundrum and Pavillions shopping centres. These centres, he said – particularly Dundrum were more modern, enjoyed a better tenant mix and were located in better commercial locations.

The Respondent's Evidence

Mr. Maher, a Valuer in the Valuation Office, having taken the oath, adopted his written précis and valuation which had previously been received by the Tribunal and the appellant as being his evidence-in-chief.

In his evidence Mr. Maher put forward a valuation of €1,797,000 calculated as set out below:

92,396 car spaces @ €750 per space = €1,797,000.

In support of his opinion of net annual value, Mr. Maher introduced 6 comparisons details of which are set out in Appendix 3, attached to this judgment.

Mr. Maher said that since he was carrying out a revision of valuation under Section 28 of the Act, the proper statutory basis of valuation was set down in Section 49. Having regard to the nature of the property, he came to the conclusion that the use of Section 49(1) was appropriate by virtue of the fact that there were a number of properties comparable to the property concerned currently on the valuation list for South County Dublin rating authority area. Accordingly, therefore, he had examined the values of these properties – that is car parking attached to or forming part of commercial and mixed-use development schemes in Tallaght and located close to The Square and found that several of them were valued at a uniform rate of €750 per space. He also examined the value of the car parking at the Ashleaf Shopping Centre which was valued at €650 per space (Comparison No. 3) and the multi-storey car park adjacent to Tallaght Hospital which was valued at €1,500 per space (Comparison No. 2) but was not relying on these comparisons as they were not truly comparable to the property concerned. The other comparisons, he said, were broadly similar in all material respects to the property concerned in as much as they were car parks forming part of modern mixed-use development schemes with a commercial and residential content and which operate a fee paying regime similar to that in relation to the property concerned.

Comparison No. 1 - Underground fee paying car park in a recently constructed mixed-use development, located adjacent to The Square and providing 1,200 car parking spaces with lift access to the retail units and apartments overhead.

Comparison No. 2 - Multi-story fee paying car park providing 512 car parking spaces over 4 levels located adjacent to Tallaght Hospital and The Square Shopping Centre.

Comparison No. 3 - Underground fee paying car park at Ashleaf Shopping Centre located at the junction of Cromwellsfort Road and Whitehall Road in the Kimmage/Crumlin area. This shopping centre is located in a predominately residential area. Ashleaf is a neighbourhood shopping centre and consequently much smaller than The Square Shopping Centre.

Comparison No. 4 - Underground fee paying car park in a commercial development including the Marks and Spencer store, located adjacent to The Square Shopping Centre.

Comparison No. 5 - Underground fee paying car park forming part of a mixed-use development located close to the property concerned.

Comparison No. 6 - Underground fee paying car park forming part of a mixed-use development located close to The Square Shopping Centre.

Mr. Maher said that with the exception of Comparisons No. 2 and 3, all of the car parks referred to in his précis were fee paying and located close to the property concerned. All were valued at a uniform rate of €750 per space and in his opinion this represented the tone of the list for fee paying car parking which form part of mixed-use development schemes in the Tallaght area and located close to the property concerned. Mr. Maher said he could not accept Mr. McHugh's proposition that the car parking at The Square should be valued differently to other car parks in Tallaght, by virtue of the fact that The Square was a regional shopping centre. In his opinion there was sufficient valuation evidence in the Tallaght area to make a valuation of the property concerned in accordance with Section 49(1). It was, Mr. Maher said, unnecessary to have regard to the provisions contained in Section 49(2)(a), as Mr. McHugh had, nor was there any reason to have regard to the values of other car parking attached to other regional shopping centres in adjoining rating authority areas. In any event, each rating authority area had its own unique tone of the list and this was something that Mr. McHugh did not appear to fully appreciate. In the circumstances, comparisons drawn from other rating authority areas were not reliable and could not be preferred to comparisons drawn from the same rating authority area in which the property concerned was located.

Mr. Maher said that at arriving at his valuation of the property concerned he had considered whether or not it would be appropriate to make quantum allowance. However having regard to the size of The Square Shopping Centre and range of facilities on offer therein he came to the conclusion that the numbers of spaces provided thereat were necessary and not surplus to normal requirement.

Under cross-examination Mr. Maher said he was familiar with Tallaght but had not been involved in the valuation of The Square Shopping Centre at the 2007 revaluation. When asked where he had sourced his comparison evidence, he said he had taken the evidence from the valuation records but had not physically checked the facts contained therein by inspecting the properties referred to. Mr. Maher said that he accepted that the property concerned was a separate single rateable property and that it would be fair to describe it as a car park at a regional shopping centre. He agreed that this was not how it was described in the valuation list but said that this was not in itself of any great importance.

When asked by Mr. Hickey if the property concerned was different from his comparisons, Mr. Maher said that as far as he was concerned *“a car park is a car park is a car park”* and it was not his function to make a distinction between a car park forming part of a regional shopping centre or any other car parking facility. Mr. Maher said that as far as he was concerned, he valued the property concerned as a car park and based his valuation by comparison with the values of similar car parks in the Tallaght area and whose values appeared on the current valuation list for the South Dublin County Council rating authority area. He agreed with Mr. Hickey that none of these car parks were attached to a regional shopping centre and to that extent – and to that extent only – they were not the same as the property concerned.

When asked by Mr. Hickey if he would have regard to the values of other car parks at Dundrum Shopping Centre and the Pavillions Shopping Centre which were valued in accordance with Section 48 as at 30th September, 2005, Mr. Maher said that he might have had, if he considered the valuations to be of assistance, but not necessarily to the exclusion of all other evidence of whatever type that might be available to him. In any event the proper basis for the valuation of the property concerned was contained in Section 49(1) and not in Section 48 nor 49(2)(a).

When it was put to Mr. Maher that Mr. McHugh's evidence was to the effect that, there being no properties on the valuation list for the South Dublin rating authority area, it was not possible to value the property concerned on the basis of Section 49(1), Mr. Maher said he did not accept this proposition. As far as he was concerned, the property concerned was a car park and there were several such car parks in the vicinity of the property concerned, the values of which are on the valuation list. The fact that these car parks formed part of mixed-use development schemes which were not of the same type as The Square Shopping Centre, was not of itself particularly material. The fact of the matter being that they were all car parks just as the property concerned is.

When asked if he had been aware that the car parking at Tallaght Hospital was valued at €150 per space, Mr. Maher said he was but chose to disregard it as it was out of line with other car parks in the area. It was, he said, "*the odd one out*". When asked about the Ashleaf Shopping Centre and more particularly if it was a relevant comparison, Mr. Maher said that in his opinion it was, to the extent that it was a car park at a shopping centre containing a Dunnes Stores, large public house and a number of retail units. When further questioned about his other comparisons, Mr. Maher said that his comparison were relevant in that they all formed part of mixed-use development schemes and several were located close to The Square. The fact that these developments were not regional shopping centres was not itself particularly important in his opinion. When it came to valuing a car park no distinction should be made for the nature of the development of which it formed a part.

When asked by Mr. Hickey if he had considered making a quantum allowance, having regard to the fact that the property concerned contained 2,396 spaces as against 1,002 spaces in his comparison No.1 and roughly 500 or less in his other comparisons, Mr. Maher said that he was of the opinion that no such allowance was warranted having regard to the size of The Square Shopping Centre and the demand for car parking spaces thereat.

When asked by Mr. Hickey if he was aware that the car parking spaces at the St. Mary's Dominican Priory and the Plaza Hotel had been valued at €200 and €300 per space respectively, Mr. Maher said he was aware of these valuations but had come to the conclusion that the established tone of the list for car parking attached to commercial developments in Tallaght was €750 per space. In his opinion the proper basis for the valuation of the subject property was contained in Section 49(1) and not Section 49(2)(a).

Section 49(1) he said maintained equity between rate payers in the rating authority area concerned and in his experience he had never yet felt it necessary to have recourse to Section 49(2)(a).

Mr. Hickey asked Mr. Maher if he could give any good reason as to why the car parking at Dundrum Shopping Centre was valued at €550 per space, as against €750 per space in respect of the property concerned. In response Mr. Maher said he could make no comment on the relative values other than to say that they were located in different rating authority areas and hence were of no assistance when preparing a valuation on the basis of Section 49(1). Mr. Maher said he would not disagree with Mr. McHugh's evidence that the Dundrum Shopping Centre was more modern, larger and had a higher specification than The Square Shopping Centre. He also acknowledged that the Zone A rents were 50% higher at Dundrum than in The Square but could not accept the proposition that the values of the car parking spaces at the two centres should bear a similar relationship to one another. In short, as far as he was concerned, the tone of the list for car parking spaces attached to commercial developments in Tallaght was €750 per space and this was the figure he attributed to the spaces at The Square Shopping Centre.

Closing Submissions

In his closing submission Mr. Hickey said that the comments of the Tribunal in the **VA06/2/045 – Orange Tree Ltd.** appeal were relevant to this appeal, particularly Section 33 and Section 34 thereof which states as follows:

“33. It is clearly the function of the valuer when valuing a property for the purposes of revision to first have regard to Section 49(1). Only when the valuer is satisfied that there are truly no comparable properties within the relevant Rating Authority area can Section 49(1) be rejected and 49(2) be considered. In such an exercise it is not sufficient to opt for Section 49(2) by virtue of the fact that there may be “better comparisons” outside the Rating Authority area than within. Section 49(1) cannot be set aside if there are comparables available, no matter how unsatisfactory the valuer may consider these to be. It is part of the valuer's skill to examine and analyse all the relevant information available and to make such adjustments and allowances as may be necessary or appropriate in order to make the exercise one of some consequence. In some instances the range and extent of the allowance and adjustments necessary may indeed render such an exercise impractical or unworkable.

34. In the context of this appeal the Tribunal is of the view that from a purely property perspective the better comparisons are those located outside the Dun Laoghaire/Rathdown area. That said however, the Tribunal is satisfied that there are, within the Dun Laoghaire/Rathdown area, properties which are comparable in the normal sense of the word in that they are retail units in shopping centres, although they are somewhat different in scale and quality of finish to Dundrum Town Centre. Nonetheless there is available to an experienced, competent rating valuer sufficient material to enable him or her to carry out a meaningful analysis which would enable the valuation to be made in accordance with the statutory provisions and more particularly Section 49(1).”

With regard to the above paragraphs, Mr. McHugh had looked at the valuation of car parks in the Tallaght area and came to the conclusion that they were not relative comparisons in as much as the property concerned was car parking forming part of a regional shopping centre development. In such circumstances Mr. McHugh correctly came to the conclusion that Section 49(1) was not the appropriate basis of valuation and carried out his valuation in accordance with Section 49(2)(a). Mr. McHugh was also correct to look at the values of the car parks at other regional shopping centres located close to The Square, notwithstanding the fact that they were located in other rating authority areas. His reasons for having regard to the values of these car parks were fully justified in light of the fact that the values of these car parks had recently been determined as part of a revaluation process, and shared a common Section 20 valuation date of 30th September, 2005 with the property concerned and were located relatively close to one another within the greater Dublin area.

Mr. Dodd in his closing submission said that the proper valuation basis was contained in Section 49(1). The only circumstances under which Section 49(2)(a) could come into play were in those unusual circumstances where the property concerned was unique or of a one off type. This was not the situation in regard to the property concerned as it was a car park and there were many such car parks in close proximity to the property concerned whose values appeared on the valuation list for the South Dublin County Council rating authority area. There was, Mr. Dodd said, no cogent reason to set aside Section 49(1) which was the proper statutory basis for valuing the subject property.

Having carefully considered all the submissions and arguments adduced and the evidence advanced on behalf of the appellant and the respondent, the Tribunal has arrived at the following findings and conclusions.

Findings and Determination

The oral hearing in relation to this appeal extended over four days. During the course of the hearing counsel appearing on behalf of the parties raised a number of issues in relation to the meaning and operation of certain sections contained in the Valuation Act, 2001. Counsel also referred to a number of matters regarding rating law and practice in written and oral submissions and opened to the Tribunal a wide range of authorities and rating appeal cases, as listed at the end of this judgment. The Tribunal is indebted to Mr. Hickey and Mr. Dodd for their contributions, which were of great assistance to the Tribunal in arriving at its final determination. Similarly it must be said that the evidence adduced by Mr. McHugh, Ms. Spain, Mr. Kyne, Mr. Maher and Mr. Furlong was clear, concise, fulsome and helpful to the Tribunal.

Summary and Conclusions

The Property

The property concerned in this appeal is the car parking at the Square Shopping Centre. In its judgment dated the 4th February, 2011 the Tribunal found that the introduction of the electronic control barrier and time based paying regime constituted a material change of circumstances as defined in the Act. The Tribunal also found that the car parking was under the control of and occupation of Square Management Ltd. (Management).

The appeal property consists of a total of 2,396 spaces including 1,361 spaces at surface level, 733 spaces in a multi-storey car park block and 302 spaces at roof level.

Basis of Valuation

It is common case that the property concerned is to be valued in accordance with the provisions of Section 49 of the Valuation Act, 2001. The appellant contends that in the absence of any properties comparable to the appeal property on the valuation lists for South Dublin rating area, then the basis of valuation is contained in Section 49(2)(a). The respondent contends that there are other properties comparable to the appeal property on the

valuation list and, in such circumstances; the valuation is to be determined on the basis of Section 49(1).

The Valuation Act 2001

At this stage it might be helpful to look at the Valuation Act, 2001 in some detail in order to highlight the differences between sub-sections 49(1) and sub-sections 49(2)(a) and the underlying differences in the valuation methods contained therein.

The Valuation Act, 2001 which came into effect on the 2nd May 2002, is the sole statute dealing with the valuation of property for rating purposes. *Inter alia*, Section 13 provides for the valuation of all relevant properties in the state in accordance with the provisions of the Act. In order to achieve this end, Section 19 of the Act provides that, the Commissioner of Valuation, after consultation with the Minister for the Environment and Local Government, may “*make an Order (and this Act is referred to as a valuation 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 a valuation of every relevant property situated in the area ...*”

The Act further provides at Section 20(1) that “*a valuation order shall specify one date by reference to which the valuation of every relevant property, the subject of the valuation mentioned in the order, shall be determined.*”

To date valuation orders have been obtained in respect of four rating authority areas – namely South Dublin County Council, Fingal County Council, Dun Laoghaire and Rathdown County Council and Dublin City Council. The specified valuation date in respect of the first three rating authority areas is the 30th day of September, 2005 and the specified date for the revaluation of every rateable property in the Dublin City Council area is the 7th day of April, 2011.

It would appear that it is the policy of the Commissioner of Valuation to obtain valuation orders in respect of each rating authority area in the state over a period of years. Until such time as a valuation order is obtained and a revaluation exercise completed, the existing valuation lists shall remain in force.

When a Section 19 valuation exercise has been completed, the valuation of each relevant property appearing on the valuation list represents what is commonly referred to as “the tone of the list.” The emergence of and the significance of the “tone of the list” was considered in some detail by the Tribunal in appeal ref. no. **VA08/5/219 - Marks & Spencer**. Having regard to the fact that the revaluation of each relevant property in each of the rating authority areas will be carried out over a period of years, it is probable that each rating authority area will have its own unique “tone of the list” which will reflect rental values as at the date specified in the Section 19 order.

Despite the fact that each rating authority area will have its own unique “tone of the list” does not necessarily mean that several rating authority areas may not share a common relevant valuation date. Indeed, this has already occurred in respect of the Section 19 revaluations prepared for South Dublin County Council, Fingal County Council and Dun Laoghaire-Rathdown County Council, which have a common specified valuation date of the 30th September, 2005. The revaluation exercise in the first two rating authority areas are completed, save for a small number of appeals which are subject to Section 39 appeals to the High Court. As far as the Dun Laoghaire-Rathdown County Council rating authority area is concerned, the revaluation process has arrived at the Section 34 appeal stage and some 300 appeals have been lodged with the Valuation Tribunal and will be determined over the next several months.

Section 25 provides as follows:-

(1) It shall be the duty of the Commissioner to exercise the powers conferred on him or her by subsections (1) and (2) of section 19 from time to time in relation to each rating authority area so that the result referred to in subsection (2) is achieved.

(2) The result mentioned in subsection (1) is that a period of not less than 5 years and not more than 10 years elapses between the date on which any valuation list in relation to the area concerned is caused to be published under section 23 and the date on which the next subsequent valuation list in relation to that area is caused to be so published.

In the period between Section 19 revaluation exercises, the Act provides that the occupier and other interested parties, as set out in Section 27 may make an application to the Commissioner of Valuation for a revision of the valuation of a property appearing on the

relevant valuation list. In such circumstances, the Commissioner shall, under the provisions of Section 28, appoint a Revision Officer who is empowered to amend the valuation of a property concerned appearing on the valuation list if “a material change of circumstances”, as defined in Section 3 of the Act has occurred. In amending the valuation of the property concerned, as it appears on the valuation list or entering a new valuation on to the valuation list, the basis of valuation shall be that set down in Section 49.

Section 49

Section 49 provides as follows:-

(1) 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.

(2) For the purposes of subsection (1), if there are no properties comparable to the first-mentioned property situated in the same rating authority area as it is situated in then—

(a) in case a valuation list is in force in relation to that area, the determination referred to in subsection (1) in respect of the first-mentioned property shall be made by the means specified in section 48 (1), but the amount estimated by those means to be the property's net annual value shall, in so far as is reasonably practicable, be adjusted so that 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 by reference to the date specified in the relevant valuation order for the purposes of section 20 ,

(b) in case an existing valuation list is in force in relation to that area, the determination referred to in subsection (1) in respect of the first-mentioned property shall be made 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 1 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.

The purpose of Section 49 is to ensure that valuations determined on foot of a request for revision and where a material change of circumstances has occurred, are made in such a manner as to maintain equity between rate payers so that each individual rate payer will bear a proper proportion of the total rates bill for the rating authority area concerned. In most circumstances, the valuation on foot of a request for a revision shall be determined in accordance with Section 49(1) - in other words based on the "tone of the list." From time to time, however, situations may arise where there are no truly comparable properties on the valuation list and, in such circumstances, Section 49(2)(a) comes into play. However, when valuing a property on the basis of Section 49(2)(a), all the established methods may be considered, such as having regard to actual rents; by having regard to the values of comparable properties; by using the receipts and expenditure method; by using the contractors basis of valuation having regard to the provisions of Section 50 of the Act. In the final analysis, the method to be preferred is the one most likely to provide the proper valuation of the property concerned in accordance with the statutory provisions.

When using Section 49(2)(a) it is implicit that there are no properties truly comparable to the property being valued on the relevant valuation list. However, where there exists evidence of comparable properties in other rating authority areas then it may be appropriate to have regard to this evidence. Obviously, the weight to be accorded to such evidence will depend on a number of factors including the relevant Section 20 specified valuation date, proximity to the property concerned and the degree to which they are physically comparable in terms of property type, scale, location and other socio-economic factors which would have a bearing on rental value. It follows of course that the greater the similarities there are between the property concerned and such comparables and the closer the relevant valuation dates, the greater will be the weight to be accorded to this evidence.

Section 49(2)(b) is a transitional provision and applies to revisions of valuation in respect of relevant properties which are situated in those rating authority areas which have not yet been subject to Section 19 revaluation programmes. In time, when Section 19 revaluations have been obtained in respect of all the rating authority areas in the state, Section 49(2)(b) will no longer be of any relevance.

The Square Shopping Centre

The Square Shopping Centre was originally conceived as being the focal point of the development of a new town centre for Tallaght. In its present state, it is a three-storey structure providing some 150 retail units of various sizes, including three anchors which are tenants (Dunnes Stores, Tesco and Debenhams) and a multi-screen cinema complex together with 2,396 car parking spaces which are the subject of this appeal.

It is common case – albeit with some reservation on the part of Mr. Maher – that the Square is a regional shopping centre in the Irish context. While there is no precise criteria as to what constitutes a regional shopping centre, it is fair to say that the location and scale of the complex and the range of shopping and other facilities provided therein, together with extensive car parking, are important factors. So also is the availability of a good transportation infrastructure so as to attract shoppers from a wide catchment area. From the evidence tendered, there are a number of major shopping centres in the greater Dublin area located convenient to the M50 motorway such as the Dundrum Shopping Centre, the Square, Liffey Valley, Blanchardstown, Charlestown and the Pavillions Shopping Centre at Swords. It is doubtful if the latter two in their present state of development are of a scale and nature to warrant the description of being a regional shopping centre.

One of the key requirements of a regional shopping centre is that it provides extensive car parking facilities, as it draws its customer base from a wide catchment area, a high percentage of whom are car borne. The only other regional shopping centre in the South Dublin rating authority area is the Liffey Valley Centre which operates a “free to all” car parking regime. In line with current Valuation Office practice such car parking facilities are not considered to be relevant properties for rating valuation purposes. Blanchardstown Shopping Centre operates a similar free car parking system but at the other three centres (Dundrum, Charlestown and the Pavillions) there is in place a fee paying car parking regime.

Dundrum Shopping Centre is located in the Dunlaoghaire Rathdown County Council rating authority area while Charlestown and the Pavillions Shopping Centre are located in Fingal County Council rating authority area. The relevant Section 19 valuation date for each of these rating authority areas is 30th September, 2005 - that is the same as that for the South Dublin County Council rating authority area in which the appeal property is located.

Shopping Centres and Car Parking

There is a symbiotic relationship between large shopping centres and car parking. Just as it would be unthinkable for a developer to contemplate the building of a regional shopping centre without extensive car parking facilities so too it would be equally unthinkable for a planning authority to grant planning permission for such development without setting down strict criteria in relation to the number of spaces to be provided. It is axiomatic, therefore, that regional shopping centres and large retail centres must have adequate car parking to meet the needs of tenants, shoppers and shopping centre staff.

Tenants are also aware of the importance of adequate car parking and agree rents in the knowledge that car parking is available and that they will in most instances be obliged to contribute to the upkeep, maintenance and operation of the car park as part of the service charge arrangement. This is the situation that pertained at the Square, although, it would now appear that Management, since the introduction of the fee paying regime has assumed direct financial responsibility for the provision and maintenance of this essential facility and service.

Tenant's Rights

Each unit in the Square is occupied under a sublease and inter alia each sublease contains a proviso in the following terms "*the right of the tenant, it's permitted successors, assigns, licensees and invitees to use the car parking spaces as designated for such use by the freeholder during the term hereby granted*"

While the above proviso in the subleases grants some modicum of comfort to the tenants in relation to the car parking, there is nothing in the proviso that gives the tenants or their invitees etc. a right (real or implied) to use the car park without charge or indeed a reduced charge. Similarly, such rights as are granted do not give the tenants an overriding right to occupy specific spaces at any time. The fact that Management has reserved a number of spaces for centre staff use, subject to what has been described as an annual registration fee, does not undermine the fact that the car parking is available to anyone who is prepared to pay the appropriate fee calculated on a progressive hourly rate. Tenants and shoppers do not enjoy preferential rates of charges compared to members of the general public, which one

would expect if there was an implied right for them to the use of the car park and for which the tenants paid as part of the rent of the unit in their occupation.

It is manifest from its actions that Management understands the importance of providing satisfactory car parking facilities at the Square for the benefit of tenants, centre staff, shoppers and other users. The introduction of the time-based fee paying regime was to discourage the use of the car parking by long stay parkers to the detriment of the tenants, centre staff, shoppers and other users. Similarly, the allocation of a proportion of the available spaces for the sole use of centre staff (subject to the payment of a nominal annual fee) is a further acknowledgment by Management of the importance of the availability of car parking to the tenants and their staff but not an acknowledgment of any rights – real or implied – thereto.

Perhaps the real strength of the car parking proviso is that it could be used to prevent the owners (Management) from entering into an arrangement whereby the tenants, centre staff, shoppers and other users of the centre would be precluded from using the car parking facilities.

Double Counting

In rating law there can be only one occupier of a relevant property. Where it can be shown that the valuation of a property has already been included in the valuations of other properties, then it would be wrong in law to value the said property and enter it onto the valuation list because to do so would represent double counting and/or double taxation. In the context of this appeal, no conclusive evidence was adduced to show that the valuations of the individual units in this centre included the value of a car park. It is accepted that the availability of the car park was acknowledged in the assessments and in the rents being paid by the tenants. The only reason why the car park was not valued at the 2007 revaluation was due to the fact that the car parking was available to all free of charge and that in such circumstances it was the policy of the Valuation Office not to value such car parks.

As already stated, the car parking in our opinion, is in the rateable occupation of Management and any such rights that tenants may have under the car parking proviso are not sufficient to sustain the argument that the car park is in whole or in part in the beneficial occupation of the

tenants in common and that the valuation of the car park is included in the valuation of the shop units.

Basis of Valuation

Having regard to the foregoing finding in relation to double counting, the only matter to be determined is the valuation of the property concerned in accordance with the relevant sections of the Valuation Act, 2001.

The basis of valuation for valuing a relevant property on foot of a request for a revision of valuation under Section 27 and Section 28 of the Act is contained in Section 49.

Section 49(1) provides that the property concerned be valued having regard to what is colloquially referred to as being the tone of the list. If there are no properties comparable to the property concerned in the valuation list, then the valuation of the property is to be determined in accordance with Section 49(2)(a).

The property concerned in this appeal is the car parking forming part of an enclosed regional shopping centre. The Tribunal finds as a matter of fact that there are no comparable properties on the valuation list for South Dublin rating authority area. Accordingly, therefore, the valuation of the property concerned is to be determined in accordance with Section 49(2)(a).

Method of Valuation

There are four established methods of valuation for arriving at the valuation of a property for rating purposes: namely the rental method, the comparison method, the receipts and expenditure method and the contractor's method of valuation. In any situation the preferred method is that which is most likely to produce the proper estimate of net annual value in accordance with the statutory provisions.

In relation to this appeal, no evidence of rental value was adduced nor did any of the parties suggest that the contractor's basis or the receipts and expenditure method of valuations was appropriate, notwithstanding the fact that, the appellant submitted management accounts for the year ending 31st August, 2010 in respect of the property concerned.

In effect, both parties relied upon comparisons in order to arrive at what they considered to be the appropriate net annual value of the property concerned.

The respondent relied mainly upon the valuation of several car parks forming part of mixed-use developments in the vicinity of the property concerned. In the Tribunal's view, these comparisons are not relevant comparisons, in so far as they are not car parking facilities forming part of a regional shopping centre. The appellant, on the other hand, introduced comparisons drawn from other rating authority areas within the greater Dublin area, all of which were subject to Section 19 revaluations. In all instances, the date specified in the Section 20 Valuation Order was 30th September, 2005, that is the specified date for the South Dublin County Council rating authority area revaluation. In the Tribunal's opinion this evidence is admissible in principle, but care must be exercised in examining the relevant valuation factors in respect of these comparisons. Greater weight is to be given to that property or properties which most closely resemble the property concerned in terms of physical characteristics, location, scale and age. Regard must also be had to the social and economic factors in the area in which the comparisons are located relative to those in Tallaght where the property concerned is located.

Having regard to Mr. McHugh's evidence in relation to the comparisons, we have come to the conclusion that the Dundrum Shopping Centre is closest in terms of physical characteristics, but it must be taken into account that it is a relatively new development with a wider catchment area, better retail mix and located in an area where there would be a greater level of discretionary expenditure. The Pavillions Shopping Centre and Charlestown Centre in their current state are not truly comparable and are not yet of a scale to warrant being described as regional shopping centres. Nonetheless, by virtue of the fact that they are large modern enclosed shopping centres occupying a location which in socio-economic terms are not dissimilar to the property concerned, they cannot be lightly set aside.

The car parking spaces at Dundrum are at seven levels under the shopping malls and provide a total number of 3,300 spaces valued at €50 per space. This valuation was not subject to a Section 30 or Section 34 appeal.

At the Pavillions Shopping Centre which is located in the Fingal County Council rating authority area the car parking is provided at surface level and in multi-storey block somewhat

similar to that at the property concerned. In this instance all spaces (1,676) are valued at a uniform rate of €400 per space. This valuation is currently on the valuation list and was not subject to appeal.

The car parking at Charlestown consists of 329 spaces at surface level and 330 at basement level. At the revaluation, the spaces were valued at a uniform rate of €330 per space. No appeal has been lodged against this assessment.

Determination

Having carefully considered all the evidence and submissions adduced on behalf of the appellant and the respondent and having regard to the legal and valuation principles contained in the various cases and authorities opened by counsel, in so far as these were considered relevant to this appeal, together with the findings and conclusions of the Tribunal as set out above, the Tribunal makes the following findings and determination.

1. The proper basis of valuation is contained in Section 49(2)(a) by virtue of the fact that there are no properties truly comparable on the valuation list for South Dublin County Council rating authority area. In the absence of rental evidence the evidence of assessments located in other rating authority areas close to the property concerned and which share a common Section 20 specified valuation date is deemed to be admissible.
2. The valuation of the car parking which is in the sole control and occupation of the appellant is not included in the valuation of the individual units contained in the shopping centre. Hence, no issue of double counting/double taxation arises.
3. Having regard to the valuation evidence adduced in relation to the Dundrum Shopping Centre, Charlestown Shopping Centre and the Pavillions Shopping Centre and taking into account the difference in scale, location and social and economic factors relative to those pertaining to the Square, we are of the opinion that the car parking at the Square should be valued somewhere between €550 per space (Dundrum) and €400 per space (Pavillions).

Valuation

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

2,396 Car Parking Spaces @ €475 per space = €1,138,100

NAV, say €1,138,000

And the Tribunal so determines.

Authorities and cases opened to the Tribunal

1. Ryde on Rating and the Council Tax (various sections)
2. Doncaster Union Assessment Committee v Manchester, Sheffield and Lincolnshire Ryle
3. VA89/0/131 - Navan Shopping Centre Limited
4. Holywell Union v Halkyn District Mines Drainage Co [1895] AC 117
5. VA97/2/039 - Quinn Family Partnership
6. VA91/2/059 - Erin Executor and Trustee Co. Ltd.
7. VA91/4/004 - Holland Developments Limited
8. Westminster Council v Southern Railways [1936] AC 511
9. Carroll v Mayo County Council [1967] 1 I.R. 364
10. VA95/5/010 - University of Limerick
11. Iarnród Éireann v Commissioner of Valuation, Barron J., High Court, Unreported, 27th November 1992
12. Ravenseft Properties Ltd. v Assessor for Strathclyde Region (1991 S.C. 266)
13. Scottish Development Agency v Assessor for Fife Region (1987 S.C.139)
14. Assessor for Central Region v Samuel Properties (Developments) Ltd (Unreported – 14th June, 1985)
15. Assessor for Dunbartonshire v William Baird & Company Ltd. (1926 S.C. 479)
16. VA08/3/018 – The Glasshouse Hotel
17. VA02/3/002 – Weir & Sons Dublin Limited
18. VA05/2/022 – Lidl Ireland GmbH
19. VA10/1/009 – Maxela Limited
20. VA96/2/021 – Hickey & Company Limited
21. VA00/3/022 - Bay Trading Co.
22. VA02/2/091 – Shoezone Ltd., t/a Tylers
23. VA06/2/045 – Orange Tree Ltd.