LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

RATES (NORTHERN IRELAND) ORDER 1977

IN THE MATTER OF AN APPEAL

VR/32/2011

BETWEEN

DEBENHAMS PLC - APPELLANT

AND

THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND - RESPONDENT

Re: Unit 39 Fairhill Shopping Centre, Ballymena

Mr Michael R Curry FRICS Hon.Dip.Rating

Introduction

1. The Appellant ("Debenhams") appealed against a Decision the Respondent ("the Commissioner") had made in regard to an alteration made by a district valuer in the Valuation List ("the List") assessing the net annual value for rating purposes ("NAV") of the hereditament that it occupied at Fairhill Shopping Centre, Ballymena ("Fairhill ").

2. The main contention on behalf of Debenhams was to the effect that there were some retail hereditaments which by virtue of their size and location were, or should be recognised as being, in a distinct mode or category within the List. This would be a category one step below anchor stores, comprising what might be termed, for convenience, mini-department stores. These would attract, as occupiers, what landlords would see as key retailers. It was further contended that, within the List, the market for mini-department stores might differ in values from the markets for larger and/or smaller hereditaments. It was also suggested that if there were such a category, the appropriate valuation method would not be a zoning approach but would be an overall approach. The Commissioner disagreed with all these contentions.

3. In the course of an oral Hearing the Tribunal was invited to consider, among other things, the helpfulness or otherwise of evidence about the NAVs, size, location and configuration of other hereditaments within Fairhill. It was contended on behalf of Debenhams that these should include in particular Next and New Look.

4. The List is continuously being revised, mainly to deal with new or altered properties. (See the discussion at para 19 below.) The Commissioner had excluded the latter two hereditaments from his consideration because, although they were in the List at the time of his decision, they

had not yet been entered in the List at the time the district valuer entered Debenhams in the List. And, consistent with that practice, the expert witness instructed by the Commissioner in this appeal similarly had excluded them from his consideration in his preparations for the hearing. It was suggested on behalf of the Commissioner that the Tribunal also should exclude them in arriving at its determination on the ultimate issue.

5. The parties agreed to make written legal submissions on this "exclusion issue" only. Subsequently, in the submission on behalf of Debenhams, it was noted that, if the Tribunal concluded that the material should have been taken into account, the Commissioner's expert witness had not as yet had a fair opportunity to deal with it. In these circumstances the Tribunal suggested, and the parties agreed, that it should deal with the exclusion point as a preliminary issue.

6. The discussion of the background is intended to provide a context for this decision on the exclusion issue only and nothing in this decision should be taken to be determinative of any other aspect of the ultimate issue. For convenience only, the Tribunal refers to hereditaments by the name of the occupier and describes some hereditaments as smaller or larger etc.

Procedural Matters

7. The Tribunal received written submissions on the preliminary issue from Mr Stewart Beattie QC on behalf of Debenhams and from Mr Stephen Shaw QC on behalf of the Commissioner.

8. Earlier, in connection with the ultimate issue, the Tribunal had received written and oral evidence from Mr Nicholas Rose and Mr William Joss, both experienced Chartered Surveyors.

9. After preliminary consideration of the submissions, following discussion with the Tribunal, the parties reconsidered and revised the framing of the preliminary issue.

10. As the Tribunal's reasoning appeared to it to have gone beyond the scope of the submissions, it then first issued its Decision on this preliminary issue in draft form it so as to allow the parties to respond, if they so wished.

11. They did so. The Tribunal received a written response from Mr Shaw QC on behalf of the Commissioner and a rejoinder from Mr Stewart Beattie QC on behalf of Debenhams. The latter was subsequently amended to redact reference to some matters not relevant to the exclusion point.

12. This is the revised and final decision of the Tribunal on the exclusion issue.

Positions of the parties

13. The revised issue ("the exclusion issue") was agreed to be this:

> "In reaching its decision under Article 52 of the Rates (Northern Ireland) Order 1977 with regard to the subject hereditament and what appears proper to it, is the Lands Tribunal entitled to exclude the hereditaments occupied by Next and New Look?"

14. Prior to the issue of the draft decision, Mr Beattie QC suggested that the legislative regime set no limit after which valuation evidence was to be excluded and that there was no sound basis for the exclusion of valuation evidence concerning revisions made some 13 months after the valuation date. Mr Shaw QC suggested that the Tribunal should exclude revisions to the List made later than the relevant valuation date as that would fit in with the plain language of the statute, the decided authorities and would be consistent with sound policy and practice.

15. Having considered, and in response to, the draft decision, Mr Shaw QC accepted that it was permissible to have regard to post-valuation date market comparables when assessing a market value in the real world, outside the special requirements of valuations for rating. He further accepted that there may be circumstances in rating cases in which the Tribunal may be correct to conclude that it is not entitled to exclude later assessments. But he suggested that, in the hypothetical market represented by the List, it was not possible to have regard to post-valuation date assessments of NAV since those assessments themselves in fact had regard to the earlier assessment which is the subject of challenge; he suggested the result would be circular and illogical. In this case, the district valuer, in arriving at the two post-valuation date assessments of Next and New Look, had in fact relied on the earlier assessment of Debenhams, which is the subject of this appeal, as evidence on which to base their valuations. Mr Shaw QC further suggested that where those later assessments were themselves the subject of appeals to the Commissioner, if this Tribunal had regard to them, that would prejudice the outcome of their appeals; and would result in a cycle of appeals and reviews following every alteration in the List where there were also appeals outstanding. In his rejoinder Mr Beattie QC suggested that having regard to these assessments would be consistent with the wording of the legislation and the use of the word "proportionate" in the 1977 Order and the concept of proportionality was highly material.

16. Mr Beattie QC further suggested that the decision of the Commissioner could not be reconciled with the comparables, and it was such an inconsistency that the legislation as drafted could prevent. But the Tribunal, at this stage, forms no view on whether or not there was any relevant inconsistency.

Discussion

17. The Tribunal was referred to:

    i. The Rates (Northern Ireland) Order 1977 ("the 1977 Order");

    ii. The Northern Ireland Transport Holding Company v Commissioner for Valuation [1996] VR/12/1982;

    iii. Marks & Spencer Plc v Commissioner for Valuation [1991] VR/9/1993;

    iv. Kennedy Entertainments Limited v Commissioner of Valuation [2002] VR/27/2000; and

    v. A Wear Limited v Commissioner of Valuation [2003] VR/3/2001.

18. The Tribunal also has considered

    in connection with valuations for rating purposes:

    i. Pointer v Norwich Assessment Committee [1922] 2 KB 471 CA;

    and in connection with valuations for other purposes:

    ii. Melwood Units v Commissioner for New Roads [1979] AC 426 PC;

    iii. Segama N. V. v Penny Le Roy [1984] 1 EGLR 109;

    iv. McKeown Vintners v Commissioner of Valuation [1991] RA 223; and

    v. Scalene Investments Limited v Department for Social Development [2008] R/30/2005.

19. This exclusion issue must be considered against the background of the roles of a district valuer, the Commissioner and this Tribunal in the context of valuations and appeals under the 1977 Order. The Tribunal has set out below an outline only:

    i. The head of the Department of Finance and Personnel appoints an officer of the Department as the Commissioner of Valuation for Northern Ireland. (See Article 36.) From time to time, the Department requires the Commissioner to prepare and publish a new valuation list containing a general revaluation. (See Article 45.) Any net annual value ("NAV") of any hereditament in a new list is ascertained by reference to an antecedent valuation date, but on the assumption that the hereditament was in the same state and circumstances as at the time when the list comes into force. (See Article 39A.)

    ii. Northern Ireland is divided into valuation districts and, in respect of each such district, the Department appoints an officer of the Department as the district valuer. Without prejudice to the functions conferred on district valuers by the Order, the Commissioner supervises them. (See Article 36.) Where the district valuer considers that a valuation list ought to be revised in relation to any hereditament he does so. (See Article 49.) Where a District Valuer does so, he must act in accordance with the general rule that in estimating the net annual value of a hereditament for the purposes of any revision of

a valuation list, regard shall be had to the net annual values in that list of comparable hereditaments which are in the same state and circumstances as the hereditament whose net annual value is being revised. (See Schedule 12.)

iii. Any person who is aggrieved by an alteration which the district valuer has caused to be made may appeal to the Commissioner. (See Article 51.) Where an appeal is made to the Commissioner, the Commissioner investigates the subject matter of the appeal and reviews the alteration. After completing his review, the Commissioner makes such decision with respect to the manner in which the hereditament in question is to be treated as appears to him to be proper; and where that treatment requires an alteration alters that list accordingly. The Commissioner also may make such alteration in any valuation list in relation to any comparable hereditament which is in the same state and circumstances as the appealed hereditament as appears to him to be necessary in order to render the valuations proportionate and uniform. (See Article 52.)

iv. Any person who is aggrieved by the decision of the Commissioner on an appeal or an alteration made by the Commissioner in a valuation list in consequence of such a decision may appeal to the Lands Tribunal. On such an appeal the Tribunal may make any decision that the Commissioner might have made; and if any alteration in a valuation list is necessary to give effect to the decision, direct that the list be altered accordingly. On appeal, any valuation shown in a valuation list with respect to a hereditament shall be deemed to be correct until the contrary is shown. (See Article 54.)

20. The Tribunal next turns to the circumstances of this appeal. Briefly, the history of Fairhill and its valuation for rating was as follows:

i. Fairhill opened about 1991. It was within the town centre. About 2000, the mall was extended by the addition of 8 smaller units. The mall might then be described as a hockey stick in layout. At one end there was pedestrian access to a secondary shopping street; at the other to a surface car park. Short side malls led to larger units - the Co-op and Marks and Spencer.

ii. The Fifth General Revaluation (the current List) was published in April 2003.

iii. In 2004, Marks & Spencer was extended (ground floor retail 3745 Sq M, first floor retail 1378 Sq M – total 6,238 Sq M; valued on an overall basis at £485,000 NAV) and the Co-op was replaced by a large unit - BHS (ground floor retail 2480 Sq M, first floor retail 975 Sq M – total 3,455 Sq M; valued on an overall basis at £280,000 NAV) and 13 smaller units. In addition a multi-storey car park was provided beside Marks & Spencer.

iv. In 2007, a smaller unit, at the end of the mall beside the surface car park, was extended to form a large unit - Debenhams (ground floor retail 752 Sq M, first floor retail 754 Sq M – total 1,507 Sq M). In September 2008 Debenhams was first entered in the List by the District Valuer at £225,000 NAV. He used a zoning approach. Debenhams appealed to the Commissioner in October 2008.

v. In 2009 BHS was sub-divided into two large units: Next (ground floor retail 1,168 Sq M, first floor retail 908 Sq M – total 2,076 Sq M); and New Look (ground floor retail 915 Sq M, first floor retail 707 Sq M – total 1,622 Sq M). In October 2009, while the appeal on Debenhams was pending, Next and New Look were entered in the List by the district valuer at Next £243,000 NAV; and New Look £190,000 NAV. He valued both on an overall basis. Next and New Look both appealed to the Commissioner in November 2009.

vi. Later, in August 2011, the Commissioner gave his decision on Debenhams. He made no change. He did not make any alteration to the other larger units - Next or New Look. (See paragraph 29 iii above and Article 52 of the 1977 Order.) Debenhams promptly lodged an appeal to this Tribunal. The appeals to the Commissioner on Next and New Look remained undecided and their valuations unaltered.

21. The date of the district valuer's certificate relating to Debenhams - 19th September 2008 - was agreed to be the relevant valuation date. The Tribunal agrees with Mr Shaw QC that the valuation must reflect the state and circumstances of the hereditament at the valuation date. It further agrees that the Tribunal is constrained to look at the circumstances that pertained at that date in properly performing its valuation exercise. (See The Northern Ireland Transport Holding Company v Commissioner for Valuation [1996] and Marks & Spencer Plc v Commissioner for Valuation [1990].) In the view of the Tribunal the real issue in regard to the exclusion point was not about what circumstances should be taken into account and it was not about what the circumstances were (shortly) after that date. The Tribunal accepts that expert analysis of the List may reveal relationships, between valuations, that may not have been in the minds of those responsible for the original individual valuations. Debenhams contended that, at that date, there was a category comprised of mini-department stores, which would include Debenhams, Next and New Look, with a distinct market in the List and it really was about whether the Tribunal should exclude evidence from after that date ("post-valuation date evidence") when, in due course, it comes to consider that contention - that the category existed at the relevant valuation date.

22. The issue of post-valuation date evidence has been considered in valuations for other purposes e.g. rent reviews and compulsory purchase. It may be excluded because, in logic, later transactions or settlements could not have been comparisons that influenced the minds

of the hypothetical parties in their negotiations at the valuation date and so could not have influenced market sentiment. Despite that, the view that has prevailed is that they may be included because such evidence may provide, although clearly only with hindsight, an indication of what the market sentiment had been - the state of the market at the earlier date. Excluding such material solely because it was post-valuation date evidence would not now be consistent with the decided authorities on the point and would be out of step with policy and practice in valuations for such purposes. (See for example Melwood Units v Commissioner for New Roads [1979] PC; Segama v Penny Le Roy [1984]; and Scalene Investments Limited v Department for Social Development [2008].)

23. In valuations for rating under the 1977 Order in this jurisdiction and in light of that view, should valuations of comparable hereditaments, entered in the List after the relevant valuation date, necessarily be excluded, and should they be excluded in the circumstances of this case?

24. Mr Beattie QC pointed out that the Tribunal previously had said that it was inclined to the view that a degree of flexibility is appropriate to the approach to market evidence and the evidence should not be confined too closely to only that available at the valuation date. But as Mr Shaw QC pointed out, that was in the context of actual market evidence; not other assessments for rating. (See A Wear Limited v Commissioner of Valuation [2003].)

25. In the leading English rating case on reliance on the assessments of comparables - Pointer v Norwich Assessment Committee [1922] CA Atkin LJ concluded that evidence of the rateable value of comparable premises must be admissible for two reasons. In the first place it was evidence against the assessment Committee in the nature of an admission. And, secondly it may be the only way in which to get to the rental value of the appellant's premises, on the statutory assumptions. Although the procedural arrangements in this jurisdiction are different, the first reason probably is sufficient for the Tribunal to conclude that properly it is not entitled ordinarily to exclude relevant assessments that were in the List at the time of the hearing. There may however be other reasons why they should be excluded.

26. Between general revaluations, where the evidence shows that a part of the List has become settled, the level of values – the "tone of the List" may be said to represent a hypothetical market, represented by the assessments in that part of the List. In effect reliance on these other assessments has become a method of valuation – the comparative method. Probably in most cases, to quote Atkin LJ "that is the way to get to the rental value of the appellant's premises" - the valuer's task is to place the new or altered hereditament at the appropriate level in that hypothetical market. (See McKeown Vintners v Commissioner of Valuation [1991].) If the assessments of hereditaments in the List are equated with transactions or

settlements then post-valuation date assessments may provide an insight into the state of the hypothetical market at the valuation date. Moreover, in rating cases, as a consequence of the requirement to follow the tone of the List, matters such as the passage of time have limited consequences and so it may be said to be a very stable market. Unless consideration of such assessments were barred by statute, decided authorities, rating practice, or the particular facts of this case, there would not appear to be any reason why the approach in rating cases should differ from that in valuations for other purposes.

27. In regard to the circularity point - that it was not possible to have regard to post-valuation date assessments of NAV since those assessments themselves in fact had regard to the earlier assessment which is the subject of challenge – it is clear from the language of the 1977 Order that, in arriving at an assessment a district valuer is compelled to have regard to comparable hereditaments in the List which are "in the same state and circumstances"; he has no option. (See para 19 ii above.) If there are such comparables in the List he must do so, whether or not some or all are at that time the subject of appeal to the Commissioner or this Tribunal. But the position on appeal to the Commissioner is not the same; that compulsion is not repeated in Article 52. The expression is repeated in that Article but in a different context; the Commissioner is given a power, following his decision on an appeal, to make such alteration, in relation to any comparable hereditament in the List, which is in the same state and circumstances as the appealed hereditament, as appears to him to be necessary in order to render the valuations proportionate and uniform. (See para 19 iii above.) In that way the Commissioner, whose role is then independent from that of a district valuer, looks again at all the material and has the opportunity to break potential circularity (including thinking again about alterations that had been made to other assessments by a district valuer while an appeal to the Commissioner is pending). As the Tribunal has said on a number of occasions, the expression – "in the same state and circumstances" – should be given a narrow rather than a broad interpretation so the enquiry need not be extensive and also the number of potential subsequent appeals should be limited. The description by Mr Shaw QC of the role of the Commissioner (and, in turn, that of the Tribunal) as allowing him to make any decision that a district valuer could have made does not go quite far enough; the role has a wider scope.

28. The position on appeal to this Tribunal is different again; the Tribunal is not constrained to any decision a district valuer may have made; it may make any decision that the Commissioner might have made. The matter again is considered afresh. But at that stage <u>any</u> valuation shown in a valuation List is deemed to be correct until the contrary is shown. (See Article 54.) That plainly does not exclude assessments made after the valuation date but now in the List. And would include valuations altered by the Commissioner to any comparable hereditament in

the List, which he had considered to be in the same state and circumstances as the appealed hereditament. (See para 19 iv. above.)

29. Mr Shaw QC suggested that where such later assessments were themselves the subject of appeals to the Commissioner, if this Tribunal had regard to them, that would prejudice the outcome of their appeals and result in a cycle of appeals and reviews. Both in the rating cases and in valuations for other purposes, as so many valuations are based on comparison, there sometimes is a danger that the resolution of one dispute may prejudice another party. Both this Tribunal and the Commissioner should be alert to that risk. In the rating cases it seems to this Tribunal that if, where such appeals to the Commissioner do interact, they are promptly dealt with and the expression "in the same state and circumstances" is given a narrow interpretation, the risk is reduced and also the risk of any cycle of appeals. If that results in a group of Appeals reaching this Tribunal together (as does happen from time to time) the Tribunal rules are sufficiently flexible to allow it manage its procedures with a view to fairness to all the parties. On the general point of receiving evidence about assessments under appeal, that would depend on the particular circumstances. (See for example the discussion in A Wear Limited v Commissioner of Valuation [2003].)

30. In principle the Tribunal concludes that there is nothing in the language of the statute that would require exclusion of assessments made after the valuation date from its consideration. The attention of the Tribunal was not brought to any decided authorities directly on the point and it does not accept that not excluding them would be out of step with sound policy and practice.

31. In the circumstances of this particular case, Next and New Look were entered in the List by a district valuer after Debenhams and while its appeal to the Commissioner was pending. If the Commissioner had concluded that they ought to have been altered in consequence of his decision in Debenhams, he could have done so. However, he did not.

32. Mr Shaw QC suggested that because the appeals to the Commissioner on Next and New Look remained undecided, this Tribunal should not have regard to them since that would prejudice the outcome of their appeals. As outlined above (see para. 29 above) the Tribunal accepts that the fact that a valuation has been appealed, and the reasons for the appeal, may well be factors to be taken into account in considering the weight to be attached to it as evidence but it does not accept that the evidence must be necessarily excluded. It would be a valuation shown in a valuation list and the Tribunal would be required to deem it to be correct unless and until the contrary were shown.

33. On a preliminary view only of the available material, including the relative sizes, locations and valuations of Next and New Look, it would seem that their assessments may provide helpful insight into the hypothetical market at the relevant valuation date. The Tribunal concludes that, as Next and New Look may be helpful, they should not be excluded. However the issue of the extent of their helpfulness would require further consideration of all the circumstances.

Conclusion

34. The Tribunal concludes that in reaching its decision under Article 52 of the Order with regard to the subject hereditament and what appears proper to it, the Lands Tribunal is not entitled to exclude the hereditaments occupied by Next and New Look.

35. The Tribunal directs that the matter be listed for mention to consider how best to proceed.

ORDERS ACCORDINGLY

24th May 2013 **Mr Michael R Curry FRICS Hon.Dip.Rating**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Appellant: Mr Stewart Beattie QC instructed by Mr Nicholas Rose FRICS
Respondent: Mr Stephen Shaw QC instructed by the Departmental Solicitor's Office.