

Appeal No. VA11/2/044

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

**MMEM Public Houses Ltd.**

**APPELLANT**

**and**

**Commissioner of Valuation**

**RESPONDENT**

RE: Property No. 1037123, Licensed Shop at Lot No. 9b, Monread Ave, Monread South, Naas Urban, Naas UD, County Kildare.

**B E F O R E**

**John O'Donnell - Senior Counsel**

**Chairperson**

**Patrick Riney - FSCSI, FRICS, ACI Arb**

**Member**

**Veronica Gates - Barrister-at-Law**

**Member**

**JUDGMENT OF THE VALUATION TRIBUNAL  
ISSUED ON THE 22ND DAY OF DECEMBER, 2011**

By Notice of Appeal dated 30th day of June, 2011 the appellant appealed against the decision of the Commissioner of Valuation that No Material Change of Circumstance occurred in relation to the subject property.

The grounds of appeal as set out in the Notice of Appeal are attached at Appendix 1 to this judgment.

### **Preliminary**

Prior to the commencement of evidence, the parties agreed the issue to be determined was whether or not a material change of circumstances as defined within Section 3 of the Valuation Act, 2001 had occurred. The parties were also agreed that if the Tribunal concluded that such material change of circumstances (“MCC”) had occurred as contended for by the appellant, the respondent would then revise its valuation of the subject property.

The appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay, Dublin, on the 19th day of September, 2011. At the hearing the appellant was represented by Mr Eamonn S. Halpin, BSc (Surveying), ASCS, MRICS, MIAVI. Mr David Dodd BL, instructed by the Chief State Solicitor appeared on behalf of the respondent and Mr Denis Maher, RICS, Grade One Valuer in the Valuation Office was also present. Both parties having taken the oath adopted their respective précis which had previously been received by the Tribunal as their evidence-in-chief. From the evidence so tendered, the following emerged as being the facts relevant and material to the appeal.

### **The Appellant’s Case**

1. On behalf of the appellant, Mr Eamon Halpin adopted his précis of evidence as his evidence-in-chief. The property in question is a pub in a suburban housing estate on the edge of Naas, built in the early 1990s. It has no passing trade and is some distance from the town centre. The property occupies the ground and basement floors of a mainly two-storey over basement detached property. The premises were initially valued in a 1995 revision at a valuation of £225.00 (€285.69).
2. Since that date, however, a number of changes have been made to the premises:-
  - (i) A kitchen extension was built onto the premises. The total size of this was approximately 14 square metres.
  - (ii) A food store was also built by way of extension. On the other side of this extension are new staff toilets. Again this area totalled 14 square metres.
  - (iii) An internal wall in the serving area was removed in part.

- (iv) The entire internal wall separating the dining area from the rest of the bar was removed also.
3. Mr Halpin acknowledged that the additional square metres added to the premises (totalling some 28 square metres) represented an addition of some 4.5% of the previous total area of the rateable premises in question. In his submission, however, these extensions as well as the other structural alterations constituted a material change of circumstances within either definition (a) or (b) ( see below) as set out in Section 3 of the Act. Mr Halpin submitted that if these extensions had formed part of the property at the time of the original valuation in 1995 they would have been taken into account and the rateable valuation of the property would have been higher. Therefore, since these changes affected the rateable valuation of the property, this constituted a material change in circumstances within the meaning of the Act and so a revision should occur.
4. Mr Halpin referred us to the decision of the **Commissioner of Valuation –v- Birchfox Taverns Limited [2008] IEHC 110 (“Birchfox”)** which he said could be distinguished from the instant case on its facts. He also referred us to the previous determinations of the Tribunal in **VA04/7/003 - Patrick McDermott, VA07/3/016 - Michael Butler, VA08/4/002 - Thomas Mullane and VA10/4/002 - Mia Taverns.** These determinations were of little assistance to the Tribunal, he submitted, because of the different facts of the instant case.
5. Mr Halpin made it clear that he was not arguing for a revision based on the economic downturn. If there was no MCC, then he acknowledged his client had no entitlement to a revision. In his view the issue was whether the additions/alterations were sufficiently significant to alter the value (or to have altered the value in 1995). In this regard Mr Halpin drew our attention to a consent determination by a division of the Valuation Tribunal on the 9<sup>th</sup> of November 2004 in the case of **VA04/3/038 - Classical Décor Limited** where the appellant and the Commissioner of Valuation appear to have agreed that a structural alteration adding approximately 7 square metres to the rateable area (which would thereby have increased the RV from €191.73

to €193.00) constituted a material change of circumstances.

6. Mr Halpin also drew our attention to the original inspection carried out by the respondent in 1995 of the premises in question. It is clear from this document that the respondent, in carrying out its evaluation process in 1995, did not simply rely on the turnover figures supplied by the appellant. The respondent firstly calculated the rateable valuation based on the construction cost of the premises in question. The 1995 report of the respondent sets out in detail the various dimensions of the bar, toilet areas, offices, function rooms and other relevant spaces; then estimates a construction cost therefrom and extrapolates an RV of £227.00. The report then seeks to evaluate the premises based on its turnover figures and comes up with an RV of £218.75. The Commissioner's representative then proposes an RV of £225.00. It is perhaps worth noting that the respondent's valuer (who was the same valuer, Mr Maher, who is giving evidence in this case) did not simply "*split the difference*" between what we will call the construction cost RV and the turnover RV; rather the proposed RV was just £2.00 short of the (higher) construction cost figure.
7. In cross-examination, Mr Halpin accepted that there had been no appeal taken by the appellant on the grounds that the valuation was excessive in 1995, even though the appellant owned two other pubs and, therefore, might have been expected to be in a position to know whether an RV in relation to a pub in the area was excessive. Mr Halpin was reluctant to accept that the construction cost methodology was not the standard one used for pubs and that turnover was the usual basis on which an RV was struck. However, he noted that at the time of the 1995 valuation, the turnover figures available to the respondent would only have covered a period of approximately 3 months as the pub has just been constructed and in the circumstances the turnover figures would have been of limited assistance.
8. Mr Halpin noted, however, that the turnover in pubs from 2009 onwards is down; he suggested turnover was less likely to be used as a method of valuing in such circumstances. Mr Halpin accepted that his proposed RV of the pub (of €168.00) made no reference to the floor space at all. He also accepted there could be structural alterations which did not affect value. He indicated that he was not resiling from his

claim that the MCC fell within sub-section (a) of the definition which relates to “*new relevant property*” as well as to sub-section (b) (where a change occurs as a result of “*structural alterations*”). Mr Halpin was also reluctant to accept that the “*new*” buildings could not be let separately and pointed out that at times a kitchen in a premises is franchised out to somebody other than the owner or licensee of the premises. He did, however, agree that it was most unlikely that the additional premises could be let separately.

### **The Respondent’s Case**

9. On behalf of the respondent, Mr Denis Maher, Valuer, gave evidence. He adopted his précis of evidence as his evidence-in-chief.
10. He indicated he had been the original Valuer for the premises in 1995. Mr Maher said he looked mainly then at the turnover figures as well as at the build cost. He said he measured the interior of the building for information purposes but did not value the premises based on its size.
11. Mr Maher indicated that even if the extra 28 square metres had been there in 1995, his opinion on the RV of the premises would have remained unchanged.
12. In cross-examination he acknowledged that if the extra 28 square metres had been present in 1995 they would not have been built for nothing and thus the estimated construction cost would have been different. However, he emphasised that the figure provided by him in respect of construction cost was always an estimate. He indicated that in order for him to form the opinion that there had been an MCC, he would have to be of the opinion that the MCC had changed the value of the premises. He distinguished the *Classical Décor* Consent Order, pointing out that this appeared to be a case where all parties concerned were agreed that the RV would be based on floor size whereas the RV in respect of pubs was not based on floor size.
13. Mr Maher indicated that at present, the respondent has encountered problems in taking turnover into account as the only factor by which to strike an RV indicating that there had been many many changes since 1988. He indicated that he had valued

### **The Appellant's Submissions**

14. Mr Halpin made brief oral submissions. In his view, the issue was whether or not the respondent would have had a different view of the property in 1995 if the changes now present had been present then. In Mr Halpin's submission the answer to this must be yes. Therefore, in Mr Halpin's submission, there was a material change of circumstance and the appellant was entitled to a revision.

### **The Respondents's Submissions**

15. The respondent had already provided written legal submissions which were extremely helpful. Mr Dodd, BL, on behalf of the respondent also made brief oral submissions. He drew the attention of the Tribunal to various aspects of three decisions. In **Birchfox** (which Mr Dodd indicated was the only High Court decision on what constituted an MCC), Mr Justice McMahon indicated that in order to exercise any of the powers set out in Section 28(4)(a) and (b) the Revision Officer must first consider:-

- (i) That a material change of circumstances has occurred (since the last relevant valuation, if any); and
- (ii) That such a material change warrants the exercise of these powers.

16. While the decision in **Birchfox** focussed on sub-paragraphs (c) and (d) of the definition of MCC, Mr Dodd indicated this was irrelevant. Mr Dodd drew our attention to the observations of Mr Justice McMahon at pages 13 and 14 of the

decision in **Birchfox**. Mr Justice McMahon interprets the fact that revisions can only occur under the 2001 Act in accordance with Section 27 and Section 28 as follows:-

*“As has been seen, strict restrictions apply as to when such a revision is allowed. This was an intentional policy of the Oireachtas to reverse the previous position where revisions were easily available.... Since the 2001 Act was passed, however, apart from the mechanisms provided for in Sections 27 and 28, there are no other circumstances where a revision can be ordered by the Tribunal. If a revision is not allowed under Section 27 and 28, the Tribunal has no residual power to order one”.*

17. Mr Dodd submitted, accordingly, that if the policy of the Oireachtas was to make revisions more difficult to obtain, this would be set at nought if Mr Halpin’s submission was correct, since this would mean that every alteration or addition no matter how small could constitute an MCC. In his submission, this could not be correct.

18. Mr Dodd also referred us to **Butler** which makes it clear that the applicant seeking a revision must clearly demonstrate a material change of circumstances has taken place in order to be entitled to a revision.

19. Mr Dodd also drew our attention to the determination of the Tribunal in **Mia Taverns** which concerned Birchalls Pub in Ranelagh. In that determination, the division of the Tribunal noted the fall in rental values (and turnover) of all commercial property as a result of the present economic circumstances. The division of the Tribunal observed:-

*“It is clear that in rating law, the relative value of a property is more important than its value in absolute terms”.*

20. In **Mia Taverns** the Tribunal deprecated what appeared to be the current practice of valuing licensed premises which had been subject to material change of circumstances by reference to their adjusted turnover, indicating that this may give rise to even more anomalies than currently exist on the valuation list:-

*“Such a method of valuation should, in the Tribunal’s opinion, be seen more as a means of comparison than valuation”.*

21. The Tribunal also expressed the view that the amalgamation of two previously separate relevant properties into one (a small kitchen previously separately assessed on the first floor, now used in connection with the pub on the ground floor) amounted in that case to a material change, but not a material change that changes the value of the pub from its previous assessment as the changes are considered to be *“deminimis the view of the division, if such a change were to be considered as a change to value, then that change should be reflected in a small increase to the value of the pub to reflect the addition of this area to the subject premises”*.

22. Mr Dodd also drew our attention to the statement of the Division of the Tribunal in **Mia Taverns**:-

*“The essence of a well founded rating system is that each rate payer shall pay his or her proper proportion of the overall rates burden – no more and no less. This can be achieved when revaluations are carried out at regular intervals and by the proper use of sections 28 and 49 during the interim period”.*

23. In reply, the appellant (in response to a question from The Tribunal) indicated that the cost of the additions in 1995 would have been of the order of IR£20,000 to IR£25,000. This estimated figure was not disputed. Mr Halpin repeated his assertion that the decision in **Birchfox** was irrelevant because it did not consider grounds (a) and (b). He also indicated that he was not seeking a revision based on the economic downturn but rather because of the new building/structural alterations which he contended constituted a material change of circumstances within the meaning of the Act.

### **The Law**

24. It may be helpful to set out the relevant extracts of Section 3 and Section 28 of the Act of 2001. Section 3 of the 2001 Act (the interpretation section) provides:

*“material change of circumstances” means a change of circumstances which consists of—*

- (a) the coming into being of a newly erected or newly constructed relevant property or of a relevant property, or*
- (b) a change in the value of a relevant property caused by the making of structural alterations or by the total or partial destruction of any building or other erection by fire or any other physical cause, or*
- (c) the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property, or*
- (d) the happening of any event whereby any relevant property begins, or ceases, to be treated as property falling within Schedule 4, or*
- (e) property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties, or*
- (f) property previously valued as 2 or more relevant properties becoming liable to be valued as a single relevant property;*

**Section 28:**

- (4) A revision officer, if he or she considers that a material change of circumstances which has occurred since a valuation under [section 19](#) was last carried out in relation to the rating authority area in which the property concerned is situate or, as the case may be, since the last previous exercise (if any) of the powers under this subsection in relation to the property warrants the doing of such, may, in respect of that property—*
  - (a) if that property appears on the valuation list relating to that area, do whichever of the following is or are appropriate—*

- (i) *amend the valuation of that property as it appears on the list,*
  - (ii) *exclude that property from the list on the ground that the property is no longer relevant property, that the property no longer exists or that the property falls within Schedule 4,*
  - (iii) *amend any other material particular in relation to that property as it appears on the list,*
- (b) *if that property does not appear on the said valuation list and it is relevant property (other than relevant property falling within Schedule 4 or to which an order under [section 53](#) relates), do both of the following—*
- (i) *carry out a valuation of that property, and*
  - (ii) *include that property on the list together with its value as determined on foot of that valuation.*

25. As is clear from the Act (and confirmed by determinations such as **Butler**) the onus of establishing the existence of an MCC is on the ratepayer. The definitions contained in sub-sections (a) and (b) of “material change of circumstances” would in theory allow any newly constructed property or structural alteration to constitute a material change in circumstances. For example, the addition of an outdoor self-contained toilet or the structural alteration of a shop by 1 square metre would all have the potential to constitute a material change of circumstances. However it is clear that not every newly constructed property or structural alteration will warrant the exercise by the respondent of its powers under Section 28(4) to revise the list.

26. It seems to us further that the matters contended for here as being a material change in circumstances fall within sub-category (b) rather than sub-category (a) of the definition set out above. They are extensions and/or alterations to an existing property. In accordance with the definition set out in sub-section (b), therefore, the issue is whether or not these alterations would have changed the value of the relevant

property.

27. One of the unusual features about this case is the methodology of valuation used at the time of the 1995 valuation. Mr Maher acknowledges that turnover was generally used as the basis for valuing pubs though he contends that this is perhaps less appropriate at present and in this regard his sentiments are echoed by the determination of the Tribunal in the **Mia Taverns** case. But it is clear from the 1995 report that the primary method of valuation used in 1995 for this premises was the construction cost of the premises. While a notional RV was also extrapolated based on turnover, it is interesting that the ultimate RV struck by the respondent was much closer to the RV reached by use of the construction cost method than the turnover method. Accordingly, it seems to us that the construction cost method was of very considerable significance in valuing these premises in 1995.
28. Mr Halpin suggests the construction cost in 1995 of these alterations would have been of the order of between IR£20,000 and IR£25,000. He was not challenged on this. Even if one takes the lower figure of IR£20,000, adding this figure to the construction cost (and adjusting the annual yield accordingly) would leave an RV based on the construction cost of IR£236.25. This is significantly higher than the original construction cost. Given that the RV originally struck by the respondent was much closer to the construction cost valuation than the estimated turnover valuation, it seems to us as a matter of probability the respondent would have struck a higher RV if these alterations had been present, since the RV actually struck was very close to the construction cost methodology valuation. There is no argument but that the various extensions and alterations come within the definition of “*structural alterations*” contained in sub-section (b). But it seems to us also that these structural alterations were not alterations which made no difference to the value of the premises; rather, in our view, they would have increased the construction cost of the premises and thus led in the particular circumstances to a higher RV being struck in respect of the property.
29. We have, therefore, come to the conclusion that the structural alterations made to the premises constitute a material change of circumstances in the instant case. We have

come to this conclusion because the respondent appears to have relied more on the construction cost method of valuation than the turnover method at the time of the initial valuation. This is highly unusual in the context of the valuing of public houses and is perhaps explained by the highly unusual circumstances in which the property came to be valued originally, since at that time it had only recently been constructed and so there was very little information in relation to turnover. The use of the construction cost methodology and the absence of reliable turnover figures at the time of the original valuation are two features which distinguish this case from other cases involving licensed premises.

30. However, it should be said that the effect of these structural alterations is hardly negligible on turnover. In the view of the Tribunal, it is likely the increase in kitchen size was undertaken in order to increase food output thereby increasing turnover; the addition of an area for food storage has an allied purpose and hoped-for effect. Likewise, the removal of certain of the internal walls to increase and improve circulation is presumably done with a view to increasing turnover. We accept, however, that there is no hard evidence as to whether or not turnover has actually been affected. However, it is clear that the alterations when taken together would appear to have at least the capacity to affect turnover.
31. We are mindful of the conclusions of McMahon J in **Birchfox**, in which he indicated that a mere material change in circumstances was insufficient; the Revision Officer had also to form the conclusion that the change in question “*warranted*” the exercise by him/her of the power to revise the valuation in question. McMahon J did not address the issue of when the exercise of that power would or would not be warranted where the material change in circumstances came within the rubric of Section 3 (a) or Section 3 (b) of the definition as set out above.
32. It seems to us, however, that where there is a material change in circumstances which changes the value of the property in any way other than *de minimis*, it would be perverse for a Revision Officer to refuse to exercise his power to revise the valuation. In our view, if an MCC occurs which changes the value of the property in anything more than a minor or inconsequential manner, the Legislature cannot have intended

the Revision Officer to have had an effective veto in respect of any possible revision. It therefore seems to us that where there is a material change in circumstances which alters the value of the property to any appreciable degree, this will almost always warrant the exercise by the Revision Officer of his/her power of revision. We note that in the instant case, both parties are agreed that if there is a material change in circumstances found to exist, the value of the property should be revised, and therefore to some extent our observations on this point may be regarded as *obiter* but in deference to the views expressed by McMahon J in **Birchfox** we felt it appropriate nonetheless to deal with this issue.

33. In conclusion we would make the following observations. We do not believe that this determination should be read as a “*charter*” for occupiers of licensed premises to make minor internal or external alterations and then claim that there has been a material change in circumstances. It seems to us that this case falls to be decided on its somewhat unusual facts, including the primary use of the construction cost methodology at the time of the original valuation, and the relative paucity of reliable figures in respect of turnover at that time also. It also seems to us that looked at in the round, the extensions and alterations would undoubtedly have led to a higher RV if included originally, and may well be regarded as having an input in relation to turnover also. In these circumstances, the alterations in question appear to have changed the value of the premises within the meaning of the Act.
34. It is clear, however, that not every structural alteration or addition can possibly have this effect. We wish to make it clear that not every material change in circumstances will necessarily warrant the exercise by the Revision Officer of his powers under Section 28(4). In the instant case, however, because of the unusual features highlighted above, we have concluded the Appellant has established a material change in circumstances under subsection (b) of the definition contained within the Act such that warrants the exercise by the Revision Officer of his/her powers under the Act.

### **Determination**

35. The Tribunal determines the appellant has established a material change in circumstances to the subject property which warrants the exercising by the Revision

Officer of his powers to revise the valuation of the premises pursuant to Section 28(4) of the Act.

And the Tribunal so determines.