

Appeal No. VA04/2/076 &
078

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

Advanced Information Management Consultants Ltd. (VA04/2/076)
&
Brophy Colton (VA04/2/078)

APPELLANTS

and

Commissioner of Valuation

RESPONDENT

RE: Office(s), at Lot No. Unit 19 (076) & Unit 3 (078), Ballybane, Clondalkin Dunawley,
Clondalkin County Dublin

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Michael F. Lyng - Valuer

Member

Michael McWey - Valuer

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 13TH DAY OF DECEMBER, 2004

By Notice of Appeal dated the 24th day of June, 2004, the appellants appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €151.10 (076) and €123.16 (078) on the above described relevant properties.

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

"The RV is excessive, inequitable & bad in law, the appellants seek the application of the corrected tone (of list) as determined by the Tribunal in VA02/2/050."

Representation

For the Appellants: Mr. Owen Hickey B.L. instructed by Mullanys, Solicitors

For the Respondent: Mr. Brendan Conway B.L. instructed by the Chief State Solicitor's Office

Introduction

The said appeals proceeded by way of oral hearing before the Tribunal on 15th October 2004.

These appeals come before this division of the Tribunal on what is effectively a test-case basis. The only issue between the parties is how the Act is to be interpreted. Both properties are units in the Courtyard, Kilcarbery Distribution Park, Clondalkin, Dublin 22. Both properties were first revised in the 2001/4 revision and values assigned.

However another unit was the subject of a determination by the Tribunal (**VA02/2/050 – Research Business Solutions Limited**). This had in effect been a test case for a total of six similar units in the development. Following the issuing of this determination the Appellants in the instant cases applied to the Commissioner of Valuation in May and June 2003. In effect they were applying to have the assessment in each unit reduced in line with what was contended to be the amended “tone of the list”; “amended”, that is following the determination by the division of the Tribunal referred to above.

Thereafter submissions were received by the appointed Revision Officer and discussions took place.

On the 5th November 2003 the Commissioner of Valuation issued a Notice indicating that there had been no material change in the circumstances between the period of the initial revision assessment and the recent revision request.

By Notice dated the 10th December 2003 the Appellants appealed the determination of the Commissioner of Valuation (recommending no change in value because of no material change of circumstances). On the 10th June 2004 the appeal officer of the Commissioner of Valuation

issued a decision. The decision disallowed the appeal, indicating that “*there has been no material change of circumstances between the date of the initial assessment and the recent revision request.*”

By Notices dated the 24th June 2004 the Appellants appealed this decision to the Valuation Tribunal.

The Issue

In essence the issue between the parties is whether the determination by the division of the Tribunal in **VA02/2/050** constitutes a “material change of circumstances” which should then be taken into account in assessing the request for a revised valuation.

Both the Appellants and the Respondent were represented by Counsel. Both sides furnished written submissions. Both sides adopted their submissions as précis of the evidence to be given but agreed that in the circumstances the issue was in effect a matter of legal interpretation rather than a matter which would be decided on factual evidence. In the circumstances neither side called any viva voce evidence.

The submissions on behalf of the Appellants

On behalf of the Appellants Mr. Hickey referred to Sections 48 and 49 of the 2001 Act as being the fundamental basis for valuation. In addition he submitted that a combination of Section 19 and Section 20 (which latter Section required a Valuation Order to specify one date by reference to which the value of every relevant property shall be determined) was of considerable significance. His contention was that the effect of these sections was to provide that all properties were to be treated equally as of that date until the next general valuation occurs. In effect he contended that Section 49 referred to general pre-existing valuation lists where there were no comparable properties in existence. He emphasised that the Act under Section 19 required that existing valuations be used for existing properties; however the Act required uniformity and fairness of treatment as between properties.

Mr. Hickey referred to the Judgment of the Tribunal in **VA02/2/050 (Research Business Solutions Limited)**. In that case it had been submitted on behalf of the Appellant that the appeal was a test case which should be persuasive in relation to the determination of the other appeal “as they were all similar type buildings”. He also referred to the determination of the Tribunal therein, whereby the Tribunal recognised and corrected an error by the revising Valuer; as a result the rateable valuation of the property was reduced.

Mr. Hickey then referred to extracts from **The Irish Legal System (Byrne & McCutcheon)** and cases referred to therein as authority for the following propositions:

- (a) The statute should be construed so as to keep its operation within the ambit of the broad purpose of the Act in question; this is a fundamental rule¹.
- (b) It is not possible to add to or delete express statutory provisions so as to achieve objectives which to the Court appear desirable, but in rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective².
- (c) A schematic approach to interpretation can be adopted where the literal meaning of the legislation in question is said to be repugnant or to render the statute unworkable or meaningless, or to be grossly unreasonable. However the mere fact that the literal meaning would lead to an unfair, unreasonable or inequitable result is insufficient to warrant its rejection. Something more is required. An absurdity is considered to arise where the literal interpretation leads to a conclusion which it is thought could not have been intended by the Oireachtas. It is this factor, the failure to give effect to assumed intention of the Oireachtas, which justifies the invocation of the schematic approach. The schematic approach might be adopted justifiably so as to avoid a pointless absurdity³.

¹ *Frescati Estates Limited –v- Walker* [1975] I.R. 177

² *McGrath –v- McDermott* [1988] I.R. 258

³ *Nestor –v- Murphy* [1979] I.R. 326

This approach can also be adopted where to apply the words literally would be to defeat the obvious intention of the legislation and produce a wholly unreasonable result⁴.

Having regard to these principles Mr. Hickey contended:

- (i) The broad purpose of the action is, inter alia, to treat properties equally and fairly *inter se*. Insofar as there is no literal mechanism which allows for an alteration between general valuations, even where all parties agree that an alteration has occurred (since on its face the reference in the Act to material change of circumstances refers only to physical changes) appropriate wording must be implied into the Act.
- (ii) To imply the appropriate wording into the Act would be to avoid the creation of an absurdity.

Mr. Hickey invited the Tribunal to imply into Section 3 (the definition section) of the Act at “*material change of circumstances*” the following words (after “*relevant property*”) in 3(b)

“but, where a relevant property has been the subject of an Order under Section 19, then only changes in value”

- (iii) Mr. Hickey submitted that this was the only consistent way to interpret the legislation. He said it was not the intention of the Legislature to provide for a situation where all parties agreed that changes in value had occurred in the property and yet the Legislature required that those changes in value should be ignored.
- (iv) It was submitted that the implication of these words was in keeping with the schematic approach of the Act and prevented an unfair, unreasonable or inequitable result.

⁴ Luke –v- The Inland Revenue Commissioners [1963] AC 557

Mr. Hickey also referred to the decision of the Valuation Tribunal in **VA04/1/028 and 035 Careworks Limited and SDL Limited**. He noted at paragraph 2 of the determination of that division that the Tribunal stated as follows:

“Having regard to the determination of the Tribunal in relation to these two appeals, it appears to the Tribunal that in equity the Commissioner of Valuation should exercise his power under Section 40 of the Valuation Act, 2001 in relation to those properties in the Apex Business Centre that were not appealed.”
(emphasis added)

He also referred us to appeal No. **VA04/1/023 Buy4Now –v- Commissioner of Valuation** where at paragraph 3 of the Tribunal’s determination the Tribunal stated:

“The Tribunal recommends that the Commissioner of Valuation exercise his powers under Section 40 of the Valuation Act, 2001 in respect of the other properties of Beacon Court which in the light of the above are similarly circumstanced.” (emphasis added)

Alternative Submission – Section 40 Valuation Act, 2001

Mr. Hickey’s first submission was to the effect that the Tribunal could and should imply his suggested wording into the relevant Section of the Act so as to comply with the schematic approach. In the alternative Mr. Hickey submitted that the Commissioner of Valuation was obliged under Section 40 to amend the values of property that are “similarly circumstanced” to the property the subject matter of the relevant decision.

Section 40(1) provides as follows:

“If the Commissioner amends under Section 38 a valuation list in relation to a particular property, he or she may also amend, in a manner consonant with the relevant decision,

that or any other valuation list in relation to each other property appearing on that list that he or she considers is similarly circumstanced to the said property.”

(In sub-section 2 “*the relevant decision*” is stated to mean the decision of the Tribunal, the High Court or Supreme Court as the case may be giving rise to the first mentioned amendment in sub-section 1.)

Mr. Hickey referred to a letter from Eamonn Halpin & Company, Valuation Surveyors (on behalf of the Appellants) to Mr. Kevin Heery, Revision Officer (on behalf of the Respondent) of the 14th October 2004 in which Mr. Halpin formally applied to the Commissioner of Valuation to exercise his powers under Section 40 to amend the value of the subject properties in a manner consonant with the decision of the Tribunal in **VA02/2/050 – Research Business Solutions Limited**.

Mr. Hickey concluded his submissions in relation to what he contended was the mandatory effect of Section 40 by referring to **Administrative Law in Ireland (3rd Edition) (Morgan and Hogan)** and in particular as follows:

“In certain circumstances the use of permissive language such as “may” can be of a mandatory effect (page 438 and 439 Op Cit). In particular “may” can mean in effect “must”.”

As a matter of equity therefore Mr. Hickey contended that the words “*he or she may also amend*” in Section 40(1) in fact require the Commissioner to amend the values of similarly circumstanced property – “may” should therefore be read in this section as meaning “must”.

In the alternative he submitted that the Valuation Tribunal should recommend to the Commissioner of Valuation that it exercise its discretion in relation to the amendment of the values for these properties as it had done in the **Careworks** and **Buy4Now** cases.

The Respondent's Submissions

On behalf of the Respondent Mr. Conway submitted in the first instance that the Revision Officer who carried out the revision was not an agent of the Commissioner of Valuation but was a separate and individual person who exercised his or her own discretion. He submitted that Section 28 set up the revision system and that it did not permit the Revision Officer to be directed by the Commissioner of Valuation or indeed anyone else as to how he should carry out his revision. This is particularly so having regard to the provisions of Section 28(4) and 28(9), both of which confer specific discretion on the Revision Officer and in particular a discretion to “*consider*” whether a material change of circumstances has occurred since a valuation.

Mr. Conway submitted that if the Revision Officer makes a decision under Section 28 that there has been no material change of circumstances he is then *functus officio*. Thus he has no further role. Any other application should be made thereafter to the Commissioner for Valuation. It was then up to the Commissioner to make such a decision as he saw fit.

Mr. Conway also referred to the text of **Byrne and McCutcheon**. He noted that while the schematic approach can be adopted where the literal meaning is said to be repugnant, to render the statute unworkable or meaningless or to be grossly unreasonable, the mere fact that the literal meaning would lead to an unfair, unreasonable or inequitable result is insufficient to warrant its rejection. Mr. Conway submitted that even if there was an apparent inequity, such an inequity had the capacity to be cured by the operation of the provisions set out in Section 40. He accepted that the restricted definition of “material change of circumstances” contained in the definition section did give rise to a potential inequity between properties but submitted that it could be cured.

Dealing with Section 40, Mr. Conway noted that “*the relevant decision*” meant the decision of the Valuation Tribunal, the High Court or the Supreme Court. Here he contended there was no “*relevant decision*”. He also submitted that the Commissioner was entitled to and would in fact exercise his own discretion since he was carrying out a form of review.

Mr. Conway accepted that it would be reasonable for the Valuation Tribunal to make a recommendation that he exercise his discretion to consider the effect of the earlier decision on these two properties, though he submitted that such a recommendation would not of course in any way be binding.

Mr. Hickey in reply reasserted his client's position. He also suggested that Mr. Heery on behalf of the Commissioner of Valuation had already agreed that the properties were similarly circumstanced. (In response to this however Mr. Conway submitted that Mr. Heery's discussion could not in any way bind the Commissioner of Valuation and while there might be a certain meeting of minds, Mr. Heery could not in any sense be said to be operating the power reserved to the Commissioner of Valuation under Section 40 since it had not been specifically delegated to him).

Both parties agreed that the rateable valuations had been agreed subject to the Commissioner's approval and subject to the determination of this issue.

The Law

“Material change of circumstances”

Material change of circumstances is defined in Section 3 as meaning

“A change of circumstances which consist 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) *a property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties, or*
- (f) *a property previously valued as 2 or more relevant properties becoming liable to be valued as a single relevant property.”*

“*Relevant property*” is defined in Schedule 3 of the Act.

Critically, however, changes in value of a relevant property appear to be confined to changes which occur to the value as a result of the making of structural alteration to or the total or partial destruction of the building. A change in value which occurs as a result of other events is not provided for and therefore cannot be regarded as a “*material change of circumstances*”.

One can easily see the difficulties caused by the somewhat restrictive definition of “*material change of circumstances*”. The example offered in argument between the parties may be of assistance. A petrol station on the side of a road is the subject matter of a general valuation. Immediately after this, and well in advance of the next general valuation, a major highway is built by-passing this road (and the petrol station). Almost certainly the rateable valuation of that petrol station would fall. Yet because the change in value to the petrol station does not occur because of structural alteration to or the destruction of the petrol station, the building of the by-pass motorway cannot be regarded as a “*material change of circumstances*”. The occupier of the petrol station must therefore wait until the next revision/general valuation to seek lower valuation.

This certainly creates the potential for unfairness and inequity. However we are of the view that the Act also provides for a manner by which this potential unfairness and inequity can be addressed. Ideally, the definition of material change in circumstances should be amended and expanded to allow for situations similar to the one which has arisen here. Despite Mr. Hickey's valiant efforts to persuade us to the contrary, we do not believe that we can insert the words suggested by him into the definition of "*material change of circumstances.*" To do so would be to do undue and inappropriate violence to the language of the legislation as well as to usurp the role of the Legislature. Desirable and all as such an amendment might be, this is undoubtedly a matter for the Houses of the Oireachtas rather than this Tribunal.

As noted above, we are of the view that the Act as drafted at present does create the potential for inequity (though it does not in our view create an absurdity or set at nought the intention or effect of the legislation). Section 40 of the Act provides a mechanism whereby this inequity may be addressed. In our view, however, it would not be appropriate to interpret the provisions of Section 40 as requiring or directing the Commissioner of Valuation to value the properties the subject matter of this appeal in accordance with the decision in the **Research Business Solutions Limited** case. The wording of Section 40 appears to confer a discretion on the Commissioner. If we were to follow the submission of Mr. Hickey in relation to Section 40 we would in effect be depriving the Commissioner of the entitlement to exercise the discretion conferred on him by Section 40. We do not believe we would be entitled to remove from the Commissioner a discretion conferred on him by statute.

However all parties are agreed that it is open to this division of the Tribunal to recommend to the Commissioner of Valuation that he exercise his powers under Section 40 in relation to these properties having regard to the determination of the Tribunal in **VA02/2/050 (Research Business Solutions)**.

Determination

The Tribunal determines as follows:

- (i) An earlier decision of the Tribunal does not come within the definition of “*material change of circumstances*” within Section 3 of the Act.
- (ii) Section 40 of the Act confers a discretion on the Commissioner of Valuation; it does not oblige or require him to exercise that discretion so to amend valuations in the subject properties having regard to the earlier decision in **VA02/2/050 (Research Business Solutions)**.

Recommendation

Having regard however to the fact that all of the parties agree that it is open to the Tribunal to make a recommendation to the Commissioner as to how the discretion should be exercised in the instant case and having regard also to the potential inequity and unfairness of the situation if this discretion is not exercised in accordance with this recommendation, the Tribunal recommends to the Commissioner of Valuation that he exercise his powers under Section 40 of the Valuation Act in respect of the subject properties, having regard to the decision of the Tribunal in **VA02/2/050 – Research Business Solutions Limited**.