

Appeal No. VA15/5/020

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

**Thomas Healy**

**APPELLANT**

**and**

**Commissioner of Valuation**

**RESPONDENT**

**In Relation to the Issue of Quantum of Valuation in Respect of:**

Property No. 2203094, Retail (Warehouse) at 6 Eastpoint Retail Park, Limerick, County Limerick.

**JUDGMENT OF THE VALUATION TRIBUNAL**  
**ISSUED ON THE 28<sup>TH</sup> DAY OF MARCH, 2017**

BEFORE:

**Majella Twomey – BL**

**Deputy Chairperson**

**Carol O'Farrell - BL**

**Member**

**Hugh Markey FRICS, FCSI**

**Member**

**Background**

1. By Notice of Appeal received on the 10<sup>th</sup> day of September, 2015 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a net annual value of €228,000 on the above described relevant property (No. 2203094) on the ground as set out in the Notice of Appeal as follows:

*“The property is incapable of beneficial occupation and should be excluded from the Valuation List.”*

2. The Appeal commenced by way of an oral hearing in the offices of the Valuation Tribunal, 3<sup>rd</sup> Floor, Holbrook House, Holles Street, Dublin 2 on the 29<sup>th</sup> June 2016 and resumed on the 16<sup>th</sup> November 2016. Mr. Proinsias Ó Maolchalain BL instructed by Holmes O'Malley Sexton Solicitors appeared on behalf of the Appellant with Mr. David Moloney BSc MA and Mr. Val O' Brien BSc. (Hons) MSCSI MRICS Dip Proj. Man. and Mr. Robert O'Neill BL instructed by the Chief State Solicitor appeared on behalf of the Respondent with Mr. Dean Robinson MSCSI MRICS, ACI Arb.

### **Preliminary Issue**

3. The Respondent at the outset objected to the Appellant raising any ground of appeal other than the sole ground of appeal set out in the Notice of Appeal. Mr Ó' Maolchalain, on behalf of the Appellant, formally sought liberty to amend the grounds of appeal to include the following additional grounds which the Appellant wished to advance without prejudice to the contention that the property is incapable of beneficial occupation:
  - (i) the purported decision of the Respondent to increase the valuation of the subject premises from €219,000 to €228,000 is *ultra vires* the provisions of section 33 of the Valuation Act 2001.
  - (ii) The Respondent did not allow the appeal, as if he had done so, he would have accepted the Appellant's submission that the subject premises was incapable of beneficial occupation and ought to have been excluded from the Valuation List.
  - (iii) Given that the Respondent did not, in fact, allow the appeal, the Respondent did not have power under section 33 of the Valuation Act 2001 to amend the valuation of the property so as to increase it. The purported increase in valuation is therefore *ultra vires* and bad in law.

### **Respondent's Submission**

4. Counsel for the Respondent submitted that the appeal was taken on the sole basis that the appeal property is not capable of beneficial occupation and that the Tribunal, in the interest of fair procedures and natural and constitutional justice, ought not to consider

the application to amend the grounds of appeal in the absence of exceptional circumstances. The Respondent further submitted that the new grounds sought to be raised by the Appellant fell properly to be canvassed by means of judicial review rather than by way of appeal to the Tribunal and that the Appellant was requesting the Tribunal to engage in a review jurisdiction reserved to the High Court and that any question as to the legality of the Respondent's decision in respect of the subject property was confined to the judicial review jurisdiction. He drew the Tribunal's attention to a number of decisions of the Tribunal –VA 05-3-054 Pfizer, VA06-1-013 Peter Davis, VA06-020045 Orange Tree Ltd and VA08-5-017 & VA08-5-018 Coolmine Leisure Ltd.

### **Appellant's Submission**

5. Counsel for the Appellant submitted that the new grounds could be ventilated in an appeal without any need to commence a further set of costly proceedings and referred to the Tribunal's decision in VA10-3-007 Carlow Warehousing.

### **The Law**

6. Under section 34 of the Valuation Act 2001 an appeal against a decision of the Respondent to allow or disallow an appeal in relation to a property under section 30 may be made to the Valuation Tribunal within 28 days. Section 35 provides that an appeal under section 34 must specify the grounds on which the Appellant considers that the value of the property, the subject of the appeal, as determined or confirmed by the Respondent is incorrect and the value the Appellant considers the Respondent ought to have determined as being the value of the property or the grounds on which the Appellant considers that the property ought to have been included in, or, as the case may be excluded from, the relevant valuation list by the Respondent.
7. The jurisdiction of the Valuation Tribunal on an appeal under section 34 is delimited by section 37 (1) of the 2001 Act which provides:

The Tribunal shall consider an appeal made to it under [Section 34](#) and may, as it thinks appropriate—

- (a) disallow the appeal and, accordingly, confirm the decision of the Commissioner, or
- (b) allow the appeal, and, accordingly, do whichever of the following is appropriate—
  - (i) amend the value of, or any other detail in relation to, the property, the subject of the appeal, as stated in the valuation certificate issued under *paragraph (b)(i) or (b)(ii) of [Section 33 \(2\)](#)*,
  - (ii) decide that the property, the subject of the appeal, ought to be included in, or, as the case may be, ought to be excluded from, the relevant valuation list and, in the case of a decision that the property ought to be so included, determine the value of the property,
  - (iii) amend any detail in relation to the property, the subject of the appeal, stated in the notification made under [Section 33 \(2\) \(b\) \(iii\)](#).

8. It is clear from section 37 (1) that the Tribunal’s jurisdiction is limited to considering whether or not the value of an appeal property as determined or confirmed by the Respondent is correct or whether the appeal property ought to have been included in, or, excluded from the relevant valuation list. In so far as the final determination of an appeal is concerned, the Tribunal’s only powers are those contained in section 37 (1) of the Act of 2001: the Tribunal may, if the appeal is allowed, amend the value or other detail of the appeal property as stated in the valuation certificate or it may disallow the appeal in which case the valuation certificate as issued by the Respondent stands good.

### **Finding on the Preliminary Issue**

9. The Tribunal is of the view that it does not have jurisdiction to determine whether a decision made by the Respondent purporting to increase a valuation is *ultra vires* the provisions of section 33 of the Valuation Act 2001 and bad in law. There is an appropriate remedy available to a person who claims that a purported decision of the

Respondent is outside the parameters of their statutory remit. That remedy is by way of judicial review of administrative action. If there are circumstances upon which it may be argued that a determination of the Respondent was made without jurisdiction, an application may be made to the High Court for a declaration of invalidity or an order of certiorari quashing the determination. The Carlow Warehousing appeal is distinguishable from the circumstances asserted on this application in as much as it involved an increase in the valuation of property. In Carlow Warehousing, after the Appellant had lodged an appeal to the Tribunal against the valuation determined by the Respondent of property comprising a number of buildings, the Respondent became aware that a warehouse building had been omitted from the valuation and on the hearing of the appeal sought to increase the valuation to rectify that error of omission. The Tribunal determined that as the Respondent had not made any decision in respect of the valuation of that warehouse, the Tribunal had no jurisdiction to deal with the valuation of the warehouse.

10. There may be an arguable ground that the Respondent did not have power under section 33 of the Valuation Act 2001 to increase the valuation of the subject property, and it may be that the Respondent's decision can legitimately be subjected to a criticism as displaying an erroneous approach but the Tribunal does not have jurisdiction for the foregoing reasons.
11. Even if the Tribunal is incorrect in holding that it has no jurisdiction to decide whether the determination made by the Respondent in respect of the subject property was outside the parameters of the Respondent's statutory powers under section 33 of the 2001 Act, by reference to Rule 10 of the Valuation Act, 2001 (Appeals) Rules 2008 and Guidelines for the hearing of Appeals, the Tribunal is precluded from entertaining any amendments to the grounds of appeal at hearing and, in particular, the adducing of new grounds of appeal other than in exceptional circumstances. The test is whether, given the importance of the issue on the one hand and the rights of the Respondent on the other, it is, in the interests of justice, desirable and necessary to permit the amendment. The onus of proof is on the Appellant. On the first day of hearing the only reason given by Mr Ó Maolchalain for the application to amend the grounds of appeal was that legal advice had only been sought approximately 12 days earlier and that an application for

judicial review would be costly. The Tribunal does not consider these reasons capable of constituting “exceptional circumstances” such as would make it just and equitable to allow the grounds of appeal to be amended.

**The Ground of Appeal & the Law:**

12. The question for the Tribunal, in this case, is whether the property, the subject matter of this appeal is incapable of ‘beneficial occupation’?
13. The case of **Telecom Éireann v Commissioner of Valuation [1994] 1 IR 66**, states that the essential ingredients for rateable occupation are “*the occupation must be exclusive, it must be of benefit to the occupier and it must not be transient*”.
14. Section 48 (3) of the Valuation Act 2001 provides (subject to section 50) for the purposes of the Act of 2001 that “*net annual value*” means, in relation to a property, *the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year...*”. [Emphasis added].
15. The Respondent is obliged pursuant to section 13 of the Act of 2001 to provide for the determination of the value of all relevant properties other than relevant properties specified in Schedule 4 of the Act. Under section 15 all relevant property is rateable except for the relevant properties specified in Schedule 4. Properties that fall within any of the categories listed in paragraph 1 of Schedule 3 of the Act of 2001 and comply with the condition referred to in paragraph 2 of that Schedule are relevant and rateable properties. The condition mentioned in paragraph 2 of Schedule 3 is that the property concerned
  - (a) is occupied and the nature of that occupation is such as to constitute rateable occupation of the property, that is to say, occupation of the nature which, under the enactments in force immediately before the commencement of this Act (whether repealed enactments or not), was a prerequisite for the making of a rate in respect of occupied property, or
  - (b) is unoccupied but capable of being the subject of rateable occupation by the owner of the property.

16. In order for a property to be deemed incapable of beneficial occupation, the Appellant must prove, on the balance of probabilities, that the property is of no use to any party or is ‘struck with sterility in any and everybody’s hands’. Per *London County Council v Erith Churchwardens [1893] AC 562*, *Fabian Doyle v Commissioner of Valuation VA 14/2/001*, *Oakbell Ltd v Commissioner for Valuation VA 14/5/149*.
17. The revaluation date for the subject property is the 1<sup>st</sup> of March 2012.
18. The Tribunal notes that the subject property is currently up for sale/let by private treaty with property consultants, GVA O Buachalla.

### **The Appellant’s Submissions**

19. Counsel for the Appellant stated that the occupation of the subject property would not be of benefit to anyone in their present state.
20. Counsel referred to *Harper Stores v Commissioner of Valuation [1968] IR 166*, where Henchy J explained the rule of *rebus sic stantibus*.
21. It was submitted that the principles in *Bord Gais v Commissioner for Valuation VA96/4/07*, a case dealing with the rateability of disused tanks, also applied to this case.
22. It was submitted that the Tribunal should only deal with the physical circumstances of the property and that there was a difference between minor works and non-minor works which a hypothetical tenant could not be expected to finance.
23. It was submitted that the subject property had not been occupied since 2013.

## **The Respondent's Submissions**

24. Counsel for the Respondent said that the only issue for consideration was whether the property was capable of beneficial occupation.
25. He referred to the case of *Oakbell Ltd v Commissioner of Valuation, VA14/5/149* , which sets out the principles applicable to beneficial occupation.
26. It was submitted that the Appellant has failed to show that the property is not of use to any hypothetical tenant.
27. It was submitted that the outcome in *Bord Gais v Commissioner for Valuation VA96/4/07*, related to a special set of circumstances and that one had to show that no Tenant would rent the property in order to come within this dicta.
28. It was submitted that the subject property has been tenanted at some point. The property was bought by the Appellant and is on the market for let and sale. It was further submitted that the Appellant is claiming a rebate on the rates on the grounds that the property is vacant and available to let. It was stated that, when this is taken into account, that it could not be argued that the Unit is '*sterile in any and everybody's hands*'.
29. Counsel said there was a very high standard for excluding a relevant property from the valuation list and that if such a property were to be excluded that it must be of no beneficial value.
30. Counsel referred to Butler on Rating Law in Ireland, para 2.07, which cites *Sinnott v Neale (1948) Ir. Jur. Rep. 10* in relation to the point that it is not necessary to show pecuniary profit in order for something to be in rateable occupation.

## **Findings and Conclusions**

31. The Tribunal, having examined the particulars of the subject property of this appeal; having confirmed its valuation history; having examined and considered the written



evidence and having heard the oral evidence on the 29<sup>th</sup> June 2016 and the 2<sup>nd</sup> November 2016 adduced before us by Mr. O'Brien and Mr. Moloney Valuer, on behalf of the Appellant, who contended for a net annual value of nil, and Mr. Robinson, on behalf of the Respondent, and having considered the legal submissions finds as follows:

32. Evidence was given at the hearing, by Mr. Val O' Brien, Chartered Building Surveyor, for the Appellant, that the subject property has been used previously. However, he said that it was disused at the time of his inspection on the 6<sup>th</sup> of October 2014. Mr O' Brien gave evidence that the property suffered fire damage and water ponding and that it was a fire safety hazard, *inter alia*. He gave evidence that a substantial amount of expenditure would be necessary in order to bring it up to a standard whereby it could be occupied by a tenant.
33. Mr. O Brien was asked if he had any knowledge of the state of the property in March 2012, and he confirmed that he did not. He said that he had only been in the building on the 6<sup>th</sup> of October 2014.
34. Mr. Moloney, for the Appellant, gave evidence that the subject property was occupied up until January 2013, by a company called 'Wickes', at which point it closed.
35. The Tribunal finds, therefore, as a matter of fact, that the subject property was capable of beneficial occupation on the date of valuation and thereafter as there is clear, uncontradicted evidence before it, to show that this is the case. The Appellant has failed to show that the subject property is of no use to any party.
36. In *Petmania v Commissioner of Valuation VA15/5/066* the Tribunal reduced the valuation in respect of Property No. 2203097, a retail warehouse at Unit 2 Eastpoint Retail Park, for the reasons therein set out. The Respondent by virtue of section 38 of the Valuation Act 2001 is obliged to amend the valuation list in a manner consonant with that decision. The Respondent has power under section 40 of the said Act, if it amends a valuation list in respect of a particular property under section 38, to also amend in a manner consonant with that decision of the Tribunal, each other property appearing on the valuation list as he considers similarly circumstanced to the said

property. The Tribunal is of the view that consideration ought to be given, by the Respondent, to exercising his power under section 40 in respect of the subject property which is situate in the same retail park as Property No. 2203097, given that uniformity and equity are essential to the administration of the rating system.

And the Tribunal so determines.