

Appeal No: VA17/5/616

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

**NA hACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015**

BELGARD NOMINEES ONE LIMITED

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

In relation to the valuation of

Property No. 5001776, Leisure at Belgard Square West, Cookstown Way, Tallaght, County Dublin.

B E F O R E

Barry Smyth – FRICS, FSCSI, MCI Arb

Deputy Chairperson

Claire Hogan - BL

Member

Caroline Murphy - BL

Member

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 9TH DAY OF JUNE, 2020.

1. THE APPEAL

1.1 By Notice of Appeal received on the 12th day of October, 2017 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value (“**the NAV**”) of the above relevant Property (“**the subject property**”) was fixed in the sum of €87,900.

1.2 The grounds of appeal as set out in the Notice of Appeal are as follows:

1. *“This property has been sterilised, has no independent access and is incapable of beneficial occupation. The valuation is excessive and the valuation should be NIL.*
2. *Without prejudice to our primary condition above if this is not accepted by the Valuation Tribunal, the valuation is excessive based on its impairment.”*

1.3 The Appellant considers that the valuation of the subject property ought to have been determined in the sum of €0. However, as an alternative it is contended that the valuation should be reduced from the sum of €87,900 to the sum of €11,500.

2. REVALUATION HISTORY

2.1 On the 13th day of April, 2017 a copy of a valuation certificate proposed to be issued under section 24(1) of the Valuation Act 2001 (“**the Act**”) in relation to the subject property was sent to the Appellant indicating a valuation of €219,000.

2.2 Being dissatisfied with the valuation proposed, representations were made to the valuation manager in relation to the valuation. Following consideration of those representations, the valuation of the subject property was reduced to €87,900.

2.3 A Final Valuation Certificate issued on the 7th day of September, 2017 stating a valuation of €87,900.

2.4 The date by reference to which the value of the property, the subject of this appeal, was determined is the 30th day of October, 2015.

3. THE HEARING

3.1 The Appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 24th day of February, 2020. At the hearing the Appellant was represented by Mr Michael Doyle MRICS, MSCSI, ACI Arb of Bagnall Doyle MacMahon and the Respondent was represented by Mr Robert O’Neill BL, instructed by Mr Michael Collins of the Chief State Solicitors Office and Mr Viorel Gogu of the Valuation Office.

3.2 In accordance with the Rules of the Tribunal, the parties had exchanged their respective reports and précis of evidence prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief in addition to giving oral evidence.

4. FACTS

4.1 From the evidence adduced by the parties, the Tribunal finds the following facts.

4.2 The subject property is located in a basement in Belgard Square West, Tallaght, close to the Square Shopping Centre. A property which was originally fitted out as a gym with a swimming pool and sauna, and occupied by Crunch Fitness, was subdivided into two properties in 2012.

4.3 A company named Fit4Less occupies one part of the original building – PN 5004502 – and uses it as a “dry gym”. It was leased in October 2013 for €31,200 per year, and the Lease states at page 9 that the demised premises comprises 765.5 m² (8,240 square feet). PN 5004502 was valued in 2014 at €114,300. It was the subject of an appeal and a Tribunal determination (VA14/4/009) and the valuation was reduced to €95,600, representing a rate of €125/m². The property was revised in 2019 and the NAV remained unchanged.

4.4 However, it is only the remaining part of the originally integral gym building which is the subject of this appeal (PN 5001776). The measurement of the subject property is 2,198.16 m². The subject property has a swimming pool, sauna and steam room equipment. It is physically subdivided from PN 5004502 by temporary partitions such as sheets. Therefore, it is the case that Fit4Less has access to the subject property.

4.5 The extent of occupation of Fit4Less was a matter which the Tribunal probed at the hearing of this matter. It transpired that Fit4Less is currently occupying part of the subject property which was not demised to it under its Lease. A map at page 9 of the Appellant’s precis shows that it is occupying an area marked in light blue which it uses as a fitness studio. This is obviously difficult to reconcile with an argument that the subject property is not capable of occupation, however, this issue shall be discussed later in this determination.

5. ISSUES

5.1 The first main issue is whether the subject property is capable of beneficial occupation and thus capable of being valued.

5.2 The second issue, which depends on the first issue being answered in the affirmative, is whether the valuation of €87,900 is fair or excessive.

5.3 An issue not in dispute is the valuation of the property occupied by Fit4Less (PN 5004502).

6. RELEVANT STATUTORY PROVISIONS:

6.1 Section 15 of the Act provides that “relevant property” shall be rateable. Schedule 3 of the Act identifies relevant property. Section 1 of Schedule 3 identifies the nature of relevant property and includes lands used or developed for any purpose and any constructions affixed thereto. Section 2 of Schedule 3 requires that the property:

(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 subject of rateable occupation by the owner of the property

6.2 If the subject property is “relevant property”, the net annual value of the subject property has to be determined in accordance with the provisions of section 48(1) of the Act which provides as follows:

The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.

6.3 Section 48(3) of the Act as amended by section 27 of the Valuation (Amendment) Act 2015 provides for the factors to be taken into account in calculating the net annual value:

Subject to Section 50, for the purposes of this Act, “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 be expected to let from year to year, on the assumption that the probable annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant.

7. APPELLANT'S CASE

7.1 The Appellant contended that the subject property has been rendered incapable of beneficial occupation. The Appellant highlighted that access to the subject property is via one stairway and lift core, which is in the property demised to Fit4Less.

7.2 The Appellant relied on a report from Ms Krystyna Rawicz, a building surveyor, which concluded that *“based on the current configuration, the space cannot be independently accessed in a way which would meet statutory requirements, most particularly as there is no disabled access route to the premises except through the space occupied by Fit4Less”*. Ms Rawicz concluded that a new Fire Safety Certificate application and fire separation works would be necessary. The Appellant contended that the subject property does not satisfy statutory requirements as regards fire safety and disability access, and that it could not be *“legally independently occupied in its current state”*. It was also argued that the Planning Department of South Dublin County Council would be unlikely to give approval for the separation works. Ms Rawicz's report also stated that she observed water ingress problems in the subject property. It was argued that Fit4Less are the only potential hypothetical tenant for the space and it has been offered to them on a number of times over the last 7 years at nil rent, if they will pay rates etc, but that they have declined this offer as it is not commercially viable for them to use this space.

7.3 If the Appellant's first argument about beneficial occupation was not successful, the Appellant maintained that it ought in any event to receive a reduction in the rate applicable to the subject property. It argued that the “footprint” occupied by Fit4Less was “in reality” 1,375 m² (almost twice the demised area under the lease) as it could access areas of changing rooms etc. The Appellant sought to argue that €31,200, which is the rent per annum, divided by the area of 1,375 m² produced a valuation of 22.69/m². The Appellant referred to three comparison gyms in the area; PN 404504, PN 2181279 and PN 2186179. All three were valued at €55/m². It was argued that these properties were superior to the subject property as they were standalone gyms on large sites which have natural light and plenty of car-parking. The Appellant argued that *“it does not make sense that the occupied portion of the basement gym in Belgard Square should be valued at €125 psm”*.

7.4 It then argued that the remainder space occupied by the subject property could be considered to be 1,588.66 m² (2963.66 m² - 1375 m²) and multiplying this space by 22.69/m², the Appellant reached a figure of €36,046.70. It sought to apply a further discount of 32% to reflect the difference between the unoccupied and occupied portions of the basement, to ultimately reach the figure of €11,534.

7.5 Under cross-examination, it was put to the Appellant that Crunch Fitness, the previous occupier of the property prior to sub-division, went into receivership, and that this was why it walked away from its lease. It was accepted that Crunch Fitness went into receivership. It was put to the Appellant that some materials owned by Fit4Less such as gym equipment are stored in the subject property, as evidenced by photos taken by the Respondent. The Appellant accepted that some items were “lying around”. However, he stressed that the subject property was not legally capable of independent use. It was put to the Appellant that the subject property could be easily restored to its original condition. The Appellant stated that he did not have costings, and could not say how easy this would be.

8. RESPONDENT’S CASE

8.1 The Respondent maintained that the property was capable of beneficial occupation and that it ought to remain in the valuation list in accordance with Schedule 3 part 2(b) of the Act. The Respondent provided legal submissions on this point.

8.2 The Respondent argued that a rate of €40/m² which is the level for basement retail stores in the area was a fair rate, and five retail basement comparisons at the same level were provided.

8.3 The Respondent provided nine comparison properties of gyms/ fitness centres in the same area as the subject property:

- (i) PN 2181279 (Westpark Fitness Ltd) has an NAV of €55/m²
- (ii) PN 2186179 (South County Dublin Leisure Services Limited) has an NAV of €55/m²
- (iii) PN 5004502 (Fit4Less) has an NAV of €125/m²
- (iv) PN 5019999 (FlyeFit) has an NAV of €100/m²
- (v) PN 5002384 (Lucan Health & Fitness Club) has an NAV of €85/m²
- (vi) PN 441796 (South County Dublin Leisure Services Ltd) has an NAV of €40/m²

(vii) PN 404504 (South County Dublin Leisure Services Ltd) has an NAV of €55/m²

(viii) PN 455284 (Firhouse Community & Leisure Club Ltd) has an NAV of €40/m²

(ix) PN 491713 (Dublin Hydrotherapy Practice Limited) has an NAV of €60/m²

8.4 Under cross-examination, the Respondent was asked whether it accepted that the subject property was largely empty. Mr Gogu stated that it was used as a store. The Appellant asked the Respondent whether the subject property was valued as a gym or as a store. The Appellant replied that it was valued as a gym which is in use as a store. The Respondent was pressed on its retail basement comparisons. The Appellant put it to the Respondent that they all operated in conjunction with retail units, and that none of them were independent basement properties. The Respondent was asked what kind of person or business would be interested in occupying the subject property. Mr Gogu replied that he did not know. The Appellant asked the Respondent about the access difficulties, and the Respondent maintained that there was no evidence that a solution could not be found.

9. SUBMISSIONS

9.1 The Appellant did not make any legal submissions about the concept of beneficial occupation under valuation law.

9.3 The Tribunal had the benefit of legal submissions from the Respondent. In these submissions, the Respondent highlighted the case of *Winstanley v North Manchester Overseers* [1910] AC 7 and argued that it was authority for the proposition that any deterioration, deliberate closing off or lack of maintenance is a matter for the owner and does not affect rateability.

10. FINDINGS AND CONCLUSIONS

10.1 On this appeal the Tribunal has to determine first whether the Property is capable of beneficial occupation, and second if it is capable of same, the Tribunal must determine the value of the Property so as to achieve, insofar as is reasonably practical, a valuation that is correct and equitable so that the valuation of the Property as determined by the Tribunal is relative to the value of other comparable properties on the valuation list in the rating authority area of South Dublin County Council.

10.2 In relation to the first issue, the Appellant's expert, Ms Krystyna Rawicz was not present at the hearing of this matter, which is a matter of regret to the Tribunal. She could not be cross-examined on her Report. However, the Respondent did not raise an objection regarding the Appellant's reliance on the Report.

10.3 The owner of the subject property was not in occupation on the relevant date, and therefore the test is that set out in section 2 of the Third Schedule of the Act i.e. whether the property was capable of being the subject of "rateable occupation" by the owner of the property. There is no definition of rateable occupation in the Act. The essential ingredients of rateable occupation are that it must be (1) exclusive in the sense that the person using the hereditament can prevent any other person from using it in the same way; (2) of value or benefit to the occupier but not necessarily of financial benefit; and (3) not for too transient a period (*Telecom Éireann v. Commissioner of Valuation* [1994] IR 66, O'Hanlon J)

10.4 The Tribunal was not persuaded that the subject property is incapable of beneficial occupation. The most compelling evidence of beneficial occupation is to be found by looking at the *status quo*, whereby the occupier of the adjacent premises, Fit4Less, has started using part of the subject property as a fitness studio. Therefore, a company has effectively gone into rateable occupation of the subject property.

10.5 The Tribunal considered the Report of Ms Rawicz notwithstanding her lack of availability at the hearing, and notes her view that there may be legal difficulties regarding fire safety and disability access. However, the Tribunal is not persuaded that a solution cannot be found. The Tribunal finds that the owner of the original gym building should not be permitted to benefit from the way in which he has carved out a portion of it to demise to Fit4Less, and that the Appellant did not demonstrate that the owner is incapable of alternative configurations for use which will not run afoul of access regulations.

10.6 The Tribunal concludes that the property is "relevant property" as defined in Schedule 3 section 2 of the Act.

10.7 On the second issue of the appropriate valuation, the Tribunal must note at the outset that it was unhelpful that the Appellant made ancillary complaints about the valuation of the property occupied by Fit4Less (PN 5004502) throughout the course of this appeal. This property was not the subject of this appeal, therefore arguments regarding an unfair valuation of this property could not be entertained.

10.8 The Tribunal also did not accept the Appellant's contention that the area of the space occupied by Fit4Less ought "in reality" to be considered as 1,375 m², meaning that the area subject property was 1,588.66 m². The Tribunal must use the measurements upon which the final valuation certificates were based, meaning that the area of the space occupied by Fit4Less is 765.5 m² and the area of the subject property is 2,198.16 m². The Appellant did not seriously dispute these figures and acknowledged that the lease demised only 765.5 m², but gave alternative measurements in order to come up with a hypothetical valuation of 22.69/m² which he sought to apply across both the subject property and the demised property occupied by Fit4Less. This is an artificial and unrealistic calculus. It also obviously contradicts the Appellant's arguments regarding sterility to state that Fit4Less actually occupies a large portion of the subject property, beyond their demised property PN 5004502 (which measures 765.5 m²).

10.9 Equally, the Tribunal did not accept that the Commissioner's retail store basement valuation was appropriate, and it was not correct to compare this basement to other basements which are part of a retail unit. The subject property is a gym and should be valued as such. However, the Tribunal accepts that it has some disabilities. When the comparisons with other gyms are taken into account, it is evident that many others are far superior. In this regard, both the Appellant and the Respondent relied on PN 2181279 (Westpark Fitness Ltd) as a comparison. This is a standalone gym with surface car parking and a NAV of €55/m². The gulf between this property and the subject property which is valued at €40/m² is greater than a €15 per m² difference. Therefore, the Tribunal was persuaded that a greater discount ought to apply, and that a fair rate for the subject property would be €25/m², in order to fully reflect the disabilities and potential problems attaching to it.

DETERMINATION:

Accordingly, for the above reasons, the Tribunal holds that the property should remain on the valuation list as “relevant property” in accordance with section 15 and section 2 Schedule 3 of the 2001 Act.

However, the Tribunal decreases the valuation of the Property as stated in the valuation certificate to €25/m² .

NAV calculation:

2,198.16 m² X €25

€54,954 **SAY €55,000**

And the Tribunal so determines.