

THE HIGH COURT

2006 No. 890 S.S.

BETWEEN

COMMISSIONER OF VALUATION

APPELLANT

AND
BIRCHFOX TAVERNS LIMITED

RESPONDENT

IN THE MATTER OF THE VALUATION ACT 2001

AND IN THE MATTER OF THE VALUATION OF THE FOLLOWING PREMISES:

Appeal No. VA04/1/005 – LICENSED SHOP AT LOT No. 1, EDWARD STREET, TRALEE, COUNTY KERRY

Judgment of Mr. Justice Bryan McMahon dated the 23rd day of April, 2008.

1. Introduction

1.1 The case before the Court concerns the question of the entitlement of a person to a revision of the valuation list under the Valuation Act 2001. Section 27 of the 2001 Act sets out the persons who may apply to the Commissioner of Valuation to appoint an officer of the Commissioner ("revision officer") to carry out a revision of the valuation list and to exercise certain powers in that regard. These powers are specified in s. 28(4), but before they can be exercised certain preconditions must be fulfilled.

2. Background

2.1 This is a case stated from the determination of the Valuation Tribunal on the 2nd September, 2004.

2.2 The case stated concerns Lot No. 1, Edward Street, Tralee: a three storey terrace building. The ground floor is a public house with accommodation on the first floor used in conjunction therewith. The second floor is now a bar manager's flat and has a separate pavement access. Access to the staircase leading to the second floor is also possible from the first floor. Birchfox Taverns Limited ("Birchfox") occupy the entire property under a lease. Mr. J.D Wynne is the Landlord and the Director of Birchfox.

2.3 In 1998, the premises were listed for rates revision and as a result the then existing rate of a valuation of IR£19 was increased to IR£56. This was appealed to the Valuation Tribunal and the valuation was reduced to IR£48 based on a Net Annual Value of IR£9,621 calculated as set out below:

Ground floor – Bar/Lounge 660sq ft at IR£14 = IR£9,240

Door 37sq ft at IR£3 = IR£111

First Floor – Toilets/Office 370sq ft at IR£31 = IR£207

Net Annual Value = IR£ 9,621

Rate of Valuation at 0.5% = IR£48 (€60.95)

2.4 It will be seen from this that no valuation was attributed to the accommodation on the second floor level. Dissatisfied, Mr. Wynne made a request in writing to the Chairman of the Valuation Tribunal and thereafter the case was stated on the 19th November, 2001 by the Valuation Tribunal to the High Court. The High Court decided that the Tribunal was correct in point of law and ordered Mr. Wynne to pay the respondent's costs when taxed and ascertained.

2.5 Subsequently, on the 11th December, 2002, Birchfox made an application for a revision of valuation in accordance with s. 27(1) of the Valuation Act 2001 ("The Valuation Act"), which allows an occupier of a property to apply in writing to the Commissioner for the appointment of a Revision Officer under s. 28(3) of the Valuation Act. The revision was sought on the grounds that "the entire second floor together with the hallway from a street level providing access thereto has been altered to residential accommodation since the valuation of the 9/11/1998. This structural alteration constitutes a 'material change of circumstances'."

2.6 The Commissioner for Valuation appointed a Revision Officer. Pursuant to s. 28(4) of the Valuation Act, a Revision Officer has the powers under this subsection to decide if "a material change of circumstances" has taken place. A "material change of circumstances" is defined in s. 3 of the Valuation Act. If the Revision Officer decides that a "material change of circumstances" has in fact taken place he may exercise powers set out in s. 28(4)(a) and (b) of the Valuation Act. In August, 2003, the Revision Officer wrote to Birchfox stating:

"No material change of circumstance has occurred in relation to this property and I will therefore not exercise my powers in relation to the revision application".

2.7 This letter was written pursuant to s. 28(9) of the Valuation Act which obliges a Revision Officer to issue a notice of his decision that circumstances referred to in s. 28(4) of the Valuation Act do not exist.

2.8 Birchfox lodged an appeal to the Commissioner of Valuation against the Revision Officer's decision and stated grounds in accordance to s. 30(1) (a) and s. 31 of the Valuation Act. In February, 2004 the Commission of Valuation wrote to Birchfox:

"Having considered your appeal I have decided that your property as detailed in the above Certificate should be entered in the valuation list".

2.9 The effect of this letter was to make no change to the existing valuation of €60.96.

2.10 Section 34 of the Valuation Act entitles the occupier of property to appeal a decision of the Commissioner of Valuation to the Valuation Tribunal. On the 6th August, 2004 Birchfox lodged an appeal against the Commissioner of Valuation's decision. On the 17th

August, 2004 the Tribunal issued its determination that Birchfox was entitled to the revision sought. On the 2nd September, 2004 the Chief State Solicitor wrote to the Chairman of the Valuation Tribunal on behalf of the Commissioner of Valuation to formally declare dissatisfaction with the judgment in accordance with s. 39(1) of the Valuation Act. On the 3rd July, 2006 a draft case stated was filed in the High Court's Central Office identifying the question of law stated for the opinion of the High Court:

2.11 *Whether the Valuation Tribunal was correct in law in holding that the property concerned was the entire of the building known locally as No. 10 Edward Street rather than that part of the ground and first floor which comprises Valuation Lot No. 1 Edward Street appearing on the existing valuation list as a consequence of the 1998 revision.*

3. The Law

3.1 The Valuation Act 2001 which came into effect on the 2nd May, 2002, is now the only statute dealing with the valuation of property for rating purposes. Essentially, what the court is called to adjudicate on is primarily a question of statutory interpretation. The difficulty facing the court arises because the original valuation made in 1998, attributes no valuation to the accommodation on the second floor level nor indeed was there any reference to this accommodation in the written judgment of the Tribunal dated the 12th September, 2000. In the valuation list of 1998 the property is described as a "Licensed Shop".

3.2 The relevant sections of the Valuation Act are produced here for ease of reference and to provide an overall view:-

"Part 6

Revisions of Valuations

27-(1) An occupier of a property may apply in writing to the Commissioner for the appointment by the Commissioner of a person under *section 28(3)* to exercise the powers under that section in relation to that property.

...

28-(1) In this section 'property concerned' means a property in relation to which person, by virtue of his or her appointment under this section, is entitled to exercise the powers conferred by this section.

...

(3) If an application under s. 27 is made to the Commissioner, the Commissioner shall appoint an officer of the Commissioner to exercise, in relation to the property or properties to which the application relates, the powers expressed by this section to be exercisable by a revision officer, and such an officer who is so appointed is also referred to in this Act as a 'Revision Officer'.

(4) A Revision Officer, if he or she considers that a material change of circumstances which has occurred since the valuation under s. 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 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 s. 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 to that valuation.

(5) A Revision Officer shall, if the property concerned is property that has been the subject of an application under s. 27, within six months from the date of his or her appointment under *subs. (3)* in respect of that application –

(a) make a decision as to whether the circumstances referred to in *subsection (4)* exist for the exercise by him or her of the powers under that subsection in relation to that property,

(b) if he or she decides that those circumstances do exist, exercise those powers in relation to that property accordingly.

.....

(9) If a revision officer decides that the circumstances referred to in *subsection (4)* do not exist for the exercise of the powers under that subsection in relation to a property referred to in *subsection (5)* he or she shall, forthwith after the making of that decision issue to the person or as the case may be, each person who applied for his or her appointment under *subsection (3)* in respect of the property a notice of the decision.

(10) The revision officer concerned shall amend the relevant valuation list in the appropriate manner to take

account of the exercise by him or her of the powers under *subsection (4)* in relation to a property.

(11) Without prejudice to the preceding provisions of this section, the Commissioner may, at any time, amend a valuation list so as to –

(a) correct any clerical error therein, or

(b) amend any other detail appearing on the list that in the opinion of the Commissioner is inaccurate (other than the valuation of any property)."

Section 3 (Definitions)

Section 3 of the Act is the following definitions:-

"material change of circumstances' means a change of circumstances which consists of –

(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*,

.....

'Domestic premises' means any property which consists wholly or partly of premises used as a dwelling and which is neither a mixed premises nor an apart-hotel:

- "relevant property" shall be construed in accordance with *Schedule 3*.

Schedule 3

Relevant Property

1. – Property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in *paragraph 2* of this Schedule shall be relevant property for the purposes of this Act:

(a) Buildings,

.....

2. – The condition mentioned in *paragraph 1* of this Schedule 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.

Schedule 4

Relevant Property Not Rateable

.....

6. – Any domestic premises (but subject to *section 59(4)* (which provides that apartments are rateable in certain limited circumstances))."

4. Property Concerned

4.1 "Property concerned" is defined in s. 28(1) in the following language.

"In this section 'property concerned' means a property in relation to which a person by virtue of his or her appointment under this section, is entitled to exercise the powers conferred by this section."

4.2 The first point of note in considering this definition is that it is a definition for the purposes of s. 28 only as is clear from the introductory words- "In this section". It is also clear that the term is defined in the subsection by reference to the powers given to the Revision Officer. It does not identify the physical property in question. The definition relates to a legal concept and does not cast any light as to whether the property in question in our case is the entire house or only part of it. The nature and extent of the property in that sense is defined and described by the occupier when he makes his application under s. 27. "Property concerned" has no meaning under s. 28 until a Revision Officer is appointed. Prior to his appointment the legal concept does not exist. Furthermore, "property concerned" means property in relation to which the Revision Officer "is entitled to exercise the powers conferred in this section". This clearly signifies that it is only "property concerned" when there is an entitlement "to exercise the powers conferred in the section". This would suggest that unless there is the entitlement to exercise the relevant powers, the property, whatever it is, does not come within the definition.

4.3 The powers referred to in s. 28(1) are the powers to amend the valuation of that property, exclude the property from the list, amend any material particular in relation to the property, and if the property is not on the valuation list, to value it and include it on the list. (Section 28(4) (a) and (b))

4.4 Section 28(4) provides as follows:

"A Revision Officer, if he or she considers that a material change of circumstances which has occurred since ... [the last

relevant valuation] *.... warrants the doing of such, may, in respect of that property...". (* My paraphrase).

4.5 This is the introductory paragraph which clearly sets out the conditions which must be met before the Revision Officer is entitled to exercise the powers in question. A reading of this paragraph makes it clear that to exercise any of the powers referred to in s. 28(4) (a) and (b), the Revision Officer must first consider.

(1) That a material change of circumstances has occurred (since the last relevant valuation if any)

and

(2) Such a material change warrants the exercise of these powers.

4.6 These are preconditions (not powers in themselves as the appellant argued) which must be met before the Revision Officer is entitled to exercise the powers. (This interpretation is supported by the wording of s. 28(5) (a) and s. 28(b)). Clearly, if they were not met, the Revision Officer has no entitlement to act and the property in question cannot be "property concerned". We must now examine more closely both of these preconditions. "Material change of circumstances" is defined in the definition section of the act as follows:

"Material change of circumstances' means a change of circumstances which consist of –

(a)

(b)

(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)

(f)"

(Paragraphs (a) (b) (e) and (f) are omitted since the appellant relies only on paras. (c) and (d) in making his case).

4.7 Before examining this definition more closely, we must first look at the definition of "relevant property" as given in Schedule 3 of the Act since this concept appears in both paras. (c) and (d). To keep the matter simple only the relevant portions of the definition are given here.

4.8 "Relevant Property" means;

"Schedule 3

(1) – Property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in *paragraph 2* of this Schedule shall be relevant property for the purposes of this Act:

(a) buildings,

(b) ...

(2) The condition mentioned in para. 1 of this schedule is that the property concerned –

(a) Is occupied and the nature of that occupation is such as to constitute rateable occupation... or

(b) Is unoccupied but capable of being the subject of rateable occupation by the owner of the property.

4.9 Some relevant property is not rateable under Schedule 4. This includes any domestic premises (i.e. property which consists wholly or partly of premises used as a dwelling and which is neither a mixed premises nor an apart-hotel).

4.10 It is clear that Lot No. 1, Edward Street, Tralee is relevant property under the terms of Schedule 3. This is not disputed by the parties. In arguing, as the appellant does, that there has been a "material change of circumstances", to the entire property, because the second floor has been converted into a flat, it faces considerable difficulties under both headings.

4.11 In relation to (c) there is no question of the property or part of it beginning to be treated as relevant property since the ground floor and first floor already feature on the valuation list, and the second floor before and after refurbishment clearly qualifies as relevant property it being in rateable occupation (*Telecom Éireann v. Commissioner of Valuation* [1994] 1 I.R. 66) and is capable of being subject to rateable occupation (as required by para. 2 of Schedule 3). That the second floor is not noted in the valuation list is immaterial. The second floor was a relevant property before it was renovated and remained so after it was refurbished.

4.12 Turning to para.(d) of the definition of "material change of circumstance", the appellant faces a different problem. For para.(d) to apply it must be shown that an event occurred whereby "any relevant property begins, or ceases, to be treated as property falling within Schedule 4". Schedule 4 is headed relevant property not rateable and contains a list of properties which are relevant but which are, for one reason or another, exempt from rates and are not rateable. In the present case there is no question of any relevant property ceasing to be within Schedule 4 as Lot No. 1, is a rated property and has never been included in Schedule 4. The question then arises as to whether the relevant property "begins" to be classified as Schedule 4 property (i.e. not rateable)? Unlike para. (c), however, which speaks of "part of any property" para. (d) does not make provision for "part of the property" (i.e. in this case the second floor) being reclassified.

4.13 The applicant recognises his difficulties in this regard and in para. 21 of its submission to the court it makes the following concession:

"The categories of properties that are no longer rateable are set out in s. 15, Schedule 4. They remain relevant property and the Commissioner is obliged to value them, but no rates are leviable on these properties. Therefore category (c) in the definition of material change in circumstances does not seem to help Birchfox as upon the conversion to residential accommodation the second floor remained relevant property, even if it became exempted from rates. Schedule 4 states that domestic premises are not rateable. Therefore, when the second floor was converted into residential accommodation it became exempted from rating. There was then perhaps a material change of circumstances within subs. (d) because the second floor was not rateable. However this argument is subject to the difficulty that subs. (d) talks about relevant property and does not refer to a change to "part" of the relevant property. In this case it is only a part of the relevant property that began to fall within Schedule 4."

4.14 From this analysis it can be seen that insofar as "material change of circumstances" is concerned the appellant cannot bring itself within either paras. (c) or (d) of the definition. Accordingly, no "material change of circumstances" has occurred and this in turn means that the powers expressed in s. 28(4) (a) and (b) cannot be exercised by the Revision Officer and the appellant must fail on that ground.

4.15 In addition to there being "a material change of circumstances" there is a second precondition before the powers under s. 28(4) are triggered. The material change of circumstances in relation to the property must warrant the exercise of these powers. This means that when a material change of circumstances is established, the Revision Officer can only exercise the power given to him in that section if he considers that the changes are such that they warrant action by him.

4.16 The submission on behalf of the Commissioner of Valuation on this point is worth reproducing.

"Even if the Tribunal was correct in determining that there had been a material change of circumstances in relation to the building as a whole, it should then have proceeded to consider whether it was such as to warrant the exercise of the s. 28(4) powers. This is an essential step in the scheme laid down by the legislature, but it is something which the Tribunal plainly failed to do. It is submitted that this was a clear error on the part of the Tribunal in determining that Birchfox was entitled to the revision.

Insofar as it might be contended that there was an implicit determination that the alleged material change of circumstances warranted the exercise of the s. 28(4) powers, it is submitted that any such implicit determination was in error.

It is quite clear that the intention of Birchfox (see the précis of evidence submitted to the Tribunal) was at all times to seek a lower valuation of the ground and first floor. However, the valuation to be placed on the ground and first floor has already been the subject of a determination and a written judgment by the Tribunal, and a case stated to this Court. The only change relates to the third floor [the "second" floor in the Court's usage], which is clearly residential and as such not rateable at all, by virtue of Schedule 4. In the circumstances, even if there was a change of circumstances, it does not warrant the exercise of the powers under s. 28(4). The Tribunal observed that "whether or not the revision will materially affect the appellant's position is not relevant. What is relevant is that the procedures set down in the Act of 2001 are strictly followed."

4.17 It is submitted that in expressly excluding any consideration of whether a revision would materially affect the ratepayer's position, the Tribunal failed to comply with the steps laid down in s. 28(4). The revision sought is precisely the sort of "unnecessary" revision condemned in the *Eastlink* case. (*Eastlink Limited v. The Commissioner of Valuation*, judgment of Valuation Tribunal dated 11th May, 1998)

4.18 One must conclude that whatever property (the entire building or only part of it) is embraced by the term "property concerned", the Revision Officer is not entitled to exercise the powers set out in s. 28(4)(a) and (b), because a material change of circumstances has not occurred and in any event any such change would not warrant the exercise of these powers in the circumstances of this case.

4.19 Under the 2001 Act, circumstances where revisions are allowed are contained in Part 6 of the legislation. This part, although expressed in terms applicable only to a "new" valuation list (i.e. a list prepared under the 2001 Act) clearly applies also, by virtue of s. 44(1) of the Act, to "an existing valuation list" such as we have in this case. (see s. 3 and s. 43 of the 2001 Act also). The only revisions provided for, since the 2001 Act came into force, in cases such as that before the Court, are those provided for in ss. 27 and 28. 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. (See s. 3(1) of the Valuation Act 1988, and the Tribunal's attempts to limit this liberal regime in *North Kerry Milk Products Limited v. Commissioner of Valuation* (VAT 89/0/24) and *Eastlink v. Commissioner of Valuation* (VAT 96/4/016)).

4.20 Since the 2001 Act, was passed, however, apart from the mechanisms provided for in ss. 27 and 28, there are no other circumstances where a revision can be ordered by the Tribunal. If a revision is not allowed under ss. 27 and 28, the Tribunal has no residual power to order one.

5. Conclusion

5.1 From this analysis it can be seen that the point of law that should be addressed in these proceedings is not whether "property concerned" means the entire property known as Lot 1 Edwards Street, Tralee, Co. Kerry, or only that part of the property in the refurbished second floor. The true question for this Court is whether there was a "material change of circumstances" which will enable the revision officer make a revision of the valuation list under s. 28(4). It is clear from the above, that the opinion of this Court is that no revision can be made in the circumstances and that the Tribunal erred in law in reaching a different conclusion. I construe s. 39(5) as giving me authority to determine this matter even though it is not exactly the question identified by the Tribunal when stating a case for this Court.

5.2 Finally the Tribunal relied on the *Inspector of Taxation v. Kiernan* [1981] I.L.R.M. 13, as partly justifying its determination in favour of Birchfox. Since the Valuation Act, 2001 is not a penal statute and there is no question of the fresh imposition of a liability on the appellant, I consider it a wholly irrelevant justification for its determination.

