Appeal No. VA09/2/007

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Angela Wright **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Property No. 731627, Right of Street Trading at Lot No. A26, Moore Street, North City, North City 2B, County Borough of Dublin.

B E F O R E

John O'Donnell - Senior Counsel	**Deputy Chairperson**
Joseph Murray - B.L.	**Member**
Michael F. Lyng - Valuer	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 9TH DAY OF NOVEMBER, 2009

By Notice of Appeal dated the 11th day of May, 2009, the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €8.89 on the above-described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are:
"Should not be rated - no right of way exists over the land. Property not rateable."

The appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 28th day of September, 2009. At the hearing the appellant was represented by Mr. Owen Donnelly, BL, instructed by Thomas Loomes & Company, Solicitors. The respondent was represented by Mr. Pat McMorrow, ASCS, IAVI, Valuer in the Valuation Office and Mr. James Devlin, BL, instructed by the Chief State Solicitor. Both sides filed written legal submissions which were of considerable assistance to the Tribunal.

BACKGROUND

The subject Pitch A26, Moore Street, Dublin 1, was valued at a rateable valuation of €8.89 in 1985. While the pitch in question was then occupied by Catherine Hickey, it has since been occupied by Angela Wright. On the 26th June, 2008 an application to the Commissioner of Valuation for revision of valuation was received in the Valuation Office for the subject property. The appellant contended that the pitch occupied by the appellant was not subject to the Valuation Act, 2001 and that the pitch should instead be valued at a nil value.

The Revision Officer decided that no material change of circumstances had occurred. On the 7th October, 2008 a notification of this decision was sent to the rate-payer in question. On the 17th October, 2008 an appeal against the decision that no material change of circumstances had occurred was received in the Valuation Office. On the 15th April, 2009 the Commissioner decided that no material change of circumstances had occurred. A notice disallowing the appeal in question was issued to the ratepayer. On the 11th May, 2009 an appeal was lodged with the Valuation Tribunal.

By way of preliminary submission on behalf of the respondent, Mr. Devlin suggested that the appellant must first establish whether or not there had been a material change of circumstances which would allow for a revision of the rateable valuation of the property to take place. He urged that this issue be decided before considering the issue of whether or not the property in question is a rateable property.

On behalf of the appellant, Mr. Donnelly submitted that the occupation of the pitch in question could not be regarded as anything other than a right to trade on the street in question and that it was not, therefore, a “relevant property” within the meaning of the 2001 Act. However, he accepted that as matters stood, given that the property had at all material

previous times for the last 25 years been regarded as rateable, he would have to establish in the first place that the valuation should be revised and that he could only establish his entitlement to such a revision if he could establish that a material change of circumstances had taken place in the intervening period.

Accordingly, both parties agreed that a preliminary issue arose for determination which was "Had a material change of circumstances taken place?"

Preliminary Issue: The Appellant's Submissions

Counsel for the appellant drew our attention to the definition of "*material change of circumstances*" contained in the 2001 Act. He made it clear that he continued to view the rights associated with the pitch in question as no more than a right to trade on the street, and certainly not a relevant property within the meaning of the Act. In those circumstances, he submitted that it was difficult to see how any of the definitions of material change of circumstances (all referring as they do to "*property*") could be easily applied to the pitch in question.

In his submission, however, sub-paragraph (b) of the definition of "material change of circumstances" was the most appropriate definition. This definition, which occurs in section 3(1) of the Valuation Act, 2001, indicates that a change of circumstances can consist of "*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...*".

Mr. Donnelly submitted that his evidence would be that a number of buildings in the vicinity of the pitch in question have been significantly altered. A number have been closed. Others have changed hands so that the trade which they would attract has likewise changed. In addition, a Lidl store has opened. As a result, he contended that the value of the property (i.e. the pitch) which his client occupies has been changed in value by virtue of these various changes which have occurred in Moore Street since 1985. Accordingly, it was his contention that the change in (i.e. reduction in) the value of the pitch in question by virtue of the reduced trade and other adverse circumstances changing within the street meant that a "material change of circumstances" has occurred and that, accordingly, if the property is deemed to be

rateable, the change in circumstances is such that the property should be revised so as to attract a nil rateable valuation.

Preliminary Issue: The Respondent's Submissions

Mr. Devlin submitted that sub-paragraphs (a), (c), (d), (e) and (f) of the section 3 definition of material change of circumstances could not and did not apply in the instant case. With regard to the submission that sub-section (b) of section 3 applied, it was his submission that this sub-section referred to a change in the value of the property caused by alterations or destruction of buildings being part of that relevant property. He accepted, however, that the 2001 Act did not expressly say this but submitted that it was implicit within the Act in its terms.

However, without prejudice to this submission, he contended that even if sub-section (b) of section 3 allowed an occupier to refer to alteration to or destruction of e.g. adjacent properties, this did not avail the appellant in the instant case. In this case, the appellant was saying not that the property should have a revised i.e. reduced valuation but rather that it should have no valuation at all and should be deemed as a non-rateable property. In his submission, a party who wished to contend that the property should not be rateably valued at all could not do so via a revision under section 27 and 28 of the Act. Instead, in order to make such a contention an occupier had to await the full revaluation process which, although imminent, had not yet taken place. In his submission, an appellant who wished to challenge a valuation could only do so by establishing that a material change of circumstances had taken place.

In answer to Mr. Murray of the Tribunal, Mr. Devlin suggested that the coming into effect of the 2001 Act could not constitute an "event" within sub-section (d) of the definition of material change of circumstances. He drew our attention to section 16(1) which provides that the provisions of the Act come into effect beginning with the year in which the Act is commenced.

In his submission, the fundamental contention of the appellant that the property should never have been rateable was not a matter that could be dealt with in this appeal.

By way of reply, the appellant contended that the rates had never been collected even though the property had been deemed to be rateable from 1985 onwards. In his submission, any

attempt to collect the rates would be a change in the value of the property, given that the property in question would now face the actual burden of rates as opposed to a notional one. He contended that this was a material change of circumstances. (Mr. Devlin, however, suggested that the decision to collect rates is wholly different from the issue of rateability). Mr. Donnelly said that he accepted the applicable case law and, in particular, accepted the decision of the High Court (McMahon J) in **Commissioner of Valuation v Birchfox Taverns Limited** (High Court unreported 23rd April 2008). He accepted that he had to bring himself within one of the sub-divisions of the definition of "*material change of circumstances*" in order to be entitled to pursue the appeal, though he maintained his contention that the property in question was not a "*relevant property*" within the meaning of the Act and, therefore, should never have been regarded as being rateable in the first place.

The Law

The property in question is deemed to be rateable property since (at least) 1985. The appellant contends that the property in question should never have been deemed to be rateable in the first place. However, for the present, the appellant accepts that the power of a Revision Officer to revise the valuation in question can only be exercised if a material change of circumstances within the meaning of the definition set out in the Valuation Act, 2001 has occurred.

In this regard, the appellant is undoubtedly correct. The decision of McMahon J in **Birchfox Taverns Limited** makes it clear that under the 2001 Act, circumstances where revisions are allowed are contained in Part VI of the legislation. This applied not only to new but also to existing valuation lists such as the valuation list which contains the subject property.

The only revisions provided for since the 2001 Act came into force for cases such as the subject property are those provided for in Part VI, sections 27 and 28. Apart from the mechanisms provided for in sections 27 and 28, there are no other situations in which a revision can be ordered by the Tribunal. If a revision is not allowed under section 27 and/or 28, the Tribunal has no residual power to order one.

It is true that the Revision Officer has power under section 28 (ii) to exclude a property from the list on the ground that "*the property is no longer relevant property*". But in order for the Revision Officer to exercise this power of inclusion, he must first have considered that a

material change of circumstances has occurred since a valuation. He would thus need to be satisfied that some material or relevant change has occurred in the circumstances of the property which now means that it is no longer rateable. It is insufficient for him to form the view that the property should never have been regarded as being rateable in the first place. We are of the view that it is only during a general revaluation that a person in the appellant's position will be able to argue that, outside of any "*material change of circumstances*" the property should not be valued as being rateable at all.

As a result, the appellant is compelled to bring herself within the definition of "*material change of circumstances*" in order to persuade a Revision Officer that the property should be revalued. We note the very able submissions made by Mr. Donnelly in this regard that the area surrounding the pitch has changed radically and that this has, in turn, reduced the trading ability of street traders such as the appellant; which has, in turn, changed the value of the pitch, being the "*relevant property*".

In our view, sub-section (b) of the definition of material change of circumstances is intended to refer to the alteration or destruction of a building which is part of the property concerned rather than some other property. The terms of the definition do not expressly limit the definition in this way but we believe that having regard to the other provisions contained in the definition as well indeed as the provisions of section 27 and section 28 of the Act, it is appropriate to interpret the definition of material change of circumstances in this way.

The appellant (correctly in our view) acknowledges that no other sub-section of the definition of "*material change of circumstances*" could be said to apply.

We should add that, even if the definition contained in sub-section (b) applies to buildings other than the relevant property, we do not believe that the kind of changes canvassed by Counsel for the appellant constitute the kind of structural alterations or the total or partial destruction of a building by fire or other physical cause as provided for within the definition. In our view, this sub-section of the definition is intended to provide for a situation where a building has in some way been physically altered (or damaged).

We wish to make it clear that we are expressly leaving open the issue of whether or not the property in question should be regarded at all as relevant property within the meaning of the

Act. The appellant has submitted that the pitch in question is not "*relevant property*", not being an "*easement and/or other right over land*". We express no view on this issue which will be a matter for consideration in a revaluation.

Determination

No material change of circumstances has occurred in relation to the property the subject matter of the appeal. The appeal is dismissed.

And the Tribunal so determines.