

**Appeal No. VA14/5/089**

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

**Clement Kenny**

**APPELLANT**

**And**

**Commissioner of Valuation**

**RESPONDENT**

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

Property No. 853063, Retail (Shops), Workshop, Offices, Stores, Yard 4 Parliament Street, County Borough of Dublin.

**JUDGMENT OF THE VALUATION TRIBUNAL  
ISSUED ON THE 1<sup>ST</sup> DAY OF FEBRUARY, 2018**

BEFORE:

**Niall O Hanlon- BL**

**Deputy Chairperson**

**Rory Hanniffy – BL**

**Member**

**Claire Hogan – BL**

**Member**

By Notice of Appeal received on the 27<sup>th</sup> day of August, 2014 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a net annual value of €37,500 on the above described relevant property on the grounds as set out in the Notice of Appeal as follows:

*"There is no yard. The building has not been inspected."*

*"Section 35 Valuation Act, 2001 point 2, is of historical importance for Dublin and similar to 'Sweeney Pharmacy' that pays no rates."*

The relevant valuation date in respect of the instant property is the 7<sup>th</sup> day of April 2011. Whilst the matter had previously come on for hearing before a division of the Valuation Tribunal in 2015, due to the subsequent unavailability of Division members, it was deemed necessary to conduct a full *de novo* hearing before a newly constituted division.

The hearings in respect of the appeal took place in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 15<sup>th</sup> of May 2017 and the 17<sup>th</sup> of May 2017. Mr. Eamonn Halpin appeared on behalf of the Appellant. Mr. David Dodd, instructed by the Chief State Solicitor, appeared on behalf of the Respondent.

### **THE ISSUES ARISING**

At the opening of the hearing, the parties agreed that the only issue for determination by the Tribunal was whether the property was capable of beneficial occupation. It was confirmed that the parties had now agreed that in the event of the appeal proving unsuccessful, a rateable valuation of €29,200.00 would apply to the property.

### **THE EVIDENCE**

The property the subject of the appeal is a mid-terrace retail unit that was previously occupied by a cutlery specialist. The subject property comprises basement, ground floor and first floor only. The evidence before the Tribunal is that the property was last occupied in the early 1990's.

The Tribunal heard evidence from Mr. James Kelly, a specialist conservation architect engaged by the Appellant. Mr Kelly outlined that he had been involved in the property since in or about September 2011. He opined that the property required complete renewal. He outlined that there were a number of structural defects with the property including the fact that not all floors were “live” meaning that they were not tied into the exterior walls. He also opined that the front wall was no longer tied into the rest of the building. He opined that there was a danger of a chimney breast collapsing due to a lack of support.

Mr Kelly addressed the Tribunal regarding the “Summary of Works” (appendix VIII of the Appellant’s *précis*) which he had prepared. He opined that the property required very significant expenditure and that in its current state he would not approve the property as being capable of letting. He indicated that the stairs was in a very poor condition and that as a result it was not possible to safely access the basement or upper floors. He stated that as of 2013, there was inadequate fire separation between the Crane Lane ground floor room and the basement beneath, which forms part of the public house premises next door. Mr Kelly stated that if the occupier was to ignore the defects outlined above and establish a business in the premises, he would feel obliged to notify Dublin City Council’s Dangerous Building Section. In summary, Mr Kelly opined that it was not safe to use the premises for any purpose.

The Tribunal next heard evidence from Mr Halpin, who at the outset adopted his *précis* of evidence as his evidence in chief. He accepted the somewhat unusual scenario that a standing building might not be rateable. He stated that the Respondent had not examined the property despite being asked to do so by the Appellant. Mr Halpin opined that the property is incapable of beneficial occupation in its actual state and in this regard relied upon the significant schedule of works set out by Mr Kelly, which he described as both structural and internal restoration works. He submitted that all such works would be required in order to make the property capable of beneficial occupation. He stated that the relevant works could not be described as a fit out or running repairs. He set out that the minimum estimated cost of repairs was €265,000 (or €360,000 inclusive of VAT and professional fees). He submitted that such costs would clearly fall outside the remit of the hypothetical tenant as the sum of €360,000 would reflect 12.5 years of rental income at the valuation date based upon the agreed quantum for a fully occupied unit. He stated that works are currently at a standstill due to structural issues identified with the adjoining property which must be resolved before works can resume on the subject property.

In cross-examination, Mr Halpin accepted that the property enjoyed access to the front and to the rear. He also accepted that some of the rooms illustrated in the photographs included in both the Appellant and the Respondent’s *précis* of evidence, could be used for storage

or as a workshop but only if the property was renewed. He also accepted the property enjoyed a temporary supply of electricity at the very least.

Ms Claire Callan, Valuer, gave evidence on behalf of the Respondent and commenced by adopting her précis of evidence as evidence in chief. She confirmed having carried out a joint inspection with Mr Halpin on the 2<sup>nd</sup> day of February 2015. She indicated that having entered the premises she observed wooden and glazed cabinets together with shelving units in the front shop which she opined could be used for a variety of purposes. She opined that a small room to the rear of the shop could be used as a workshop or for the purposes of storing materials or goods. She outlined that the basement, which was accessed by a wooden staircase, had a concrete floor and a ceiling height of 2.5 m. She outlined that at the time of her inspection the area was being used for the storage of decorating materials. She stated that she had no difficulty gaining access to the basement. She confirmed having observed a small office/store on the upper floor which she opined could be used for a variety of purposes. She noted the floors were wooden in nature and the walls were plastered. She outlined that there was access to the rear of the property from Crane Lane. Finally, she indicated that the property appeared to be connected to mains electricity.

Under cross-examination, Ms Callan confirmed she accepted that the property would require a degree of repair and refurbishment. She indicated that she had not carried out any costings regarding potential works but did not take issue with Mr Kelly's estimates. She confirmed that Mr Kelly's evidence had not changed her view of the capacity of the property to enjoy beneficial occupation. She accepted that if the property was found to be incapable of beneficial occupation it would not be rated. She accepted that if the property was held to be unsafe, it would not be appropriate for the property to be rated.

## SUBMISSIONS

### APPELLANT

Mr Halpin submitted in his written *précis* that the building must be valued *rebus sic stantibus*. In support of his contention he referred the Tribunal to *Marconi Communications Optical Networks Ltd*<sup>11</sup> in which he submitted the valuation had been struck out for being incapable of beneficial occupation as the building was incomplete at the time of revision. Mr Halpin submitted that this decision was particularly notable in circumstances where part of the property was capable of occupation but the entire property was deemed incapable of beneficial occupation.

Mr Halpin next referred the Tribunal to *SJ & J Monk v. Newbigin (VO) [2014]* which he submitted had defined in some detail the test for beneficial occupation. Whilst in his *précis of evidence* Mr Halpin quoted extensively from the said judgement, he specifically referred to the following extract:

*“In a programme of extensive alterations, the works required to make the property capable of beneficial occupation are clearly not repairs. In many cases, properties are stripped back to the shell so that substantial reconstruction or improvement works can be carried out. In such cases, the property would be considered in its actual state on the material day and if it is incapable of beneficial use, removed from the rating list.”*

Mr Halpin relied upon the *SJ & J* decision in support of his contention that the basic premise of the rating paradigms remains the same across common law jurisdictions i.e. that if there is a schedule of works in place signalling substantial reconstruction or improvement and the property is rendered incapable of beneficial use at the Valuation Date due to its actual state, then it must be removed from the rating list or a nil valuation applied.

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<sup>11</sup> VA01/3/040

In oral submissions Mr Halpin expanded upon the foregoing by stating that the Appellant is incapable of letting the premises by virtue of its condition and that therefore there cannot be a hypothetical tenant. He continued, in circumstances where there could not be a hypothetical tenant the premises could not be considered capable of beneficial occupation.

He distinguished the instant case from *Harper Stores Ltd v. Commissioner of Valuation*<sup>2</sup> by pointing to the fact that in *Harper Stores*, the premises was in a good condition but the occupier decided to renovate same. He also pointed to the fact that the occupier in *Harper Stores* took no issue with the fact that the property had been in continuous occupation.

In summary, he submitted that the works required in the case of the subject property go well above and beyond anything which could be termed as repairs or redecoration. In the circumstances, he indicated that the Appellant seeks to have the property declared incapable of beneficial occupation in its actual state at the valuation date and as a consequence removed from the rating list.

## **RESPONDENT**

Mr Dodd reasserted that the single issue for determination by the Tribunal was whether the premises was capable of beneficial occupation. He set out the statutory background to the issue and submitted that the premises was occupied by the Appellant in accordance with Schedule 3 paragraph 2 (a) of the Valuation Act 2001 and/or the premises was capable of rateable occupation in accordance with paragraph 2 (b).

It was submitted that the English Court of Appeal decision of *John Laing & Son Limited v. Assessment Committee for Kingswood Assessment Area and Others*<sup>3</sup> summarised the prerequisite conditions for rateable occupation under the enactments in force immediately before the commencement of the 2001 Act. The case related to the rebuilding of a runway and the question to be determined was whether the occupiers were in rateable occupation

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<sup>2</sup> [1968] 166 1 IR

<sup>3</sup> [1949] 1 KB344

whilst the contractors were on site. Ultimately it was found that the occupiers were indeed in rateable possession/occupation. The Tribunal was specifically referred to the following extract:

*“Thirdly, it is said that the possession must be of some use or value or benefit to the possessor; but as to this it seems to me enough to say that the contractors occupied those premises for the purposes of their business, and it seems to me to be quite immaterial that their business in this connection consisted of the carrying out for award of a particular construction project.”*<sup>4</sup>

It was argued that the above extract supported the contention that even where the public have no access, a premises is capable of beneficial occupation.

Relying upon *Williams v. Scottish & Newcastle Retail Ltd and another*<sup>5</sup> the Respondent argued that the notion of beneficial occupation need not necessarily involve the occupier enjoying a personal profit and furthermore that the necessity for a benefit is a low threshold.

The Respondent, in dealing with the question of beneficial occupation, relied on three authorities from the High Court. The first, *Sinnott v. Neale*<sup>6</sup>, concerned the question of whether the Defendant, the owner in fee simple of an uninhabited and uncultivated sea island six miles from the mainland was in rateable occupation. The island was maintained as a wild bird sanctuary, visitors and bird lovers being permitted by the defendant to visit the island.

Murnaghan J. in dealing with the question of occupation stated, at 14:

*“I will take a case where one would obtain no benefit whatever in the practical sense, no charge for admission, no use of the land, but only the pleasure that this historical building was associated with his family, and could be inspected by*

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<sup>4</sup> Ibid, at 357

<sup>5</sup> [2001] All ER (D) 173 at para 57-58

<sup>6</sup> (1948) Ir. Jur. Repts. 10

*persons interested. I am inclined to think that that would sustain an occupation. ... This is not a piece of land that is owned and utterly left derelict. I suppose it is a gratification to the defendant that he is the owner of this famous island, and can give facilities to bird-lovers. Although he may do that in the interest of science and a love of nature, nevertheless it brings some reward to him in the shape of the gratitude of the people who visit it. Dealing with the case on that basis, I have come to the conclusion that the defendant is in occupation and liable to this rate.”*

The Tribunal was also referred to the decision of the High Court in *Iarnród Éireann v. Commissioner of Valuation*, **Unreported, 27<sup>th</sup> of November, 1992**, wherein Barron J., at page 4 of the judgment, stated that there were three ingredients to rateable occupation:

- 1) *It must be exclusive;*
- 2) *It must be of value or benefit to the occupier;*
- 3) *It must not be for too transient a period.*

The Tribunal was next referred to *Harper Stores Ltd. v. Commissioner of Valuation*<sup>7</sup> in which the Appellants applied for a revision of the rateable valuation of the premises in January 1960. They had vacated the premises in that month to allow contractors perform reconstruction work. The Appellants returned to the premises at the end of March 1960, when the reconstruction work was nearly completed. They appealed the revised valuation, *inter alia*, on the ground that they had not been in beneficial occupation of the premises as at the date of the revision.

In giving judgment Henchy J. stated, at page 173:

*“While the variety of circumstances prevents there being any universally accepted test of rateable occupation, both Wright J., in London County Council v. Hackney Borough Council [1928] 2 K.B. 588, at 595 and Lord Radcliffe in Arbuckle Smith*

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<sup>7</sup> [1968] I.R. 166



*& Co. Ltd. v. Greenock Corporation [1900] A.C. 813, at 828 approved of the following approach by Farwell L.J. in Rex v. Melladew [1907] 1 K.B. 192, at 203:-*

*“The test, in a case like the present, of business premises, appears to me to be: Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it? Another test is that used by Buckley L.J. in Liverpool Corporation v. Chorley Assessment Committee [1912] 1 K.B. 270, at 288:- Are the corporation using the land for the purpose of their business or adventure and deriving benefit from it?”*

Henchy went on to state in relation to the facts of the case before him that:

*“This case is far removed from that of a new house which is sought to be valued for rating before it is completed. For a considerable time before the ten weeks in question, and ever since, the Appellants have clearly been in rateable occupation. The ten weeks in question amounted, not to a sundering of the Appellants’ rateable occupation, but to a mere variation of the mode of their continuous use of the premises for the purposes of their business as retailers of ladies’ drapery. During those weeks they were using the premises through the agency of the contractors, not (admittedly) for trading, but for the purpose of making structural and other changes which would enhance their trading prospects. This use of the premises was to their benefit as lessees and amounted to rateable occupation”*

## **THE DECISION OF THE TRIBUNAL**

The substantive issue before the Tribunal is whether the subject property is capable of rateable occupation. It is common case between the parties that the issue turns on the provisions of paragraph 2 of Schedule 3 of the Valuation Act, 2001, the relevant parts of which provide:

*“... 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.”*

Paragraph 2 of Schedule 3 provides for two situations. Either the property is occupied or it is not. If the property is occupied, then the nature of that occupation must be such as to constitute rateable occupation of the property. When asked by the Tribunal, Counsel for the Respondent agreed that if the property was occupied such occupation could only constitute rateable occupation if the property was capable of being the subject of rateable occupation. It was accordingly conceded by the Respondent that the sole issue arising for determination was whether the property was capable of being the subject of rateable occupation and that the question of whether or not the property was occupied was not determinative of the substantive issue arising on this appeal.

Whilst the Respondents referred to a number of judgments from outside the jurisdiction and to a number of Tribunal decisions, the Tribunal holds that the controlling authorities in relation to the meaning of rateable occupation in the present appeal are the aforementioned decisions of the High Court.

The Tribunal was directed, *inter alia*, to the judgment of Henchy J. in *Harper Stores Ltd. v. Commissioner of Valuation*, who approved two tests for the purpose of determining what constitutes rateable occupation.

The first test is:

*“Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it”*

The Tribunal heard evidence that the Appellant intended to operate a shop from the property. The Tribunal have considered carefully and accept the evidence of Mr Kelly regarding the structural condition of the property. The Tribunal notes that the resulting and most concerning safety issues were not in any way impeached by the Respondent. In light of same, the Tribunal finds as a matter of fact that the condition of the property prevents the Appellant from engaging in his desired course of action in respect of the property. Indeed, based upon Mr Kelly’s evidence, it seems probable that the property is incapable of any beneficial occupation.

Noting as we do that there was no evidence before the Tribunal to suggest the Appellant previously operated a shop from this property, the Tribunal holds that the Appellant does not have such use of the property as the nature of the property and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it.

The second test is

*“Are the corporation using the land for the purpose of their business or adventure and deriving benefit from it?”*

Again, the Tribunal finds that the Appellant is not using the property for the purpose of his business or adventure and deriving benefit from it.

## **DETERMINATION**

The Tribunal determines that the property the subject matter of this appeal is not capable of beneficial occupation.

And the Tribunal so determines.