

**Appeal No. VA17/2/010**

**AN BINSE LUACHÁLA  
VALUATION TRIBUNAL**

**AN tACHTANNA LUACHÁLA, 2001 - 2015  
VALUATION ACTS, 2001 - 2015**

**BLARNEY SUPERMARKET LTD**

**APPELLANT**

**AND**

**COMMISSIONER OF VALUATION**

**RESPONDENT**

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

Property No. 953215, Supermarket, At Lot No. 26g, 27, The Square, Blarney, Monacnapa,  
Blarney, Cork Upper, County Cork.

**JUDGMENT OF THE VALUATION TRIBUNAL  
ISSUED ON THE 13<sup>TH</sup> DAY OF NOVEMBER, 2018.**

BEFORE:

**Stephen J. Byrne - BL**

**Deputy Chairperson**

**Michael Connellan Jr - Solicitor**

**Member**

**Liam Daly – MSCSI, MRICS**

**Member**

By Notice of Appeal received on the 24 day of May, 2017 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €260 on the above described relevant property on the grounds as set out in the Notice of Appeal as follows:

"1) *Estm. NAV is excessive and inequitable. The property has not been assessed in line with comparable premises in County Cork.*

- 2) *Blarney is a small village with limited potential being so close to Cork. The building itself although well fitted internally is mainly comprised of very moderate old flat roofed felt covered structures. The hypothetical tenant would scale back his rental bid if he had to take the premises on FRI terms due to the nature of these structures and their likely need for repair. The 1<sup>st</sup> floor ancillary space with the exception of the front store is very poor and badly laid out.*
- 3) *The property has no car park or rear loading area. All goods come in through the front door, which would be a major drawback for the hypothetical tenant. Very limited paid parking is available on the street outside.*
- 4) *The layout of the property is poor by modern standards with most of the space to the rear and relatively little street frontage due to site constraints. The 1<sup>st</sup> floor is particularly poor with many narrow passages, fire exits and flights of stairs."*

The Tribunal, having examined the particulars of the property the subject of this appeal; having confirmed its valuation history; having examined and considered the written evidence and having heard the oral evidence on the 14 day of September, 2017 and the 23 day of November, 2017 adduced before us by Mr. Eamonn Halpin on behalf of the Appellant, who contended for a rateable valuation of €157, and Mr. Paul Ogbebor of the Valuation Office with Counsel from Mr. David Dodd BL on behalf of the Respondent to the appeal,

## **BACKGROUND**

1. The Appellant sought revision pursuant to the provisions of Section 27(1) of the Valuation Act, 2001. The Appellant argued that there had been a material change of circumstances. The Appellant, in presenting its appeal to this Tribunal, has not made any meaningful attempt to appraise the Tribunal as to the 'circumstances' which prompted the Appellant to seek such revision.
2. From the evidence that has been adduced touching upon this particular issue, the Tribunal is satisfied that the change of circumstances as relied upon is a change of use. There has been no structural change. A store was now being used as some class of a restaurant. (First floor). Mr. Ogbebor, on behalf of the Respondent, tendered evidence which supported this 'state of affairs'. This evidence has not been challenged.

3. The Appellant, having exercised its entitlement to have its contention that there had been a material change of circumstances, triggering an entitlement to revision, the statutory cogs were set in motion with the appointment of a Revision Officer, pursuant to the provisions of Section 28(2) of the 2001 Act. The evidence establishes that Mr. Ogbebor was appointed on 5<sup>th</sup> March 2014. He carried out an inspection of the property on 11<sup>th</sup> June 2014. Mr. Ogbebor considered the argument as presented by the Appellant. Having done so, he was and at that time, satisfied that there was, and under the Act, a material change of circumstances. This particular decision properly prompted a consideration afresh as to the appropriate measure and/or level of rates applicable to what is, in law, a property that has significantly altered since the date on which ‘commercial’ properties as a collective (within a particular confine) had been rated.
4. Human (business) nature, being what it is, ‘ratepayers’ as a rule apply for revision where the change in circumstances relied upon has reduced the value of the property concerned. As a rule the ratepayer who has successfully pleaded its case for revision expects a reduction in the level of rates for which it is liable.
5. Mr. Ogbebor, and to a point, met this routine expectation. Having decided that revision was warranted, Mr. Ogbebor proposed a reduction in rates from €260 to €257.
6. The Appellant, having the benefit of expert advice, considered the quantum of this reduction. The Appellant took the view that it was, and in the circumstances, insufficient.
7. The Appellant, employing the structures as put in place for agitating against a decision that “*we are less than happy with*”, makes representation to the Revision Officer (Mr. Ogbebor).
8. Mr. Ogbebor considers the representations made by or on behalf of the Appellant. Having considered the representations, Mr. Ogbebor, as Revision Officer, remains satisfied that the decision that he has made concerning the level of rates that is to apply following revision should remain at €257.
9. This particular decision is communicated to the Appellant and the Appellant’s professional advisers. Collectively they decide that they continue to be hard done by; that

the argument for a further reduction is well made and should be pursued to all or any possible limits.

10. The next step on this seemingly arduous journey is an appeal which, having regard to the structures as put in place, is an appeal of Mr. Ogbagor's refusal to 'budge' on foot of the Appellant's representations. As per the Act, the appeal is an appeal to the Commissioner. It is in truth an appeal, as is evidenced by the documentation which has been put in evidence, in the first instance, to an Appeal Officer, Mr. Pascal Convoy and thereafter, to an Appeal Manager, Mr. Martin Fagan.
11. As is clear from the Revision Appeal report which has been put in evidence, the Decision on foot of the appeal is the decision as taken by the Appeal Manager, Mr. Fagan.
12. It is clear from the material as put in evidence that the Appellant is allowed to advance its case for what is, in essence, a further reduction, that is to say, a reduction from the €257 as proposed by Mr. Ogbebor.
13. It would be a strange, if not unsatisfactory, state of affairs if the person who has proposed the valuation, to which the Appellant lays challenge, is not allowed an opportunity to make his case and in so doing, put before the Appeal Officer anything which he considers relevant.
14. It transpires that whilst preparing his case to meet the Appellant's further challenge to his proposed revised quantum, Mr. Ogbebor carries on what is referred to in direct evidence as "*further investigation*".
15. This further investigation prompted a return by Mr. Ogbebor to the decision which he had made earlier, that is to say, his decision that there had been, and in the circumstances as advanced, a material change of circumstances.
16. Mr. Ogbebor has now, and at this point in the labyrinthine structure as put in place, reversed his decision. He has, upon "*further investigation*" concluded that there has not been a material change of circumstances within the meaning of the 2001 Act.

17. Mr. Ogbebor, upon Oath before the Tribunal and without challenge, informed the Tribunal that his ‘original decision’, that is to say his decision that there had been a material change of circumstances was based on his mistaken view that a change of use (in this particular instance a change of use from store to restaurant) constituted a material change of circumstances as defined.
18. As evidenced, Mr. Ogbebor put this to the Appeal Officer by way of response to the Appellant’s broad contention that, following revision, the valuation should in fact reduce to €157.
19. Consistent with this, admittedly dramatic shift in position, Mr. Ogbebor proposed to the Appeal Officer that there be no change to the Rateable Valuation. In other words, the Rateable Valuation should remain at €260, the level that applied prior to the Appellant’s application for revision.
20. Mr. Pascal Convoy, Appeal Officer, by Decision which he appears to have made on 27<sup>th</sup> April 2017, endorses Mr. Ogbebor’s proposal by ‘concurring’ with same. Mr. Martin Fagan, Appeal Manager, makes a decision which, on its face, dated 2<sup>nd</sup> May 2017 wherein Mr. Fagan formally indicates that the recommendation is accepted. This, in the circumstances, is a recommendation that the original Valuation pre the application for revision, be reinstated and because the Revision Officer, Mr. Ogbebor is now of the view that he should not have exercised his powers under Section 28(4) and because there had been no material change of circumstances.
21. Mr. Fagan’s decision is, in effect and in law, the Commissioner’s Decision.
22. The Appellant now seeks to appeal that Decision to the Tribunal.

## **DECISION**

1. The Appellant and Respondent have set out their respective stalls concerning, in the main, what the Tribunal can and/or should decide, where and as accepted by both Appellant and Respondent, the Revision Officer as appointed by the Commissioner, having decided, in

exercise of his powers, that there was a material change of circumstances, has reversed that Decision.

2. Mr. Halpin, in summary, has argued that Mr. Ogbebor, having exercised his statutory powers in deciding that there has been a material change of circumstances, is, to put it crudely, stuck with that decision. On this view, the only issue that is or can be left open for discussion, is that of quantum. In other words, the appropriate adjustment on the premise that there has been a material change of circumstances.
3. Mr. Dodd B.L., representing the Commissioner, takes issue with this. In summary, he has argued that the Tribunal's statutory remit, in broad terms, is to hear appeals de novo and on their merits.
4. The Tribunal has given the matter careful consideration. Having considered the evidence and submissions, written and oral, the Tribunal decides as follows:
  - (a) The Appellant herein has exercised its statutory entitlement to appeal. As expressly provided for under Section 34 of the Valuation Act, 2001, this is an appeal "*against a Decision of the Commissioner*".
  - (b) The Decision which ignites this Appellant's passion, is a decision which has, in substance and on the Appellant's account, deprived the Appellant of a finding and/or decision which favoured/benefited the Appellant, that is to say, Mr. Ogbebor's original finding/decision that the property concerned had undergone a material change of circumstances.
  - (c) The Appellant is understandably aggrieved at the loss of this concession and at the manner in which it has come about. The fact that the Appellant had the benefit/concession of a finding by the Revision Officer that there had been a material change of circumstances is, of course, of interest to the Tribunal in exercise of its statutory remit.

- (d) Further, the fact that the Appellant has, whilst winding its way through an appeal process, lost this benefit and/or concession is equally a matter of interest and/or concern to the Tribunal.
- (e) All of this necessarily prompts inquiry into and/or consideration of whether or not the Appellant is, in the circumstances and in law, entitled to what is, in the scheme of things, an exceptional finding, that is to say a finding that there has been, and since the date of last valuation, a material change of circumstances.
- (f) It is, or ought to have been clear, to both Appellant and Respondent that the Tribunal and in the circumstances and having regard to the history and/or background of this case as evidenced, would require the parties to engage with the Tribunal on what is or appears to be a core issue; whether there has been a material change of circumstances.
- (g) The Appellant, in its dealings with the Tribunal, has made it clear that it is not willing and/or prepared to assist the Tribunal in understanding why the Appellant initiated a process which has culminated in this appeal, by in the first instance, making an application to the Commissioner for revision pursuant to Section 27(1) of the Valuation Act, 2001.
- (h) Simply put, what is or was the material change of circumstances being relied upon? As stated above, the Appellant did not address this (in the circumstances fairly fundamental issue) in any meaningful and/or informed way. The Appellant, through Mr. Halpin, has rigidly adhered to a style over substance argument. In summary, (as above) Mr. Ogbebor's decision cannot, in law and in the circumstances, be reversed by him.
- (i) Just to recap, the Decision which the Appellant appealed against is the Decision of Mr. Martin Fagan as pronounced and formulated by him on 2<sup>nd</sup> May 2017. It is a decision which was made on foot of the Appellant's appeal from the Revision Officer (Mr. Ogbebor's) refusal to accede to representations on revised quantum.
- (j) Mr. Fagan's decision, on any view of it, is in substance, a decision rejecting the Appellant's contention that there has been a material change of circumstances.

- (k) It follows that the issue which this Tribunal is required to consider is whether this Decision taken by Mr. Fagan is in law and in the circumstances, a correct and/or appropriate decision for him to take.
- (l) This issue necessarily and fundamentally requires a consideration of and/or inquiry into whether the relevant provision, that is to say Section 28(4) of the 2001 Act, has been engaged. In other words, whether there has in fact been a material change of circumstances within the meaning of the 2001 Act.
- (m) The Appellant, for reasons which are, in the Tribunal's view and in the overall scheme of things, misplaced, has elected not to offer any evidence which might assist the Tribunal in considering whether or not there has been a material change of circumstances.
- (n) The Tribunal, endeavouring as best it can to come to a fair and balanced view on this issue, has the evidence of Mr. Ogbebor.
- (o) This evidence, even though it is unchallenged, has to be treated by the Tribunal with extreme caution because the Respondent accepts, as he must, that the evidence is materially at odds with and/or entirely inconsistent with a position and/or stance;
- (i) formally adopted by the Revision Officer (Mr. Ogbebor);
- (ii) formally communicated to and relied upon by the Appellant.
- (p) Whilst the general thrust of Mr. Dodd's submission holds true, this is not a state of affairs that this Tribunal as independent/impartial/fair arbiter can lightly dismiss.
- (q) Mr. Ogbebor's evidence before this Tribunal on the inter-related questions of:
- whether there has been a material change of circumstances;
  - why Mr. Ogbebor, as expert, had such a volte face;



can be summarised thus:

*“The material change of circumstances contended for was a change of use of part of the property concerned. That part of the property had been used as a store and is now being used as a restaurant. There had been no structural changes to the property. Mr. Ogbebor, when deciding that there had been a material change of circumstances, took the view that such change of use, without any structural alteration, constituted a material change of circumstances as defined. At the ‘appeal stage’, that is to say at the appeal to the Commissioner pursuant to Section 30 of the Valuation Act, 2001, Mr. Ogbebor carried out further investigation and on foot of this investigation, satisfied himself that change of use, in circumstances where there has been no structural or physical alteration, did not in law amount to a material change of circumstances.”*

- (r) Mr. Ogbebor, frankly and to his credit, admits to having made an error in his original appraisal. This accounts for the original decision.
- (s) As stated above, the Appellant has not challenged or taken issue with this evidence.
- (t) Accepting, as it must, the unchallenged evidence of Mr. Ogbebor, the Tribunal is in as good a position as any to consider which of the two countervailing views as proffered by one and the same expert (Mr. Ogbebor) should prevail and/or in the alternative, whether the evidence is in truth so contaminated by inherent dichotomy as to render it wholly unreliable.
- (u) Does a change of use from a store to a restaurant without structural alteration constitute a material change of circumstances within the meaning of the Valuation Act, 2001?
- (v) Bearing in mind that the change in circumstances contended for is a change of use simpliciter, Mr. Dodd, bluntly and in the Tribunal’s view correctly asserts that this state of affairs does not come within any of the individual and/or separate exigencies as expressly provided for in the 2001 Act.
- (w) It follows and the Tribunal so determines, that Mr. Ogbebor had cause to reflect on what has been termed above his ‘original’ decision. Further, it follows and the Tribunal so

determines that Mr. Ogbebor's reversal of his original decision by way of proposal, in the first instance to Mr. Pascal Convoy, whilst unorthodox and whilst on its face a tad unfair, was nevertheless and in the circumstances and in law, the correct decision.

- (x) It further follows and the Tribunal so determines that Mr. Martin Fagan's decision on appeal, whilst unorthodox and again on the face of it, a tad unfair, was in law and in the circumstances, the correct decision.
- (y) Unfairness in the conduct of business/human affairs can at times result in harm and/or prejudice. An appellate body such as this Tribunal when, as in this case, on notice of patent unfairness, must, whilst staying within the boundaries of its statutory remit, strive to ensure that such unfairness has not visited on a party at the receiving end (in this case the Appellant) tangible harm and/or prejudice.
- (z) The original Decision was, and in the circumstances and in law, incorrect. For so long as it remained in place, the Appellant secured and/or retained an advantage and/or benefit to which the Appellant was not in law and/or in the circumstances, entitled. Mr. Ogbebor's proposed reduction in valuation following Mr. Ogbebor's original (incorrect) decision presented the Appellant with an advantage and/or benefit to which the Appellant was not in law and/or in the circumstances, entitled. The Appellant was not content with this, and in the Appellant's view, modest 'windfall'. The Appellant, like Oliver Twist, pushed for more. (A greater reduction in the level of applicable rates). In so pushing the Appellant lost all, including in particular the modest advantage and/or benefit as originally bestowed. On this presentation, the Appellant, in the Tribunal's view, whilst on the face of it treated unfairly, cannot in truth lay claim to harm and/or prejudice.

For reasons as set above, the Appellant's appeal against the Decision of the Respondent, as per the Decision of Mr. Martin Fagan as formally pronounced on 2<sup>nd</sup> May 2017, stands dismissed.

And the Tribunal so determines.