

Appeal No: VA19/2/0009

Appeal No: VA19/5/0430

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

**NA hACHTANNA LUACHÁLA, 2001 - 2020
VALUATION ACTS, 2001 - 2020**

John Lambert

APPELLANT

and

Commissioner of Valuation

RESPONDENT

In relation to the valuation of

Property No. 2212345, Nightclub/discotheque/pub at 22Bc Camolin Kilcomb, Gorey, County Wexford (Appeal VA19/2/0009)

&

Property No. 2212345, Industrial Uses, Lamberts, Camolin, County Wexford (Appeal 19/5/0430)

B E F O R E

Barry Smyth - FRICS, FSCSI, MCI Arb

Deputy Chairperson

Sarah Reid - BL

Member

Fergus Keogh - MSCSI, MRICS

Member

**JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 24th DAY OF AUGUST, 2022**

1. THE APPEAL

1.1 This determination arises from two Appeals in respect of the same property which were heard together on the basis that a core issue arises in both, the resolution of which will be determinative of a rates liability on the property. In the first instance a revision application (and subsequent Appeal) was made by the Appellant (VA19/2/0009). Subsequent to that, the subject property was included in the 2019 Revaluation Process which resulted a certificate of valuation which the Appellant also appealed (VA19/5/0430).

Appeal No: VA19/2/0009: Revision

1.2 By Notice of Appeal received on the 20th day of May, 2019 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV)' of the above relevant Property was fixed in the sum of €99.

- 1.3 The Grounds of Appeal are fully set out in the Notice of Appeal. Briefly stated they are as follows:

"The valuation is incorrect. The subject property is a former nightclub & lounge which has been unoccupied for 14 yrs. In 2017 the property was inspected by the fire officer of Wexford Co Co and was declared incapable of occupation as a licenced premises in its actual state.

The subject property is in a bizarre circumstance in that the property has been under appeal since 2013, with no determination on this appeal issued. The commissioner has now seen fit to revise the property in 2019 but has still not given any decision on the original appeal."

- 1.4 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €0

Appeal No: VA19/5/0430 (Revaluation)

- 1.5 By Notice of Appeal received on the 14th day of October 2019 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV)' of the above relevant Property was fixed in the sum of **€23,400**.

- 1.6 The Grounds of Appeal are fully set out in the Notice of Appeal. Briefly stated they are as follows:

"The subject property is a former nightclub and lounge which has been unoccupied for 14 years. In 2017, the property was inspected by the fire officer of Wexford County Council and was declared incapable of occupation as a licenced premises in its actual state. That adjoining bar (PN 2009924 - separately assessed) was only granted a licence on the basis that the former lounge and nightclub. The property is incapable of beneficial occupation in its actual state."

- 1.7 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €0.

Earlier request for revision

- 1.8 In respect of the Appellant's revision appeal (VA19/2/0009) and the grounds of appeal therein, the Appellant states that the subject property has been under appeal to the Respondent since 2013 with no determination issuing. At the hearing of the present Appeal(s), Mr. Halpin confirmed that days previously, a decision had been made by the Respondent in that respect but same fell outside the scope of the present adjudication. For reasons outlined below, the Tribunal has not considered this complaint within its determination.

2. VALUATION HISTORY

Appeal No: VA19/2/0009: Revision

- 2.1 The Appellant lodged a revision request in respect of subject property on 30 November 2011 seeking to subdivide the occupied and unoccupied sections of the premises. A

revised valuation certificate issued following this request on 8 July 2013 and the Appellant sought a reduced assessment from the Commissioner on 16 August 2013. No decision appears to have been made in respect of that request until shortly before the Tribunal sat to hear the within Appeal(s).

- 2.2 On or about 12th March 2019 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 Property was sent to the Appellant indicating a valuation of €117 though the Appellant’s agent stated he was not notified of same. Thereafter a final certificate was published on 23rd April 2019 with a rateable valuation of €99, reduced without agreement. The Appellant lodged the above numbered appeal on 17th May 2019 seeking an exemption in respect of the within property.

Appeal No: VA19/5/0430 (Revaluation)

- 2.3 On or about the 7th June 2019 the Respondent issued a proposed certificate for the subject property in the sum of €23,400 as part of their revaluation programme (15th September 2017 being the relevant statutory valuation date for same). The Appellant lodged representations on 16th July 2019 in respect of that valuation seeking an exemption and an unchanged Certificate of Valuation issued on 10th September 2019. The Appellant lodged the above numbered appeal on 14th day of October, 2019 seeking an exemption in respect of the within property.

3. THE HEARING

- 3.1 The Appeal(s) proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 29th day of April 2022 and resumed by remote hearing the 11th May 2022. At the hearing the Appellant was represented by Mr. Eamonn S. Halpin B.Sc. (Surveying) M.R.I.C.S. M.S.C.S.I. and the Respondent was represented by Mr Mark Gibbons of the Valuation Office, Mr. David Dodd BL, Mr. Cian Henry BL, Mr. Michael Collins of the Chief State Solicitors Office and Ms Ann Gill Tribunal Register was present in an observation capacity.
- 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. Upon commencing the hearing, the Respondent objected to the Appellant’s inclusion in their précis and reliance on a letter from Mr. Paul L’Estrange, Chief Fire Officer with Wexford County Council when Mr. L’Estrange was not present to be cross examined on same. The Tribunal having heard from both parties, agreed to adjourn the hearing for Mr. L’Estrange to attend and directed the Appellant provide evidence from the letting agent to substantiate the claim made in the Appellant’s précis that the property had been advertised to let for a period of 14 years with no offers received.
- 3.3 At the resumed hearing, on 11th May 2022, 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 property is a former night club and lounge with a floor area of approximately 722.65m². It is located on Main Street in Camolin, Wexford approximately 11km southwest of Gorey on the R772.
- 4.3 The Appellant ceased operating the lounge and night club portion of his enterprise in and around 2006 but continued to trade in the adjoining bar (PN 2009924) and was granted an Ordinary Publicans Licence for this purpose in 2017 on condition that the subject property remain unused unless significant works were carried out due to fire safety concerns.

5. ISSUES

- 5.1 Appeal VA19/2/0009 was heard in conjunction with Appeal VA19/5/0430 with the same claim for exemption being made by the Appellant in both. Mr. Halpin contends that the subject property is not 'relevant property' on the basis that it is neither occupied nor capable of beneficial occupation and is therefore exempt from valuation by virtue of Paragraph 2 of Schedule 3 of the Valuation Act, 2001 as amended. The Respondent rejects the Appellant's position and maintains that the property is both occupied by the Appellant and capable of beneficial occupation rendering it eligible for valuation. Both parties are agreed that the conclusion of whether Paragraph 2 of Schedule 3 of the Valuation Act applies to the subject property, will determine the issues in both appeals before the Tribunal.
- 5.2 The Appellant contends that the subject property is unoccupied and incapable of beneficial occupation by virtue of fire safety conditions and requirements imposed on the property. The said restrictions were outlined by the Chief Fire Officer, on behalf of Wexford County Council, in correspondence dated 13th March 2017 and pertain to an application by the Appellant for an Ordinary Publicans Licence. On the basis of these limitations, the Appellant claims the subject property is 'struck with sterility' and is therefore eligible for exemption pursuant to Paragraph 2(b) of Schedule 3 of the Valuation Act. The Respondent contends that the property is in fact occupied in a manner that constitutes 'beneficial occupation' for the purposes of Paragraph 2(a) by virtue of its use for storage purposes.
- 5.3 In order to determine the issue in controversy across both Appeals, the Tribunal must consider the following questions:
 - A) Whether the subject property was occupied (within the meaning of paragraph 2(b) of Schedule 3 of the Valuation Act, 2001) or unoccupied (within the meaning of paragraph 2(a) of Schedule 3) the parties having conflicting views on same.
 - B) Whether the Fire Safety conditions that attach to the subject property (outlined in full below) render the portion of the subject property under consideration, incapable of use in any way.
 - C) Whether in all the circumstances, the property is capable of 'beneficial occupation' within the meaning of Paragraph 2 of Schedule 3 of the Valuation Act.

6. RELEVANT STATUTORY PROVISIONS:

6.1 All 'relevant property' falls to be valued in accordance with the provisions of section 49 (1) of the Valuation Act, 2001 and is defined in Schedule 3 of the Act as:

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) lands used or developed for any purpose (irrespective of whether such lands are surfaced) and any constructions affixed thereto which pertain to that use or development,*
- (c) railways and tramways, including running line property and non-running line property,*
- (d) harbours, piers, docks and fixed moorings,*
- (e) mines, quarries, pits and wells,*
- (f) rights of fishery,*
- (g) profits á prendre, other than rights of fishery,*
- (h) tolls,*
- (i) easements and other rights over land,*
- (j) rights to drill for and take away petroleum,*
- (k) canals, navigations and rights of navigation,*
- (l) advertising stations and land and any buildings used as advertising stations,*
- (m) electricity generating stations, including where appropriate—*
 - (i) all buildings and structures,*
 - (ii) all tanks, including fuel oil tanks, water tanks and chemical tanks,*
 - (iii) boilers, furnaces and ancillary fuel handling equipment,*
 - (iv) cooling water inlet and outlet facilities, including pump-houses, culverts, pipe works, weirs and outfall works,*
 - (v) natural gas installations,*
 - (vi) effluent disposal works, including chimneys and treatment plant,*
 - (vii) wind generators, turbines and generators, together with ancillary plant and electrical equipment, including transformers,*
 - (viii) docks, cooling towers, embankments, canals (head race, tail race), locks, penstocks and surge tanks,*
 - (ix) dams, weirs, bridges, jetties, railways, roads and reservoirs,*

- (x) all ancillary on site developments,*
- (xi) all electric lines.*
- (n) the entire networks subsumed in an undertaking including, as the case may be—*
 - (i) signal transmission and reception equipment, all associated masts, lines, cables, posts, pylons, supports, brackets, ducting, tubing and all equipment necessary for normal effective functioning of the networks up to the supply point for each individual consumer,*
 - (ii) all pipeline networks and systems, including pressurising and pressure reducing equipment, together with associated site developments,*
 - (iii) storage and containment facilities, including tanks, silos or other plant or developments used for the storage and for containment of any substance whether solid or fluid (liquid or gaseous),*
 - (iv) gas works, gas pipelines and natural gas terminals,*
 - (v) telecommunications, radio and television relay and rediffusion networks, including lines, cables and ancillary appendages necessary for the working of such networks,*
 - (vi) electricity transformer stations, including—*
 - (I) all buildings and structures,*
 - (II) all site developments,*
 - (III) transformers,*
 - (IV) electrical equipment, including switchgear, circuit breakers and associated developments,*
 - (V) all electric lines,*
 - (vii) electric lines (within the meaning of the Electricity (Supply) Act, 1927, as amended by section 46 of the Electricity (Supply) (Amendment) Act, 1945), including transmission and distribution networks and consumer service mains and networks on, over, or under ground, together with lines and cables with their respective supports (including poles, pylons and brackets), culverts, cuttings, ductings and pole transformers, used in association with those electricity conductors,*
- (o) any building or part of a building or lands or waterways or harbours directly occupied by the State, including lands or buildings occupied by any Department or office of State, the Defence Forces or the Garda Síochána or used as a prison or place of detention.*

6.2 The Act qualifies 'relevant property' in paragraph 2 of Schedule 3 as follows:

- 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.*

7. APPELLANT'S CASE

- 7.1 The Appellant's case was focused on the fact that the subject property, being a former night club and lounge, has remained unused by the Appellant for 14 years and further was incapable of being used due to the imposition of fire safety compliance conditions and requirements. Based on the said restrictions, the Appellant claimed the property was 'struck with sterility' in anybody's hands and incapable of beneficial occupation.
- 7.2 In support of his claim, the Appellant argued that the following conditions (specifically number 6 thereof), created a ban on the Appellant using the subject property and, on that basis, it ought to be deemed exempt from rateable valuation. The below conditions were provided by the local authority's Chief Fire Officer to Wexford Circuit Court at the hearing of the Appellant's liquor licence application on the adjoining bar (PN 2009924):
1. *All escape routes and exit doors shall be maintained free from obstruction and immediately available for use while the public are on the premises. Refer to Appendix B (S.I. No 249 of 1985) of the Code of Practice for the Management for Fire Safety in Places of Assembly.*
 2. *Adequate fire protections systems and equipment shall be provided on the premises. All such equipment shall be inspected and maintained in accordance with Appendix C of the Code of Practice for the Management of Fire Safety in Places of Assembly.*
 3. *All data relating to the inspection, testing and maintenance of fire protection systems and equipment shall be recorded in a Fire Safety Register.*
 4. *The person responsible for the implementation and overseeing of the fire safety programme shall keep a Fire Safety Register in the form set out in Appendix D of the Code of Practice for the Management for Fire Safety in Places of Assembly.*
 5. *The Register shall be kept on the premises at all times and shall be available for inspection by any authorised officer of the Fire Authority.*
 6. *The parts of the premises which are currently unused (namely the night club area and the lounge area) shall remain unoccupied and shall not be used by any persons for any reason until all fire safety requirements are completed to the satisfaction of the Fire Authority.*
- 7.3 At a resumed hearing of the Appeal(s) on 11th May 2022, Mr. Paul L'Estrange, Chief Fire Officer with Wexford County Council gave evidence that he had inspected the subject property five years previously and the above restrictions arose and were imposed in the context of the Appellant's licensing application. Mr. L'Estrange confirmed that he saw no reason why the owner could not apply for a 'change of use' under the fire regulations but put the matter no further. In addition, he could not say the property was incapable of beneficial occupation. Mr. L'Estrange further, and expressly, limited his evidence to the question of fire safety matters and stated he had no experience in matters of rating or

valuation, nor would he comment on what constitutes 'beneficial occupation' when asked for his view on same in cross examination.

- 7.4 Mr, Halpin stated that condition 6 of the licence conditions created a ban on the Appellant using the subject property 'for any reason' (as per the wording of the condition) and on that basis the exemption sought, ought to apply.
- 7.5 The Appellant stated that the property was advertised to let with a local agent and in 14 years no offers had been received in respect of same. At the resumed hearing of the Appeal, a letter from the Appellant's letting agent dated 10th May 2022 was provided in support of this claim which read as follows:

"To whom it may concern,

We have been trying to let the unit previously known as "Lamberts Nightclub & "Lounge" on Main Street Camolin, Enniscorthy, Co. Wexford since December 2008 to date without success due to the substantial amount of upgrading required. We are asking €25,000 per annum for the unit which extends to circa 720 sq m. (7,750 sq ft).

We will continue to advertise the unit with the hope of finding suitable tenants due to the high amount of works required to get the unit to a rentable state we are finding it difficult.

If you have any further queries do not hesitate to contact us.

Regards,

*Michael Kinsella MIPAV MMCEPI ARICS
On behalf of Kinsella Estates Carnew Ltd
10th May 2022"*

- 7.6 In cross examination, the Appellant's agent confirmed that the photographs contained in his précis showed miscellaneous items, of varying purpose, present in the premises but maintained that this was simply because to remove them was a futile and expensive exercise for the Appellant to undertake. Mr. Halpin denied that these items were being stored in the subject property and stated they were simply left in situ as to remove them was not an economically viable prospect for the Appellant.
- 7.7 In light of the foregoing the Appellant maintained the subject property did not qualify as relevant property and was exempt from valuation on the basis that it fell within paragraph 2(b) of Schedule 3 of the Valuation Act 2001. Further, Mr. Halpin claimed that neither a reasonable landlord nor a reasonable tenant would take on the works required by the fire safety officer given the underlying value of the property. On that basis the property was said to be 'struck with sterility in any and everybody's hands' and therefore incapable of 'beneficial occupation' meaning the appropriate valuation for the subject property was €0.
- 7.8 In cross examination by Mr. Henry BL, Mr. Halpin confirmed that the pictures contained in his précis showed various items on the premises including construction tools and other items however he did not accept that these items were being stored on the premises or that the property had a storage use. He re-iterated that it was not commercially viable to

pay to have these items removed when the unit was not in use by the Appellant and has been closed since 2008.

- 7.9 The Appellant's case was that the subject property was exempt from valuation under paragraph 2 of Schedule 3 and no evidence was adduced as to the appropriate NAV for the property, should they be unsuccessful in their bid for exemption. The Appellant did not challenge the Respondent's evidence in respect of the NAV contended for and the final valuation certificate for the property.

8. RESPONDENT'S CASE

- 8.1 Mr Gibbons provided a summary of his case, his response to the Appellant's case, the valuation history, a location map, block plan and pictures of the subject property. He maintained the view that the property was capable of beneficial occupation as a commercial property and met the requirements for relevant property under the Act. Further, he disputed Mr. Halpin's claim that the property was unused contending it had been used as a store and that the photographic evidence before the Tribunal confirmed same.
- 8.2 The Respondent's case focused on the definition of 'beneficial occupation' and that the property was being used by the Appellant for storage purposes. The Chief Fire Safety Officer's conditions in relation to the Ordinary Publicans Licence application were not considered as a total ban on the use of the property and the Appellant's witness (Mr. L'Estrange) was cross examined on this point.
- 8.3 Insofar as the property was capable of beneficial occupation, the Respondent maintained €27.33 was an appropriate value per m² for the property providing a NAV of €19,750.02 and a rateable valuation of €99. No further evidence was offered by the Respondent to support this level and the Appellant made no comment in relation to same.
- 8.4 In cross examining Mr. Gibbons, Mr. Halpin put it to him that 'the power had been cut off in the property' on the date of his second inspection circa December 2020. Mr. Dodd for the Respondent took issue with this claim and Mr. Halpin's description noting it was vague and imprecise when power could be cut off for a number of reasons. He queried if this meant sockets had been stripped out, the mains electricity switched off or simply an account with an energy provider had been terminated. Absent definitive explanation and proof of the claim being made by Mr. Halpin Mr. Dodd urged the Tribunal to disregard the claim as unsubstantiated in the circumstances.

9. SUBMISSIONS

- 9.1 This Appeal turns on whether the subject property is exempt from valuation by virtue of paragraph 2 of Schedule 3 of the Valuation Act, 2001. The Appellant's submission was that the exemption ought to apply for the reasons set out above. The Respondent disputed the Appellant's interpretation of the provision and cited case law in furtherance of their position.
- 9.2 In seeking the rates exemption, the Appellant maintained that as part of a licencing application in 2017, Wexford County Council's Fire Safety Officer (Mr. Paul L'Estrange) placed a condition on the subject property as follows: "6. The parts of the premises which are currently unused (namely the night club area and the lounge area) shall remain unoccupied, and shall not be used by any persons for any reason until all fire safety requirements are not completed to the satisfaction of the Fire Authority." The Appellant described and characterised this condition as a 'declaration' and argued that it rendered

any use of that portion of the subject property unlawful. On that basis, the Appellant argued he was unable to use the property, was not in occupation of same and that the nature of the restriction was to render the property 'struck with sterility' in the hands of whomever occupied it.

9.3 The Respondent provided written submissions and opened case law on the definition of 'beneficial occupation' to the Tribunal. Mr. Dodd BL maintained that the test for same was neither dependant on nor instructed by whether the property had a monetary value to the occupier and instead the case law showed that if the property could be put to a particular use (and in the present case same was storage) then it passed the test of being capable of beneficial occupation rendering it 'relevant property' within Paragraph 2(a) of Schedule 3.

9.4 Insofar as beneficial occupational is considered, Mr. Dodd directed the Tribunal to the decision of Mrs. Justice Hyland in *Fibonacci Property Ica v Commissioner of Valuation* [2020] IEHC 31 and paragraph 27 thereof which found:

"It is common case that in a deciding whether an owner is in beneficial occupation one does not look only at the question of pecuniary benefit or whether a profit may be made but may also look at the wider question as to whether it is in "immediate use and enjoyment of the land" (as characterized in Sinnott v Neale [1984] (IR JUR. REP. 10, even though in that case the defendant was not in occupation of the property) or whether the occupation was of value (O'Malley v The Congested Districts Board 2 [1919] IR 28)"

9.5 Mr. Dodd also relied on the English Court of Appeal decision in *Williams v Scottish & Newcastle Retail Ltd & Ors* [2001] ALL ER (d) 173 paragraph 57-8 regarding the threshold for beneficial occupation which he described as a low one:

"The first and most important of these principles is the distinction between the determination of a person's liability to be rated (on the one hand) and the quantification of that liability by determination of the rateable value (on the other hand). Mr. Holgate submitted that the Lands Tribunal fell into serious error by failing to make this distinction. He also relied on what he called the principles of reality and uniformity. These submissions call for serious consideration.

58. A person cannot be liable to pay non-domestic rates unless he is in occupation of a non-domestic hereditament within the meaning of the 1988 Act, and there is a long line of cases (starting, so far as the modern law is concerned with the Mersey Docks case in 1865) on the concept of rateable occupation. It is a concept which imports the notion of beneficial occupation, but not necessarily in the same sense of being profitable to the occupier personally. Moreover, the need for benefit is (as Mr. Holgate urged, referring to the advice of the judges given by Blackburn J in the Mersey docks case (1865) II HLC 443, 461) a low threshold. Once a hereditament has passed this threshold and is shown to be ratable, the valuation process requires a determination of annual value to a hypothetical tenant holding under a hypothetical annual tenancy and the actual occupier ceases to be relevant."

9.6 The Respondent maintained that the evidence showed the subject property was not only capable of being used by the Appellant but was in fact used for storage purposes of various items and though no pecuniary benefit was being derived from the property in its present state, this was not the test for beneficial occupation under the Valuation Act. On that basis

the Respondent argued the application for exemption should fail and the Certificate of Valuation be upheld.

10. FINDINGS AND CONCLUSIONS

- 10.1 On this Appeal the Tribunal has to determine if the subject property is 'relevant property' within the meaning of Schedule 3 of the Valuation Act. If it is, the Tribunal must then determine the value of the Property so as to achieve, insofar as is reasonably practical, a valuation that is correct and equitable relative to the value of other comparable properties on the valuation list in the rating authority area of Wexford County Council. If it is not 'relevant property', then the property is not rateable and the Certificate of Valuation in respect of the subject property should be amended to reflect that.
- 10.2 Both parties are agreed that the determination of the claim for exemption will be applicable to both of the Appeals before the Tribunal (VA19/2/0009 and VA19/5/0430) which were heard together before the Tribunal. The parties also agree that the Appellant's original request to the Commissioner for revision in November 2011 (which has since been resolved and which may or may not be subject to an Appeal) is outside the scope of the present Appeal. However, the Tribunal notes that it is a startling length of time for a matter to remain unresolved, not least when two subsequent decisions (now before us by way of Appeal) were capable of being progressed by the Respondent during this time. It is a matter for the Appellant to decide their position in that regard, but the Tribunal expresses its frustration that all Appeals in relation to the subject property could not be dealt with at the same time.
- 10.3 In determining the core question in the present Appeal, the Tribunal has considered the following:
- A. Whether the subject property was occupied (within the meaning of paragraph 2(b) of Schedule 3 of the Valuation Act, 2001) or unoccupied (within the meaning of paragraph 2(a) of Schedule 3).**
- 10.4 Whether or not the subject property was occupied and/or capable of beneficial occupation are central issues in this Appeal. If the Appellant establishes that the property was unoccupied and incapable of rateable occupation, no liability arises in the circumstances. If the Respondent proves that the property was in fact occupied and capable of beneficial occupation, then the property falls to be valued and a rates liability attaches to it.
- 10.5 Both parties provided photographs of the subject property and the Tribunal notes that there were two separate inspections undertaken, with photographs taken on each occasion. The Appellant's agent Mr. Halpin originally took photographs in November 2011 and took a second set of photos in December 2020 during a joint inspection with the Respondent. Both sets of photos were included in the Appellant's précis of evidence. The Respondent's agent could not recall exactly when their photos were taken but it is noted in Mr. Gibbons précis of evidence that an inspection of the property was carried out in 2019 and photos are included in that regard.

- 10.6 In cross examination, the Appellant conceded that items such as construction tools and shop display cabinets, clearly visible in the photographs, were merely 'junk' items and the reality was it would have cost the Appellant money to clear out these premises so instead he simply shut the doors and didn't use the property. Mr. Halpin was asked on several occasions if the Appellant used the property for storage but he maintained it was not storage but a 'dumping ground' for the Appellant.
- 10.7 It was clear from the evidence in this case that the parties fundamentally disagreed on whether the subject property was 'occupied' within the meaning of paragraph 2 of Schedule 3 and further whether the Appellant's use of the property constituted storage in the circumstances. It is clear from the Act that two different scenarios are envisaged in paragraph 2 of Schedule 3. The first, 2(a), describes a property that is occupied, and the nature of that occupation renders it rateable. The second, 2(b), describes a situation where a property is unoccupied but nonetheless capable of beneficial occupation.
- 10.8 The Tribunal notes the dispute between the parties as to whether the property was occupied, but in the circumstances finds that if it was occupied by the Appellant in a manner constituting rateable occupation, it is 'relevant property' under paragraph 2(a) and if was not occupied, but nonetheless capable of occupation by the owner, it is 'relevant property' under paragraph 2(b).

B. Whether the Fire Safety conditions arising from the Appellant's Ordinary Publicans Licence for the adjoining bar (PN 2009924) are such to render the portion of the subject property under consideration, incapable of use in any way.

- 10.9 The Appellant placed significant emphasis on the fact that the conditions imposed by the Chief Fire Officer in Wexford County Council rendered 'any use' of the property unlawful and on that basis it was not used by the Appellant, nor was it capable of being used for any purpose. The said Fire Officer, Mr. L'Estrange, gave evidence before the Tribunal and in response to both Mr. Halpin for the Appellant and Mr. Dodd BL for the Respondent, confirmed that his comments were made in the context of an Ordinary Publicans Licence application and not in the context of commercial valuation. Mr. L'Estrange further declined to confirm that the property could not be used for any purpose and explained his comments to that effect were referring to uses connected with the operation of the Ordinary Publicans Licence on the adjoining premises (PN 2009924).
- 10.10 The Tribunal finds that the said conditions relied on by the Appellant arose in a different context to the rateable valuation of the property and cannot be taken as evidence of a blanket restriction on the use of the subject property for any and all purposes. Further, the Tribunal notes that in cross examination Mr. L'Estrange expressly declined to say that the subject property could never be used, and instead maintained that his comments were in respect of the safe use of the said property when open to members of the public.
- 10.11 The Tribunal notes that the Fire Safety conditions were submitted by Mr. L'Estrange to Wexford Circuit Court as part of the Appellant's licencing application. The Tribunal further notes that the Court Order that issued in respect of the said property makes no mention of these conditions, but it is taken as given that they applied and are binding for the purposes of the Appellant's Ordinary Publicans Licence. The Tribunal therefore finds that Mr. L'Estrange provided his expert opinion to the Circuit Court as required of him in the context of the Appellant's Ordinary Publicans Licence renewal in March 2017 and the extent of his evidence was to comment on the safety, or otherwise, of the Appellant's

property holdings for the purposes of an Publicans Licence. Mr. L'Estrange's expertise do not lie in the area of rateable valuation, he did not profess to have any such expertise and the Tribunal finds that his observations and findings both before the Circuit Court and before this Tribunal are limited to the context in which they were given.

- 10.12 Arising from the foregoing, the Tribunal does not accept that the fire safety conditions, (specifically condition 6 set out at paragraph 7.2 above) imposed a blanket ban on any and all use of the subject property and rejects the proposition that the Fire Safety conditions created or were intended to create a legal restriction on the use of the night club and lounge area beyond the scope and remit of the Ordinary Publicans Licence, to which the conditions related. Notwithstanding the use of the phrase 'any use' in the condition, Mr. L'Estrange confirmed that his letter must be read in the context of the licencing application only. Further the Tribunal notes that it was accepted in cross examination of Mr. Halpin that the Appellant was not precluded from entering his own property or using it as demonstrated in the photos. The Tribunal therefore rejects that the above conditions, imposed as part of the Appellant's Ordinary Publicans Licence rendered the portion of the subject property under consideration, incapable of use in any way.
- 10.13 The Tribunal's considers that Mr. Halpin's approach in maintaining and reiterating that condition 6 barred any and all use of the property, contrary to what his own witness (Mr. L'Estrange) had said, was inappropriate and ignored sworn evidence given earlier in the hearing. In the circumstances the Tribunal rejects Mr. Halpin's characterisation of the evidence and relies on Mr. L'Estrange's oral evidence, as tested and confirmed in cross examination.

C. Whether the property is capable of 'beneficial occupation' in the circumstances.

- 10.14 It is well established law and clear from the decisions opened by the Respondent that the threshold for establishing beneficial occupation is a low one. Furthermore, the absence of a pecuniary benefit being derived from a property, is not determinative of the issue. The Tribunal accepts the position outlined by Mr. Dodd and the legal test to be applied when considering beneficial occupation and its application to paragraph 2 of schedule 3 of the Act.
- 10.15 The four conditions required for rateable occupation to exist were summarized in *John Laing & Son Ltd. v Kingswood* [1949] 1 KB 344 (and subsequently adopted by the High Court as well as this Tribunal) as:
1. There must be actual occupation;
 2. It must be exclusive for the particular purposes of the possessor;
 3. The possession must be of some value or benefit to the possessor; and
 4. The possession must not be for two transient a period.
- 10.16 In maintaining that the subject property was incapable of beneficial occupation, Mr. Halpin emphasized the fire safety conditions, discussed above, which he said rendered the property unusable. Mr. Halpin further claimed the property was 'struck with sterility in any and everybody's hands' which is an oft cited phrase and concept discussed in *London County Council v Erith Churchwardens* [1983] AC 562 as follows:

"...if land is 'struck with sterility in any and everybody's hands' whether by law or by its inherent condition, so that its occupation is and would be of no value to anyone,

I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from occupation by the occupier is a criterion which determines whether the premises are rateable, and at what amount they should be assessed; and I do not think that a building in the hands of a school board is incapable of being beneficially occupied by them, and is not so occupied because they are prohibited from deriving pecuniary profit from its use."

- 10.17 The Tribunal rejects the Appellant's contention that the property is struck with sterility in everyone's hands as contended for by Mr. Halpin. The Tribunal also rejects that the property is incapable of any use. The Tribunal agrees with the Respondent that it would be unusual for a property not to be capable of some beneficial occupation or occupation that serves a purpose. As already outlined, the benefits of that purpose need not have a monetary value or be pecuniary in nature for it to satisfy the test.

DETERMINATION

- 11.1 Both parties are agreed that the conclusion of whether Paragraph 2 of Schedule 3 of the Valuation Act applies to the subject property, will determine the issues in both appeals before the Tribunal. Accordingly, for the above reasons the Tribunal disallows both appeals (VA19/2/0009 and VA19/5/0430) on the basis that the property does not meet the criteria for exemption under paragraph 2 of Schedule 3 of the Valuation Act, 2001 as amended. Consequently, the NAV in both instances are affirmed.
- 11.2 Determination in respect of Appeal VA19/2/0009 (Revision): The Tribunal upholds the Respondent's valuation of €99.00 as cited on the Certification of Valuation.
- 11.3 Determination in respect of Appeal VA19/5/0430 (Revaluation): The Tribunal upholds the Respondent's valuation of €23,400 as cited on the Certification of Valuation.