

Appeal No: VA19/5/0306

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

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

PASCHAL BERMINGHAM

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

**In relation to the valuation of Property No. 651408 at 45 Main Street, Arklow,
County Wicklow**

B E F O R E

Carol O'Farrell

Barrister-at-Law

Chairperson

**JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 7th DAY OF MARCH, 2023.**

THE APPEAL

- 1.1 By Notice of Appeal received on the 10th of October 2019 the Appellant appealed against net annual value (the NAV) of €13,010 determined in respect of the above relevant Property (hereafter “the Property”).
- 1.2 The two grounds of appeal advanced are that the valuation is incorrect and that the second floor of the Property is in residential use. The Appellant contended that the Property ought to have been valued at €10,000.
- 1.3 The Appellant opted to have the appeal determined as a document appeal and the Tribunal considered appropriate to determine this appeal on the basis of the written documentation submitted by the parties without the need to hold a hearing.
- 1.4 In accordance with the Rules of the Tribunal, the parties submitted their respective Précis of evidence to the Tribunal

2. REVALUATION HISTORY

- 2.1 The Valuation Order for the rating authority area of County Wicklow was made on the 6th October 2017.
- 2.2 A proposed valuation certificate issued on the 15th of March 2019 under section 24(1) of the Valuation Act 2001 ('the Act') in relation to the Property indicating a valuation of €15,210.
- 2.3 Representations were made by the Appellant to the valuation manager and a final valuation certificate issued on the 10th of September 2019 stating a valuation of €13,010. The valuation was reduced because the retail Zone A rate of €240 per sqm was reduced to €180 per sqm.
- 2.4 The Valuation Order provided that the date by reference to which the value of the Property is to be determined is the 15th of September 2017.
- 2.5 The valuation list for the rating authority area was published on the 17th of September 2019. The valuation list became effective on the 31st of October 2019.

3. ISSUE

- 3.1 Prior to the determination of the appeal the parties reached agreement on the valuation of the ground and first floor of the Property at €10,350. The confirmation of that agreement is contained in Appendix 7 of the Respondent's Précis of evidence (n/a to the public). The Tribunal is required to decide whether the second floor of the Property is a domestic premises and ought properly to be excluded from the list.

4. RELEVANT STATUTORY PROVISIONS

- 4.1 The provisions of the Valuation Act 2001 in so far as relevant to this appeal are set out below for ease of reference. All references hereinafter to a particular section of the Valuation Act 2001 ('the Act') refer to that section as amended, extended, modified or re-enacted by the Valuation (Amendment) Act, 2015.

Section 3

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

Section 15

- (1) Subject to the following subsections and sections 16 and 59, relevant property shall be rateable
- (2) Subject to sections 16 and 59, relevant property referred to in Schedule 4 shall not be rateable.

The NAV of a relevant property has to be determined in accordance with the provisions of section 48.

Section 48 (1)

“The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.”

Section 48 (3)

“Subject to Section 50, for the purposes of this Act, “net annual value” means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably be expected to let from year to year, on the assumption that the probable annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant.”

The procedure for commencing valuation of relevant properties in a rating authority area is governed by section 19.

Section 19 (1)

“The Commissioner, after consultation with the Minister for the Environment, Community and Local Government and the rating authority concerned, may make an order (in this Act referred to as a “valuation order”) specifying a rating authority area as being an area in relation to which the Commissioner proposes to appoint a person under subsection (2) to organise and secure the carrying out of a valuation of relevant property situate in that area (other than any property specified in paragraph (a) or (b) of that subsection)”

The dates to be specified in a valuation order are governed by sections 20 and 21.

Section 20 (1)

A valuation order shall specify one date by reference to which the value of every relevant property, the subject of the valuation mentioned in the order, shall be determined.

Section 21(1)

A valuation order shall specify

- (a) a date (in this Act referred to as the “publication date”) on which the Commissioner proposes to cause to be published under section 23 a list comprising every relevant property that has been the subject of the valuation mentioned in the order, and the value of that property as determined by that valuation, and*
- (b) a date (in this Act referred to as the “effective date”) on which that list becomes effective for rates purposes.*

(2) Such a list shall be known, and is in this Act referred to, as a “valuation list.”

The categories of properties that are relevant properties but no longer rateable are set out in the twenty two paragraphs of Schedule 4.

Schedule 4 – Relevant Property Not Rateable

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

5. THE PROPERTY

5.1 There is no dispute as to the physical characteristics and dimensions of the Property. It is located at 45 Main Street, Arklow in the County of Wicklow on a corner at the junction of Main Street and Condren's Lane Upper. The Property can be accessed from Main Street or from the rear on Condren's Lane Upper.

5.2 The Property is a modern three storey building and was found in good condition upon inspection by Mr Maguire on the 24th May 2019.

5.3 The agreed floor area measured on a net internal area basis is 162.11 m². The ground floor and the first floor of the Property were let by the owners on the 18th April 2019. The ground floor has been valued for retail use and the first floor for office use.

5.4 The second floor of the Property measures 50.32 m². The accommodation on the second floor consists of three rooms and a bathroom. The second floor area was valued by the Respondent for office use.

5.5 The Appellant is a joint owner of the Property with his sister.

6. DOCUMENTS SUBMITTED

6.1 The Tribunal had before it the following documents:

(a) a letter from the Appellant dated the 13th May 2022 providing written evidence (hereinafter referred to as the Appellant's Précis) accompanied by the following supporting documents

- i. Notice of Appeal date receipt 10th October 2019
- ii. Cheque for Appeal Fee
- iii. Valuation List Details
- iv. One External Photograph of 45 Main Street
- v. Four Internal Photographs of second floor of 45 Main Street
- vi. Short Term Business Letting Agreement dated 18th April 2019
- vii. Photograph Comparable - 87 Lower Main Street Arklow
- viii. Photograph Comparable - 43 Main Street Arklow and Short Term Business Letting Agreement dated 16th September 2019 in respect of 43 Main Street Arklow
- ix. Letting Agreement dated 1st March 2022 – Unit 2 at 43 Main Street Arklow

- x. Photograph Comparable - 30 BC Main Street Arklow
- xi. Business Letting Agreement dated 23rd February 2018 - 30 A/B Main Street Arklow and four bank statements
- xii. Photograph Comparable - 2 Main Street Arklow and Short Term Business Letting Agreement dated 8th September 2020 in respect of 2 Main Street Arklow
- xiii. Two Photographs Comparable - 2 and 3 Church Buildings Arklow and Letting Agreement dated 3rd September 2018 in respect of Nos. 2 and 3 Church Buildings

(b) Emails of 24 January 2023 from the Tribunal to Appellant and the Appellant's reply thereto.

(c) Précis of Evidence prepared by Mr David Maguire of the Valuation Office

- Appendix 1 Representations to Revision Manager
- Appendix 2 Valuation Report
- Appendix 3 Final Valuation Certificate
- Appendix 4 Correspondence from the Appellant on 21/4/2021
- Appendix 5 Photographs of 2nd floor received from Appellant on 06/4/2021
- Appendix 6 Photographs of 2nd floor from Appellant Précis
- Appendix 7 Settlement Proposal and Agreement for Ground and First Floor

(All Appendices are not available to the public)

(d) Legal Submissions on behalf of the Respondent dated the 15th July 2022

(e) Tribunal Judgment VA04/2/035 First Citizen Residential Ltd.

7. CASE FOR THE APPELLANT

7.1 The Appellant stated that the Property was owner occupied up until the 17th April 2019. Upon the owners' retirement the Estate Agency business which operated from the Property was sold and a new letting was made on the 18th April 2019 of the ground floor and first floor to the current occupiers on a short term business lease dated the 18th April 2019.

7.2 The Appellant stated that from April 2019 the second floor was used by the owners for residential and personal use but that a full fit out took some time due to Covid 19 and having to wait for tradesmen to become available. He included four photographs in his Précis showing the interior of the rooms on the second floor.

8. CASE FOR THE RESPONDENT

8.1 Mr Maguire is employed in the Valuation Office. He holds himself out as an expert witness without stating his qualifications or experience in his Précis. His Précis contains a summary of the background to the appeal, his response to the Appellant's case, the valuation history, a location map, an unscaled hand sketched block/floor plan in respect of each floor of the Property, a photograph of the exterior of the

Property and three photographs in support of his description of the use of the second floor.

- 8.2 Mr Maguire confirmed that agreement was reached with the Appellant on the reduction of the NAV of the ground floor and first floor from €11,050 to €10,350. He proposed that the Property be valued at €12,319.28 as follows:-

Floor	Use	Area m ²	NAV €/m ²	Total NAV €/m ²
	Retail	29.46	180	5,335.20
0	Retail	18.06	90	1,625.40
0	Store	11.23	20	224.60
1	Office	52.86	60	3,171.60
2	Office	50.32	39	1,962.48

The figures provided above do not properly reflect the agreement reached as the figures applied to the ground floor and first floor area tot at €10,357.80 and not €10,350.

- 8.3 Mr. Maguire inspected the Property on the 24th May 2019. He stated in his Précis that during this inspection he could see no evidence of residential use on the second floor. He pointed out that the second floor does not have a separate access but is accessed internally presumably via staircase. He stated that there was no kitchen, bedroom or living room on the second floor and the three main rooms contained desks and files as shown in the three photographs in section 3.8 of his Précis. Based on that inspection he formed the view that the second floor is rateable and did not qualify for removal from the valuation list.

- 8.4 Post inspection, Mr Maguire received an email dated the 21st April 2021 from the Appellant (Appendix 4) which stated that the second floor was converted to residential use in June 2020. That email is contained in Appendix 4 of Mr Maguire's Précis (n/a to the public).

- 8.5 Mr Maguire challenged the Appellant's contention that the full fit out of the second floor was delayed due to Covid because Covid restrictions were not implemented until 2020. Referencing the Appellant's email of the 21st April 2021 Mr Maguire posited, based on a comparison of the photographs in Appendix 6 of his Précis (sent to him by the Appellant on the 6th April 2021 n/a to the public) and the photographs that he took in May 2019 that the second floor was still not in residential use in April 2021. He contended that the Appellant had produced no concrete evidence to prove that the second floor was in residential use on the date when the list became effective i.e. the 31st October 2019.

9. LEGAL SUBMISSION

- 9.1 Mr David Dodd B.L. was instructed by Chief State Solicitor's Office to write legal submissions on behalf of the Respondent. Those Submissions briefly stated are as follows.
- 9.2 In *VA04/035 First Citizen Residential Ltd v Commissioner of Valuation* the Tribunal determined that the definition of domestic premises involves a positive test that the

premises either in whole or in part be used as a dwelling and two negative tests that the premises cannot be a mixed premises nor an aparthotel.

9.3 The word 'premises' is to be given its ordinary meaning in the context in which it appears per Lord Reid in *Maunsell v Olins* [1975] 1 All ER 16:

9.4 In the *Kerry County Council v Kerins* [1996] 3 I.R. 493 the Supreme Court held that chalets were dwellings, were used as dwellings and could only be used as dwellings and were accordingly domestic premises within the meaning of the Local Government (Finance Provisions) Act 1978 and entitled to relief from rates. Domestic premises are defined in the 1978 Act as "*Any hereditament which consists wholly or partly of premises used as a dwelling and which is not a mixed hereditament*" The Supreme Court observed that this definition does not require the occupier to make private use of the dwelling and nor does it preclude the occupier from using it for commercial advantage by letting them out for dwellings during the holiday period. Counsel submitted that the Supreme Court considered the chalets to be physical buildings in their own right and in emphasising their current use as dwellings held they could only be used as dwellings.

9.5 Counsel also referred to *Liam Slattery v Bernadette Flynn* [2002] IEHC 199 which was another case where a defence was successfully raised to a claim for rates on the basis that the premises constituted a domestic premises as defined in the Local Government (Financial Provisions) Act, 1978. In that case six bedrooms in a ten bedroom terrace dwelling were set aside for bed and breakfast occupation by paying guests.

9.6 Counsel next cited fourteen Tribunal decisions all of which, he submitted, made clear that a premises must be used in whole or in part as a dwelling to avail of the exemption in paragraph 6 of Schedule 4.

9.7 Section 19(5) makes clear that the valuation list must be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue.

9.8 The relevant date for the purpose of the use of the Property is in theory up to the publication date, the 19th of September 2019, and arguably only up to the 10th September 2019 when the Commissioner issues the valuation certificate.

9.9 Events after September 2019 are not relevant and any change of use of the second floor of the Property after that date does not mean the valuation certificate is incorrect or that the Respondent has erred in law.

9.10 The Appellant states in his Précis that the second floor was used for residential and personal use from April 2019. When the Property was inspected by Mr David Maguire in May 2019 there were no signs of residential use. The photographs taken during that inspection confirm that to be the position.

9.11 The Appellant states that the full fit out of the second floor took some time due to the availability of trades and Covid. He confirmed by email dated the 21st of April 2021 that the second floor was converted to residential in June 2020. The photographs in Appendix 5 of Mr Maguire's Précis (n/a to the public) received from the Appellant on the 6th of April 2021 when compared with the photographs contained in Appendix 6 (n/a to the public) of the Appellant's Précis show that the second floor was not in residential use

9.12 The Respondent invokes *lex non cogit ad impossibilia* (the law does not compel someone to do that which is impossible). The Respondent could not value the Property based on a future use that had not yet occurred when he discharged his statutory functions. It is common case that the second floor was not in use as a dwelling when the final valuation certificate was issued. This is dispositive of the appeal.

10. APPELLANT'S REPLY

10.1 The Appellant was given the opportunity to submit a Reply to the Respondent's Précis of evidence and legal submissions. By email dated the 23rd January 2023 the Appellant responded to say that he had already provided information and comparables and that the NAV of ground floor and the first floor at €11,052.86 is excessive. He also stated that the current rent has not changed since April 2019 when he and his sister retired from the Estate Agency business and that the current occupier was not in a position to pay higher rent as rates are a substantial burden on her business. As regard the second floor he re-iterated that it was converted to residential use and is now occupied by refugees.

11. FINDINGS AND CONCLUSIONS

11.1 The Tribunal is grateful to both parties for narrowing the issues in relation to this appeal. As a result the Tribunal does not need to address in any great detail the comparative evidence and can focus upon the fundamental issue between the parties relating to whether the second floor ought to have been excluded from the valuation list.

11.2 Though the Valuation Act 2001 is not a taxation or penal statute it is nonetheless strictly interpreted. Exemption provisions are interpreted strictly against the rate payer and any ambiguities in an exemption provision are also to be interpreted against the rate payer (*Nangles Nurseries v. Commissioners of Valuation [2008] I.E.H.C. 73*).

11.3 Before the Tribunal turns to consider the facts upon which the outcome of the appeal depends, it is necessary to outline the legislative context. The Respondent has a duty to draw up a valuation list for each rating authority area every five to ten years after the publication of the previous valuation list for that area. The process starts with a Valuation Order by which the Respondent appoints a valuation manager to organise and secure the carrying out of a valuation of every relevant property in the rating authority area. The Valuation Order specifies the valuation date by which all relevant properties in that area are to be valued, the publication date for the valuation list and the date when that list become effective for rates purposes.

11.4 The value of a relevant property is determined under section 48 of the Act by estimating the “*net annual value*”. The net annual value’ in relation to a property, is the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant. This hypothetical tenancy is assumed to commence on the valuation date specified in the Valuation Order.

11.5 It is a well-known principle of valuation that a property is valued in its “*actual state*.” In *Harper Stores Ltd v Commissioner of Valuation* [1968] I.R. 166 Henchy J. in considering the meaning of the words “actual state” cited Lord Parmoor in *Great Western and Metropolitan Railway Companies v. Kensington Assessment Committee* as follows

"the hereditament should be valued as it stands and as used and occupied when the assessment is made"

and Lord O'Brien, L.C.J., in *Armstrong v. Commissioner of Valuation* as follows

"The words 'actual state' were introduced to ensure that the hereditament or building was valued such as it was, rebus sic stantibus, and to prevent speculation as to mere contingencies, speculations as to what the value of a house might be under conditions different from those subsisting.

Henchy J. went on to hold that

"the words "actual state" connote all the existing factors that go to make up the premises as they are currently occupied and used or "all that would affect the rent that would be paid by a hypothetical tenant per Lord Ashbourne C., in Armstrong's Case."

11.6 On the facts of this appeal, the Property fell to be valued by reference to rental values on the 15th of September 2017. The Respondent was bound to value the Property no later than the 17th of September 2019 as that was the date the list was due to be published pursuant to the Valuation Order. The valuation was carried out on the 10th September 2019 when the Respondent issued the final valuation certificate.

11.7 The whole of the Property was a relevant rateable property at the valuation date. The obvious question that needs to be addressed is what use was made of the second floor between April 2019 and the 17th of September 2019 when the property was revalued pursuant to section 19 of the Act.

11.8 The Appellant’s statement in his Précis that from April 2019 the second floor was in residential use is not plausible because when it was inspected by Mr Maguire on

the 24th of May 2019 there was no evidence of residential use as evidenced by the photographs taken by Mr Maguire during that inspection.

11.9 The Appellant has not produced any photographs taken between the 24th May 2019 and the 17th September 2019 of the three principal rooms on the second floor to show that the second floor was in residential use.

11.10 The Appellant exhibited undated photographs of the second floor. No correspondence, household bills, letting agreement or any other documentary evidence addressed to the Appellant or any other person at 45 Main Street Arklow was furnished by the Appellant to show that he or some other person or persons were residing on the second floor following the sale of the Estate Agency business in April 2019. When the Appellant submitted representations to the Respondent on the 10th April 2019 stating “*The property is used as offices at ground and 1st floor with residential at 2nd floor*” following receipt of the proposed valuation certificate, he gave Sea Road Arklow as his contact address. When he submitted the Notice of Appeal to the Tribunal on the 4th October 2019 he again gave Sea Road Arklow as his contact address.

11.11 The Tribunal is satisfied taking the Appellant’s case at its height that he has not made out an arguable case that the second floor was in residential use when it was valued by the Respondent pursuant to the Valuation Order in September 2019. The burden is on the Appellant to put material before the Tribunal to support his grounds of appeal.

11.12 The Tribunal has weighed the Appellant’s evidence against the following facts:

- i. The Appellant did not produce any direct evidence to support his assertion that the second floor was in residential use when it was valued by the Respondent
- ii. The second floor was inspected by Mr Maguire on the 24th May 2019 and during his inspection to took a photograph of the three main rooms on the second floor none of which support the Appellant’s claim that the second floor was in residential use at that time.
- iii. The Appellant, despite been given an opportunity to reply to Mr Maguire’s Précis of evidence, did not dispute Mr Maguire’s account of his inspection of the second floor.
- iv. On the 6th April 2021 the two photographs in Appendix 5 of Mr Maguire’s Précis of evidence (n/a to the public) showing a bathroom, and a room containing a wardrobe and camper bed were sent by the Appellant to Mr Maguire. The Appellant did not say when those photographs were taken and did not at that time furnish to Mr Maguire photographs of the other two rooms on the second floor.

- v. On the 21st April 2021 the Appellant confirmed in an email to Mr Maguire that the second floor “*was converted to residential in June 2020*”.
- vi. The four photographs in the Appellants Précis are undated. What is clear is that the photograph of the room containing a wardrobe and camper bed sent to Mr Maguire on the 6th April 2021 has been completely transformed and refitted as a kitchen/dining room.

11.13 It is reasonable to assume that had these photographs been taken between June 2020 and the 6th April 2021 they would have sent to Mr Maguire on the 6th April 2021 rather than the two photographs that he did send on that date.

11.14 Following receipt of the proposed valuation certificate in April 2019 the Appellant expressed his dissatisfaction with the valuation to the valuation manager and one of the reasons he advanced to seek the amendment of the proposed certificate was that the second floor in residential use. The Appellant should have been aware of the importance of taking photographs and keeping adequate records evidencing the purported change of use of the second floor when those representations were made. The Appellant has not adduced any persuasive evidence to show that there was a change of use of the second floor from office to residential use when the property was revalued. The Appellant's assertion that the change to residential use took place in April 2019 is totally undermined when assessed against the facts set out above in paragraph 49.

11.15 The Tribunal has decide this appeal on the only credible evidence it has before it. The fact that the second floor is now in residential use is not the issue. The issue is whether it was in residential use when the Property was revalued for rating purposes. The determination of the Tribunal relates to that particular point in time. The Tribunal finds as a fact that the second floor of the Property was not in residential use when it was revalued and that it is properly included in the valuation list.

11.16 In his Précis the Appellant contended that the NAV for the ground floor and first floor totalling €11,052.86 is excessive and that the NAV for the second floor at €1,962.48 should be removed/struck out on the basis that it was converted to residential. On the 23rd May 2022 the Appellant confirmed acceptance of the revised valuation of €10,350 for the ground floor and first floor. It was not agreed, however, that if the Appellant's appeal in respect of the second floor was upheld that the second floor of the Property ought to be valued at the rate of €1,960 per square metre. The Appellant did not produce any evidence of office rents or of comparable properties to show that the valuation of the second floor was excessive. In the circumstances, the Tribunal affirms the valuation of the second floor of the Property as it appears on the list at €1,962.48.

11.17 In conclusion, the Tribunal allows the appeal in part and decreases the NAV of the Property from €13,010 to €12,312 assessed as follows

Ground Floor and First Floor	€10,350.00
Second Floor	€ 1,962.48

SAY €12,312.00