

Appeal No. VA08/1/002

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

NSCDA (Operations) Limited

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Swimming Pool (Comm) at Lot No.1H, Snugborough/Blanch/Abbot, Deanestown, Blanchardstown Abbotstown, Blanchardstown, County Dublin.

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Leonie Reynolds - Barrister

Member

Brian Larkin - Barrister

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 31ST DAY OF MARCH, 2008

By Notice of Appeal dated the 9th day of January, 2008 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €4,500.00 on the above described relevant property.

The grounds of Appeal are set out in a letter attached to the Notice of Appeal, a copy of which is at the Appendix to this Judgment.

APPEARANCE FOR THE APPELLANT: DENIS McDONALD SC
INSTRUCTED BY McCANN FITZGERALD, SOLICITORS

APPEARANCE FOR THE RESPONDENT: BRENDAN CONWAY BL
INSTRUCTED BY THE CHIEF STATE SOLICITOR'S OFFICE

INTRODUCTION

The appeal was listed for hearing in the office of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 3rd March, 2008. The application in question is an appeal by the appellant in relation to the rateability or otherwise of the National Aquatic Centre at Blanchardstown, Dublin. In summary, it is the appellant's contention that the subject property falls within the rubric of "*office of State*" set out in section 15(3) of the Valuation Act, 2001 and accordingly is not rateable. The appellant contends this because although the property in question had previously been in private ownership and had been rated, following litigation against the then operator and occupier (Dublin Waterworld Limited) for breaches of the lease, a state owned company (namely Campus and Stadium Ireland Development Limited) went into occupation of the National Aquatic Centre. The National Sports Campus Development Authority Act, 2006 ("the 2006 Act") was then enacted which provided for the dissolution of Campus and Stadium Development Ireland Limited which occurred on the 1st January, 2007. Campus and Stadium Development Ireland Limited was replaced by the National Sports Campus Development Authority ("NSCDA") established under Part II of the 2006 Act to develop a sports campus.

In 2003 a valuation of €4,500 was placed on the property at appeal. However, the appellant now suggests that the coming into existence of, and subsequent occupation of the premises by, National Sports Campus Development Authority (Operations) Limited means that the property is now an office of State and as such is subject to the benefit of section 15(3) of the 2001 Act which states that such property occupied by an office of State shall not be rateable.

Therefore in essence the appellant contends that a change in the nature of the ownership and occupation of the premises in question is a "*material change of circumstances*" ("mcc"). The appellant contends that this mcc should be taken into account by the respondent.

A preliminary issue arises which both parties agree has to be determined before the issue of whether or not the National Aquatic Centre is or is not an “office of State” within the meaning of section 15(3) can arise. That issue is whether or not what has occurred constitutes a material change of circumstances which entitles the property to be deemed not rateable pursuant to section 15(3).

We believe it is of assistance if we set out the relevant sections of the Act;

Section 3 (“Interpretation”) provides:

“Material change of circumstances” means a change of circumstances which consists of:

- (a) the coming into being of a newly erected or newly constructed relevant property or of a relevant property, or*
- (b) a change in the value of a relevant property caused by the making of structural alterations or by the total or partial destruction of any building or other erection by fire or any other physical cause, or*
- (c) the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property, or*
- (d) the happening of any event whereby any relevant property begins, or ceases, to be treated as property falling within Schedule 4, or*
- (e) property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties, or*
- (f) property previously valued as 2 or more relevant properties becoming liable to be valued as a single relevant property;”*

Section 15(3) provides:

“Subject to section 16, relevant property, being a building or part of a building, land or a waterway or a harbour directly occupied by the State (including any land or building occupied by any Department or office of State, the Defence Forces or the Garda Síochána or used as a prison or place of detention), shall not be rateable.”

Section 13 of the Act provides:

“The Commissioner shall provide for the determination of the value of all relevant properties (other than relevant properties specified in Schedule 4) in accordance with the provisions of this Act.”

Section 14(1) provides:

“A provision of this Act providing that relevant property shall be rateable shall be construed as a provision to the effect that the property is property in respect of which a rate may be made and like provisions of this Act shall be construed accordingly.”

Section 15(1) provides:

“Subject to the following subsections and sections 16 and 59, relevant property shall be rateable.”

Section 15(2) provides:

“Subject to sections 16 and 59, relevant property referred to in Schedule 4 shall not be rateable.”

Schedule 3 of the Act (which is headed “*Relevant Property*”) then sets out various categories of property which shall be relevant for the purposes of the Act. Schedule 4 (which is headed “*Relevant Property Not Rateable*”) sets out various categories of property which are not rateable.

THE APPELLANT’S SUBMISSIONS

On behalf of the appellant Mr. McDonald quite properly acknowledged that there was a significant difficulty of statutory interpretation which arose in the instant case. The issue is whether or not a change in ownership and occupation of the premises in question constitutes a material change of circumstances which will avail the appellant.

Mr. McDonald noted in passing that it appeared that the Revision Officer had indicated in April, 2007 that he was prepared to recommend that the appellant constituted an “*office of State*” (and the property would thus not be rateable). However, subsequently on the 8th May he indicated that he had been instructed that no applications for exemption on the “*office of State*” basis should be granted until the High Court had resolved a number of cases stated on

this issue which were before the High Court. A formal Notice of Decision indicating that there was no material change of circumstances issued on the 11th May, 2007. Mr. McDonald however focused (with the agreement of the respondent's legal advisor) on the net issue of whether or not a change of ownership came within the definition of material change of circumstances in such a way as to allow the appellant avail of the provisions of section 15(3).

Mr. McDonald readily acknowledged that he could not bring himself within subsection (a), (b), (d), (e) or (f) of the definition contained in section 3 of "*material change of circumstances*". Insofar as subsection (c) is concerned, Mr. McDonald acknowledged that the property is currently a relevant property which is rateable. However, even if the change of ownership rendered it an office of State and so entitled to the benefit of section 15(3) it would remain a "*relevant property*". The entitlement to non-rateability conferred by section 15(3) is only conferred in respect of relevant property. Thus, in order to avail of section 15(3) one must be the occupier of a relevant property. As the Appeal Officer notes, even if the subject property was deemed to be occupied by the State within the meaning of section 15(3) "*it would still be relevant property and would not begin or cease to be treated as a relevant property. Property occupied by the State or office of State is relevant property, albeit relevant property not rateable.*"

Mr. McDonald suggests that the only way in which this part of the definition (c) of material change of circumstances can be read so as to allow a change of occupation to or from an office of State is if one inserts the word "*rateable*" before the word "*relevant*" within the definition. This would mean that a material change of circumstances would be deemed to occur by any property that had begun or ceased to be treated as a rateable relevant property.

However, Mr. McDonald acknowledges quite properly that it is difficult to justify the reading into an Act of a word which is not there. While the definition in question appears to try to allow for the occurrence of an event which renders a rateable property no longer rateable, the section does not actually do this as a matter of construction. He acknowledged that this appeared to be a surprising lacuna in the Act.

THE RESPONDENT'S SUBMISSIONS

On behalf of the respondent Mr. Conway made it clear that despite the apparent unfairness or difficulty caused by the literal interpretation of the section it was an established principle of

statutory construction that statutes imposing fiscal liability (including valuation statutes) must be construed strictly. We were referred to the decision of **Patrick J O’Connell (Inspector of Taxes) v Fyffes Banana Processing Limited**, 2000 Tax Cases 235. Keane CJ, as he then was in that case, held:

*“If this case were to be decided on the basis of what was most probably the intention of the Oireachtas, however inaptly expressed, the appellant would be entitled to succeed. It seems highly unlikely that the legislature, while making it clear that the ripening of bananas did not constitute a manufacturing process for tax relief purposes, thereby reversing by statute the effect of the decision of this court in **Charles McCann Ltd v S O’Cualachain Inspector of Taxes**, should have decided that the tax relief would be available where the artificial ripening was carried out by a company on bananas belonging to another company. The learned High Court Judge was of the view, however, with which I would agree, that such an approach is not permissible in the present case.*

In the case of a taxing statute, it is, of course, the duty of the court to give effect to the intention of the legislature “as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed.”

Keane CJ refers also to the decision of Kennedy CJ in **The Revenue Commissioners v Doorley** [1933] IR 750.

Mr. Conway therefore contends that in accordance with the **Fyffes** decision it is not possible to enlarge the definition of material change of circumstances “...*beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject matter.*” We were also referred to the decision of the Tribunal in **VA04/2/018 - Trabolgan Holiday Centre** in which material change of circumstances as a phrase was construed strictly. In submissions we were also referred to the decision of the Tribunal in **VA07/3/016 - Michael Butler** in which the Tribunal determined as follows:

“The material change of circumstances provisions as contained in the Valuation Act, 2001 are quite specific and unambiguous and the applicant seeking a revision must

clearly demonstrate that a material change of circumstances has taken place. If no material change of circumstances has occurred the Revision Officer has no alternative but to issue a Notice of Decision to that effect and to make no change to the rateable valuation of the property concerned as it appears on the valuation list.”

In the course of argument Mr. Conway acknowledged that it was difficult to think of a situation where a relevant property ceased to be a relevant property. One suggestion he made was that of a mine (which is a “*relevant property*” under Schedule 3(1)(e)). If the ore contained in the said mine was exhausted so that it was no longer a functioning mine it is conceivable that this once relevant property could now be described as a “non-relevant” property. He also suggested that easements and other rights over land (which are relevant property having regard to the provisions of Schedule 3(1)(i)) can be extinguished or indeed come into existence by virtue of an event: this too would be an example of the relevant property becoming “non-relevant”. The difficulty with the concept of “non-relevance” is of course that it is nowhere expressly defined in the Act, the distinction instead being between relevant rateable and relevant non-rateable properties. However subsection (c) of the definition section referring to material change of user appears implicitly to envisage the existence of such a category. Further if we were to assume the existence of a separate category of non-relevant property (as suggested), such a property would clearly lie outside the Act and so be non-rateable.

THE APPELLANT’S RESPONSE

Mr. McDonald acknowledged the difficulty which arose in interpreting the particular subsection of the definition of material change of circumstances. However, in his submission one could legitimately argue that the definition contained at subsection (c) has no utility without the insertion of the word “*rateable*” before the word relevant in the definition in question.

THE LAW

There is a large measure of agreement as to how the law should be interpreted in the instant case. It is clear that only the occupier of a relevant property can take advantage of the non-rateability conferred by section 15(3). The appellant contends in effect that a change of occupation and ownership means that the property, having previously been occupied by a rateable owner, is now occupied by a non-rateable owner. However, this kind of change is

manifestly not included within the six definitions of material change of circumstances contained within the Act.

We are indebted to both Counsel for the learned written submissions furnished to us on this issue as well as for the careful oral submissions made at the hearing. Mr. Conway rightly acknowledges on behalf of the respondent that the lacuna identified by Mr. McDonald in the Act is obviously not of Mr. McDonald's client's making and (if we may say so) the respondent appears to have some sympathy with the plight of the appellant. We should make it clear that the respondent does not concede that the appellant would in any event have been an office of State within the meaning of section 15(3). That, however, is not the issue at this stage. It appears that the change in occupation and ownership which has occurred does not constitute one of the six material changes of circumstances set out in the definition section of the Act and therefore no material change of circumstances can be said to have occurred.

We gave careful consideration to the suggestion made by Mr. McDonald that definition (c) should be read as if the word "*rateable*" had been inserted before the word relevant. However, for the following reasons we find ourselves unable to read the definition in question as if this extra word were inserted:

- (i) In general terms it may be said that the Courts are very reluctant to substitute words in a statute or to add words to it; it has been said that they will only do so where there is a repugnancy or something which is opposed to good sense. See, *inter alia*, **Fredericks v Payne** [1862] 1 H & C 584.
- (ii) We note the strictures imposed by decisions such as **Patrick J O'Connell (Inspector of Taxes) v Fyffes Banana Processing Limited** and **Revenue Commissioners v Doorley** as to construction.
- (iii) The section as interpreted undoubtedly has the meaning that the changing of the character of a property from e.g. a commercial property to an office of State is not a material change of circumstances because the property does not change from relevant to what for want of a better term might be described as "non-relevant" property. But it is possible to read the definition as applying to a property whose character changes so dramatically that they can no longer be described as a "*relevant property*" within the

meaning of Schedule 3. The extinguishment of a right of way is perhaps a reasonable example of this. While one might be tempted to read “relevant” as being synonymous with “rateable”, unless otherwise expressly provided by the Act we do not think this is an appropriate construction, since relevance and rateability are distinguished at various points within the Act.

- (iv) We do not believe it is open to us to insert the word “rateable” before the word “relevant” in the definition section (c) without exploring whether we should do so in all of the other subsections in which material change of circumstances is defined. However, those sections do not need insertion of the word “rateable” and indeed insertion of the word would be otiose. While the absence of the word “rateable” from subsection (c) of the definition of material change of circumstances dramatically limits the kind of material change of circumstances which can be availed of by an occupier in the position of the appellant, we do not feel we are at liberty to do violence to the relevant subsection of the Act by inserting the word “rateable” into the section in question.

We acknowledge, as indeed do both parties, that this narrow interpretation may cause a degree of hardship which is unnecessary. A property which was formerly rateable becomes an office of State but remains rateable notwithstanding section 15(3). One might also wonder what would happen if an office of State became a commercial entity; would it lose its non-rateability status? These conundrums highlight the difficulties parties face in trying to interpret the relevant definition section of the statute.

However we are of the view that the property in question occupied by the appellant is still relevant property and so does not come within the definition of material change of circumstances and in particular definition (c) thereof.

THE DECISION

No material change of circumstances has occurred. The appeal is dismissed.

And the Tribunal so determines.