

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 507 JR]

BETWEEN

ANN KEANE AND PAT HALPIN

APPLICANTS

AND

THE COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 11th day of December, 2020

Background

1. The applicants reside with their family at 53/55 Park Avenue, Sandymount, Dublin 4 (the premises). The premises had been registered as a guesthouse under the Tourist Traffic Acts 1939 to 2011 and, until 2012, was operated by a limited liability company, Elektron Holdings Limited. Rates were paid in respect of the premises by said company. Following the appointment of a receiver to the company in July, 2012, the guesthouse was shut down and the registration lapsed.
2. Subsequently, the first named applicant operated a bed & breakfast business in the premises but did not register the premises as a guesthouse. The premises has sixteen ensuite bathrooms and is listed on some websites as a "*boutique guesthouse*". The applicants maintain that they have no control over such listings.
3. In addition to the instant proceedings, there were, or are, other proceedings concerning the receivership of Elektron Holdings Limited and also proceedings in the District Court on a claim by Dublin City Council for arrears of rates. The District Court Judge found that the premises was a commercial premises, was liable for rates and granted a decree in the sum of €75,195.12 (plus costs). The applicants appealed against this Order by way of case stated to the High Court. These proceedings are not at issue in the instant proceedings.
4. On 21 November 2017, the applicants made an application for a revision of the premises under s. 28 of the Valuation Act 2001 (as amended) (the Act of 2001). It is this revision and a subsequent revision under s. 29A of the said Act that are the subject of these judicial review proceedings.

Revision of Premises

5. On 21 November 2017, the applicants applied for a revision of the premises in order to have the premises excluded from the valuation list. The basis for this application was that the premises were "*domestic premises*" within the meaning of the Act of 2001 and, thus, ought not to be rated. In support of this application, the applicants relied on decisions of the Supreme Court, High Court and Valuation Tribunal.
6. The revision officer, Ms. Louise Hogan, was appointed by the respondent. On 24 January 2019, the respondent's revision manager, Mr. John Colfer, issued a proposed valuation certificate which excluded the premises from the valuation list. The applicants were

agreeable to the proposed exclusion and it does not appear that the rating authority, Dublin City Council, raised any objection.

7. On 11 March 2019, the revision manager decided, pursuant to s. 28 of the Act of 2001, to exclude the premises from the valuation list as proposed. The basis of the decision is set out in the valuation report of the revision officer, Ms. Louise Hogan, who stated as follows: -

“Property Description: Revision 2018: Aberdeen Lodge detached domestic house used partially as a B&B. Not registered with An Bord Fáilte anymore, shared kitchen and living room...

...

Observations: Revision 2018: Third party listing by the owner/occupier of the house to deem the property not rateable. MCC: At per definition (c) the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property.

The house is a domestic home with part being used as a B&B. Total of sixteen bedrooms with seven used for B&B purposes. Property only has one kitchen and one living room which is used domestically for guests. No longer registered with Bord Fáilte. Proposed to EXEMPT as mainly used as a family home...”

8. In light of the above, a notice was issued to the applicants to state that the property would not be included in the valuation list on the basis that it was deemed not to be rateable. This notice could be appealed at the Valuation Tribunal by Dublin City Council or any other party, the final date of lodgement of such appeal being 7 April 2019. No appeal was lodged.

Subsequent Revision

9. On 23 May 2019, the revision manager of the respondent issued a new proposed valuation certificate whereby the premises was described as a “*guesthouse*” and was listed as rateable. The applicants queried the basis on which the premises had now come to be listed for revision. There had been no “*material change of circumstances*” within the meaning of the Act of 2001 since 11 March 2019. In response to this, the respondent’s Head of Valuation Services, Mr. Declan Lavelle, stated that following the exclusion of the premises from the valuation list an “*investigation*” had been carried out into the revision manager’s decision and it was concluded that the decision “*appeared to have been an error*”. Further clarification was sought by the applicants on this and Mr. Lavelle responded stating that “*the nature of the error related to a misunderstanding that deregistration of a guesthouse would automatically render that property exempt from rates*”.
10. It also appears that, on 17 May 2019, the finance division of Dublin City Council queried the revision, which seems to have led to the respondent’s Managing Valuer, Mr. Patrick Kyne, to investigate the matter. He was of the view that the premises should not have

been removed from the valuation list “based on the evidence on file and the evidence on the occupier’s website in relation to a large guesthouse”. On 21 May 2019, Mr. Kyne requested that the premises be listed by the respondent for revision under s. 28(2) of the Act of 2001 due to what he called a “clerical error”. I refer to the exhibit “A” in Mr. Kyne’s affidavit, which states: -

“Commissioner’s listing for the above property no. due to it being inadvertently removed from the valuation list due to a clerical error.”

In any event, it was decided that, as no material change of circumstances (within the meaning of s. 28(4) of the Act of 2001) had occurred in respect of the premises since the previous review that resulted in the certificate of 11 March 2019, no amendment would be made to the valuation of the premises. On 23 May 2019, the revision manager informed the respondent that, in the revision manager’s view, the respondent’s powers under s. 29A(1) of the Act of 2001 had arisen. In accordance with this section, the respondent directed the revision manager to amend the valuation of the property.

Judicial Review Proceedings

11. On 22 July 2019, the High Court (Noonan J.) granted the applicants leave to apply by way of an application for judicial review for a number of reliefs, including: -

- (1) A declaration that the decision of the respondent to appoint a revision manager pursuant to s. 28(2)(a) of the Act of 2001 to revise the property was *ultra vires* and was made in a manner that was arbitrary, unreasonable, contrary to the requirements of constitutional and natural justice;
- (2) An order of *certiorari* quashing the said decision;
- (3) A declaration that the decision of the respondent to direct the revision manager pursuant to s. 29A of the Act of 2001 to revise the premises was *ultra vires* and was made in a manner that was arbitrary, unreasonable, contrary to the requirements of constitutional and natural justice; and
- (4) An order of *certiorari* quashing the said decision.

Relevant Statutory Provisions of the Act of 2001

12. Section 28 provides: -

- “(1) ...
- (2) (a) The Commissioner may of his or her own volition appoint an officer of the Commissioner to exercise, in relation to such one or more properties as the Commissioner considers appropriate, the powers expressed by this section to be exercisable by a revision manager, and such an officer who is so appointed is referred to in this Act as a ‘revision manager’.
- (b) ...

- (3) ...
- (4) A revision manager, if he or she considers that a material change of circumstances which has occurred since a valuation under *section 19* was last carried out in relation to the rating authority area in which the property concerned is situate or, as the case may be, since the last previous exercise (if any) of the powers under this subsection, or of comparable powers under the repealed enactments, in relation to the property warrants the doing of such, may, in respect of that property—
- (a) if that property appears on the valuation list relating to that area, do whichever of the following is or are appropriate—
- (i) amend the valuation of that property as it appears on the list,
- (ii) exclude that property from the list on the ground that the property is no longer relevant property, that the property no longer exists or that the property falls within Schedule 4,
- (iii) ...
- (b) if that property does not appear on the said valuation list and it is relevant property (other than relevant property falling within Schedule 4 or to which an order under section 53 relates), do both of the following—
- (i) carry out a valuation of that property, and
- (ii) include that property on the list together with its value as determined on foot of that valuation.
- ... ”

13. Section 29A provides as follows: -

“(1) Where a revision manager decides not to—

- (a) amend the valuation of a relevant property under section 28, or
- (b) ...

the Commissioner may, exceptionally and provided he or she is of opinion that it is necessary to do so in the interests of equity and uniformity of value ... direct the revision manager, as appropriate, to amend—

- (i) the valuation of that relevant property...”

Issues to be determined

14. The relevant provisions of the Act of 2001 are complex but it seems to me that there are two central issues in this application: -

- (1) Following the decision of 11 March 2019 to exclude the premises from the valuation list, was there a basis for the respondent to exercise powers under s. 28(2), referred to as a “*commissioner’s listing*”; and

- (2) Having exercised powers under s. 28(2) and it being established that there had been no "*material change of use*", was the respondent entitled to exercise the powers under s. 29A.

In addition, there is also an issue as to whether or not the respondent followed fair procedures in its exercise of power both under ss. 28 and 29A of the Act of 2001.

Consideration of Issues

15. A starting point is the application by the applicants for a revision in November, 2017 to have the premises excluded from the valuation list. The basis for the application was that the premises were "*domestic premises*" within the meaning of the Act of 2001 and ought not to be rated. Written representations, including authorities, were submitted in support of this.

16. On 11 March 2019, the revision manager issued a valuation certificate which excluded the premises from the valuation list. I have already set out in para. 7 above the basis for this decision, which was, *inter alia*: -

"The house is a domestic home with part being used as a B&B. Total of sixteen bedrooms with seven used for B&B purposes. Property only has one kitchen and one living room which is used domestically for guests. No longer registered with Bord Fáilte. Proposed to EXEMPT as mainly used as a family home..."

17. In his replying affidavit, Mr. John Colfer, revision manager, states: -

"I say and believe that the decision deeming the premises not to be rateable and leading to the issue of the proposed notice and the notice was made on the basis of an erroneous interpretation of the Act that the deregistration of a guesthouse renders a property exempt from rates."

A reading of the valuation report makes clear that the decision deeming the premises not to be rateable was not on the basis that the deregistration of a guesthouse renders the property exempt from rates but, rather, that "*the house is a domestic home with part being used as a B&B*". The respondent submitted that reliance was placed on the preceding line in the valuation report, which states: -

"As per definition (c) the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property."

In my view, this is not of assistance to the respondent. The reason why it was deemed that the premises was not rateable was because the premises was considered to be "a domestic home" and, thus, not a "*relevant property*" under the Act of 2001.

18. The position of the respondent is not improved by certain matters set out in the affidavit of Mr. Patrick Kyne, Managing Valuer of the respondent. In his affidavit, he states that, having investigated the matter on the respondent's database, he formed the view that the premises should not have been removed from the valuation list "*based on the evidence on*

file and the evidence on the occupier's website in relation to a large guesthouse...".

Further, he states that he requested a "commissioner's listing" in respect of the premises on 21 May 2019 and refers to a "screenshot" of the said request which reads: -

"Inadvertently removed due to clerical error."

19. Though the provisions of s. 28(2) state that the respondent "*may of his or her own volition appoint an officer...*" for the purposes of conducting a "commissioner's listing", there has to be a sound legal basis for such a decision. I am satisfied that in the instant case there was no such basis. Firstly, the decision to remove the premises from the valuation list was not because the premises was no longer registered with Bord Fáilte. Secondly, it was irrational and unreasonable to rely on the contents of the applicants' website in circumstances where the applicants had stated that they do not have control over the content and, in any event, the premises had been inspected and assessed for the purposes of the valuation report referred to. Thirdly, there was clearly no "*clerical error*".
20. It follows from this that the conditions precedent for the respondent to exercise his powers under s. 29A were not satisfied in that it was not a situation where the revision manager decided not to amend the valuation of a relevant property and there was no amendment of any other material particular in relation to the property as it appears from the valuation list.
21. The wording of s. 29A refers to the respondent giving a direction to the revision manager "*exceptionally and provided he or she is of the opinion...*". In his direction under s. 29A, the respondent stated: -

"I have now considered this matter in detail and, having regard to the exceptional circumstances of the matters outlined in your report, I am of the opinion that it is necessary to amend the valuation..."

In his report, the revision manager simply refers to "*exceptional circumstances*" without any elaboration. This matter was referred to in an affidavit of Mr. Colfer, of 20 January 2020, where he stated as follows: -

"8. I say and believe that the incorrect removal of a property from the valuation list is 'exceptional' within the meaning of section 29A of the Act and that it inhibits equity and uniformity of value among rate payers."

As I am of the view that the removal of the property from the valuation list was not incorrect, it would follow that there were no "*exceptional*" circumstances that the respondent could rely on to lawfully invoke the provisions of s. 29A of the Act of 2001.

Conclusion

22. By reason of the foregoing, I am satisfied that the applicants are entitled to the reliefs sought herein and I will hear the parties as to the appropriate orders to be made. As this judgment is being delivered electronically, the parties have fourteen days within which to file written submissions on consequential orders.