



**THE COURT OF APPEAL
CIVIL**

**High Court Record No. 2020/952 SS
Court of Appeal Record No. 2021/99
Neutral Citation [2022] IECA 35**

**UNAPPROVED
NO REDACTION NEEDED**

**Whelan J.
Murray J.
Pilkington J.**

BETWEEN

DAYHOFF LIMITED

APPELLANT

- AND -

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 11th day of February 2022

1. Section 49 of the Valuation Act 2001 ('the Act') provides that, in certain specified circumstances, the determination of the value of a property for the purposes of the Act shall be made by reference to the values as they appear in the '*valuation list*' of certain '*other properties comparable to*' the property being valued. The issue in this appeal is whether the valuation of a property (C) which is formed by the amalgamation of two other properties (A and B) must - if A and B are found comparable to C - be conducted by reference to the pre-amalgamation values of A and B as they appear in the valuation list. The appellant Dayhoff Limited ('Dayhoff') says that A and B are not '*other properties*' for the purposes of the section but instead the '*same property*' as C and that, accordingly regard cannot be had to them in the valuation exercise provided for in the Act. The respondent Commissioner contends that A and B are for rating purposes distinct from C and must, if comparable to C, be taken into account in the exercise of valuing that property.
2. The issue is framed in a case stated by the Valuation Tribunal ('the Tribunal') pursuant to s.39 of the Act, which in turn arose from the revision of the valuation of a licensed premises at 23/24 John Street Upper Kilkenny ('*the subject property*'). Until 2009, that property consisted of a ground floor bar and lounge and a first-floor domestic dwelling. The ground floor valuation was revised in 1995, 2000 and 2003. In May 2009, the subject property was subdivided into a restaurant on the first floor, and a bar and lounge on the ground floor, and its valuation was thereupon revised to take account of the first-floor restaurant area.
3. From that point until 2011 these premises were separate in all respects, being owned by different and unrelated entities, each property having its own entrance, telephone

number and booking system. There was no physical connection between them. Each of the units was thus used, and appeared on the valuation list as, distinct properties. The valuation of the ground floor was recorded under reference **79381** and that of the first floor under reference **2199717**. Having been first valued separately in May 2009, the premises were valued again in September 2009. Following the latter valuation, the two properties appeared on the valuation list with rateable valuations of, respectively, €198.00 and €122.00.

4. In 2011, the two properties came under the ownership of Dayhoff and were eventually amalgamated to form one unit. Works were undertaken to insert a mezzanine floor into a portion of the ground floor of the property, and a stairway was installed connecting the ground floor to the first floor. The entire property has since then been used as a single, licensed premises.
5. The statutory context in which the amalgamation of the ground and first floor units gave rise to the valuation from which the Tribunal's case stated arises, is this:
 - (i) Section 21 of the Act provides that the '*valuation list*' comprises every '*relevant property*' that has been the subject of a valuation order and the value of that property as determined by that valuation. '*Value*' for these purposes means the value by reference to which a rate made in respect of that property has effect (s.3(1)).
 - (ii) The '*value*' of a relevant property is determined by estimating the net annual value of the property which, in turn, means the rent for which, one year with

another, the property might in its actual state, be reasonably expected to let from year to year subject to certain statutory assumptions (s.48).

- (iii) Section 63 provides that the statement of the value of a property as appearing on a valuation list shall be deemed to be a correct statement of that value until it has been altered in accordance with the provisions of the Act.
- (iv) '*Relevant property*' as that term appears throughout the Act is defined by reference to Schedule 3 thereof (s.3(1)), which in turn lists various species of property.
- (v) Section 15 of the Act decrees that – subject to certain prescribed exclusions - '*relevant property*' shall be rateable.
- (vi) Relevant property may be ascribed a rateable valuation on the valuation list in one of two ways. The rating authority may conduct a *revaluation* of the list in respect of its area, which involves a re-assessment of the rateable valuation of all rateable properties in that area, or it may undertake a *revision* of the list in respect of an individual entry on the list. The valuation of a premises may thus be assessed prior to a revaluation or between revaluations.
- (vii) Under s.28 of the Act, a revision may be undertaken only if there has been a '*material change of circumstances*' ('MCC') since the property was last valued.

(viii) Where a revision officer determines that there is such an MCC, he or she proceeds to value the property in accordance with s.49(1). That decision may be appealed to the Commissioner under s.30 of the Act, being subject to an onward appeal to the Tribunal under s.34.

6. In November 2011 Dayhoff sought a revision of the valuation of the property seeking amalgamation of the ground floor and first floor of the premises. That request was at first refused but following an appeal against that decision first to the Commissioner of Valuation and then to the Tribunal, the Commissioner conceded (in August 2012) that a material change in circumstances within the meaning of s.28 had occurred and that Dayhoff was entitled to a revision. From there, the sequence was as follows :

(i) On 9th May 2014 the Commissioner issued a proposed certificate of valuation for the entire property of €278.00.

(ii) On 7th October 2014 (and following representations on behalf of Dayhoff) the Commissioner issued a certificate with a rateable valuation of €257.00. That was calculated by reference to a rate per square metre on the ground floor of the property. By agreement, the value of the first floor was determined to be one third of this.

(iii) On 23rd May 2016, the Commissioner determined an appeal brought against that valuation, declining to change the certificate issued on 7th October 2014.

7. Dayhoff's appeal to the Tribunal against that valuation (which it should be said was assigned to a property also designated as number **79381** on the relevant list) was based upon the contention that the Rateable Valuation as assessed was excessive and inequitable and that the Commissioner had failed to revise the property in line with the '*tone of the list*'. It contended that the valuation of the subject property ought to have been determined in the sum of €130.00.

8. The appeal was heard by the Valuation Tribunal on a number of dates in 2017 and 2018, and its decision issued on November 16 2018. Having regard to the grounds of appeal, one of the issues that presented itself in the course of the hearing arose from the proper approach to be adopted in seeking to value the property in accordance with the '*tone of the list*'. This is a term used by valuers to describe the process whereby a property is valued by reference to the prevailing values of comparable properties appearing on the valuation list in the same rating area. The use in this way of the '*tone of the list*' is mandated by s.49(1) of the Act via the requirement imposed by that provision and to which I have earlier referred that upon a revision the valuation must be conducted by reference to the listed value of '*other properties comparable to that property*'.

9. In this case, the Commissioner's expert witness sought to conduct the exercise of valuation before the Tribunal by reference to the valuation of other properties she contended were comparable to the subject property. These included the two premises which had previously appeared separately on the list, but which upon amalgamation now constituted '*the property*' being valued. Dayhoff objected to this, adopting the position that the previously separate premises that now comprised '*the property*' could

not be ‘*other properties*’ for the purposes of this provision. That contention depended on meaning of the term ‘*other properties*’ as it appears in s.49(1).

- 10.** The Tribunal - agreeing with Dayhoff – addressed its understanding of the import of that language, stating (paras. 8.16-8.18) :

‘It is clear that the same property falls to be valued both before and after the material change of circumstances ; what changes is not the property to be valued but the mode of valuation, in the present case, from valuation as two relevant properties to valuation as a single relevant property.

Accordingly, to argue that the two relevant properties constitute other properties for the purposes of section 49(1) is to fundamentally misunderstand the operation of the provisions of the Act and, in particular, the interactions between subparagraph (f) of the definition of a material change of circumstances, section 28(4) and section 49(1) of the Act.

In truth, at all times material to the present appeal, there was only one property to be valued. It necessarily follows the Property cannot constitute other property for the purposes of section 49(1). In the circumstances, the Tribunal does not find it necessary to consider the argument advanced by the Respondent by reference to section 18(a) of the Interpretation Act 2005.’

- 11.** From there, the Tribunal determined by reference to the valuation evidence adduced by the parties that the valuation of the property was €190.00. The Commissioner declared

his dissatisfaction in accordance with the requirements of s.39 of the Act, and the Tribunal presented the following question in its consequent case stated :

‘Whether the Valuation Tribunal was correct in law in holding that the Property or the two relevant properties (ie property number 79381 (ground floor pub) and property number 2199717 (first floor restaurant)) do not constitute other property for the purposes of s.49(1) and having no regard to their valuations in determining the appeal’.

12. The trial judge ([2020] IEHC 661) answered this question in the negative and allowed the Commissioner’s appeal. I believe that he was correct to do so.

13. Section 49(1) is as follows :

*‘If the value of a **relevant property** ... falls to be determined for the purpose of s.28(4), (or of an appeal from a decision under that section) that determination shall be made by reference to the values as appearing on the valuation list relating to the same rating authority area as that property is situate in, of **other properties comparable to that property**’.*

(Emphasis added).

14. The language used in s.49, and in particular the conjunction between ‘*a relevant property*’ and ‘*other properties*’ as they appear in the provision define the starting point. From there, the matter can be viewed in one of two ways. One is to say that two parts

of a whole cannot be differentiated from the entire unit so that the constituent elements of *'the relevant property'* cannot be distinguished from the property itself. That which is part of the unit cannot be *'other'*. This is one of the points made by Dayhoff in its submissions: the two relevant properties formerly contained in property reference numbers 79381 and 2199717 were not comparable to the property, it says, as *'they were the property itself, or the first mentioned property, to use the language of the section itself'*. The Tribunal agreed : *'at all times material to the present appeal, there was only one property to be valued'*.

15. The other approach is practical and focusses upon what is described in the marginal note to s.17 of the Act as the *'unit of valuation'*. According to this approach, the court must look at the matter in what the Commissioner variously describes as *'valuation terms'* or *'rating terms'*. Whether or not ultimately amalgamated into a single property, the two premises in operation prior to 2011 were commercially distinct and were rated distinctly. Being thus different from each other, they cannot together be equated with a single property formed by their being combined. This was an important part of the reasoning of the trial Judge who said (para. 55) :

'The Court ... accepts the argument put forward on behalf of the Commissioner that the 2 pre-MCC properties in this case were certainly 'other properties' due to the fact that they were totally separate in their operation; they had separate owners; they had separate entrances; they had separate telephone numbers and booking systems and there was no physical interconnection between the 2 properties. The court is satisfied that they constituted 'other properties' and their valuations were relevant because, given the nature of the use of the

premises and the businesses carried on in the pre-MCC properties and in the post-MCC property, they were certainly comparable to the subject property’.

16. Obviously, the correct construction of s.49(1) falls to be ascertained by reference to the words used by the Oireachtas but viewing that language in the light of the context and purpose of the statute as a whole. Either of the interpretations I have outlined may be plausible on the wording of the section, but both parties rightly acknowledged the limitations of that language and also pitched their cases by reference to differing perspectives on the place of the section in the overall statutory scheme. Of these competing claims it seems to me that that advanced by the Commissioner must be the correct one.

17. Central to the proper understanding of s.49(1) in this regard is the definition of ‘*material change of circumstances*’ appearing in s. 3(1). MCC, it will be recalled, is the trigger for a revision, and it is with the process of valuation upon a revision that s.49(1) is concerned. The two provisions must be construed together and, in particular, each must be understood as being concerned with the same components within the valuation process. It is therefore critical to the issue arising in this appeal that the definition of MCC addresses itself to the combination of previously separate properties, and that it does so in a way that is only consistent with pre-amalgamation units being viewed as distinct for the purposes of rating from the single property formed by their joinder.

18. Section 3(1) includes within the definition of a ‘*material change of circumstances*’ that will give rise to a revision :

‘property previously valued as 2 or more relevant properties becoming liable to be valued as a single relevant property’

19. It also provides that a *‘material change of circumstances’* will occur in the event of :

‘property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties’.

20. There are in each of these parts of the definition of MCC four key terms (albeit re-ordered as between the two different situations addressed in the provision) : *‘property previously valued’*, *‘becoming liable to be valued as’*, *‘single relevant property’* and *‘2 or more relevant properties’*. What section 3(1) in this way makes clear is that the *‘relevant property’* that is produced by amalgamation and is *‘liable to be valued’* is not the same as the *‘relevant properties’* that were *‘previously valued’* as separate units. Similarly, it makes it clear that the *‘relevant properties’* produced by subdivision are not the same as the *‘relevant property’* thereafter divided. In each of these situations the MCC has given rise to *separate relevant properties* as envisaged by s.17(1) of the Act :

‘where a valuation falls to be made under this Act of relevant properties, each separate relevant property shall be valued separately and entered as a separate item in the relevant valuation list’.

21. If the pre-amalgamation units are *‘separate relevant properties’* from the post amalgamation relevant property, then they are not the same relevant property. If not

the same relevant property, they must be different relevant properties, and if they are different relevant properties the pre-amalgamation units are when matched against the amalgamated property for the purposes with which s.3(1) and s. 28 are concerned, 'other' relevant properties.

22. I have earlier observed that s.49(1) must be construed so as to operate harmoniously with these provisions. While the '*tone of the list*' has some relevance in the context of a revaluation (see s.31(a)(ii)), s.49(1) is concerned only with a revision, and as I have previously stressed it is a '*material change of circumstances*' as defined in s.3(1) that, pursuant to s. 28(4), enables a revision to occur. Indeed, s.49(1) itself refers to s.28(4). All of these provisions *must* be construed as having the same meaning and effect. It follows that if (as I have found to be the case) s.3(1) and 28(4) provide that two separate properties and the unit formed by their amalgamation are different, and therefore 'other' properties, the same conclusion must be assumed to have been intended to follow within the text of s.49(1). I can see nothing in the language used in s.49(1) that would displace that conclusion. While some reference was made to the fact that the text refers to '*relevant property*' in describing the property to be valued, and to '*other properties*' when referring to the comparators, these by definition must also be other '*relevant*' properties as it is only such properties that will appear on the list. It follows that for the purposes of s.49(1) properties appearing on the valuation list that are subsequently amalgamated to form a new '*relevant property*' for the purposes of the Act are '*other properties*' within the meaning of the final clause of that provision. They are *different* valuation units.

23. There are a series of closely related considerations of context that support this construction. The first is the importance of ensuring that the valuing body has before

it all information necessary to achieve a fair and just valuation in accordance with the rules provided for in the Act. The construction contended for by Dayhoff is, as Mr. Hickey SC readily acknowledged, exclusionary. Its consequence would be that neither the Commissioner nor the Tribunal could have regard to a valuation which they might otherwise think directly relevant to the task of valuation in hand. To my mind very clear language would be required to justify that conclusion.

24. The position as contended for by the Commissioner is both more logical and fairer : the valuer may have regard to the pre-amalgamation properties if it believes that they are in fact reliable comparators. If it concludes that they are, in fact, not comparable the valuer is free to disregard them. This, I think, was what the trial judge was getting at when he said in his judgment that the construction contended for by Dayhoff would *'have the effect of denying curial deference to the Tribunal, by denying the ability of the Tribunal in future cases to correctly decide what weight, if any, to apply to the previous valuations of the two properties pre-MCC'* (at para. 54). While counsel for Dayhoff described this statement as *'curious'*, when thus understood what the judge said was both correct in fact and it was in law properly viewed as a relevant factor in construing the Act.

25. It is for the Tribunal to decide based upon its expertise whether a specific property is in fact comparable to the subject property and this is precisely the arena within which the Tribunal's decisions will be deferred to by the courts. In *Stanberry Investments Ltd. v. Commissioner of Valuation* [2020] IECA 33 (*'Stanberry'*) at para. 51, I described those aspects of the Tribunal's decision making with which the courts would not easily interfere as including *'the reliability of comparators, the appropriate method of valuation and the correct approach to the application of particular valuation concepts*

such as the tenant's share or divisible balance'. In my view the court should not lightly attribute to the Oireachtas an intention to remove from that zone of expertise potentially relevant information. And, to repeat, in enabling the Tribunal to take account of the pre-amalgamation units there is no injustice of any kind occasioned to Dayhoff. If those units are not truly comparable, Dayhoff is free to so contend and to lead expert evidence accordingly.

26. In this regard the purpose driving the statutory recognition accorded by s.49 to the *'tone of the list'* is significant. This is intended to ensure consistency of the net asset value of property across a rating authority area, arising in a context in which the value of properties on the list reflects not just the values of those properties, but their relative values in relation to other *'relevant properties'* of a similar use and, indeed, to other properties in different use categories at the relevant valuation date. As the Commissioner puts it in his written legal submissions, relative value rather than absolute value is what is important in the rating system. The system as provided for in the 2001 Act requires that a property be valued by reference to an estimate of the annual rental value of that property at a specified valuation date. The *'tone of the list'* assumes that values as they appear in the valuation list are accurate assessments of the rent the properties would command under the relevant statutory conditions, and it thus makes sense that the valuation of comparable properties be conducted by reference to that listing.

27. Section 49(1) thus reflects the fact that equality of rating is a fundamental principle of the law. I think that the matter was put particularly well by the trial judge when he said of s.49(1) (at para. 40) :

‘Adopting such a comparative approach ensures that there is a symmetry between the valuation placed on the subject property and the valuations placed on other properties of a similar kind in the relevant area. To that end, the revision officer is allowed to look at valuations of other comparable properties. Basically, this is to ensure that the subject property is valued on the same basis as other similar properties in the rating area’.

- 28.** In seeking to ensure consistency in the process of valuation in a revision, there will inevitably be cases in which the valuation of part of the property itself as it appears in the list may be of prime importance as it is both likely to afford the surest guide to the valuation of the property in its adjusted state, and should itself reflect the value of properties comparable to it at the time it was valued. This is particularly the case in relation to the joinder in a single unit of two parts of the same property which are then applied to the same or a similar use and where (as the Commissioner puts it in his submissions) most of the relevant valuation factors remain constant. The properties are in the same location, they are used for the same purpose and have the same potential. The Commissioner’s interpretation of the section most effectively implements that objective. That urged by Dayhoff is liable to thwart it by precluding the decision-making body from having regard to what may in some cases be a key indicator of value.
- 29.** Aside from these objectives, the argument advanced by Dayhoff is illogical. The *valuation list* cannot be understood solely by reference to individual properties appearing on it. Each property on the list of a particular class or category should reflect the value of other similar properties. The point was well made by the Commissioner’s valuer in her evidence to the Tribunal : the valuation of the subject property, she said,

'has been indelibly woven into the fabric of the list and has itself been a factor in establishing and maintaining the integrity of the list. During the course of time since the property has been placed on the list, it has contributed to an unquantifiable number of occasions to the assessment of other properties which fell to be revised over that period. To change the relative position now would be tantamount to unravelling the entire valuation list and undermining the existing tone, particularly if similar applications for other properties become common place.'

- 30.** Apart from the distortion of the list suggested in this quotation, even if the pre-amalgamation units are disregarded for the purposes of the valuation exercise, one must expect that their value may be embedded in the valuation of other comparable properties to which regard *must* be had by the Commissioner under s.49. In those circumstances it makes little sense to exclude from consideration some properties which in turn may have their values reflected in those of other relevant properties to which regard *must* be had.
- 31.** Together with its argument based upon the literal wording of the provision (the components of a property cannot be '*other properties*'), Dayhoff relies on a number of features of the context which it says supports its construction. In its notice of appeal it highlights a statement by the valuer tendered by the Commissioner who had referred in the course of her evidence to her valuation having been conducted by reference to *inter alia* the valuation of '*the property itself before it was revised*'. While the Tribunal was inclined to attach some significance to this, the trial judge disregarded it. I believe he was correct to do so. The question of whether the subject property and the pre-existing

units which were amalgamated to form it are the same or different properties is one of law the correct answer to which cannot be affected by the approach adopted by a witness tendered by one of the parties. For the same reason the fact that the subject property was assigned the same property number as the ground floor cannot be relevant.

32. In the course of the case stated Dayhoff is recorded as contending that the displacement of the separate valuations of the ground floor and first floor properties upon amalgamation means that the listing of those pre-existing units cannot be referred to as they will never appear on the same valuation list as the subject property. Section 49, it is thus suggested, is focussed upon what was on the valuation list at the time of the appeal to the Commissioner or Tribunal. That argument (which was rejected by the Tribunal) cannot be correct. The pre-existing listing is removed only after the first stage of the valuation process (that is the point at which the new values are initially determined by a revision officer). The information which is available to the Commissioner and the Tribunal must, logically, be the same as that before the revision officer. Therefore, the focus must be upon the list when the revision officer reaches his or her valuation. The fact that as a consequence of that decision the pre-existing units are removed cannot, accordingly, affect the legal analysis.

33. In a related vein, Dayhoff argues that the construction urged by the Commissioner ignores the fact that the pre-amalgamation properties will, by definition, no longer exist after an MCC in the form they presented at the time of the listing. It says that the whole scheme of s.49(1) is based on comparing actual and existing other properties which are capable of being inspected for comparison purposes with the subject property. It points to the fact that the first floor relevant property – although still on the list – was not there at all as a separate relevant property when the revision was being carried out. All that

existed was a listing and a paper record of what was there before the amalgamation. That, it argues, does not constitute a '*comparable other property*' within the meaning of the provision.

34. I do not believe this argument to be well placed. The physical alteration of a property is a common consequence of a material change of circumstance, and indeed there may be other circumstances in which property although on the valuation list, no longer presents as it did when the listing occurred. If the Tribunal concludes that there is insufficient evidence to allow it to reliably determine whether an asserted comparator is in fact '*comparable*' to the property being valued, then it is entitled not to have regard to it. The mere fact that the unit no longer exists as it once did does not mean that there will, necessarily, be such insufficient evidence. And, perhaps most critically, this is not an argument that justifies the construction contended for by Dayhoff as it merely precludes regard being had to pre-amalgamation units in some – but not necessarily all – circumstances.

35. Dayhoff in its submissions also refers to the fact that s.49 refers to '*other properties*' for the purposes of the exercise in comparison, and it was suggested that this meant that there had to be more than one such property. This is not correct. Section 18(a) of the Interpretation Act 2005 posits a default position whereby the singular in a statute imports the plural and vice versa. That default position can be displaced expressly or by context, but there must be something in the context to suggest that it was intended to displace it. Not only is there no such indication in this case, but the conjunction between s.49 and the definition of '*material change in circumstance*' in s.3(1) would strongly suggest the opposite intent. Moreover, as counsel for the Commissioner observed in the course of his submissions, section 49(2) addresses the correct approach

where comparable properties cannot be located. It says '*if there are no properties comparable to the first mentioned property*'. Had it been intended to exclude the singular from s.49(1) this would have had to be quite differently expressed.

36. Two other points should, finally, be noticed. Dayhoff contended that the court should afford '*curial deference*' to the decision of the Tribunal. As I have noted earlier, I have addressed the operation of '*curial deference*' in the course of my judgment in *Stanberry*. As I explain there – and as indeed is well established – the concept has no role in relation to pure issues of law, and this was such an issue.

37. Second, there was some discussion in the course of the hearing of this matter of the appropriateness of the use of what is described by valuers as a '*bolt on*' approach to valuing a property that has been extended, the original valuation of part of it being used as a basis for valuing the remainder. It was contended that the decision of the Tribunal in *MMEM Public House Limited v. Commissioner of Valuation* (VA 14/4/023) supports the view that this approach is impermissible. It is my view, given the frequency with which the Tribunal appears to have had resort to this method, that it would not be appropriate to express any general view as to its use in a case in which it is not necessary to do so *save* to observe that insofar as such objection is grounded upon an argument analogous to that advanced by Dayhoff here on the basis of the meaning of '*other properties*' in s.49(1) it necessarily follows from what I have said earlier that it is ill founded.

38. My conclusion having regard to the foregoing can be shortly stated. Where a new '*relevant property*' is created following the amalgamation of two pre-existing '*relevant properties*', those pre-existing '*relevant properties*' are '*other properties*' for the purposes of s.49(1). The valuing body *may* accordingly take account of those properties

in identifying properties that are ‘*comparable*’ to the property being valued, and if it concludes that they are so comparable *must* conduct the valuation ‘*by reference*’ to them. That interpretation (a) enables s.49(1) and the definition of MCC to function harmoniously and (b) gives effect to the policies of consistency in rating, of ensuring that the Tribunal has available to it all probative evidence relevant to its task, and of maintaining the essential ‘*fabric*’ of the valuation list.

39. Whelan J. and Pilkington J. agree with this judgment and my conclusion that the trial judge correctly answered the question presented to him by way of the case stated. It is the provisional view of all members of the court that Dayhoff having failed in its appeal should bear the costs of the appeal and of the proceedings in the High Court. If Dayhoff wishes to contest this provisional view it should advise the Court of Appeal office within a week of the date of this judgment whereupon the court will convene a hearing to address the question of costs.