

Appeal No. VA04/3/041

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

Sisters of Nazareth

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Nursing Home at Lot No. 6Aa/1, Figary, Fahan, Inishowen, County Donegal
Exemption - caring for elderly - not for profit - Schedule 4 par. 14(a)

B E F O R E

Frank Malone

Deputy Chairperson

Brian Larkin - Barrister

Member

Mairéad Hughes - Hotelier

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 7TH DAY OF FEBRUARY, 2005

By Notice of Appeal dated the 10th day of August, 2004, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €342.00 on the above described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are:

"This relevant property is not rateable by virtue of Schedule 4 of the Valuation Act, 2001."

At Issue

Rateability and quantum.

The appeal proceeded by way of an oral hearing which took place in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 24th of November, 2004. The appellant was represented by Mr. Owen Hickey, B.L., instructed by Mr. Michael J. Horan, Solicitors, Sligo and Sister Cornelia Walsh. Mr. Patrick McCarroll, Chartered Surveyor also attended on behalf of the appellant. Mr. James Devlin, B.L., instructed by the Chief State Solicitor represented the respondent. Mr. Damien Curran, Valuer in the Valuation Office, also appeared on behalf of the respondent.

From the evidence tendered by and on behalf of the parties the following emerged as being the facts relevant and material to the appeal.

Location and Description of the Subject Property

The subject property is a Nursing Home run by the Sisters of Nazareth and comprises a single storey modern extension to a period residence known as Nazareth House which is a domestic convent situated in the village of Fahan, on the west coast of the Inishowen Peninsula, south of Bunrana, County Donegal.

The accommodation consists of 33 bedrooms with 48 beds, together with dining area, kitchen etc.

Tenure

The property is held freehold.

Appellant's Case

Sister Cornelia Walsh gave oral evidence on behalf of the appellant. She confirmed that the Order was granted Charitable Status by the Revenue Commissioners and that the physical and financial facts contained in the submissions of Mr. McCarroll were correct,

in response to the questions put to her by her counsel, Mr. Hickey. Sr. Cornelia then proceeded to furnish a historical profile of the activities carried on in the subject premises and of the role played by the Sisters of Nazareth. She said that from the outset the premises was in effect a residential home for the elderly and that in keeping with the ethos of the Sisters of Charity, 35 out of a total of 48 beds were contracted out to the North Western Health Board. Sr. Cornelia added that nowadays the activities carried on in the said premises were subject to the regulations embodied in the Nursing Homes Act, 1990. This required a significant revamp and restructure of Nazareth House.

Responding further to questions put to her by Mr. Hickey, Sr. Cornelia stated that 90% of the patients in the Nursing Home were maximum dependency and 10% were high dependency. On the question of charges Sr. Cornelia indicated that the fee was €350 per week and that there were different arrangements for discharge of same, depending upon the status of the patients viz Health Board subvented, private or otherwise means related.

On the subject of staffing Sr. Cornelia told the Tribunal that there was a total of 65 staff, 5 of whom were Sisters of Nazareth nuns and the balance lay staff. Two of the 5 nuns were qualified nurses, two were engaged in pastoral ministry, while Sr. Cornelia was Administrator of the Nursing Home.

By reference to the audited accounts included with the appellant's précis and/or otherwise by way of oral evidence, Mr. Hickey asked Sr. Cornelia to outline to the Tribunal how the financing of the subject Nursing Home worked in practice. Sr. Cornelia gave evidence to the effect that in the 1970s leading up to 1981 the Order benefited substantially from funds allocated by its Headquarters in London, which funds were repayable by the Irish Sisters when financially practicable.

Asked by Mr. Hickey to explain the significance of the surplus reflected in the Main Building accounts for the periods ending 31/12/2001 and 31/12/2002 amounting to €70,931 and €31,827 respectively, Sr. Cornelia stated these figures were not indicative of profits as conventionally understood or that the Nursing Home was operated for the

purposes of making a private profit. Sr. Cornelia impressed upon the Tribunal that the audited accounts included no charge for the Sisters' input and that if such were factored in, the accounts for the two periods in question would be in deficit. Furthermore Sr. Cornelia indicated that surpluses if not otherwise required for refurbishment were ultimately destined for Headquarters in London in repayment of loans received in earlier years.

Adverting to the Constitution of the Congregation of the Sisters of Nazareth, Mr. Hickey sought confirmation from Sr. Cornelia that the extracts incorporated with the appellant's précis could in no way be deemed selective. Sr. Cornelia proffered evidence to the Tribunal by reference to the Constitution and otherwise that the excluded material purely related to matters touching on religious life and was of no commercial relevance. Sr. Cornelia added that the aims of the Congregation were set out in Chapter 1 of the Constitution while the Apostolate was stated in Chapter 5 and read as follows:

- (i) The care of the needy, the elderly, infirm, disabled and poor, whom the Sisters receive into Houses adapted to that purpose.
- (ii) The care of deprived children, whom the Sisters receive into Houses similarly adapted.

Sr. Cornelia assured the Tribunal that the Order was not established for the purposes of making a private profit.

Mr. Owen Hickey also drew the attention of the Tribunal to paragraph 4 of the addendum to the Constitution which stated in the clearest terms that "any gift or 'remuneration' given to the Congregation without any wish or indication as to its use for the benefit of any particular House, shall be used for the general charitable purposes of the Congregation...."

Cross-examined by Mr. James Devlin, for the respondent, as to the basis for the charge of €50 per week in the Nursing Home, Sr. Cornelia stated that in the pre Nursing Homes Act, 1990 days residents paid what they could afford for accommodation but when the premises became an 'official' Nursing Home under the Act, operations were required to

become more streamlined with attendant higher overheads. This situation was compounded by the decision to contract out 35 of its 48 beds to the North Western Health Board and the standards required by that body. Sr. Cornelia stated that in practice, in order to meet rising costs, Nursing Home charges increased as pensions increased. Sr. Cornelia also indicated that, while she could not be absolutely certain, the subject charged less than the commercial rates charged by Nursing Homes in the vicinity. Sr. Cornelia in rejecting any suggestion that the subject offered subsidised rates to the Health Board, stressed that but for the fact that the Sisters provided their services free, the rates charged all round would be significantly higher. Furthermore, financial surpluses arising in any periods were retained in the accounts for future refurbishment and/or transfer to the Order's London Headquarters and were not for distribution by way of a dividend or share out of profits. That concluded Sister Cornelia's evidence.

Legal Issue

At this juncture Mr. Hickey raised a preliminary jurisdictional point questioning Mr. Damien Curran's right to conclude that a 'material change of circumstances' consistent with the provisions of Section 28(4) of the Valuation Act, 2001, had taken place. Mr. Hickey, by reference to Section 3 of the 2001 Act, stated that a "material change of circumstances" meant a change of circumstances which consisted of *inter alia*:

- (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"*

Mr. Hickey put it to the Tribunal that in the absence of any 'event' he was at a loss to see where Mr. Curran's jurisdiction came from.

By way of reply, Mr. Devlin, for the respondent, explained to the Tribunal that Mr. Curran had found structural alterations consistent with Section 3(e) of the Valuation Act, 2001 viz “*property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties*”, which the Order was aware of and thus ceased to qualify for exemption under Schedule 4 of the Act. However, Mr. Hickey insisted that there was no provision in the Act for Mr. Curran to raise an issue of Jurisdiction, adding that his role was restricted to carrying out professional valuations. Mr. Hickey accepted that Section 28(4) empowered Mr. Curran to embark on a revision of the subject property where there was a material change of circumstances. He emphasized, however, that this material change of circumstances must exist. It was not good enough for Mr. Curran to act on the instructions of the Rating Authority to remove the exemption where there was no material change of circumstances, Mr. Hickey added, and the onus was now firmly on the Commissioner to prove to the satisfaction of the Tribunal that he had in fact Jurisdiction.

In support of his line of argument on the issue of Jurisdiction Mr. Hickey referred to the following cases:

VA95/5/015 - John Pettitt & Son

The right to raise issues at the Tribunal other than those advanced at first appeal stage is allowable in certain circumstances where the justice of the situation demands it.

Dublin Corporation v Dublin Cemeteries Committee, Supreme Court, 1975

In this case Henchy J made a distinction between absence of Jurisdiction and an error within Jurisdiction. Where there was an absence of Jurisdiction the onus was on the party making the decision to show that he had Jurisdiction to do so.

VA04/1/054 - DID Electrical and VA04/1/055 - Banba Toymaster

In these cases it was held that the Commissioner’s determination was made without Jurisdiction in that it took evidence from outside the Rating Authority area in which the property was situated. The Commissioner knew or ought to have known that this was a clear breach of the mandatory provision of Section 49(1) of the Valuation Act, 2001. The

Commissioner was *ultra vires* his powers set down in the Section. The action by the Valuation Office infringed the applicant's statutory rights, his right to fairness, and caused the applicant time and finance in pursuing the matter and that his position was certainly prejudiced.

Respondent's Case

Mr. Curran for the respondent at the outset sought permission to amend his précis to include a reference to the fact that in the respondent's view a material change of circumstances as provided for in Section 3(b), (d) and (e):

(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

(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,"

had occurred.

Mr. Curran gave evidence to the Tribunal that he was requested by the relevant Rating Authority, Donegal County Council "to remove the exemption" from the subject premises. On inspection he stated he found structural alterations in the form of new additions to old buildings and upon recalculation of the respective areas arrived at his separate valuations, one for the Nursing Home and the second for the Gate Lodge, convent etc. Mr. Curran then stated that having reviewed the categories of relevant property not rateable included in Schedule 4 of the Act, he found no basis for exempting the subject and decided that the said property was rateable on the grounds that there was a material change of circumstances.

Mr. Hickey raised an objection before the Tribunal at this stage on the grounds that the salient additions to Mr. Curran's précis relating to material change of circumstances went to the root of the respondent's case and were clearly prejudicial of the appellant.

Questioned by Mr. Hickey as to why the amendments were not in his original précis, Mr. Curran stated that he was confused as to the issues involved in the grounds of appeal and that it would be an error not to include them.

Mr. Hickey continued by way of cross-examination of Mr. Curran and asked him what “event” within the meaning of Section 3 “material change of circumstances” (d) occurred to explain his concluding that the subject property did not qualify for exemption under Schedule 4 of the Act and was rateable. Mr. Curran indicated that he was motivated by the coming into operation of the 2001 Act itself and the fact that in his view the property did not fall within the exemptions provided for in Schedule 4. He saw no difference between the subject property and any other commercial nursing home – they were all run on the same lines. Mr. Hickey pressed the matter further and referred Mr. Curran to Paragraph 14 of Schedule 4 which provided as follows:-

“Any land, building or part of a building occupied for the purpose of caring for elderly, handicapped or disabled persons by a body, being either-

- (a) a body which is not established and the affairs of which are not conducted for the purpose of making a private profit from an activity as aforesaid, or*
- (b) a body the expenses incurred by which in carrying on an activity as aforesaid are defrayed wholly or mainly out of moneys provided by the Exchequer.”*

Mr. Hickey put it to Mr. Curran that the subject satisfied those conditions in that:

- (i) The Congregation of the Sisters of Nazareth was a “body” within the meaning of the Act and,
- (ii) It was not established and its affairs were not conducted for the purpose of making a private profit. Any surpluses achieved were retained in the accounts to meet future refurbishing and/or renovation costs. There was no distribution by way of dividend or otherwise to members of the religious community or anybody else. There was no evidence of a “private profit” and furthermore the sisters give of their services free.

In response to Mr. Curran’s reaction that there was no reference in the subject accounts as to how any surplus or profit might be dealt with in a winding-up context Mr. Hickey,

further put it to him that it was now clear that he, Mr. Curran, applied the general “Charitable Organisation” test set out in Paragraph 16 of Schedule 4.

This, Mr. Hickey insisted, Mr. Curran was not entitled to do in this case. Paragraph 14 of Schedule 4 catered specifically for the type of activity carried on in the subject property i.e. the care of the elderly, and not Paragraph 16, which provided relief for charitable organisations per se.

Appellant’s Closing Submissions

In his closing submission, Mr. Hickey said that, while he was not taking his preliminary point about Jurisdiction, due to difficulties with regard to the drafting of the Act, he was satisfied as to its relevance and appropriateness in this case. As far as the substantive issue of rateability was concerned, Mr. Hickey stated that the Act was perfectly clear. The respondent, he said, was in stark and clear error of law in applying “the winding-up test” for Charitable Organisations as postulated in Paragraph 16 of Schedule 4 in determining exempt status or otherwise for the subject property. That approach might have been acceptable under the old Act but not under the 2001 Act, which at Paragraph 14 of Schedule 4 made specific provision for relevant non-rateable property such as the subject. Mr. Hickey in that connection referred to the evidence of Sr. Cornelia which was to the effect that the subject property was run by a body, in this case a congregation, which was not established nor its affairs conducted for the purpose of making a private profit. It was perfectly clear, Mr. Hickey said, that the statute was enacted specifically to exempt operations such as the subject, run by religious organisations. In fact, Mr. Hickey went so far as to suggest that the subject would still be exempt even if it made a profit as long as it was not established nor its affairs conducted for the purpose of making a private profit. A propos of his arguments, Mr. Hickey invited the Tribunal to consider the principles of Statutory Interpretation as applied by the Supreme Court in **Trustees of Kinsale Yacht Club v The Commissioner of Valuation, 1994** viz *“when a word or expression is used in a statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language.”*

In conclusion Mr. Hickey put it to the Tribunal that while he was not specifically relying on it there was in all probability a case for stating that the subject would qualify for exempt status also under Paragraph 14(b) of Schedule 4 on the basis of fee income received from a public authority i.e. The North Western Health Board in respect of its allocation of beds in the subject property.

Respondent's Closing Submissions

Mr. Devlin apart from stating that in his view the Nursing Home rate charged by the subject was comparable, to his knowledge, with those charged by commercial Nursing Homes, confined his closing submissions to the following:

- (1) In circumstances where private profit was not defined in the Act, Counsel for the appellant was “going a bit far” in suggesting that the application of the “the winding-up test” in the subject case was a “stark error of law”.
- (2) He agreed that Sr. Cornelia’s evidence was truthful albeit astute which prompted her counsel to re-examine her on Paragraph 14(a) of Schedule 4 for reasons of clarification and to avoid any confusion.
- (3) He disagreed with counsel for the appellant when he suggested that apart from qualifying for exempt status under Paragraph 14(a) of Schedule 4, the subject would in all probability qualify under Paragraph 14(b) on the basis of the proportion of fee income arising from the allocation of beds to the North Western Board – a public authority. On his calculations, based on the 2002 accounts he was satisfied that the expenses incurred by the subject in carrying out its activities were not defrayed wholly or mainly out of monies provided by the Exchequer.

Findings

The Tribunal carefully considered all the evidence and legal argument including case law adduced on behalf of the parties and makes the following findings:

- (1) On review of the accounts included with the précis for the financial years ended 31/12/1999 to 31/12/2002 and on hearing oral evidence from the Order's Administrator Sr. Cornelia, the Tribunal was satisfied that the operation within the subject Nursing Home property was distinguishable from other commercially run Nursing Homes on the grounds that the surpluses therein did not reflect the input of the Sisters themselves and thus were heavily inflated.
- (2) On the basis of the extracts from the Order's Constitution and in particular those dealing with the aims and Apostolate of the Order and on hearing further evidence from Sr. Cornelia, supported by legal argument from Counsel, the Tribunal was satisfied that the appellant qualified as a "body" within the meaning of Paragraph 14 of Schedule 4 of the Valuation Act, 2001.
- (3) The Tribunal accepted also that this "body" occupied the subject property for the purpose of caring for the elderly, handicapped or disabled persons and was not established nor its affairs conducted for the purpose of making a private profit from this activity.
- (4) The Tribunal found that the respondent erred in law in its assumption that the subject was a Charitable Organisation per se and thus fell within the scope of Paragraph 16 of Schedule 4 which would have required it to make provisions for winding up in its Constitution as stipulated in Section 3 of the Act. The Tribunal was satisfied that Paragraph 14 of Schedule 4 catered specifically for bodies such as the appellant and that the winding up criterion relied on by the respondent was both inappropriate and irrelevant in this case.
- (5) The Tribunal acknowledged the point contended by counsel for the appellant that the subject had potential for qualification for exempt status under Paragraph 14(b) of Schedule 4 in addition to Paragraph 14(a). However, while accepting that a significantly increasing proportion of the subject's fee income was derived indirectly from Exchequer Funds (63% in 2002), the Tribunal, for the present at least, was of the view that it was debatable whether this constituted compliance with the "wholly or mainly" condition set out in Paragraph 14(b).

(6) As already noted at page 9 hereof Counsel for the appellant in his closing submissions stated that he was not relying on the jurisdictional argument and accordingly the Tribunal is not required to make a decision on this point.

Determination

The Tribunal, having regard to the foregoing, is satisfied that the subject Nursing Home falls within the category of relevant property non-rateable and was thus entitled to exempt status from rates under Paragraph 14(a) of Schedule 4 of the Valuation Act, 2001.

And the Tribunal so determines.