Appeal No. VA07/3/010

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

The Blarney Golf Resort Limited **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Hotel, Clubhouse, Grounds at Lot No. 1a2/1, Cloghphilip, Matehy, Cork Upper, County Cork

B E F O R E

Fred Devlin - FSCS.FRICS	**Deputy Chairperson**
Brian Larkin - Barrister	**Member**
Damian Wallace - QFA, MIPAV, Valuer	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 30TH DAY OF JULY, 2008

By Notice of Appeal received on the 10th day of July, 2007, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €3,400 on the above described relevant property.

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

The appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 30th November and 19th December, 2007 and on 7th and 14th February, 2008. At the hearing, the appellant was represented by Mr. Owen Hickey B.L., instructed by Ms. Marian Pyne of Diarmuid Falvey, Solicitors. Mr. Des Killen FRICS, FRCS, IRRV, a Director of GVA Donal O Buachalla, and Mr. Frank McCarthy, a Director of Blarney Golf Resorts Ltd., gave evidence on behalf of the appellant. Mr. Colm MacEochaidh B.L., instructed by the Chief State Solicitor, appeared on behalf of the respondent. Mr. Peter Conroy, MIAVI, a Valuer in the Valuation Office, gave evidence on behalf of the respondent.

The Property Concerned

1. The property concerned comprises a 62 bedroom four star hotel, 56 self catering cottages/lodges, a golf course and clubhouse set in 164 acres. It is in a rural location, outside the village of Tower, three miles from Blarney and about 8 miles from Cork City.
2. The four star hotel contains 62 bedrooms, public areas, bar, dining room/restaurant, meeting/function room and leisure centre comprising gym and pool.
3. The golf clubhouse is a two storey building with locker rooms and pro shop on the ground floor and bar, restaurant, dining room and kitchen on the first floor.
4. The self catering cottages/lodges are in two identical layouts with four single storey, disabled friendly units and 24 two storey houses in each.

Rating History

5. Proposed Valuation Certificate issued at RV €4,220 – 15/9/2006
   Representations received from GVA Donal O Buachalla – 12/10/2006
   Consideration of representations issued. No change proposed – 6/11/2006
   Valuation Certificate issued unchanged – 7/12/2006
   Appeal to Commissioner of Valuation lodged - 15/12/2006
   Decision of Appeal Officer reducing RV to €3,400 issued – 12/6/2007
   Appeal to the Valuation Tribunal – 10/7/2007

The Valuation Certificate which was issued on 13th June, 2007 purported to include the 56 self catering cottages/lodges as an apart-hotel within the total RV of €3,400.00.

Issue

6. (i) Whether the self catering cottages/lodges are an apart-hotel or domestic premises.
   (ii) Quantum.

7. At the hearing on the 19th December, 2007 the parties submitted a document to the effect that the rateable valuation of the constituent elements of the property concerned was agreed as follows:

Hotel, Leisure Centre & Clubhouse	€2,220
Remainder	€780
Total	€3,000

   Quantum therefore was no longer an issue.

8. At the outset the appellant sought to raise as a preliminary legal issue the question as to whether or not the 56 self-catering cottages/lodges were an aparthotel or domestic premises within the meaning of the Act. The Tribunal decided however, that given the complexity of this appeal and the depth of the submissions made on behalf of the appellant and the respondent and the number of matters arising therefrom, not to take that course of action but to address all questions arising in the appeal hearing proper.

Material Facts

9. In the course of the hearing evidence was heard from Mr. Frank McCarthy, a Director of Blarney Golf Resorts Ltd. (BGR) and Mr. Des Killen, Valuation Consultant on behalf of the appellant. Mr. Peter Conroy, Revision Officer and Mr. Barry Tennyson, Consultant Engineer, provided evidence on behalf of the Commissioner of Valuation, the respondent.

All of the parties were cross examined by Counsel on the evidence given.

At the hearing the following material facts were admitted or so found:

(i) BGR is a wholly owned subsidiary of Kelcar Land Ltd.

(ii) Kelcar Land Ltd. is owned by Frank and Derek McCarthy and a group of investors.

(iii) The Blarney Hotel is owned by Kelcar Land Ltd.

(iv) BGR of which Frank McCarthy is a Director operates the resort (viz the Hotel, cottages etc.) for Kelcar Land Ltd.

(v) Planning permission for the BGR development on the basis of previously submitted plans on the 24th August, 2004 as amended on the 20th October, 2004 and on 25th November, 2004 was granted under Planning Register No. 04/6440 on the 3rd February, 2005 and the decision included the following *"Amendments to previously approved integrated tourism development, to include revision of approved 56 no. holiday apartment in two storey blocks to 56 no. two storey holiday cottages etc."* This was a significant amendment and was to be executed in accordance with the conditions of the original permission for the resort under Planning Register No. 03/2566.

Condition 3 attached to the said planning permission of the 3rd February, 2005 Register No. 04/6440 provided inter alia that *"The golf course, hotel and holiday cottages shall be developed in tandem by a single developer … who shall enter into a legal agreement, pursuant to section 47 of the Planning and Development Act, 2000 which ensures that:*

(a) the hotel, holiday cottages and golf course shall be operated, managed and marketed in perpetuity as a single entity by a single operator.

(b) The holiday cottages shall be available in perpetuity for short term holiday letting only in association with the golf course and shall not be occupied as full time permanent residences.

(c) The section 47 agreement shall be registered as a burden against the title of the property and the title of the individual components of the development (e.g each holiday cottage) in the Land Registry or the Registry of Deeds…"

Evidence was given on behalf of the appellant however that the said section 47 legal agreement was in fact never executed in this case.

(vi) The cottages were developed by Kelcar Land Ltd., the current Directors of which are Frank and Derek McCarthy.

(vii) At the relevant valuation date a number of cottages had been sold and leased to BGR under 30 year full repairing and insuring leases, subject to an income sharing arrangement. The unsold cottages are also leased to BGR under a similar 3 year arrangement. As individual cottages are sold, the 3 year arrangement is terminated by agreement and replaced by the 30 year income sharing lease between the purchaser,

investor and BGR. In effect, therefore, BGR at the valuation date were the rated occupiers of all 56 cottages, either by way of a 30 year lease or a 3 year arrangement.

(viii) BGR is the lessee of the 56 properties.

(ix) BGR is the rated occupier of the 56 properties.

(x) BGR manages the properties on behalf of the owners/investors and also arranges the short term lettings. It acts as agent, furthermore, in the marketing of the properties.

(xi) Rents are apportioned between BGR and the owners/investors in the ratio of 60/40 in favour of BGR.

(xii) The Blarney Hotel assists, via reception, with regard to bookings on the website and also with laundry, subject to the payment of an appropriate charge. As far as maintenance is concerned, where a lease is in place, the owner/investor is charged for maintenance services as arising or in other circumstances an annual maintenance fee is involved. Electricity and water services are also individually charged.

(xiii) Evidence was given that there is a direct telephone connection to the Hotel reception and the Hotel provides a facility whereby occupiers of the cottages can avail of a telephone call charge service. Other than this there is no physical nexus between the cottages and the Blarney Hotel. The cottages, albeit on the same site, operate at arm's length and are separate from the hotel and as such are in a stand-alone category distinct from the Hotel.

(xiv) The cottages provide a tax break for investors within the meaning of section 268 of the Taxes Consolidation Act, 1997.

10. The matter of quantum was agreed between the parties and concentration was now focused on the legal issue as to whether the subject cottages are "an aparthotel" or "domestic premises".

Appellant's Submissions

11. Mr. Hickey on behalf of the appellant contended that:

(i) The units, i.e. the cottages, here are not apartments.

(ii) Section 3 of the 2001 Act defines *"apart-hotel"* as: *"one or more apartments, including any ancillary facilities associated with such apartments, which are used for the purpose of the trade of hotel-keeping":*

"apartment" as *"a self contained residential unit in a building that comprises a number of such units"* and

"building" "includes a structure, whatever the method by which it has been erected or constructed"

(iii) On the basis of the above definition it follows that:

(a) An apartment is a residential unit that requires the co-existence of other such residential units within the same building before it falls within the definition of an apartment in the first instance.

(b) The intent of the legislation must be looked at and the plain and ordinary meaning of the words embraced. The phrase "*in a building*" is crucial. The respondent's engineer, Mr. Tennyson, contended that a semi-detached house or a house within a terrace were units within a building on a par with an apartment in a multi-storey apartment block. That statement was the key to the respondent's case.

(c) Apartments in an apartment block are covered by one roof, not separate roofs, and it was strained and perverse to suggest that a semi-detached or terraced building fell into that category. There was no evidence that the Legislature wanted to lasso semi-detached or terraced houses into the apart-hotel net.

(iv) If legal draftsmen intended to rate apartments as ordinarily understood, it was open to the Legislature to bring within the ambit of the 2001 Act buildings such as the subject cottages and deem them to be an hotel or apart-hotel but they did not do so. The principles of statutory interpretation applied.

(v) The respondent's *"Instructions to Valuers – Standard Operating Procedure, No.2"* is invalid and had no legal status, and is merely an attempt by the Valuation Office to strain the proper construction of the Act.

(vi) Reference to dictionary authorities such as Webster, Concise Oxford and Bennion (influence of dictionary meaning in a Court) which defined apart-hotel as a "*Hotel with furnished rooms including kitchen available for long term and short term lettings"*, further strengthened the appellant's hand in the context of literal and ordinary meaning. The definition does not fit the subject units and to attempt to shoehorn them into an apart-hotel would be wrong.

(vii) The **Kerry County Council v Kerins** [1996] 3IR 394 decision is the starting point and the law with regard to the issue in dispute viz whether the premises are holiday cottages or apartments.

(viii) The Tribunal judgement in **VA07/3/036 – Killerig Golf and Country Club Rentals ("Killerig")** judgement is the appellant's "rock". Paragraph 8 of the findings stresses that

> *"**Kerins** is authority for the proposition that a premises could avail of the exemption for domestic premises even if the occupier did not make private use thereof or used it for commercial advantage such as holiday lettings."*

(ix) The Legislature and developers have acted on the basis of **Kerins** and the judgement has been reflected in the Valuation Act, 2001.

(x) It was manifestly untenable to suggest that the holiday cottages were part and parcel of the Hotel. They are holiday cottages with planning permission as such and specific conditions that they be used for short term lettings. The use of hotel facilities for bookings and towels did not make a hotel or apart-hotel out of them and alter their rateability.

(xi) Common occupation as opposed to common ownership goes to the root of the appellant's case.

(xii) It is risible to suggest that holiday cottages are apartments. Holiday cottages are domestic premises. The underlying facts support that case. The intention of the Legislature was to rate apart-hotels consisting of apartments and leave holiday cottages unrateable. It was not open to the Tribunal under section 37 of the 2001 Act to disallow the appeal.

(xiii) The facts of **McGarry** (**Inspector of Taxes**) v **Harding** (**Lord Edward Street**) **Properties Limited**. (Unreported, Laffoy J, High Court, 27th July, 2004), a tax case, are not on all fours with the subject and did not avail the respondent.

(xiv) In the event that the Tribunal finds that the units are apartments, the appellant will say that they are not used for the trade of hotel-keeping and do not benefit from the specific tax allowances for such use.

Respondent's Submissions

12. Mr. MacEochaidh on behalf of the respondent submitted as follows:

(i) The concept of an "apart-hotel" was post **Kerins** in 1996.

(ii) An apartment was defined in the 2001 Act to assist with the definition of an "apart-hotel" which is a hybrid of "apartment" and "hotel". The definition of an "apart-hotel" in the 2001 Act bridged the gap from 1978 via the Local Government (Financial Provisions) Act through **Kerins** in 1996 and the period since then.

(iii) Domestic premises are exempt from rates. The Revenue Commissioners, however, wanted to ensure that there was no abuse of the exemption. Simply because a premises looked like a domestic premises, when in reality it wasn't, would not be deemed to be so and would be captured by the Act.

(iv) The respondent contended that the buildings were not domestic premises within the meaning of the Act, since no part of the subject premises constituted a home, and a premises cannot be domestic if use of the premises as a home is precluded. One of the conditions attaching to the third planning permission (07/10266) was to "*allow for six months owner occupation of 56 no. Existing holiday cottages*". Hence, this condition precludes any use of the premises as permanent or principal residences.

(v) The respondent also contended that "*in order for the appellant to succeed it will be required to go further than proving that the structures are not a hotel. It will be required to establish that the 56 holiday cottages/suites comprise domestic premises the definition for which is provided in the definition Section 3(1) of the Act as follows:-* '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'." In this context, Mr. MacEochaidh contended that "dwelling" equals "home".

(vi) All apartments are exempt apart from those engaged in the trade of hotel-keeping.

(vii) When terms or words were not defined in the Act, the colloquial or ordinary meaning applied. However, the terms were not left undefined here as in **Inspector of Taxes v Kiernan** (1982) ILRM 13. There was no oblique or slack language here. "Apartment" and "apart-hotel" are defined. So while it would be tempting for the Tribunal to apply the literal meaning to the instant terms, it was not obliged to do so as for the purposes of the Act. "Apartment" and "apart-hotel" had a particular meaning. The Legislature did not include common areas in the definition as it wanted to capture "apart-hotels".

(viii) The **Kerins** decision was based on specific facts which obtained at that time. The first port of call for the Tribunal is the 2001 Act.

(ix) Under present day planning legislation, comprehensive restrictions/conditions are imposed on the uses of premises which was not the case when **Kerins** was decided. Section 47 Agreements e.g. under the Planning and Development Act, 2000 registerable as a burden on the title were not possible in 1996.

(x) The occupier of the subject premises is a corporate entity and the main shareholder in evidence did not stress "domestic" use and on the contrary spoke of "collecting rents".

(xi) The system of managed ownership in the subject appeal is a tax driven corporate investment scheme under the Taxes Consolidation Act, 1997 and is distinguishable from the facts in **Kerins**.

(xii) **Kerins** did not address the fundamental concept in Irish Rating Law viz "Occupation, use and rateability". The House of Lords decisions in **Skittrall v South Hams District**

Council [1976] ALL ER 1 and the Tribunal determination in the **VA99/4/004 – Ms Helen O'Donnell (The Hunt Museum Ltd.)** appeal support the contention that "use" is the determining factor.

(xiii) There were only 12 chalets involved in **Kerins** whereas there were 56 units in this case.

(xiv) The units and the Hotel here are of the same family. They are marketed as such and form a profound association. They have a common occupier, same look and feel, shared staff and common use of hotel facilities. In Mr. Conroy's view the units combined were an extension of the Hotel and an apart-hotel.

(xv) The Tribunal is confined to the 2001 Act definition of an "apartment" viz a residential unit in a building, which the two blocks are, which has a number of such units and the findings in **McGarry v Harding** wherein Laffoy. J concluded that premises were in use for the purpose of the trade of hotel-keeping even when not registered as a hotel. Those were the two tests stipulated in the Act.

(xvi) The appeal must be dismissed unless it can be established that the appellant BGR is using the premises as a domestic premises. Mr. MacEochaidh argued that in the event of the Valuation Tribunal deciding that it was open to it to come to a conclusion that the units were holiday homes managed for short term lettings, such a use being a commercial use could not avail the appellant of the domestic premises exemption.

Appellant's reply

13. (i) There was no legal distinction between this case and **Kerins.**

(ii) **Kerins** also involved rent collection.

(iii) The term "profound association" here was incorrect as the holiday cottages were on the market for sale.

(iv) The **Skittrall** decision of the House of Lords in 1976 (which related to a guest house) had no relevance to **Kerins** in a 1996 Judgement when it was open to the Supreme Court to take on board the findings.

(v) The character of any hereditament for rating purposes is determined by the use to which it is put by the rated occupier.

(vi) In **Kerins**, which related to the letting of chalets for a two week period during the tourist season, the definition of "domestic hereditaments" within the meaning of the Local Government (Financial Provisions) Act 1978 was tested. It was held by the Supreme Court that a premises could avail of the exemption for domestic premises even if the occupier did not make private use thereof or used it for commercial advantage, such as holiday lettings.

(vii) The respondent's argument re. the application of section 37 of the 2001 Act to allow the Tribunal to amend a detail on the Valuation Certificate re the description of the subject property to ensure its conformity with the description fashioned by the developer and accepted by the Planning Authority was contrived and was a course of action not open to the Tribunal. If the premises are neither a hotel nor an aparthotel then they are domestic premises and hence entitled to exemption under the Act.

Findings

The parties to this appeal were represented by Counsel and the Tribunal is indebted to them for the depth and quality of their submissions. This, accompanied by the range of authorities, legal precedents and statutory provisions referred to, was of immense assistance to the Tribunal in its deliberations.

The Tribunal has carefully considered all the evidence proffered and legal arguments adduced on behalf of the appellant and the respondent and makes the following findings:

1. The Blarney Golf Resort Limited development is one of several similar type projects rolled out in recent years. Typically the holiday cottages form part of a much larger complex which includes a hotel, golf course and other recreational/tourist amenities.
2. The financial modelling which underpins the development is designed to attract investors both corporate and individual to participate in and to avail of a range of tax breaks under the current legislation.
3. The 56 cottages, the subject of this appeal, are set in a 164 acre site which also includes the Blarney Hotel, golf course and clubhouse. The cottages are in two identical layouts with 28 units in each block, 4 of which are of single storey and 24 of which are two storey in design.
4. (i) The Blarney Hotel is owned by Kelcar Land Ltd, the original developer of the site and complex.

   (ii) The 56 cottages were developed by Kelcar Land Ltd., the current Directors of which are Frank and Derek McCarthy.

   (iii) BGR is a wholly owned subsidiary of Kelcar Land Ltd.

   (iv) The unsold cottages are on the market for sale and those that are sold are subject to a 30 year lease-back arrangement between the purchaser/investor and BGR which manages the properties on their behalf and arranges short term lettings.

(v) The cottages which are unsold are subject to a 3 year lease from the developers Kelcar Land Ltd. (of which the current Directors are Frank and Derek McCarthy). Once a cottage is sold the 3 year lease is terminated and replaced by a 30 year lease between the purchaser/investor and BGR.

(vi) Upwards of 40 cottages were unsold at Valuation date (Nov 2006) despite the fact that all 56 cottages were capable of beneficial occupation.

5. BGR is at all material times the lessee, *simpliciter*, of the cottages.
6. BGR is at all material times the rated occupier of the cottages.
7. The 56 units were developed on foot of a planning permission granted on the 3rd February 2005 under Planning Register No.04/6440 for 56 holiday cottages in 2 two-storey blocks.
8. There was no physical nexus between the holiday cottages and the Hotel other than sharing a common site and the availability of a telephone connection to the Hotel reception. The cottages operated at arm's length from the Hotel and were in a separate and distinct stand-alone capacity.
9. Each holiday cottage was to all intents and purposes self-contained, self-sufficient and self-catering, with services separately metered/provided and charged where appropriate. The use of hotel facilities for bookings etc. did not alter that position.
10. The Revenue Commissioners have deemed the properties to be holiday homes within the meaning of S.268 of the Taxes Consolidation Act, 1997 and tax relief has been obtained by the owners/investors.
11. The holiday cottages are marketed by BGR and other agencies on a short term self catering basis. The owners/investors have no contractual relationship with the booking agencies and play no part in the short term lettings of the holiday cottages.
12. Complimentary use of the bar and restaurant at the hotel by visitors is in the nature of passing trade and not to be confused with "residents" within the meaning of the Liquor Licensing Laws.
13. The facts in this appeal are similar in many respects to **Killerig**.
14. The Tribunal in **Killerig** attached great weight to the findings of the Supreme Court in the **Kerins** case. **Kerins** is authority for the proposition that a premises could avail of the exemption from the payment of rates for domestic premises even if the occupier did not make private use thereof or used them for commercial advantage such as holiday lettings.

15. **Kerins** was decided within the context of the Local Government (Financial Provisions) Act, 1978 and the relevant section 3 thereof was repealed by the Valuation Act, 2001 insofar as it relates to a domestic hereditament, community hall or farm building. In that Act, a domestic hereditament was defined as *"any hereditament which consists wholly or partly of premises used as a dwelling and which is not a mixed hereditament"*.
16. In the Valuation Act, 2001, a 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"*.
17. In plain English an apartment is a self-contained suite of rooms equipped for dwelling purposes in a building containing a number of other such units, sharing a range of common services of a structural nature such as entrance, lobbies, staircases and elevators. While an apartment in an apart-hotel may have the same physical characteristics, users of such apartments usually enjoy the benefits of housekeeping and cleaning services and other facilities normally provided to hotel residents.
18. In **Cement Ltd v Commissioner of Valuation** (1960) IR 283 **("Cement Ltd")** two comments by Davitt. J are apposite in the context of this appeal: *"It would be obviously unwise to attempt a definition of the word "building"* and secondly *"much regard should be had to the development of the Valuation Statutes in respect of what hereditaments had to be valued and to the primary meaning of the word as understood in its popular sense"*.
19. The word "building" was not defined in the Act of 1852, nor indeed was it defined in the two amending Acts of 1986 and 1988. It would appear that the attempt to do so in the 2001 Act may have been precipitated in the light of a number of High Court cases (including **Cement Ltd**) which resulted in what arguably were considered to be items of plant or machinery being held to be buildings for the purposes of section 7 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, now repealed.
20. It is well established in law that words in a statute should be construed according to their plain and ordinary meaning, unless such a construction would give rise to an absurdity. Whilst this applies to the construction of any statute, it is even more critical when one is dealing with a possible fresh imposition of a financial liability. The Valuation Act, 2001, as a taxing statute, falls into this category.

21. The Tribunal finds that the properties the subject of this appeal do not constitute an apart-hotel but are holiday homes which in the light of **Kerins** and **Killerig** are "domestic premises" not rateable under Paragraph 6 of Schedule 4 of the Valuation Act, 2001.

Determination

The Tribunal therefore determines that

1. The properties the subject of this appeal do not constitute an apart-hotel but are holiday homes which in the light of **Kerins** and **Killerig** are "domestic premises" not rateable under Paragraph 6 of Schedule 4 of the Valuation Act, 2001.
2. The rateable valuation of the Hotel and Clubhouse is €2,220.00, as agreed by the parties.

And the Tribunal so determines.