

Appeal No. VA10/5/096

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

Newpark Care Centre Partnership

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property No. 300804, Nursing Home at Newpark Care Centre, Newpark, The Ward,
County Dublin.

B E F O R E

Fred Devlin - FSCS.FRICS

Deputy Chairperson

Brian Larkin - Barrister

Member

Tony Taaffe - Solicitor

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 1ST DAY OF MARCH, 2011

By Notice of Appeal dated the 31st day of August, 2010 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €15,000 on the above described relevant property.

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

The current valuation is excessive and the business could not sustain such a valuation NAV, as applied by the Valuation Office." "The Valuation Certificate which issued on 11/12/2009 was for a valuation of €37,000 and this is the figure we should be appealing against. Extra accommodation was added to the building in the interim but this accommodation was not capable of beneficial occupation until March, 2010."

1. This appeal proceeded by way of an oral hearing held in the offices of the Tribunal on the 28th of January, the 2nd and 4th February, 2011.
2. At the oral hearing the appellant was represented by Mr. Owen Hickey, SC, instructed by John Walsh Solicitors, Ranelagh, Dublin 6. Mr. David Dodd, BL, instructed by the Chief State Solicitor's Office, appeared on behalf of the respondent, the Commissioner of Valuation.
3. Mr. John Kenneally of Kenneally McAuliffe gave expert valuation evidence on behalf of the appellant. Mr. Mark Hutch of Doody Crowley Associates gave evidence in relation to the accounts provided to the Tribunal and other relevant financial matters pertaining to the property concerned and the nursing home industry in general.
4. Mr. Christopher Hicks, a senior valuer in the Valuation Office, gave expert valuation evidence in relation to the property concerned and outlined the steps taken by the Valuation Office in an attempt to construct a scheme of valuation which would be used for the valuation of all nursing homes in the Fingal Rating Authority area as part of the 2010 Revaluation programme.
5. Prior to the commencement of the oral hearing Mr. Kenneally and Mr. Hicks forwarded to the Tribunal a précis of the evidence and valuation they proposed to adduce at the oral hearing. From the evidence so tendered and additional oral evidence received during the course of the hearing the following material facts emerged or are as so found.

The Property Concerned

6. The property concerned, trading as Newpark Care Centre, is located on a minor county road in a rural area known as the Ward in North County Dublin, convenient to the N2 at a point approximately midway between Finglas and Ashbourne.
7. The property is a single-storey structure and first opened for business in 2003 as a 57 bed nursing home. The property was extended circa 2008/2009 by the addition of thirteen en suite single person bedrooms. At the relevant valuation date the building and fit-out works were substantially completed and an application for registration as a 70 bed nursing home was under consideration which, in due course, was granted on the 26th

March, 2010. It is agreed that the entire premises is in very good condition and provides residential accommodation and other ancillary facilities to a high standard of finish and specification. The accommodation for 70 residents is available by way of 68 single-person en suite bedrooms and one twin room, together with all necessary sitting rooms, dining rooms, treatment rooms, kitchens, etc. The nursing home has an extensive garden area and other outdoor facilities.

Staffing Levels

8. The property concerned operates with a staff complement of sixty, including the Director of Nursing, two full-time directors/partners and one other director/partner who works on a part time basis as required. In accordance with HIQA regulations and requirements, the staff members include suitably qualified and experienced nurses and care assistants and other ancillary staff in sufficient numbers to provide a 24x7x365-day service to the residents.

Financial Evidence and Information

9. Newpark Care Centre operates as a private partnership and all members of the partnership are of the same family and play an active and senior managerial role in the running of the nursing home. In his evidence Mr. Mark Hutch referred to the important role played by the Matron (the Director of Nursing) and the vast range of management roles to be performed by others under her supervision. Mr. Hutch stressed the degree of control exercised by HIQA in relation to the numbers, qualifications and experience, functions and responsibilities of all staff members and the requirements that suitable nursing and care services are available at appropriate levels on a 24x7x365-day basis. In effect, he said, the provision of nursing home care was now a highly professional and regulated operation operating to very exacting standards.
10. Mr. Hutch said the three directors/partners engaged in the business performed important administrative functions and by virtue of their roles were on call on a 24 hours basis. Whilst one of the directors/partners was engaged on a part time basis, he too had to be available at all times of the day as necessity dictated. If the directors/partners did not play the active roles that they did, then other suitably qualified and experienced persons would have to be employed at prevailing market levels of remuneration which in total would come to circa €240,000 per annum.

11. When asked about the 2005 Horwath Bastow Charleton survey of the Irish nursing home industry, Mr. Hutch said that it had to be seen for what it was – a snapshot of the industry on a regional and national basis. Whilst it may, he said, be useful as a guide, it was of limited assistance in the evaluation of the business in a specific nursing home. In regard to the Newpark Care Centre, consideration must be given to the fact that it is located in a rural area with limited public transport services so that, consequently, staff have to be adequately compensated to reflect the fact that they have to commute to and from their place of employment.

Mr. Kenneally's Evidence

12. Mr. Kenneally, having taken the oath, adopted his précis and valuation which had previously been received by the Tribunal and the respondent as being his evidence-in-chief. Mr. Kenneally said that in the absence of open market transactions he considered the Receipts and Expenditure method of valuation to be the preferred method for valuing nursing homes. Mr. Kenneally said that notwithstanding the fact that the property now had accommodation for 70 residents, the nursing home only had the benefit of HIQA registration at 31st December, 2009 for 57 residents. In the circumstances he took the view that the extension containing 13 ensuite single-person bedrooms, which at the relevant valuation date were in an incomplete state and did not meet the required standards for HIQA registration, were incapable of beneficial occupation and hence ought not be included in the valuation. Having come to this conclusion, he prepared his valuation on the basis of accounts for the years ending 31st August, 2007 and 2008 made available to him by the auditors, Doody Crowley, Associates.
13. Under examination, Mr. Kenneally said he fundamentally disagreed with the assumptions contained in Mr. Hicks' précis regarding the preparation of a scheme of valuation for the valuation of nursing homes. For example, he said, Mr. Hicks considered the normal occupancy rates to be 95%. In his opinion, a prudent hypothetical tenant would aim to attain 90% and estimate the rental value of a nursing home on that basis. Furthermore, Mr. Hicks' whole scheme was based on two assumptions – that staff costs would be 55% and that other costs would be 20% – neither of which was supported by information obtained from accounts. In Mr. Kenneally's opinion, Mr. Hicks over-estimated the quality of information contained in the Horwath Bastow Charleton survey and had relied on the findings contained therein to an undue extent. In particular, there was nothing in Mr.

Hicks' précis to show how or why 16% of estimated turnover should be the NAV of the property concerned. In Mr. Kenneally's opinion a valuation of €15,000 was grossly excessive.

14. Under cross-examination, Mr. Kenneally agreed that his estimated turnover was not supported by accounts. He also agreed that there was nothing in the accounts to support either his 90% occupancy rates or the weekly charge of €720. In relation to the R & E method of valuation, Mr. Kenneally agreed that the final outcome was sensitive to the percentage allocated to the tenant's share and in a situation where there were directors actually engaged in the business, there always was a possibility of double counting. Nonetheless, Mr. Kenneally said, the tenant's share had to be sufficient to afford the tenant a return on the capital he/she had invested in the business, the risks associated in running the nursing home, having regard to the regulations, the over-seeing role and powers of HIQA. In his opinion, 50% of the Divisible Balance was fair. Mr. Kenneally did not agree that the entire premises should be valued as a 70 bed facility at the 31st December, 2009, nor did he consider it reasonable to assume that registration would be forthcoming for the extra bedrooms in the foreseeable future.

The Respondent's Evidence

15. Mr. Hicks, having taken the oath, adopted his written précis and valuation which had previously been received by the Tribunal as being his evidence-in-chief.

In his evidence, Mr. Hicks outlined in some detail the steps the Valuation Office had taken in order to devise a scheme of valuation for nursing homes in the Fingal Rating Authority Area and which would be accepted by rate-payers and their advisers alike. As part of the preparatory work, the Valuation Office has sought financial and other relevant information from the occupiers of nursing homes under Section 45 of the Act in order to assist the formation of an acceptable scheme of valuation. The response to these Section 45 requests was low but, nonetheless, the Valuation Office proceeded as best they could with the limited information they had. In their deliberations, the Valuation Office examined in some detail all the information received and the findings contained in the 2005 Horwath Bastow Charleton Report of the nursing home industry and also had regard to the Guidance Note on *The Receipts and Expenditure Method of Valuation for Non-Domestic Rating*. In the final analysis, the Valuation Office came to the conclusion that a

hypothetical tenant in the market would expect that wage and salary costs would be in the order of 55% of gross revenue. All other operating costs as envisaged under the guidance notes would come 20% of gross income, leaving 25% to be shared between the landlord and the tenant. Having arrived at this fundamental conclusion, the scheme was refined so that net annual value of a specific property would be within the range of 12.5% to 17.5 % of gross income depending upon its size, location, age, design, occupancy rates and weekly charges and all other relevant factors. Small older nursing homes, which typically would be conversions of former dwellings, would be valued at circa 12.5% of gross turnover whilst new purpose-built facilities would be valued at circa 17.5% of gross income actual or estimated as the case may be.

Having regard to the above scheme, Mr. Hicks valued the property concerned on the following basis:

$€750 \times 52 \times 70 \times 95\% = 2005 \text{ based turnover of } €2,593,500$

$€2,593,500 @ 16\% = \text{NAV } €414,960$

Say €415,000

16. In support of his opinion of net annual value, Mr. Hicks referred to the agreed valuation of two other nursing homes in the Fingal area, details of which are set out in the Appendix, attached to this judgment.
17. Under examination, Mr. Hicks said he had initially valued the property concerned as a 57 bed nursing home and had issued his certificate in final form on that basis. It was only after an appeal had been made to the Commissioner of Valuation under Section 30 of the Act, that he became aware that the property concerned was registered for the accommodation of 70 residents. In the circumstances, he revised his valuation in the light of this new information and advised the Appeal Officer accordingly.
18. When asked about his assumptions in relation to weekly rates and occupancy levels, Mr. Hicks said he had relied on the contents of a letter received by him from the appellant to the effect that weekly rates in 2005 were between €700 and €800. The occupancy rate of 95% was based on four routine HIQA inspections which showed occupancy rates to be 95% and above. In his opinion, Mr. Hicks said, his assumptions on both counts were reasonable.

19. When asked how he arrived at his opinion that wage costs would be in the order of 55% and that other operating costs would be 20%, Mr. Hicks said his conclusions were based on the Horwath Bastow Charleton survey (57%) and other information extracted from accounts forwarded to him under Section 45 and subsequent conversations he had with interested parties. In the end, he was of the view that the scheme of valuation devised was a good basis for valuing nursing homes in the context of a Revaluation. The scheme included a large degree of flexibility by applying 12.5% to 17.5% of turnover to arrive at net annual value, having regard to the size of the nursing home, its age, type and other relevant facts. In his opinion, a tenant's share of 36% (16% of turnover in his scheme) was fair when valuing a nursing home like the subject. Such a figure, he said, recognised the capital invested by the tenant and the landlord and the risks they shared.

20. Under cross-examination, Mr. Hicks said, he could not say with any degree of certainty that the property concerned was capable of beneficial occupation as a 70 bed nursing home on 31st December, 2009. He only became aware that it was registered as a 70 bed facility during the Section 30 appeal stage.

21. When asked why he had not used the R & E method of valuation, Mr. Hicks said, he did not have available to him the relevant and reliable financial material necessary for him to use the R & E method. This in fact was the case in practically all nursing homes in the Fingal area and it was the absence of this information that led him to devise a scheme of valuation that could have universal application to all nursing homes. As previously stated, the scheme was flexible and, in his opinion, the final outcome would be fair in all instances. From the information he had it would not be possible to value each nursing home on an individual basis using the R & E method.

22. Mr. Hicks referred to a letter contained in his précis from a valuer to the effect that there was some similarity in valuing hotels and nursing homes. Mr. Hicks said he included this letter as it supported his opinion that tenant's share was somewhere in the order of 30% to 50%. Nonetheless, he did agree that the similarities ended there.

23. When it was put to him that his scheme of valuation was unsafe and more suitable to valuing nursing homes under Section 49 rather than under Section 48, Mr. Hicks did not

agree. As far as he was concerned the scheme was fair and ensured a uniform approach was taken when valuing nursing homes in the Fingal area that fairly reflected their difference in size, nature and other relevant factors. In the absence of accounts and other relevant financial information in respect of all nursing homes in the area, it was, he said, the only choice of method open to him.

Legal Submissions

Submissions on behalf of the Appellant

24. In his submission on behalf of the appellant, Mr. Hickey said it was common case that in the absence of rental evidence the property concerned had to be valued by using one of the other approved methods of valuation. Having regard to the nature of the business being carried on in the property concerned, the preferred method was the Receipts and Expenditure method and this was the choice made by the appellant's valuer. In a Revaluation situation the net annual value of each property in the rating authority area has to be individually assessed in accordance with the provisions set down in Section 48 of the Valuation Act, 2001. The method of valuation employed by the respondent, known as the "Shortened Method", is described in the Guidance Notes as being "*not a profits or R & E method of valuation*" – it is, the Guidance Note says "*a comparative method.*" If that be the case, Mr. Hickey said, its use is more suited to a valuation carried out under Section 49 of the Act and most definitely not when valuing a property under Section 48.

25. In regard to several of the authorities cited by Mr. Dodd, Mr. Hickey contended that those which were based on U.K. valuation law and practice were not necessarily relevant in this jurisdiction and hence should be treated with a degree of caution. The Tribunal, he said, in arriving at its determination in this appeal, must do so on the basis of Irish law and precedent and must have regard to the evidence and legal submission made on behalf of both parties.

Legal Submissions on behalf of the Respondent

26. Mr. Dodd in his submission on behalf of the respondent said the property concerned had to be valued "*rebus sic stantibus*" and in accordance with Section 48. In this regard, the hypothetical tenant envisaged under Section 48 could in law be the actual occupier and, in determining the net annual value of the property concerned, the Tribunal "*is not bound to use any particular method of valuation but may come to its determination in whatever*

way is most suitable to produce the required result." (Roadstone Ltd. v Commissioner of Valuation) 1961 IR. 239.

27. Under the rule of "*rebus sic stantibus*", the property concerned must be valued in its actual state at the relevant valuation date and account must be taken of all current intrinsic and extrinsic factors that may have a bearing on rental value, including "*a present probability of a future happening and the present probability affects the present value of the hereditament.*" (see *Ryde on Rating*, para. 272) In the circumstance of this appeal, it would be perfectly reasonable for the hypothetical tenant to assume that registration to operate the property concerned as a 70 bed nursing home would be forthcoming in the very near future and to take this into account when estimating its rental value. The fact that registration was granted on the 26th March, 2010 is clear proof that the assumption was a reasonable one for the hypothetical tenant to make. In any event it is the property that has to be valued and at the relevant date the extension to the nursing home was to all intents completed except for a few minor items of fit out. The only barrier to its use as a 70 bed nursing home was the lack of registration under HIQA regulations. In this regard it must be recognised that the appellant was an experienced operator in the nursing home industry. In the circumstances, it would be unthinkable that the appellant would proceed to seek planning permission and other statutory consents without ensuring that the proposed extension would not meet in full the regulations set down by HIQA.
28. In regard to Mr. Kenneally's valuation, Mr. Dodd said it was not carried out in strict compliance with the Guidance Note. This, he said, was not surprising since audited accounts in its present state at the valuation date were not available. Similarly there was no hard information regarding staff costs and other items of expenditure, so that all of the figures contained in his valuation were estimates and, hence, not reliable for the purpose of the valuation. Furthermore, his estimate of occupancy rates was 90%, whereas there was evidence available from HIQA inspection reports to show that the average occupancy rate was 95% at least. It is also, Mr. Dodd said, to be noted that in every valuation prepared by Mr. Kenneally in respect of nursing homes, the tenant's share is invariably 50% with no reason given why this should be so. Mr. Kenneally's opinions in the two above items were clear indications that he had not exercised the level of judgment necessary when using the R & E method of valuation.

The Appellant's Response

29. In response to Mr. Dodd's submission, Mr. Hickey said that, Mr. Dodd was placing an over-reliance on English rating statutes and case law contained in the various sections of *Ryde on Rating* opened to the Tribunal. The only relevant statute in this appeal was the Valuation Act, 2001 and it was Section 48 of this Act that set down the statutory basis for determining the net annual value of the property concerned. Under the Act and Irish case law, the valuation of the property concerned is to be determined using whichever method was "*most suitable to produce the required result.*" Under no circumstances could Mr. Hicks' scheme of valuation be considered "*suitable*" within the above statement.
30. At the 31st December, 2009 part of the property concerned was not capable of beneficial occupation as a nursing home, by virtue of the fact that the necessary registration for such use was not extant. The fact that there were some outstanding works to be completed at the relevant valuation date, even if they were minor in extent, was not the issue. Not even the actual occupier – to say nothing of the hypothetical tenant – could make an assumption that registration would issue. In any event, Mr. Hickey said beneficial occupation is not an assumption to be made, it is a matter of fact and law and the facts in relation to the property concerned are that due to unfinished building and/or fitout works a section of the property was not of a standard to meet in full the requirements set down before registration is granted by HIQA. Beneficial occupation either exists, or it does not.
31. The extracts from *Ryde on Rating* in relation to "*anticipated events*" opened by Mr. Dodd must be treated with caution in that they reflect decisions made under English rating law and not the Valuation Act, 2001.
32. In relation to the use of the R & E method by Mr. Kenneally, Mr. Hickey said that whatever its shortcomings might be, it is by far superior to the scheme of valuation designed by Mr. Hicks, which is clearly based on the information contained in the 2005 Horwath Bastow Charleton survey of the Irish nursing home industry. The information contained in this survey in relation to staff costs and occupancy rates should be seen as merely guidelines, Mr. Hickey said, against which actual information contained in audited accounts could be judged. Use of the R & E method of valuation required the valuer to exercise judgment as to what categories of expenditure were allowable, either in whole or

in part, in order to arrive at the Divisible Balance. This is what Mr. Kenneally had done as best he could and, in the end, he had put forward a valuation of the property concerned as a 57 bed nursing home with the benefit of registration that was fair and reasonable. Mr. Kenneally's valuation methodology was the correct one and under no circumstances could he assume that registration as a 70 bed facility would be forthcoming. Mr. Hicks' assumption in this regard could not be sustained.

Findings and Conclusions

The Tribunal has carefully considered all the evidence adduced by the parties and the submissions, written and oral, made by counsel. These, together with the various authorities, reports and legal precedents introduced, were of assistance to the Tribunal in arriving at its conclusions and determination as set out below:

1. The property concerned in this appeal is one of fifteen nursing homes valued as part of the 2010 revaluation of all relevant property in the Fingal County Council rating authority area, carried out pursuant to Section 19 of the Valuation Act, 2001.
2. Following the Representations and Section 30 Appeal Stages, six appeals were lodged with the Tribunal under Section 34 of the Act. All of the appeals went to full hearing, but in one instance the valuation of the property concerned was subsequently agreed and the Tribunal mutually requested to issue an order accordingly.
3. Members of this Division of the Tribunal sat on a number of the appeals – including the one which was agreed. In all of the appeals the only issue in dispute was the quantum of the valuation and in all instances there was much similarity in the issues raised and the arguments adduced. In the course of this judgment the Tribunal proposes to deal firstly with those issues which were common to all and then proceed to deal with those which are specific to each individual relevant property.

Common issues

4. In accordance with Section 20 of the Act, the date by reference to which the value of each relevant property is to be determined is 30th September, 2005.

5. The publication date for the new valuation list for the Fingal County Council rating authority area, pursuant to Section 21 of the Act, is 31st December, 2009.

6. In accordance with the Act the value of each relevant property is to be individually assessed in accordance with Section 48 of the Act, which states as follows:

“48.—(1) The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.

(2) Subsection (1) is without prejudice to section 49.

(3) Subject to section 50, for the purposes of this Act, “net annual value” means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant.”

7. The definition of net annual value is akin to open market rental value on a full repairing and insuring basis, and where there exists an actual rent or a body of open market rental evidence, at or about the relevant valuation date, of properties truly comparable in all material respects to the property being valued in accordance with Section 48, then that evidence should be accorded appropriate weight.

8. Nursing homes by their very nature are a category of properties which are seldom, if ever, let or, indeed, sold on the open market. Such a situation obviously poses something of a problem to rating valuers engaged in a revaluation who, in such circumstances, will have to give consideration to the use of other approved methods of valuation for rating purposes, such as the Receipts and Expenditure (R & E) method or the Contractor’s Basis.

9. While there is no statutory definition of the R & E method, or any specific mention of it in the Valuation Act, the R & E method of valuation has been accepted as the preferred method of valuation by the Irish Courts and by the Valuation Tribunal in a number of leading rating cases where other methods of valuation were not considered appropriate. When using the R & E method of valuation, the relevant gross receipts of

the enterprise must first be ascertained. From this figure the proper cost of purchases and expenses necessary to sustain the gross income is deducted and the balance remaining is referred to as the divisible balance. This figure represents the amount that is available for the tenant's share, rent and rates.

10. A Guidance Note on the R & E method of valuation, prepared by the Joint Professional Institutions, Rating Valuation Forum, published by the Royal Institution of Chartered Surveyors in July, 1997, was made available to the Tribunal and both valuers in their evidence made several references to it.
11. The Guidance Note is a comprehensive publication which sets out in considerable detail the background to, and the criteria for, the application of the R & E method of valuation. The guidance note also contains a general outline of the methodology and the considerations to which regard must be had when using it for rating valuation purposes. Despite the depth and range of information contained in the guidance note, the R & E method requires the user to exercise care and discernment in examining the accounts and to make judgments, such as, whether they provide a reliable basis for valuing the property concerned, having regard to the rating hypothesis contained in Section 48. Judgment, care and experience will also be required in determining the proper cost of working expenses and salary costs. In particular, director's remuneration must be examined and their role in the business investigated to see if it forms an allowable expense or is an item to be considered under the tenant's share.
12. Paragraph 5.46 of the guidance note deals with the tenant's share and says that it "*has to be sufficient to induce the tenant to take a tenancy of the property and to provide a proper reward to achieve profit, an allowance for risk and a return upon the tenant's capital.*" The quantification of the tenant's share must also take into account the rating hypothesis that the tenant is assuming responsibility for the "*probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property*" [cf. Section 48(3) Valuation Act, 2001] in its actual state at the relevant valuation date. It follows, therefore, that when examining the accounts, expenditure under all of the above headings is to be excluded under the general heading of proper costs of expenses. Similarly, no allowance should be made for the depreciation of the property itself as this is more properly the responsibility of the

landlord. In relation to the last mentioned item, in *Port of Cork v Commissioner of Valuation* [2003] IESC 47, the High Court held that *“the Tribunal was correct in law in determining that the depreciation of assets in the accounts of the appellant should not be taken into account in calculating the rateable valuation of the ports lands, buildings and facilities.”*

13. In these appeals the appellant relied solely on the R & E method of valuation and made such adjustments to the accounts as considered appropriate in the light of information regarding directors' remuneration and their role in the business and other pertinent factors such as occupancy rates and weekly room rates. One of the difficulties in the last mentioned item is that room rates can vary within the same establishment, due to length of stay and the date upon which the resident first entered. Nonetheless, whatever the difficulties that may be encountered in using the R & E method, the Valuation Tribunal is of the view that the R & E method when applied by valuers who have the necessary experience and understanding of the nursing home industry, provides a reliable basis for determining net annual value under Section 48 of the Act.
14. The respondent's approach to the valuation of the property concerned, in the first instance, was to obtain as much information as he could in an attempt to prepare a scheme of valuation which would be accepted by rate payers and their advisers.
15. As a first step in the process, the respondent exercised his powers under Section 45 of the Act to seek from the occupiers of all nursing homes in the Fingal Rating Authority Area audited accounts and other relevant financial information including weekly charges and occupancy rates, etc., in relation to each relevant property. It would appear that the quality and extent of information provided was below expectation but, nonetheless, the information so attained was analysed so as to obtain an overview of the industry under a number of headings, such as occupancy rates, weekly room rates, staffing levels, salary costs and directors' remuneration, etc. Why the operators of the nursing homes did not fully cooperate with the Commissioner is hard to understand, as their participation in the process would undoubtedly have been of benefit to all. The secondary source of information was the 2005 “Annual Private Nursing Homes Survey” prepared by Horwath Bastow Charleton on behalf of the Irish Nursing

Homes Organisation. The purpose of the survey was to report on key issues affecting the industry under various headings, such as occupancy rates, room rates, staffing levels and salary costs on both a national and a regional basis. As part of the survey detailed questionnaires were sent to all 431 registered nursing homes in the country and the final findings of the survey were based upon 104 completed questionnaires representing a 24% response rate on a nationwide basis.

16. On the basis of their own analysis, and taking into account the Horwath Bastow Charleton Survey, the Valuation Office proceeded to value each nursing home on what is referred to in the R & E Guidance Note mentioned earlier as the “shortened method”. In this regard paragraphs 7.1, 7.2 and 7.3, which are set out below, are worthy of consideration.

“7.1 It is sometimes suggested that valuations based on a percentage of gross receipts amount to a so-called ‘shortened profits method’. However, in the view of the Rating Forum, the method described below is not a profits or R & E method of valuation. It is a comparative method of valuation utilising either market transactions or comparable assessments (which may themselves have been derived from a ‘full’ R & E method valuation), interpreted or analysed to represent a proportion of gross receipts.”

“7.2 Although this is not a profits or R & E method, or a ‘shortened’ version of such a method, it is clear that, for some kinds of properties, rents are determined between the parties using this approach. In some markets – for example, in licensed property – this method of fixing rents now predominates.”

“7.3 The method is based upon the determination of fair maintainable annual receipts which are able to be derived by occupying the property and conducting the undertaking with the skill and expertise which should reasonably be expected from a hypothetical tenant of those premises.”

17. The scheme of valuation arising from the research and analysis carried out by the Valuation Office, as set out in Mr. Hick’s précis is predicated on the assumption that staff costs and other operating costs “gives an overall norm of 75% leaving 25% to share between landlord and tenant.” Having arrived at this conclusion the scheme of

valuation was designed so as to apply different percentages to the gross receipts (actual and estimated) in order to reflect the age, scale and nature of the nursing home being valued. Details of the scheme were set out in the précis of Mr. Hicks in the following terms. *“The proposal therefore is to take c.15% (varying from 12.5% for small, old conversions to 17.5% for large, modern, purpose-built) of actual (or estimated as outlined above) 2005 turnover as the NAV for nursing homes generally.”* In effect, the 12.5% is equivalent to a tenant’s share of 50%, 15% a tenant’s share of 40% and 17.5% a tenant’s share of 30%.

18. From the evidence tendered a number of key issues arose which were common in all appeals, such as:

- a. Occupancy rates
- b. Room rates
- c. Staffing costs
- d. Directors’ remuneration
- e. Directors’ roles in the business

All of which will be addressed within the context of each appeal.

19. Having considered all the evidence introduced and arguments adduced by counsel, the Tribunal has come to the conclusion that despite the difficulties encountered in using the R & E method, it nonetheless provides a reliable basis for determining net annual value in accordance with Section 48 of the Act, particularly when applied by valuers who have the necessary experience in, and understanding of, the nursing home industry. Nonetheless, in coming to this conclusion the Tribunal acknowledges the efforts and length to which the respondent (and Mr. Hicks in particular) went in order to devise a scheme of valuation which would find widespread acceptance by all involved. In the event, and for whatever reason, the low level of co-operation by the nursing home operators, their advisers and/or agents rendered the scheme flawed to some extent. Nonetheless, the respondent, in the absence of a consensus, unilaterally applied the scheme of valuation to all nursing homes in the Fingal area and, in due course, some nine of the valuations so determined were either agreed or otherwise left unchallenged. In a number of instances the rate payers concerned were professionally represented and hence the Tribunal, at this stage in the appeal process, cannot disregard these valuations without good reason. That said, however, the availability of

audited accounts and other verifiable financial information accompanied by expert evidence in relation to the operation of the property concerned, the role of the directors in the business, accompanied by an assessment of the contributions they make in monetary terms, are major factors in the determination of net annual value made by the Tribunal.

20. At this stage it might be timely to repeat some comments made by the Tribunal in an earlier judgment [VA08/5/160, 161, 162 and 165 - Ms. Maura Galvin (VA08/5/160), Lisheen Nursing Centre Ltd. (VA08/5/161), Stanford Woods Care Centre Ltd. (VA08/5/162), Lucan Lodge Nursing Home (VA08/5/165)] in relation to the preparation of schemes of valuation. *“In principle there is considerable merit for the preparation of a coherent scheme of valuation in relation to nursing homes and other categories of properties that are seldom if ever let on the open market. That said, however, any such scheme must be well founded and sufficiently researched to withstand a robust examination if it is to find widespread acceptance by rate payers and their advisers. Furthermore, the scheme must be fully transparent in its application and contain within it sufficient flexibility to enable it to be used right across the sector. Once again, the Tribunal would urge the Valuation Office to engage with their colleagues in private practice who have a particular expertise in the category of property concerned, as such a course of action, will in the final analysis, lead to more accurate assessments and a greater understanding of how the valuations are determined.”* Despite their obvious conflicting roles in the valuation process, there is considerable merit in continuing to explore how these roles could converge without in any way minimising the rate payer’s desire to curtail his/her rates liability, or the Valuation Office’s aim to uphold their valuation of first instance. Such a convergence of ideals would ultimately serve better all stakeholders in the valuation process and reduce the amount of time spent in lengthy and contentious negotiations and the raising of minor points of law which, in the final analysis, are in the interest of neither party.
21. The nursing home industry is one of the most regulated in the State and its operation is primarily governed under the provisions of the Health Acts 1990 and 2007 and the various regulations and other statutory instruments issued thereunder. The 2007 Act provides that the premises and the service provider must be registered and registration

must be renewed on a periodic and ongoing basis. Furthermore, nursing home premises are subject to frequent and routine inspections by HIQA to ensure compliance with current nursing home inspection regulations. Failure to comply could in extreme cases, lead to registration under the Act being cancelled, or being amended by the imposition of additional conditions.

22. The two key personnel in a nursing home are the Service Provider and the Director of Nursing, both of whom must meet stringent criteria in relation to their suitability and/or their professional qualification. Both of these persons are liable to criminal prosecution under the Act and, when not available for an extended period in excess of thirty days, HIQA must be advised and suitable replacements put in position *pro tem*. Statutory regulations also set down the numbers of nursing and care-staff that are to be available at various times during the day and night and the educational qualifications appropriate to their functions. Adequate care and nursing staff complements must be available on a 24 x 7 x 365 day basis and all accommodation, including sitting rooms, dining areas and kitchens, including the external environment, etc. must be in accordance with standards set down by and monitored by HIQA.
23. The nursing home industry is labour intensive and costly, given the level of care that must be available at all times. Weekly room rates since the introduction of the “fair deal” scheme are now largely controlled by the National Treatment Purchase Fund (NTPF), who negotiate fees based upon total outgoings, assuming a 90% occupancy rate. On the evidence adduced, it would appear that 85% of residents at any one time benefit to some extent from funding by the NTPF. This security of income stream is, of course, beneficial to the operator and mitigates against the possibility of any significant loss by way of bad debts.
24. When using the R & E method, it is to be assumed that the property concerned is vacant and to let and that the nature of the occupancy will be the current use. It follows, therefore, that all of the above statutory requirements and regulations will have to be met by the hypothetical tenant, who will also have to be rewarded for his risk in taking over the property, carrying on the business and will have to receive an

appropriate return on the monies invested by way of tenant's assets and working capital. All of the above and the hypothetical terms of the letting as set down in Section 48 must perforce be reflected in the tenant's share.

Specific Issues

25. In relation to this appeal, a number of issues arose including whether the valuation should include the new extension providing thirteen extra single-person bedrooms, the occupancy rate, the weekly room charge and to what extent, if at all, directors' salaries should be considered as being part of the allowable expenses when using the R & E method.
26. It is common case that, at the relevant valuation date, the property concerned consisted of a 70 bed nursing home. It is also common case that, at the relevant valuation date, registration under the Health (Nursing Homes) Act, 1999 and Nursing Homes (Care and Welfare) Regulations 1993 existed only in respect of 57 residents, accommodated in 53 single bedrooms and 2 two-bedded rooms. Furthermore, it is common case that HIQA advised the owners that registration for 70 residents would be granted subject to satisfactory compliance with requirements set down by notice dated 9th March, 2010. It is also common case that a Certificate of Regulation was duly issued on the 26th March, 2010, subject to the 15 conditions enabling the premises to be used for the accommodation of 70 residents.
27. The appellant contended that under rating law and practice the property concerned must be valued *rebus sic stantibus* as at the relevant valuation date, ie., as a nursing home for which registration existed only in respect of 57 residents, to be accommodated in the 53 bedrooms, covered by the certificate of registration. At the relevant valuation date the additional bedroom accommodation and associated facilities did not meet the required statutory standards in a number of respects and, as a consequence, was not capable of beneficial occupation and, hence, could not be properly included in the valuation of the property concerned.
28. The respondent contended that the *rebus sic stantibus* rule does not preclude the taking into account of future happenings such as the anticipated registration in respect of the 13 additional bedrooms and ancillary facilities being granted in the foreseeable future. The

facts of the matter being that the additional accommodation was built in compliance with all relevant planning permissions and other statutory consents to standards and specifications sufficient to meet current HIQA regulations and requirements. The fact that registration was granted on the 26th March, 2010 supported the argument that the hypothetical tenant at the relevant date would take the view that registration would be forthcoming in the foreseeable future and would formulate his/her opinion of rental value accordingly. The fact that the planning permission was sought by a person experienced in the nursing home industry would make it unthinkable that any proposed extension would not, on completion, be granted registration, since failure to do so could place the future use of the entire premises as a nursing home in jeopardy.

29. Having considered carefully the submissions received on behalf of the appellant and the respondent and having regard to all the authorities and legal precedents referred to therein, the Tribunal finds in favour of the respondent. In the circumstances, therefore, the property concerned will be valued as a 70 bed nursing home. In so doing, the Tribunal will take into account the effect that the additional bedrooms may have on anticipated occupancy rates, operating expenses and gross income.
30. Mr. Kenneally, in arriving at his estimate of net annual value, assumed an occupancy rate of 90% as a 57 bed nursing home. Mr. Hicks assumed an occupancy rate of 95%, which figure he said was supported by information contained in reports following inspections carried out by HIQA personnel in November 07, May 08, November 08, and March 09, when the premises provided accommodation for 57 residents. Having regard to this evidence, the Tribunal proposes to adopt a notional occupancy rate of 92% for valuation purposes as a 70 bed nursing home.
31. Mr. Kenneally, in his valuation, used a weekly charge of €720 per week based on information given to him by the appellant. Mr. Hicks used a figure of €750 per week based on correspondence received from the appellant, to the effect that weekly rates in 2005 ranged from €700 to €800 per week. Having regard to the above, the Tribunal proposes to adopt a weekly rate of €735 for valuation purposes.
32. The Tribunal was provided with extracts from the accounts prepared by Doody Crowley Accountants for the years ending 31st August, 2007 and 2008. The Tribunal proposes to

accept the figures contained therein under the headings of costs of sales and expenses and to make what it considers to be appropriate adjustments to reflect the time differences and the fact that the property being valued is a 70 bed nursing home, as against a 57 bed premises when accounts were prepared. The Tribunal will also make appropriate allowances in accordance with the guidelines in respect of rent, rates and repairs, insurance, depreciation, etc. Allowance will be made for the roles played by the directors in the affairs of the business which would not be contained in the Tenant's Share.

33. Finally, the Tribunal would like to express its gratitude to Counsel for the quality and depth of their submissions and the extensive range of authorities introduced and argued before us. The Tribunal would also like to compliment all the expert witnesses for the manner in which they presented their evidence.

Determination

Having regard to the findings and conclusions above, the Tribunal determines the net annual value of the property concerned, as at the relevant valuation date, in accordance with Section 48 of the Valuation Act, 2001, using the Receipts and Expenditure method of valuation, as follows:

Gross turnover		€2,462,000
Estimated as per conclusion no. 31		
Cost of Sales (estimated)		
Allowable in full	€1,459,304	
Administrative costs (estimated)		
Portion allowable under R & E		
Guidance Notes	<u>€65,980</u>	
	€1,825,284	<u>€1,825,284</u>
Divisible Balance		€36,716
Allow tenant's share @ 45%		<u>€286,522</u>
Divisible Balance		€350,194
Allow for rates @ 15c in the €		<u>x .87</u>
		€304,668
Net Annual Value, Say		€305,000

And the Tribunal so determines.