Appeal No. VA14/1/002

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Randalib Limited

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property No. 853226, Office at Dollard House, 2-5 Wellington Quay, County Borough of Dublin.

B E F O R E

Sasha Gayer - Senior Counsel	**Chairperson**
Stephen J. Byrne - BL	**Deputy Chairperson**
Patricia O'Connor - Solicitor	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 31ST DAY OF JULY, 2014

By Notice of Appeal received on the 6th day of February, 2014, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €620 on the above described relevant property.

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

"Premises of the occupier are exempt from rates under the Valuation Act (2001)"

"Occupier is exempt from rates under Valuation Act"

"The part of the property in question is occupied by an educational institution (a school) and is used exclusively for the provision of educational services. It is run otherwise than for private profit. The educational services provided in the school are made available to the public, both with and without charge."

"The property therefore is exempt from rates by reason of the fact it comes within the provisions of Schedule 4, paragraph 10(a)(i)(b) under Section 15 of the Valuation Act 2001, as such it is not rateable."

The appeal proceeded by way of an oral hearing which took place at the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2 on the 28th day of April 2014.

The Appellant was represented by Mr Kieran Kelly, Solicitor at Fanning and Kelly Solicitors, 2 Hatch Lane, Hatch Street, Dublin 2. Mr Cian Crossen, a director of the Appellant company, was in attendance and gave evidence at the hearing.

The Respondent was represented by David Dodd BL, instructed by Michael Collins of the Chief State Solicitor's Office. Mr Joseph Turley, a valuer at the Valuation Office, was in attendance and gave evidence at the hearing on behalf of the Respondent.

The representatives adopted their respective précis as being their evidence in chief.

Property

Dollard House, First Floor, Second Floor (front), Third Floor (front),
2-5 Wellington Quay, Dublin 2.

Valuation history

29th August 2013

Notice of Decision. No material change of circumstances. Rateable Valuation (RV) - €620.

7th October 2013

Appeal is submitted to the Commissioner of Valuation.

10th January 2014

First Appeal concluded and Notice of Decision to disallow Appeal issued. RV - €620.

The decision has now been appealed to the Valuation Tribunal.

The Issue for Determination

By operation of Section 15(2) of the Valuation Act, 2001 (hereinafter referred to as "the Act"), relevant property referred to in Schedule 4 "*shall not be rateable.*" The issue is whether the Appellant comes within the provisions of Paragraph 10 of Schedule 4 of the Act.

The Appellant's Case

The Appellant claims to come within the provisions of Part 10 of Schedule 4. Simply put, the Appellant claims that it occupies the building as a school and/or college. In its use of the premises as a school the Appellant claims to provide educational services otherwise than for private profit.

The Appellant is a limited liability company. The Certificate of Incorporation evidences incorporation of the company on the 30th March 2011. The Appellant places particular emphasis on provisions as contained in the Memorandum of Association which said provisions (according to the Appellant) on any reasonable or proper construction, preclude the Appellant from "*making a profit*" from the provision by it of educational services.

It is worth setting out those provisions in detail. Clause 2 of the Memorandum of Association provides as follows:

> "*2. The objects for which the Company is established are:*
>
> > *(A) To carry on the business, on a not-for-profit basis, as a school, providing all types of educational services, tuition, learning and associated services and resources, providing all types of educational resources, facilities, materials, and all other related activities.*"

Further, the Memorandum of Association at Clause 5 thereof dealing with winding up provides as follows:

> "*5. If upon the winding up or dissolution of the company there remains after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the Company but shall*

> *be given or transferred to some other charitable institution or institutions having main objects similar to the main object of the Company and which shall prohibit the distribution of its or their income and property among its or their members to an extent at least as great as imposed on the company under or by virtue of Clause 6 hereof, such institution or institutions to be determined by the members of the Company at or before the time of dissolution, and if and so far as effect cannot be given to such provision, then to some not-for-profit object.*"

The evidence establishes that the above mentioned provisions of the Memorandum of Association were effected by amendment of the Memorandum of Association by Special Resolution passed by the company.

The précis of evidence makes reference to the Special Resolution of the company having been passed on the 1st December 2011. The Memorandum of Association recites amendment by Special Resolution one year later, on the 1st December 2012. A copy of the Notice of Resolution as filed with the Companies Registration Office recites the Special Resolution as being the 1st December 2011. In addition, it evidences the signature of Mr Cian Crossen of the 7th March 2012 which is plainly consistent with a Special Resolution having been passed on the date as evidenced in the précis.

No issue has been taken on the apparent inconsistency in the evidence as to the date on which the Special Resolution was passed. The inconsistency such as it is, is more apparent than real. For the avoidance of doubt, the Tribunal is in the circumstances satisfied on the evidence that the company effected a material change in its Memorandum of Association by Special Resolution passed by the company on the 1st December 2011.

As is apparent from consideration of Clause 5, it makes provisions for the winding up of the company. In summary, Clause 5 provides that the property, on dissolution, cannot be paid to or distributed among the members of the company. Such "property" must be given to or transferred to "some other charitable institution or institutions having main objects similar to the main object of the company." Mr Kelly, on behalf of the Appellant, accepted that the provisions of the Articles of Association to wind up are materially different from and inconsistent with Clause 5 in particular. More specifically

Articles 26 and 27 of the Articles of Association expressly contemplate and provide for a division and/or distribution of "assets" on wind up "*among the members in proportion to the number of shares held by them respectively.*"

In addition to the above mentioned clauses as contained in the Memorandum of Association of the company, the Appellant relies on the sworn evidence of Mr Cian Crossen. Mr Crossen gave evidence of the fact that the property was occupied by the Appellant company and was used by the company for the provision by the company of educational services, namely that of a language school. There was supporting documentary evidence by way of a formal Certificate issued by the Accreditation and Coordination of English Language Services. This Certificate is dated 2014. It refers on the face of it to the address of the property at issue. The Certificate issues to "Dublin School of English." The evidence establishes that the Appellant company trades as the Dublin School of English.

Whilst there may and at the outset have been an issue as to whether the property was used "exclusively" for the provision of "educational services", that is to say as a language school, Mr Crossen's evidence appears to have resolved this issue to the satisfaction of the Respondent and the Respondent's legal advisers.

Mr Crossen made it clear in his evidence that whilst the Appellant made arrangements for students to obtain accommodation, the company did not provide student accommodation directly and, more particularly, did not use the property or any part or portion thereof for the purpose of providing students with accommodation.

Mr Crossen further gave evidence to the effect that the "language school" was accredited by Quality & Qualifications Ireland. He further gave evidence that the company provided classes for students all year round. The property is laid out for classes. The teachers are university graduates with the requirement that they attain a minimum standard of education.

Mr Crossen gave evidence of the fact that Clauses 2(A) and 5 and 6 of the Memorandum of Association of the company were effected by amendment by Special Resolution and

as stated the evidence establishes that this Special Resolution was passed on the 1st December 2011 and filed in the Companies Office on the 7th March 2012.

Finally, Mr Crossen gave evidence of the fact that no dividend has been paid to shareholders and no bonus has been paid to shareholders.

Mr Kelly, in response to submissions as made by the Respondent, argues as follows:

(a) Clause 2(A) is the main objects clause of the company.

(b) Clauses 2(B) to (Y) are mere powers. Properly construed, they are not objects and cannot be relied upon when construing and/or determining the "objects of the company."

(c) Insofar as there may be any material inconsistency, as between what is contained in the Memorandum of Association and Articles of Association, the provisions of the Memorandum and as a matter of legal principle prevail.

<u>The Respondent's Case</u>

The Respondent places particular emphasis on the following:

(a) The provisions of the Memorandum of Association separate and apart from Clause 2(A) and in particular Clauses 2(B) to (Y).

 The Respondent argues that these are:

 (i) Objects of the company.

 (ii) It follows that the company is constitutionally permitted to pursue these objects.

 (iii) In pursuing such objects, there is nothing in the wording of the individual Clauses which expressly precludes the company from pursuing such objects "for profit."

(b) Further the Memorandum itself expressly provides that each of the sub-clauses is to be construed "*independent of the other sub-clause.*" Further *"none of the objects*

mentioned in any of the sub-clauses shall be deemed to be merely subsidiary to the objects mentioned in any other sub-clause."

The Respondent argues that on plain construction, the sub-clauses 2(B) to (Y) or a significant number of them make provision for objects which the company is permitted to pursue for "profit."

(c) There are provisions in the Articles of Association which plainly evidence a capacity on the part of the company to distribute assets to shareholders. This is materially at odds with an entity which claims to be providing services "otherwise than for profit."

(d) It has been submitted that the Appellant is in effect seeking to avail of an exemption from a liability which it would otherwise bear. This being so, it has been argued that such ambiguities and/or inconsistencies as there are in the Appellant's case and more particularly in the evidence put forward by the Appellant in support of its case, must and as a matter of law, be *construed "against the Appellant.*"

(e) In advancing this particular line of argument, the Respondent, through Mr Dodd, relies in particular on the decision of McMenamin J. in the case of *Nangles Nurseries v. Commissioner of Valuation* which is an unreported decision of Mr Justice McMenamin delivered on the 14th March 2008, a copy of which has been furnished to the Tribunal.

In particular, Mr Justice McMenamin at paragraph 39 on page 14 of his Judgment sets out the principles which are to be applied when interpreting the provisions of the Act. These principles are as follows:

"*I would therefore summarise the principles which are applicable in an interpretation of this Statute in the light of these authorities as follows:*

(1) while the Act of 2001 is not to be seen in precisely the same light as a penal or taxation statute, the same principles are applicable;
(2) the Act is to be strictly interpreted;

(3) impositions are to be construed strictly in favour of the rate payer;

(4) exemptions or relieving provisions are to be interpreted strictly against the rate payer;

(5) ambiguities, <u>if they are to be found in an exemption</u> are to be interpreted against the rate payer; [emphasis added]

(6) if however there is a new *imposition of liability looseness or ambiguity is to be interpreted strictly to prevent the imposition of liability from being created unfairly by the use of oblique or slack language;*

(7) in the case of ambiguity the court must have resort to the strict and literal interpretation of the Act, to the statutory pattern of the Act, and by reference to other provisions of the statute or other statutes expressed to be considered with it."

(f) Having in submission and through cross-examination of Mr Crossen highlighted ambiguities and/or inconsistencies as between what is contained in Clause 2(A) and the remaining "objects" clauses and as between Clause 5 of the Memorandum of Association and Articles 26 and 27 of the Articles of Association, Mr Dodd draws particular support from Mr Justice McMenamin's invocation that:

"*(4) exemptions or relieving provisions are to be interpreted strictly against the rate payer;*

(5) ambiguities, if they are to be found in an exemption are to be interpreted against the rate payer…"

<u>Determination</u>

There are legal issues which ought in the Tribunal's view to be considered and addressed. It is best that they be considered and addressed at the outset. These legal issues are as follows:

(a) The Respondent's assertion that ambiguities and/or inconsistencies must and as a matter of law, be construed as against the ratepayer. As stated, the Respondent relies on the decision of McMenamin J. in *Nangles Nurseries v. Commissioner of Valuation* in support of this assertion.

(b) The Appellant**’s** assertion**s**. These have already been set out above. For the avoidance of doubt and/or confusion, they are as follows:

(i) Clause 2(A) is the main objects clause of the company.

(ii) Clauses 2(B) to (Y) are mere powers. They are not objects and cannot be relied upon when construing and/or determining the “objects” of the company.

(iii) Whilst there may be material inconsistency as between what is contained in the Memorandum of Association and the Articles of Association, the provisions of the Memorandum and as a matter of legal principle prevail.

Nangles Nurseries v. Commissioner of Valuation

It is not necessary for present purposes to analyse and consider in detail the decision of the High Court in *Nangles Nurseries v. Commissioner of Valuation*. That said, it has been referred to by Counsel for the Respondent. It has been relied upon by him as supporting the Respondent’s contention, simply put, that ambiguities and/or inconsistencies in presentation by the Appellant of its case and, more particularly, ambiguities and/or inconsistencies in the company documentation must be construed against the Appellant.

It is clear from the Judgment of Mr Justice McMenamin that he was being asked to interpret provisions of the 2001 Act, which said provisions secured for a potential ratepayer an “exemption” on liability for rates. The Tribunal had determined on the facts before it that the lands excluding the buildings were lands “developed for horticulture” and as such came within the “exemption” as provided for under Schedule 4 of the Act and more particularly Paragraph 2 of Schedule 4. The Commissioner on appeal favoured an interpretation of the relevant provision which the Commissioner argued gave rise to an ambiguity. On the Commissioner’s argument the provision concerned created an “exemption” in favour of the ratepayer. In view of the ambiguity contended for, the law, according to the Commissioner, requires that such ambiguity be construed against the ratepayer.

Mr Justice McMenamin accepted and as a matter of principle:

> *"(4) exemptions or relieving provisions are to be interpreted strictly against the rate payer;*
>
> *(5) ambiguities, if they are to be found in an exemption are to be interpreted against the rate payer…*"

It is clear from the judgment that Mr Justice McMenamin did not agree with the interpretation of the provision as put forward by the Commissioner ("*one collective relieving provision.*") It is clear from the judgment that in Mr Justice McMenamin's view, the interpretation advanced by the Commissioner would give rise to "a paradox" and not "ambiguity". The interpretation as advanced by the Commissioner could potentially give rise to the imposition of "a new liability." In this event, Mr Justice McMenamin, applying the principles, which he deemed to be applicable and as set out at page 14, was required to construe the provisions strictly in favour of the ratepayer.

There was, in Mr Justice McMenamin's view, an alternative interpretation ("*exemption with an exception*"). Mr Justice McMenamin considered himself entitled to adopt the opposing interpretation. He did so in finding that the Tribunal had not erred in its determination that the premises at issue were a nursery and as such not liable to rates and exempt under Section 15(2) of the Act. (See page 23 of the Judgment).

It is abundantly clear that in *Nangles Nurseries v. Commissioner of Valuation,* Mr Justice McMenamin was concerned with argument about ambiguities (perceived or real) in a statutory provision.

It follows and is in any event clear from the judgment of Mr Justice McMenamin that the principles of interpretation as laid down are principles to be applied when considering and/or interpreting a statutory provision and, more particularly, a statutory provision which (a) imposes liability, (b) seeks to make provision for exemption from liability.

It would be wrong and potentially unfair to this Appellant to read into the judgment of Mr Justice McMenamin an intention that those principles have a wider application and more particularly application to ambiguities and/or inconsistencies which the

Respondent suggests are manifest in consideration of documentary evidence as presented by the Appellant in support of its case.

It is in any event unnecessary. As has been stated, the Respondent's criticism is in substance an attack on the documentary evidence as presented. The Respondent has made that attack forcefully through cross-examination of Mr Crossen and through submission.

Argument concerning ambiguity and/or inconsistency in documentary evidence, if well-founded, goes to the weight attached to same and goes ultimately to a determination of whether that evidence can or cannot be relied upon as tending to support the case as presented by the Appellant.

Construing company documents

Mr Kelly's arguments have been set out above and do not need to be repeated. He supports those arguments by reference to extracts from Keane's Company Law, copies of which he submitted to the Tribunal. Mr Kelly states in effect that the principles of company law as advanced and as contained in the extracts from Keane's Company Law as relied upon are well established.

It is clear from the submissions as made that there are two potential "sources" of anomaly and/or inconsistency contended for:

(a) There is "*anomaly*" and/or "*inconsistency*" as between the material provisions as contained in the Memorandum of Association (primarily Clauses 5 and 6 containing the provisions on wind up) and material provisions as contained in the Articles of Association (primarily Clauses 26 and 27 which again deal with the position on wind up). The said provisions are material in that they bear directly on a key issue, that is to say the issue of whether or not the company is and in truth constitutionally equipped to pursue its "activity" as a college providing educational services "for profit" as conversely "otherwise than for profit."

    On any reasonable interpretation of the respective provisions, there is material inconsistency. Simply put, the relevant provisions of the Memorandum of

Association preclude the company's members from acquiring any profit that there may be in the event that the company is wound up. In other words and again simply put, the relevant provision of the Memorandum of Association, that is to say Clause 5 and Clause 6, precludes the company, that is to say the shareholders, from deriving profit from the pursuit by the company of its activity as a college in the event that the company has to be wound up. The relevant provisions of the Articles of Association, simply put, permit the distribution of assets on a wind up to the shareholders.

Mr Kelly's submission on this discrete point is correct. It appears to be a well established principle of company law that in the event of inconsistencies and/or anomalies as between the Memorandum of Association and Articles of Association, the provisions of the Memorandum are to prevail. It is perhaps useful to quote from Courtney's Law of Private Companies, 2nd Edition at page 87 wherein it is stated as follows:

"*The provisions in a company's Memorandum and Articles of Association are of fundamental importance. Although the Memorandum of Association is the dominant document and its provisions will prevail in any conflict with the Articles, the particular Articles of Association adopted by a company are of great significance in many different company law contexts*."

Further and at page 130, in this context Mr Courtney states as follows:

"*The accepted rule is that the Memorandum of Association is the dominant constitutional document which will prevail in a conflict between it and the Articles of Association. So Carroll J. said in Roper v. Ward*:

'*In construing the Articles I am guided by the principles that they are subordinate to and controlled by the Memorandum of Association which is the dominant document. While the Articles cannot alter or control the Memorandum or be used to expend the objects of the company, they can be used to explain it generally or to explain an ambiguity in its terms.*'

"*In construing a clause in a company's Memorandum of Association, the regulations in its Articles can only have the role of resolving any anomalies.*'"

Moreover, Palmer's Company Law in the 1st Edition reinforces this point and as follows at page 53:

"*If, e.g. the Articles purport to confer on the company empowered a power to buy its own shares or to pay dividends out of capital or to extend the objects by special resolution or to issue shares at a discount (otherwise than in the manner authorised by the Acts) or prohibit the members from exercising a statutory right of applying for a winding up order, or provide for the application of the profits in a manner which is inconsistent with some provision in the Memorandum of Association, or purports to deprive shareholders who dissent from a scheme of reconstruction under Section 287 of their statutory right to be paid out in cash, they are to that extent invalid and ineffectual.*" [Emphasis added]

(b) It has been suggested that there are anomalies and/or inconsistencies on any reasonable construction of the provisions contained in the Memorandum of Association itself. Put simply, Clause 2(A) expressly precludes the company from making a profit from the provision by it of its services as a language school. The remaining objects 2(B) to (Y) insofar as they empower the company to pursue activity, do not expressly preclude the company from doing so for profit. In addition to this, the company by its own constitution (the Memorandum of Association) refers to the remaining "activities" as provided for at Clauses 2(B) to (Y) as "objects" and goes on to expressly declare that "*each sub-clause of this Clause shall be construed independently of the other sub-clauses hereof, and that none of the objects mentioned in any sub-clause shall be deemed to be merely subsidiary to the objects mentioned in any other sub-clause*."

Mr Kelly makes two distinct yet related arguments. Firstly, he makes the point that Clause 2(A) is the main objects clause. Secondly, all of the remaining objects are in substance and on any reasonable construction "powers", notwithstanding the express reference to "objects" and moreover express provisions that such objects may be pursued independently of all other "objects."

There is no doubt that some of the so-called "objects" when properly and/or reasonably construed, are in substance "powers." One can, by way of example, consider the "object" as provided for at Clause 2(K) which permits the company to:

> "*...borrow or raise money in such manner as the Company shall think fit, and in particular by the issue of debentures or debenture stock (perpetual or otherwise), and to secure the repayment of any money borrowed, raised or owing by mortgage, charge or lien upon the whole or any part of the Company's property or assets (whether present or future), including its uncalled capital, and also by a similar mortgage, charge or lien to secure and guarantee the performance by the company of any obligation or liability it may undertake.*"

Equally, there is no doubt that some of the so-called "objects" when properly and/or reasonably construed are objects which the company has allowed itself to pursue. Consider in this vein and by way of example the provisions of Clause 2(B) of the Memorandum of Association which allows the company:

> "*To undertake and carry on and execute all kinds of financial, commercial, trading, manufacturing and other operations, and to carry on any other business which may seem to be capable of being conveniently carried on in connection with any of these objects, or calculated directly or indirectly to enhance the value of or facilitate the realisation of or render profitable, any of the Company's property or rights.*"

This, on any reasonable construction, is an object which the company is in principle entitled to pursue.

The difficulty which the company has created for itself is that by insertion of the typical independent objects clause (see Courtney on the Law of Private Companies, 2nd Edition, page 345), the company by its own hand has prevented itself from availing of the main objects rule of construction as follows:

"*A special rule of construction is applied where the objects of a company are expressed in a series of paragraphs, and one paragraph (commonly the first) appears to embody the main or dominant objects of the company. In such case, all the other paragraphs are to be treated as merely ancillary to the main object and is limited and controlled thereby.*

"The main objects rule was expressed by Lindley L.J. in Re German Date Coffee Company as follows:

'In construing ………………… any …………………… memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words ……….. must be taken in connection with what are shown by the context to be the dominant or main objects of the company. It will not do, under general words, to turn a company from manufacturing one thing into a company for importing something else, however general the words are.'"

(As per Palmer's Company Law, 21st Edition at pages 84 to 85).

Immediately thereafter the author goes on to consider the inter relationship between the independent objects clause and the main objects rule of construction. The author does so as follows:

"*Sometimes the memorandum declares the intention to be that the objects specified in each paragraph of the clause shall, except where otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company. These words are obviously intended to exclude the application of the 'main objects' rule of construction and the Court is bound to give effect to the intention thus indicated.*"
[Emphasis added]

(As per Palmer's Company Law, 21st Edition at page 85).

There is a material anomaly/inconsistency inherent in the Memorandum of Association. This anomaly and/or inconsistency cannot be adequately or satisfactorily explained away by argument to the effect that the "objects" at Clauses 2(B) to (Y) are in substance "powers" subsidiary to and ancillary to the "main object" as provided for at Clause 2(A).

This argument is good for some but not all of the so-called object clauses. Thus, when considering the documentary evidence as adduced and more particularly when considering the Memorandum of Association, the Tribunal is constrained to conclude that the company by its own constitution allows itself to pursue objects other than what has been put forward as the main object (Clause 2(A)) and further the company in pursuit of such objects, has not expressly precluded the pursuit of same for the purpose of making a profit.

If the Tribunal were constrained to determine one of the issues which it has to determine, that is to say whether the company conducts its affairs for the purpose of making a profit, having regard exclusively to the documentation as evidenced, the Appellant company is in a somewhat precarious position. Determination of this issue, having regard solely to the documentation as adduced in evidence, appears to fly in the face of the general requirement as espoused in the case of *Roper v. Ward*, that a Memorandum of Association be construed so as to give it "reasonable business efficacy."

It is unquestionably the case that the Appellant company, by its own constitution, is permitted, inter alia, to pursue the object as provided for at Clause 2(B) and by way of illustration. Moreover, it is unquestionably the case that the Appellant company is not by its own constitution precluded from making a profit, should it pursue such object.

To tie the company to this "business model" and to conclude that the company is conducting its affairs for the purpose of making a profit would, in the Tribunal's view, attach too much weight to the patent anomalies and/or inconsistencies inherent in the Memorandum and to attach insufficient weight to the other evidence and in particular the unchallenged oral evidence of Mr Crossen.

Accordingly, the Tribunal finds that there are anomalies and inconsistencies inherent in the Memorandum of Association. These anomalies and inconsistencies are not explained away by application of the arguments as advanced by Mr Kelly on behalf of the Appellant company. The company, by its own hand, has prevented itself from relying upon the main objects rule of construction. The anomalies and inconsistencies evidence a potential on the part of the company to conduct its affairs for profit. They do not however move beyond that.

Such evidential problem and/or deficit caused by the anomalies and/or inconsistencies are not and of themselves sufficient to fatally undermine in particular the direct oral evidence from Mr Crossen in his capacity as a director of the Appellant company. As stated, this evidence is unchallenged. It unequivocally evidences the pursuit by the company of a single core business, that is to say the provision by the company of educational services in the guise of a language school. Further, the direct evidence of Mr Crossen unequivocally evidences the fact that members of the company have not to date taken any profit out of the company.

On balance and notwithstanding the patent anomalies and/or inconsistencies in the Memorandum of Association, the Tribunal determines as a fact that the Appellant company, as presently constituted, does not conduct its affairs for the purpose of making a private profit.

For the purpose of clarity, whilst there does not appear to have been any issue on this and having regard to the evidence as adduced, the Tribunal further finds as follows:

(a) The Appellant company occupies the premises, particulars of which have been recited at the outset, as a school and/or college.

(b) The affairs of the Appellant company, that is to say the provision by the Appellant company of educational services from the said premises, are not conducted for the purpose of making a private profit within the meaning of Paragraph 10(a)(1) of Schedule 4 of the 2001 Act.

It is clear from the provisions of Paragraph 10(a)(1) of Schedule 4 that the Appellant, in order to avail of the exemption "*as provided for under Section 15(2) of the Act*" must satisfy the Tribunal, *inter alia*, that "*it*" (the Appellant) *is not established for the purpose of making a profit.*"

The Appellant is a private company with limited liability. It is a relatively new company. It was incorporated on the 30th March 2011. It appears reasonable to infer from this and the Tribunal so finds, that the company was established on the 30th March 2011. There is nothing in the evidence as presented to suggest otherwise and/or to evidence that the company was established at a date earlier than or later than the 30th March 2011.

> "*The issue of the Certificate of Incorporation by the Registrar of Companies is an act of delegated legislation. From the date mentioned in the Certificate as the date of incorporation the company comes into existence as a legal person/body corporate (s. 13(2)), a status which it continues to enjoy until it is dissolved.*"
>
> (As per Palmer's Company Law, 21st Edition at page 119).
>
> "*A company registered under the Companies Acts, 1963 to 2001 is a body corporate as and from the date mentioned in the Certificate of Incorporation.*"
>
> (As per Courtney's The Law of Private Companies, 2nd Edition at page 161).

Was the Appellant company established for the purpose of making a profit? Such evidence as has been adduced with the intention of proving this requirement is frankly tenuous. The Tribunal has been furnished with a copy of the Memorandum of Association. It is clear from same that the Memorandum has been amended by Special Resolution. As stated, the Special Resolution was passed by the company on the 1st December 2011, some eight months or thereabouts after the company had been incorporated. It is clear that the Special Resolution was passed with the primary, if not sole intention of precluding the company from making a profit from the pursuit by the company of its activities as a language school.

The fact that the company deemed it necessary to amend its Memorandum of Association in the manner as evidenced invites inquiry into consideration of the constitutional position of the company prior to the date on which the Special Resolution was passed. Moreover and more particularly it invites inquiry into the constitutional position of the company as of the date of incorporation.

The Appellant has not sought to adduce any evidence which might directly assist the Tribunal in coming to a determination of this issue, that is to say whether the company was "not established for the purpose of making a profit." The Tribunal has not been furnished with a copy of the Memorandum of Association which was in place prior to the amendment by the Special Resolution. Same, if furnished, could well have assisted the Tribunal in coming to a determination of this issue.

Mr Crossen, when led in evidence, was not asked to deal with this particular issue. He was not, for instance, asked to explain why the company, incorporated in March 2011, deemed it necessary and/or advisable to materially amend its Memorandum of Association, some eight months post incorporation. Why was this step taken at this time? Why was it deemed necessary?

In the absence of evidence which might directly assist the Tribunal on this issue, it is difficult to escape the conclusion, which said conclusion is supported by such evidence as has been adduced, that the company as of the date of incorporation, permitted itself to pursue its activity as a language school for the purpose of making a profit. Why else would the company seek to amend its Memorandum of Association by inclusion of provisions which permit the carrying out of its business on what might be termed "a not for profit basis" and which expressly provided for "not for profit" type distribution of assets on the company being wound up?

In conclusion, it is for the Appellant to adduce evidence to satisfy the Tribunal, *inter alia*, that the company Randalib Limited, was not established for the purpose of making a profit. There is no evidence upon which the Tribunal can safely or properly or reasonably conclude that the Appellant was "not established for the purpose of making a profit". In point of fact, the evidence as adduced infers that the company was in fact

established for the purpose of making a profit and subsequently decided to “convert” itself into a non-profit making undertaking.

For the sake of completeness, Schedule 4 Clause 10(b) provides that the Appellant satisfies the Tribunal that the educational services concerned are made available by the Appellant company to the general public.

There does not appear to have been any issue on this. Mr Crossen dealt with this by way of direct evidence when questioned on same by Mr Kelly. Mr Crossen’s evidence on this point was clear and unequivocal. He was not challenged. The Appellant satisfies this particular statutory requirement and/or condition.

For reasons as set out herein, the Appellant company has failed to adduce evidence touching on an essential condition or requirement. In order to avail of the “exemption” from liability as provided for under Section 15(2) of the Act, the Appellant must, *inter alia*, adduce evidence of the fact that it (the company) is not established for the purpose of making a profit. For reasons as set out herein, the Appellant company has not adduced evidence on this essential requirement. Accordingly, the appeal is not successful.

The decision of the Commissioner of Valuation dated the 10th January 2014, determining a Rateable Valuation of the premises in the sum of €620, is accordingly affirmed.