Appeal No. VA14/2/008

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Bree Community Development Group Ltd **APPELLANT**

And

Commissioner of Valuation **RESPONDENT**

RE: Property No. 2209123, Creche at Lot No. 2H/a, Knocknagross, Ballyhoge, Enniscorthy, County Wexford.

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 22ND DAY OF DECEMBER 2014

Sasha Gayer – Senior Counsel **Chairperson**

Rory Hanniffy – Barrister **Member**

Carol O'Farrell – Barrister **Member**

By Notice of Appeal received on the 26th day of June, 2014, the Appellant appealed against the determination of the Commissioner of Valuation that no material change of circumstances had occurred in relation to the property the subject of the appeal.

The grounds of appeal are set out in an attachment accompanying the Notice of Appeal, a copy of both of which is contained at Appendix 1.

The Appeal commenced by way of an oral hearing in the offices of the Valuation Tribunal, 3rd Floor, Holbrook House, Holles Street, Dublin 2 on the 13th October 2014. Mr Philip Sheahan SC appeared with Ms Aoife Stack BL on behalf of the Appellant instructed by Niamh Moriarty & Co. Solicitors and Mr Gerard Meehan BL instructed by the Chief State Solicitor appeared for the Respondent.

The Issues

There are essentially two issues on this appeal:

(i) whether or not the appellant is entitled to exemption from the payment of rates in accordance with the provisions of the Valuation Act 2001, Schedule 4 paragraph 10 (and (b)

(ii) Whether or not the Appellant is a charitable organisation within the meaning of section 3(1)(a), from (j) to (ix) inclusive and as inserted by section 3(1) (b) (i) and (ii) of the Valuation Act 2001 and entitled to exemption from the payment of rates in accordance with the provisions of the Valuation Act 2001, Schedule 4 paragraph 16.

The Property

The property is a purpose built single storey childcare facility occupied by Brí Beag Childcare Centre ('Brí Beag'). Brí Beag is operated by the Appellant, a company limited by guarantee with no share capital. On the 30th March 2012 the Appellant was accorded charitable status by the Revenue Commissioners following which the Appellant amended its Memorandum and Articles of Association by Special Resolution dated the 16th July 2012. The main object for which the Appellant company has been established is "*to advance education and benefit the community of Bree, County Wexford through the operation and management of a community, non profit childcare centre offering quality and affordable childcare to the children of Bree and surrounding areas, with particular emphasis on ensuring that disadvantaged children get access to childcare and early childhood education, and to promote and operate a community development programme which will act as a focus and catalyst for community development for the benefit of the residents of Bree and surrounding areas with a view to promoting their economic, social and cultural welfare*."

Valuation History

The Property was inspected and assessed for rates on the 1st July 2011 and a Final Valuation Certificate issued valuing the Property at €70.00. In August 2012 Bree Community Development Group Limited requested a revision of the rateable valuation. The Property was inspected by the Revision Officer on the 5th December 2012 and following inspection, it was decided that the Property was rateable as there had been no material change in circumstances. On the 7th January 2014 a Notice of Decision was issued notifying the Revision Officer's decision that no material change in circumstances had occurred in relation to the Property. In February 2014 an appeal was lodged to the Commissioner of Valuation. On the 30th May 2014 a Notice of Decision to Disallow Appeal was issued on the grounds that no material change in circumstance had occurred in respect of the Property.

The Evidence

In accordance with practice, prior to the commencement of the hearing, the parties exchanged their respective précis of evidence and submitted same to this Tribunal. Ms Sinéad Parnell on behalf of the Appellant and Ms Fidelma Malone, Valuer on behalf of the Respondent, having taken the oath, adopted their respective précis as being and as constituting their evidence in chief. Ms Parnell's evidence was supplemented by additional oral evidence obtained directly and upon cross-examination. The Tribunal also had the benefit of detailed written and oral submissions submitted by and on behalf of the Appellant and the Respondent respectively.

Ms Parnell stated that she resides in Bree, Enniscorthy, County Wexford and is a primary school teacher recently appointed Principal of Donard National School. Ms Parnell is a director of the Appellant and she confirmed her involvement in the establishment of Brí Beag since May 2003. The Appellant was incorporated in 2000 to source funding. She explained that Appellant's aim was to set up a pre-school to cater for the children of Bree Parish which had a population of approximately 3,000 people but no pre-school. Bree Parish has three primary schools the largest of which is St. Joseph's. The other two schools located in Galbally and Ballyhogue are small rural two teacher schools both of which receive additional support and funding through participation in DEIS, the Action Plan for Educational Inclusion launched in 2005 by the Department of Education and Skills to address educational disadvantage.

Ms Parnell referred to the 2011 Census figures in respect of the Bree Electoral Division which indicated that Bree and Ballyhogue have a total population of 2602, with a combined unemployment rate amongst males of 23.9% and a combined unemployment rate of 15.7% amongst females. So, 39.6% of the 2602 population of the area is unemployed. She indicated that Brí Beag was established in order to provide much need services in a disadvantaged area to meet the needs of unemployed parents, lone parents and parents wishing to get back into employment.

Ms Parnell explained that the construction of the Property in 2009 did not involve any private investment but was wholly funded in February 2008 through the Pobal NCIP Programme 2006-2011 which provides capital investment for a range of services in the area of early education and childcare. Brí Beag was opened on the 1st March 2010 and the opening coincided with the Early Childhood Care and Education (ECCE) Scheme which provides a free year of early childhood care and education for children of pre-school age. Of the children presently attending Brí Beag, 20 are eligible for the ECCE scheme. Furthermore, Brí Beag participates in the Community Childcare Subvention (CCS) Programme which allows disadvantaged parents and parents in receipt of medical cards to avail of reduced rates and in the Childcare Employment and Training Support Scheme (CETS) under which parents who have applied for vocational training can qualify for subsidized childcare.

Brí Beag has two sources of income: based on last year's figures funding from Pobal accounted for 65.9% of its income and the remaining 30.5% was collected from fee paying parents. Aistear, the Early Childhood Curriculum Framework Programme, was introduced in Brí Beag in December 2012 and is exclusively followed. Ms Parnell explained the four themes that connect and overlap with each other to outline children's learning and development and says that the curriculum starts with six month old children. The Property comprises a reception area, and four main rooms: the Naoinra Room which caters for up to 20 preschool children; the Preschool Room which caters for up to 19 2½ to 3½ year olds; the Toddler Room which accommodates a maximum of 16 children aged 12 months to 30 months and the Baby Room which caters for six infants. All of these rooms open onto a south facing playground. Ms Parnell gave evidence of the activities that take place in each of the rooms. In addition, Brí Beag provides after school care for children of school going

age. There are a number of other rooms in the Property comprising kitchen, store, staff quarters, offices and bathroom. Brí Beag has eight members of staff. Ms Parnell stated that all children have equal access to the facilities at Brí Beag. Brí Beag is open from 8 a.m. to 6 p.m. to facilitate parents who have a normal working day and opens for 183 days just like a primary school.

Ms Parnell emphasised that the activities at Brí Beag constitute much more than childcare. The members of staff ensure that all of the children engage in learning and development activities. Ms Parnell also made it clear that the Appellant operates on a tight budget and any surplus in the accounts is used to pay the wages of the Brí Beag staff which accounts for approximately 80-85% of its income. The Appellant is run on a not for profit basis. On the winding up of the company any surplus must be distributed to another charitable organisation. Under cross-examination by Mr Meehan, Ms Parnell confirmed that prior to December 2012, the teachers at Brí Beag operated from a planned curriculum similar to Aistear though not as structured.

When asked about the sources of income, Ms Parnell confirmed that not all children attending Brí Beag are funded or subsidized through ECCE or CCS or CETS. It was acknowledged that in 2012 77.4% of the children attending Brí Beag were in receipt of funds under the ECCE, CCS and CETS schemes and in 2013 the percentage of children in receipt of such funds was 65.9%. Ms Parnell accepted that a number of parents are paying full fees and the Property is not used exclusively for charitable purposes.

On behalf of the Respondent, Mr Meehan indicated that he would not be adducing any oral evidence.

The Appellant's Submissions

On behalf of the Appellant, Mr Sheahan SC submitted that there was ample evidence to support a finding that the Property is a relevant property not rateable by virtue of paragraphs 10(a) and/or 10(b) of Schedule 4 of the Valuation Act, 2001. He submitted that nothing other than education takes place in the Property, that the Property is used otherwise than for private profit, that the expenses incurred by the Appellant in providing educational services are defrayed wholly or mainly out of moneys provided

by the Exchequer and that the educational services provided at the Property are available to the general public. He opened the relevant sections of the Appellant's Memorandum and Articles of Association in support of his argument.

Mr Sheahan stressed that no traditional childcare takes place in the Property, that the Aistear curriculum is applied and that the afterschool services are educational services. He contended that education as a concept is a moving concept and is not confined to traditional scholastic learning. He referred the Tribunal to *O'Donoghue v Minister for Health &* Ors [1996] 2 I.R. 20 and *Ryan v Attorney General [1965] IR 294* as the meaning of "education" when used in the context of Article 42 of the Constitution was considered in both of those cases. He referred to the conclusions of O'Hanlon J. in *O'Donoghue* which was a case concerned with the extent of the State's obligation to provide free primary education and, in particular, the adoption by O'Hanlon J. of the wider definition of education from the judgment of Ó Dálaigh C.J. in the *Ryan* case. Ó Dálaigh C.J., delivering the judgment of the Supreme Court in *Ryan* stated:

> *"(Counsel) contends that the provision of suitable food and drink for a child is physical education. In the court's view this is nurture, not education. Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.*

Mr Sheahan also submitted that the Property is a relevant property not rateable by virtue of paragraphs 16 of Schedule 4 of the Valuation Act, 2001 because the Appellant satisfies the definition of "charitable organisation" as set out in section 3(1) of the 2001 Act and the Property is occupied by the Appellant as a charitable organisation for charitable purposes otherwise than for profit. He submitted that the Appellant's charitable purposes come within three of the four categories of legal charities adopted by Lord MacNaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel [1891] A.C. 53* namely, the relief of poverty, the advancement of education and other purposes beneficial to the community.

Mr Sheahan also placed reliance on the decision of the Valuation Tribunal in **VA05/2/034 – Mellow Spring Childcare Development Centre Ltd**, judgment of 7th

November 2005 (‘*Mellow Spring’*) to support his contention that childcare services provided to persons experiencing financial hardship can qualify for exemption.

The Respondent’s Submissions

On behalf of the Respondent, Mr Meehan contends in the first instance that no material change of circumstances has occurred since the last rateable valuation was carried out in 2011. Mr Meehan then referred to the decision of the High Court in *Nangles Nurseries v. The Commissioner of Valuation [2008] IR HC 73* in which it was made clear that provisions providing exemption are to interpreted strictly against the rate payer.

Mr Meehan next submitted that the Property is not a school, college, university or college of technology or an “other educational institution” within the meaning of paragraph 10 of Schedule 4 applying the principle of statutory interpretation known as *noscitur a sociis* (“known by its companions”). He contends that the expression “other educational institution” should be given its ordinary and natural meaning as it is an expression that has widespread and unambiguous currency. He argues that the Appellant is not an educational institute of the same genus or class as a school college, university or institute of technology and, his alternative argument, is that the Property is not exclusively used for the provision of educational services. Mr Meehan placed reliance on the decision of the Valuation Tribunal in **VA14/1/010 – Léargas - The Exchange Bureau**, judgment of 12th September 2014 *(‘Leargas’)*.

Mr Meehan also submitted that the fact that the Appellant is a not for profit organisation and has been accorded charitable status does not automatically entitle the Appellant to exemption from rates.

He submitted that the main object in the Appellant’s Memorandum of Association does not constitute a charitable purpose and accordingly falls outside the requirements of section 3 of the 2001 Act. He invited the Tribunal to approach the issue of charitable purpose as it did in **VA05/3/072 – Coolock Development Council Ltd**, judgment of 14th February 2006.

He further submits that if the Appellant is found to be a charitable organisation within the meaning of section 3 of the 2001 Act, the Property could not be said to be "exclusively" used for charitable purpose within the meaning of paragraph 16(a) of the Schedule 4 because the Appellant has not demonstrated that the services provided by it are overwhelmingly for the benefit of the poor and disadvantaged. Mr Meehan referred to the decision of the Tribunal in *Mellow Spring* in which it was made clear that childcare of itself is not and cannot be a charitable purpose.

Findings

The Valuation Tribunal has considered the Appellant's and Respondent's précis of evidence, the oral evidence of Ms Parnell and the submissions of Mr Sheahan SC for the Appellant and Mr Meehan BL for the Commissioner.

The Appellant in the first instance seeks to bring itself within section 15, Schedule 4, paragraph 10 (a) and 10 (b) of the Valuation Act, 2001.

Paragraph 10 of Schedule 4 provides:

> *Any land, building or part of a building occupied by a school, college, university, institute of technology or any other educational institution and used exclusively by it for the provision of the educational services referred to subsequently in this paragraph and otherwise than for private profit, being a school, college, university, institute of technology or other educational institution as respects which the following conditions are complied with—*
>
> *(a) (i) it is not established and the affairs of it are not conducted for the purposes of making a private profit, or*
>
> *(iii) the expenses incurred by it in providing the educational services concerned are defrayed wholly or mainly out of moneys provided by the Exchequer,*
>
> *and*
>
> *(b) in either case it makes the educational services concerned available to the general public (whether with or without a charge being made therefor).*

In order to succeed on this ground of appeal, the Appellant must satisfy the Tribunal that it can bring itself within the alternative requirements of paragraphs 10 (a) (i) or (ii) and the requirement of paragraph 10 (b) of Schedule 4. Accordingly, if the Appellant's affairs are not conducted for the purpose of making a profit, it is irrelevant whether the expenses incurred by it in providing the educational services concerned were defrayed wholly or mainly out of money provided by the Exchequer provided the educational services are available to the general public.

The Tribunal is satisfied that

1. The Appellant is not established and its affairs are not conducted for the purpose of making a private profit.
2. The expenses incurred by the Appellant are defrayed mainly out of monies provided by the Exchequer.
3. The educational services concerned are available to the general public on a charge/fee basis.
4. The Appellant is not a school, college, university, institute of technology.

Only recently, the Valuation Tribunal dealt with a claim for exemption under paragraph 10 of Schedule 4 in **VA14/1/010 – Léargas - The Exchange Bureau**. In that case the Tribunal's decision was that the Léargas premises did not satisfy the criteria for exemption. The Tribunal took the view that the expression "*a school, college, university, institute of technology or any other educational institution"* was governed by the *eiusdem generis* rule of statutory interpretation. The whole basis of the *ejusdem generi*s rule is that the word "other" in paragraph 10 falls to be read as if it meant "similar". That being so, the Tribual has difficulty in accepting that the Property can be put on the same footing as a school, college, university or institute of technology or that the Property qualifies under *the ejusdem generis* rule for inclusion as an "other educational institution". The children attending Brí Beag are pre-school and after-school children. Accordingly, the Tribunal has come to the conclusion that the Property is not exempt from rating having regard to section 15, Schedule 4, paragraph 10.

Turning to the next ground of appeal, the Appellant contends that it is a charitable organisation within the meaning of section 3 (1) of the 2001 Act and uses the Property exclusively for charitable purposes otherwise than for private profit for the purpose of contending that the Property qualifies as a relevant property not rateable pursuant to the provisions of paragraph 16 (a), Schedule 4 of the Valuation Act, 2001. For the Appellant to bring itself within paragraph 16, the Appellant must establish that it is a charitable organisation within the meaning of section 3 of the 2001 Act and that the Property is used exclusively for charitable purposes otherwise than for private profit.

For the Appellant to constitute a "charitable organisation" within the meaning of the Valuation Act 2001 certain statutory conditions must be satisfied. In the first instance, the Appellant must be a company or other body corporate or an unincorporated body of persons. The Tribunal is satisfied that the Appellant has been incorporated under the Companies Act 1963. By virtue of the Appellant being a company, the Memorandum of Association and/or the Articles of Association of the company must (a) state, as its main object or objects, a charitable purpose (b) specify the purpose of any secondary objects for which provision is made to be the attainment of the main object or objects (c) provide for the application of income, assets or surplus towards the company's main object or objects (d) prohibit distribution of income, assets or surplus to its members; (e) prohibit payment of remuneration (other than reasonable out of pocket expenses) to the directors or any officer of the company other than any officer who is an employee of the company; (f) provide for disposal of surplus of wind-up to another charitable organisation, the main object of which is similar to the appellant's main object or if the company receives a substantial proportion of its financial resources from a Department of State or an office or agency (whether established under an enactment or otherwise) of the State, the surplus must be returned to such a Department, office or agency.

The fact that the Appellant is a "not for profit" company and has been accorded charitable status by the Revenue Commissioners for tax purposes does not automatically entitle the Appellant to exemption from rates under the Valuation Act 2011. The Tribunal has on many occasions drawn attention to the distinctive codes under which the Revenue Commissioners and the Commissioner of Valuation operate

and underlined the principle that exemption from rates can only be obtained in accordance with the provisions of the Valuation Act 2001.

Whilst the Appellant submitted that its Memorandum and Articles of Association are essentially charitable in nature, the Respondent contends that the main object in the Appellant's Memorandum of Association is not a charitable purpose.

The Appellant relies on the decision of the Tribunal in *Mellow Spring*. In that case the Tribunal determined that the relevant property was exempt from rating with regard to the provisions of Schedule 4, paragraph 16(a) because it was used exclusively for the charitable purposes of relieving poverty and providing other services beneficial to the community. In *Mellow Spring* the objects clause expressly provided:

> *"(a) that the centre in question provides not only childcare but also training, family and child support for the Finglas Community,* and
>
> *(b) that its particular or special aim is to provide these services to those identified as being most in need."*

The evidence in that case established that *Mellow Spring* received and required significant funding from the State to help it survive. State funding was conditional upon the sizeable sector of the users, i.e. not less than 60%, being in receipt of social welfare. In practice not less than 70% of the persons using the centre were in receipt of social welfare. The centre also provided a variety of programmes, information services and other assistance to parents whose children used the centre with particular emphasis on parents who were in receipt of social assistance or parents who are attempting to break out of long-term unemployment. The evidence established that all of the children attending the centre were disadvantaged and insofar as any of their parents were working, they were on the lowest rung of the employment ladder and likely to be in difficult financial circumstances. It was made clear in *Mellow Spring* that childcare cannot be considered a "*charitable purpose."* On the facts of that case the Tribunal was satisfied that the objects clause expressly recognised the provision, not just of childcare, but also of training and family and child support and that the centre was seeking in a limited way to address problems of social inclusion and long term unemployment. More significantly, the evidence established that the centre

existed to meet the needs of those whose needs would otherwise not be met because of their inability to pay.

The objects clause in this appeal is capable of being read as a charitable purpose. It is clear from the evidence both written and oral that the Appellant company exists to advance education through the operation and management of a community non-profit childcare centre offering quality and affordable childcare to the children of Bree and surrounding areas with particular emphasis on ensuring that disadvantaged children get access to childcare and early childhood education. The Appellant operates on a not for profit basis to provide early childhood educational and care services in an area of high unemployment. In the Tribunal's view, the Appellant is a charitable organization within the meaning of the 2001 Act.

Whilst it is clear that many of the children attending Brí Beag are subsidized through the ECCE, CCS and CETS schemes, the Appellant is also receiving income from fee paying parents. The level of this source of income can vary from year to year. In 2013, fee paying parents accounted for 31% of income while in 2012, fee paying parents accounted for 23% of income. It is evident that the Appellant caters not only for the poor and disadvantaged who pay subsidized fees but also for the better off parents who pay full fees for its services. The real question, therefore, is whether the Appellant uses the Property exclusively for charitable purposes given that many parents are paying full fees for its services. In the Tribunal's view, Brí Beag is not exclusively used for charitable purpose. If it had been the case that the Appellant was catering overwhelmingly for the children of the poor and disadvantaged it would have succeeded in its claim for exemption from rates.

Accordingly, and with regret, the Tribunal cannot uphold this appeal and duly determines the subject Property to be rateable and not exempt.