Appeal No. VA05/2/034

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Mellow Spring Childcare Development Centre Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Creche at Lot No. 1Ab/3, Cardiff Castle, Finglas North B, Finglas North, County Borough of Dublin

B E F O R E

John O'Donnell - Senior Counsel	**Chairperson**
Joseph Murray - B.L.	**Member**
Michael F. Lyng - Valuer	**Member**

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

By Notice of Appeal dated the 18th day of June, 2005 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €140.00 on the above described relevant property.

The Grounds of Appeal are set out in a letter accompanying the Notice of Appeal, a copy of which letter is contained in the Appendix to this judgment.

This appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 7th of September, 2005.

At the hearing the appellant was represented by Mr. Paul Coughlan, BL., instructed by Messrs. O'Reilly Doherty Solicitors, Main Street, Finglas. Ms. Jennifer Land, Ms. Breda Kenny and Ms. Margaret Geraghty, Directors of Mellow Spring Childcare Development Centre Ltd. attended the hearing. The respondent was represented by Mr. James Devlin, BL, instructed by the Chief State Solicitor. Mr. Kevin Heery, B.Comm., ASCS, MRICS, MIAVI, a Staff Valuer with the Valuation Office also attended.

Introduction

The Mellow Spring Childcare Development Centre ("Mellow Spring") is operated by Mellow Spring Childcare Development Centre Limited which is a company limited by guarantee having no share capital. The company in question was accorded charitable status by the Revenue Commissioners having been registered as a charity on the 20th May 2004. The main object for which the Centre is established is for "*the sole charitable purpose of providing quality accessible affordable childcare, plus training, and family and child support to the Finglas Community especially those who are identified as being most in need.*"

There was little or no issue on the facts between the parties. Both parties submitted précis of evidence, which they adopted. Both sides also furnished written legal submissions, which were supplemented by oral submissions by Counsel on either side, which were of considerable assistance.

The central issue between the parties however is whether or not the Mellow Spring Centre is entitled to be deemed not rateable having regard to the provisions of Section 15(2) of the Valuation Act, 2001 and Schedule 4 of the said Act.

Evidence

Evidence was given on behalf of the Appellant, Mellow Spring, by Ms. Breda Kenny. She has been in the area of early education for some 25 years. She has worked in disadvantaged areas and in particular in Finglas as part of the Finglas Partnership Project for some 7 years. It is clear that the aims of this partnership are:

(a) To provide for increased social inclusion in the area
(b) To deal with long-term unemployment in the area.

Early education was identified as being a way forward in advancing both of these objectives. In her evidence Ms. Kenny contended that early education offered children better life chances, having regard to the problems of social inclusion and long term unemployment which confronted children from the area in question.

Ms. Kenny is a Director of the company. She gave a brief history of how the centre came to be established. As far back as 1996 the Finglas/Cabra Partnership had set up working groups. One of the identified barriers to social inclusion and employment was thought to be childcare. In addition children and young people leaving school at an early stage contributed to these problems. As a result a childcare action group was formed and the centre was established.

Ms. Kenny then gave evidence as to the activities of the centre. At any time there would be between 40-50 children "*on their books*". These groups could be identified as babies, 1-2 year olds ("*waddlers*"), 2-3 year olds ("*toddlers*") and 3-4 years of age ("*pre-school"*). In addition the centre provided after-school care for children of school-going age.

Ms. Kenny was at pains to emphasise that the centre is not just a "crèche" where children are deposited by working parents. The centre delivers what is described as a high scope educational programme (adapted from a US model) to the children in its care. She was at pains to emphasise that this is an educational programme rather than simply caring for and feeding the children present.

Ms. Kenny also gave evidence as to the programmes and assistance provided for parents of children in the centre. There is a "STEPS" programme provided for parents who are on unemployment benefit or other social assistance. Information is given in relation to "*active parenting*" courses and booklets are available on similar courses in the centre. There is a notice board which provides up-to-date information insofar as it can on training and other relevant assistance for parents.

In addition the centre is recognised by the Department of Social and Family Affairs as being entitled to financial assistance to provide free school meals. Ms. Kenny indicated that she did not believe this was a facility offered by other "*crèches*" unless they were in particularly disadvantaged areas.

The centre is a purpose built facility on Mellows Road in Finglas West. Capital funding of approximately €3,000,000 was provided by the Department of Justice, Equality and Law Reform, Dublin City Council and the Finglas/Cabra Partnership. The facility has a baby room and observation room for babies. It also has rooms providing for "*waddlers*", "*toddlers*" and pre-school children. In addition it has a room providing after school support for children of school-going age. There are a number of other administrative offices and storage areas as well as bathrooms and ancillary accommodation. There are 16 staff employed, 13 of whom are full-time.

The centre is funded by the Department of Justice, Equality and Law Reform, which covers the cost of employment of two senior childcare workers and two ordinary childcare workers. In addition the receptionist position and one other childcare worker position is funded through the Job Initiative Scheme. The centre does charge a fee to parents who avail of the service provided by the centre. However Ms. Kenny was of the view that at no stage did they ever charge the full cost to such parents. In her view the full cost of such a provision would be €216 per week. The fees charged to parents are means-tested. The highest fee paid is €155 per week, but only between 10-30% (at the highest) of the parents are ever asked pay this fee. Parents must show their welfare book, P60 or other such documentation indicating the level of income which they receive from unemployment or from other sources in order to be assessed. Ms. Kenny indicated

that she believed that approximately 70% of the parents of the children who utilise the centre were on social welfare and that while the remaining 30% were working that remaining 30% would not be able to afford what might be termed the full economic fees.

Ms. Kenny also made it clear that the centre is run on a not-for-profit basis and indeed will require additional funding for the following year. Ms. Kenny believed that in order to continue to attract funding from the government agencies described above not less than 70% of the persons using the centre in question needed to be disadvantaged. In this regard, with the consent of the parties we were furnished after the hearing with a letter from Area Development Management Ltd. dated 5th October 2005. This company acts on behalf of the Department of Justice Equality and Law Reform as the management agents for the day-to-day operation of the Equal Opportunities Childcare Programme (EOCP) and all contractual arrangements with EOCP beneficiaries. Mellow Spring is one such beneficiary. The letter states:

"Part of the conditions of funding with [Mellow Spring] is the implementation of a tiered parents payment system which ensures that childcare places subsidised by this Programme are targeted towards those most in need. In conjunction with ADM, the group set a minimum of 60% of childcare places to be available for parents/guardians/carers (people) in receipt of social welfare in the Finglas area. The remainder of places are available to others i.e. people in employment."

Ms. Kenny also indicated that she believed that the unit in question was the only one of its type in Ireland and was modelled on a similar unit in a disadvantaged area in England.

In cross-examination she accepted that other "*commercial*" operators of crèches would also contend that they offered educational programmes in order to allow them stimulate children. She indicated that she believed that commercial rates for other crèches would be not less than €160 per week for a pre-school place. She was aware of another "commercial" centre in Finglas which charged €200 per week for placement of a baby and €180 per week for placement of a child of two or more years of age.

Ms. Kenny accepted that the funding from the Department of Justice, Equality and Law Reform appears to have come out of an Equal Opportunities Childcare Programme to assist women rather than to assist childcare. However she expressed her belief that the purpose of this was to allow or encourage women to return to or go into the workforce. She accepted that the core activity of the centre was the provision of childcare or child education but contended that the actual service that was being provided was different, not only because of what she contended was the superior level of programme being provided, but, more importantly, because the service was being provided in a disadvantaged area to meet the needs not simply of parents but of parents and children in a recognised disadvantaged area. She gave examples of some of the problems which parents of some of the children attending the centre face. It is clear that a number of the parents are single or lone parents, often relatively young and frequently with problems of drug addiction. Many are unemployed and have been for some time. Ms. Kenny's contention is that the centre therefore not only provides a way of giving the children of such parents a better chance of dealing with the problems of social inclusion and long term unemployment but also works to assist the parents themselves in dealing with these problems.

The Appellant's Submissions

On behalf of the Appellant Mr. Coughlan acknowledged that the according of charitable status to the centre by the Revenue Commissioners was not determinative though he contended it was of some significance. He contended that the centre provided an education service but also had as its objective an attempt to offset social and economic disadvantage suffered by children and indeed parents in the area. We were referred to the **Pemsel**[1] case which identified four broad categories of "*charitable purpose*":

(a) The relief of poverty.
(b) The advancement of education.
(c) The advancement of religion.
(d) Other purposes beneficial to the community.

[1] Commissioner for Special Purposes of Income Tax –v- Pemsel [1891] A.C. 531 (Lord McNaghten)

Mr. Coughlan acknowledged that the decision in **Barrington's Hospital –v- The Commissioner of Valuation**[2] meant that "*charitable purposes*" in Section 63 of the Poor Relief (Ireland) Act, 1838 has a meaning less extensive than the meaning given to those words in Pemsel's case. How much less extensive has never been decided, but at least there must be excluded from the rubric "*charitable purposes*" in the Section any charitable purpose which was mentioned expressly in the Section[3].

However Mr. Coughlan was of the view that since the entirety of this section was repealed by Section 8 of the Valuation Act, 2001 and not re-enacted, the restrictions as to how Section 63 should be interpreted set out in the **Barrington's Hospital** case did not apply to how "*charitable purposes*" contained in paragraph 16(a) of Schedule 4 of the Valuation Act, 2001 should be interpreted.

Mr. Coughlan made it clear that he did not suggest that the centre was involved in an activity involving the advancement of religion. However he was of the view that the centre could be seen as carrying out an activity which provided for the relief of poverty and/or the advancement of education and/or other purposes beneficial to the community. He contended that there was no reason why a property which carried out all of these purposes together would not be regarded as being a property which existed for a number of charitable purposes; there was no reason why the property could only exist for one "*charitable purpose*".

Mr. Coughlan did not accept that references elsewhere in Schedule 4 to religion (paragraph 7), education (paragraph 10) and treatment of the sick and infirm (paragraphs 8 and 14) meant that "*charitable purposes*" in paragraph 16(a) must be construed narrowly and in particular must be construed so as to exclude those other purposes already referred to above. He referred us to various authorities on the issue of statutory interpretation in this regard.

It was contended that the Tribunal therefore abandon the restrictive interpretation suggested by the Supreme Court in **Barrington's Hospital** in looking at the Valuation Act, 2001 and in

[2] [1957] IR 299
[3] Kingsmill Moore J at page 333

particular Schedule 4, paragraph 16(a). However Mr. Coughlan made it clear that he regarded it as appropriate for the Tribunal to follow the **Pemsel** criteria and to examine the activities in the centre in that light. Having regard to this contention and having regard also to the wide interpretation as to what is meant by "educational"[4] Mr. Coughlan contended that:

(a) Insofar as the centre operated in a disadvantaged area for the specific purposes of alleviating those disadvantages it could be regarded as being "*for the relief of poverty*".

(b) Insofar as it provided an early education programme to the children in its care, its purposes included "*the advancement of education*".

(c) Insofar as it assisted in efforts to deal with the problems of social inclusion and long term unemployment as well as the very many complex social issues it was appropriate that the centre be deemed to be a charitable organisation using the property in question exclusively for charitable purposes and otherwise than for private profit in accordance with the provisions of paragraph 16(a) of Schedule 4 of the Valuation Act, 2001.

The Respondent's Submissions

On behalf of the Respondent, the Commissioner of Valuation, Mr. James Devlin BL submitted that the concept of "*charitable purposes*" has always been interpreted in a narrower manner in rating law than in revenue law or the law of equity. Whereas equity and revenue law have adopted the four point test set out in the **Pemsel** case, the jurisprudence of rating law in Ireland has led to a significantly narrower interpretation, as set out in the **Barrington's Hospital** case. In that case Kingsmill Moore J expressed the view[5] that:

> ""*Charitable purposes" in Section 63 cannot have the widest meaning in as much as particular charitable purposes are specifically mentioned with specific limitations on their nature and "charitable purposes" cannot be construed as covering the same particular purposes without such limitation."*

[4] See Magee –v- Attorney General, High Court unreported 25th July 2002 (Lavan J)
[5] at page 327

He further observed[6]:

> *""Charitable purposes" in Section 63 has a meaning less extensive than the meaning given to those words in Pemsel's case. How much less extensive has never been decided, but at least there must be excluded from the denotation of "charitable purposes" in the Section any charitable purpose which is mentioned expressly in this Section."*

Mr. Devlin contended that although the relevant legislative provision (being Section 63 of the Poor Relief (Ireland) Act of 1838) is abolished by virtue of Schedule 1 of the Valuation Act, 2001, the principles governing interpretation of rating law and in particular interpreting the concept of "*charitable purposes*" in a rating law context remain the same. Mr. Devlin drew our attention to three Valuation Tribunal cases which he contended were authorities for the proposition that case law which existed prior to the enactment of the 2001 Act did not become automatically irrelevant just because of the passing of that Act and the repeal of Section 63 of the 1838 Act. Thus in **Leitrim County Childcare Committee**[7] the Tribunal expressed the view[8]:

> "*Whilst Section 63 of the Poor Relief (Ireland) Act, 1838 has been repealed it does not necessarily mean that the body of case law including the decisions of this Tribunal in dealing with exemption on the grounds of occupation for charitable purposes are no longer relevant. Indeed in the absence of any definition of "charitable purposes" in the 2001 Act it would be foolhardy in the extreme to ignore or set aside these long established and widely accepted precedents."*

In **Dance Theatre of Ireland Limited**[9] the Tribunal noted[10] the Tribunal made a similar observation. The Tribunal continued:

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[6] at page 333
[7] VA02/4/054
[8] at page 7
[9] VA03/3/007
[10] at page 8

> "*Indeed in the absence of any statutory definition of "charitable purposes" in the Valuation Act, 2001 the precedents thus established cannot be ignored or likely set aside."*

In **Clones Community Forum Limited**[11] the Tribunal also considered the observations of Kingsmill Moore J in the **Barrington's Hospital** case. In contending that the principles set out in the **Barrington's Hospital** decision should be followed Mr. Devlin asked us to consider Schedule 4 of the 2001 Act. In his submissions, paragraph 16 of Schedule 4 must be interpreted narrowly. In his contention other paragraphs in the Schedule refer to at least two of the relevant **Pemsel** categories. For example, paragraph 7 deemed as not rateable "*any land, building or part of a building used exclusively for the purposes of public religious worship"* (one of the **Pemsel** categories is "*the advancement of religion*"). Paragraph 10, Schedule 4 deemed as not rateable any property occupied by various different types of educational institutions used exclusively by the institution in question "*for the provision of the educational services referred to subsequently in this paragraph and otherwise than for private profit"*.

We were also referred to paragraph 8 of Schedule 4 which deems not rateable any property used by a body for the purposes of caring for sick persons or for the treatment of illnesses, the affairs of which are not conducted for the purpose of making private profit.

Mr. Devlin also submitted that in the circumstances a property could not be exempted from rates if it was used partly for charitable and partly for non-charitable purposes. In this regard he referred us to paragraph 12 of the **Dance Theatre of Ireland** decision in which it was clear that the primary objectives of the Appellant in that case were educational rather than charitable; as a result the subject property was deemed to not be used exclusively for "*charitable purposes"*. In that case the primary objective of the Appellant was stated to be "*the advancement of education by promoting the study and improving the understanding of the practice of dance theatre, art and design, music and musical composition, theatre art and film art*". While these objectives were described as being laudable and worthy of public support they were clearly educational in nature.

[11] VA04/1/008

Mr. Devlin conceded that if the childcare provided by Mellow Springs is provided exclusively to what might be described as "*the poor*" it might well be regarded as being charitable under paragraph 16 having regard to the four **Pemsel** categories as interpreted in the **Barrington's Hospital** decision. However he said it was by no means clear that these activities were confined to "*the poor*".

He referred us to the decision of the Tribunal in **Leitrim County Childcare Committee**. The Committee in that case was established to try to promote the concept of childcare within the County and to identify how children's needs might best be met in this regard. However it is clear that the Committee was a catalyst or facilitator in the provision of childcare services, provided support to those providing childcare services but did not itself provide such childcare services.

Mr. Devlin submitted that the Memorandum and Articles of Association of Mellow Spring did not make it clear that the services were confined to the poor. He also referred to the evidence of Ms. Kenny to the effect that the maximum fee Mellow Spring would charge would be €155 whereas there were some childcare institutions run on a commercial basis which charged a commercial rate of less than €160 per week. In his submission the small amount of this differential made it impossible to say that the premises in question catered exclusively for children of the poor.

In conclusion he submitted that childcare was not of itself charitable. It could only be regarded as being charitable in this context if it was being provided in a situation where it could be said to be providing relief from poverty.

By way of reply Mr. Coughlan referred us again to the fact that the previous legislative provision (Section 63) had been repealed and that we were therefore free to ignore decisions based on that section.

The Law

It is without doubt unfortunate that the legislature did not seek to define the concept of "*charitable purposes*" in the Valuation Act, 2001. However the legislature may have been of the view that the concept had been sufficiently defined in case law to date, particularly in decisions such as **Barrington's Hospital**.

The Tribunal notes the repeal of Section 63 of the 1838 Act and the enactment instead of Section 3 and Schedule 4 (paragraph 16) of the 2001 Act. Whether this repeal and subsequent enactment requires us to ignore in effect all decisions under the previous legislative provisions is an intriguing issue. However, it is not an issue which we are obliged to decide in the context of this case. We do however note the caution expressed in previous determinations of other divisions of the Tribunal on this matter. We agree in principle that the Tribunal should be slow to depart from the manner of interpretation of the concept of charitable purposes in the context of rating law utilised in previous determinations unless there is compelling authority to do so. In passing we observe we are not saying that we are bound by determinations of other divisions of this Tribunal. However unless it is shown that these determinations are manifestly wrong, argued incompletely or distinguishable on a factual basis, we see no reason why we should not have regard to such previous decisions.

It seems to us however that even if the principles of statutory interpretation applied in **Barrington's Hospital** to the concept of charitable purposes is applicable here, the concept of charitable purposes in Schedule 4, paragraph 16 still includes as a minimum properties used exclusively for the relief of poverty and/or for other purposes beneficial to the community. In this regard we see no reason why (and no argument was advanced against the proposition) the property should be exempt from rating only if it were used for more than one charitable purpose. It thus seems to us that even if the **Barrington's Hospital** test is applied, the property in question may be exempt from rates if it is used exclusively for the relief of poverty and/or for other purposes beneficial to the community and is used otherwise than for private profit. In this regard we should add that no point was taken in relation to the contents of the Memorandum and Articles of Association and the requirements of Section 3(1)(a)(b).

The main object for which the centre is established is stated in the Memorandum of Association to be "*the sole charitable purpose of providing quality accessible affordable childcare, plus training, and family and child support to the Finglas Community, especially those who are identified as being most in need.*" While there was some debate as to whether childcare would be regarded as an educational concept, the evidence made it clear that all childcare centres most certainly attempt to provide some form of educational programme, however rudimentary. The distinction between Mellow Spring and other childcare centres, it is said, is that Mellow Spring operates to meet the needs of a severely disadvantaged sector of the community, a number of whose members are beset by tragic social problems. It is evident that a significant number of the persons attending could pay little more than a nominal sum by way of payment for the services provided by the centre. There is also evidence that even the highest contributions paid are lower than the absolute minimum rate which would be charged in a commercial entity. It is clear beyond doubt that the centre is operated on a not-for-profit basis and indeed has made a loss to date; it receives (and requires) significant funding from the State to help it survive. The evidence makes it clear that the State funding is conditional on the sizeable sector of the users, i.e. not less than 60%, being in receipt of social welfare. Parents are means tested for a rated charge which is then fixed. Indeed Ms. Kenny suggests that in practice not less than 70% of the persons using the premises are in receipt of social welfare.

It is also noted that the centre provides a variety of programmes, information services and other assistance to parents whose children use the centre with particular emphasis on parents who are receiving social assistance or parents who are attempting to break out of long-term unemployment. Ms. Kenny in her evidence contended that "*all of our children [attending the centre] are disadvantaged. Insofar as any of the parents of these children may be working (and this would appear to be only a very small percent) these parents are on the lowest rung of the employment ladder and are likely to be in difficult financial circumstances*".

It may be of help also to consider the decision of a division of this Tribunal in **Wallaroo Playschool Limited**[12]. This determination was issued prior to the coming into effect of the Valuation Act, 2001 and so is only of limited assistance. The premises in question provided a

[12] VA00/2/059

crèche and a childminding service for pre-school and after-school children. Evidence established that the premises catered not only for the poor and disadvantaged who paid a reduced fee but also for those termed "*the better off*" who paid a full fee for its services.

The Tribunal in that case were asked to exempt the premises from rating on the basis that the premises was an educational establishment which was engaged in the relief of poverty. The claim did not succeed. The Appellant was unable to show that its educational activities were exclusively for the poor, particularly since it was a stated objective of the Appellant to operate on a quota system in pursuance of its aim to provide an integrated model for childcare. Whatever the objective may be, the activities were of benefit to the poor and the better off alike and would so remain until the quota system was changed. In a childminding mode the Appellant catered for a significant minority of parents whose children were in other schools and who were not in need of special relief.

We believe it is clear that if the Appellant in the **Wallaroo** school case was catering only for (or indeed overwhelmingly for) the poor and disadvantaged it would have succeeded in its claim for exemption from rates. There is a significant factual distinction between the facts of the **Wallaroo** school case and the facts of the instant case in that no-one who attends the Mellow Spring Centre actually pays a full commercial fee. Whereas the Wallaroo Playschool Limited provided for children from all backgrounds, Mellow Spring provides overwhelmingly for the benefit of the poor and disadvantaged, with the small remainder living on a level of income which might properly be described as "*the lowest rung of the ladder*".

The evidence establishes to our satisfaction that the centre came into existence and continues in place as a result of concerns addressed at a local and central level to try to deal with future problems relating to social inclusion and long term unemployment in the Finglas/Cabra areas. The objects clause expressly recognises the provision, not just of childcare but also of training and family and child support in the Finglas Community. It seems to us that the centre in seeking in a limited way to address these problems of social inclusion and long term unemployment in Finglas is carrying out a purpose which is beneficial to the community in Finglas in particular and the community of citizens generally. More significantly, the evidence establishes to our

satisfaction that the centre exists to meet the needs of those whose needs would otherwise not be met because of their inability to pay. There is no suggestion that any other childcare centre in Ireland requires a means test. Indeed this centre appears to be expressly modelled on a similar centre in a disadvantaged area in England. While there was some debate as to what the "*going rate*" for placement of a child in a childcare centre is at present, it seems clear no-one whose child attends is paying even the basic minimum which would be payable in any commercial setting. Therefore, as virtually everyone who is attending appears to be struggling to attain the necessities of life, it seems to us that the centre in a significant way seeks to address the relief of poverty. It would appear that were this centre not in existence childcare would simply not be available to this sector of the community in question.

We have some concerns as to whether the main object in its objects clause establishes that its main object is a charitable purpose. We agree with Mr. Devlin's contention that childcare *per se* is not of itself a charitable purpose. However we note that the wording of the main object clause expressly provides:

(a) That the centre in question provides not only childcare but also training and family and child support for the Finglas community (emphasis added).

(b) That its particular or special aim is to provide these services to those identified as being most in need. (emphasis added).

After some hesitation it appears to us that the main objects clause is capable of being read as stating that the main object or objects is a charitable purpose within the meaning of Section 3(1)(a)(iii). In this regard we believe we are entitled to have regard to the evidence offered to us when considering the meaning of the words set out in the main objects clause.

In conclusion therefore it is our view that the property in question is exempt from rating having regard to the provisions of Schedule 4, paragraph 16(a) of the Valuation Act, 2001 because it is used exclusively for the charitable purposes of relieving poverty and providing other services beneficial to the community. We emphasise however:

(a) This determination is not to be regarded as a finding that childcare is in general terms a "*charitable purpose*".

(b) In the event of any change to the nature of the services provided, whether by way of change to the ethos and/or the finance, funding, and admission criteria and structure, further considerations would arise.

Determination

The Tribunal determines that the property the subject matter of this appeal is not rateable having regard to the provisions of Schedule 4 of the Valuation Act, 2001 and in particular paragraph 16(a) thereof and allows the appeal to the Appellant accordingly.