

Appeal No. VA11/2/032

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

Cherry Orchard Community Childcare Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property No. 2206350, Creche at Lot No. 1A, Croftwood Crescent, Raheen, Cherry Orchard A, Cherry Orchard, County Borough of Dublin.

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Brian Larkin - Barrister

Member

Fiona Gallagher - BL

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 13TH DAY OF DECEMBER, 2011

By Notice of Appeal dated the 13th day of June, 2011 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €250 on the above described relevant property.

The grounds of appeal are set out in a letter accompanying the Notice of Appeal, copies of both of which are attached at Appendix 1 to this judgment.

The appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 26th day of September, 2011. At the hearing the appellant was represented by Mr. Richard Bennett, TEP, BA, MBA the Principal of Bennetts Solicitors. Mr. Billy Mangan, Manager, Cherry Orchard Community Childcare Ltd. and Mr. Ciarán Reid, Secretary, Cherry Orchard Community Childcare Ltd. gave evidence on behalf of the appellant. Ms. Marie Hartigan, Chairperson, Cherry Orchard Community Childcare Ltd. also attended. Mr. David Dodd, BL, instructed by the Chief State Solicitor appeared on behalf of the respondent and Ms. Joanne Duggan, Post Grad Cert Statistics/Mathematics, BSc (Hons) Real Estate, ASCSI, a Valuer in the Valuation Office was also present. Both parties having taken the oath adopted their respective précis which had previously been received by the Tribunal as their evidence-in-chief. From the evidence so tendered, the following emerged as being the facts relevant and material to the appeal.

Background

By way of preliminary submissions both parties agreed the principal issue between them was whether or not the appellant constituted a charitable organisation within the meaning of the Valuation Act, 2001. Mr. Bennett indicated that, without prejudice to his contention that the organisation was a charitable organisation, he was in any event concerned that a full commercial rate had been applied which he believed was excessive. Mr. Bennett wished to keep open the issue of the quantum of the valuation, though it was pointed out by Mr. Dodd that this issue had not been raised until the submissions had been lodged by the appellant. Having heard both sides the Tribunal decided that the only issue it would deal with in this hearing was the issue of whether or not the appellant was a charitable organisation within the meaning of the Act. The Tribunal would not, however, shut out either of the parties from pursuing the issue of quantum in the event that the Tribunal determined the appellant did not qualify for exemption.

The Appellant's Evidence

Mr. Bennett adopted the précis supplied by him as the evidence of the appellant. He indicated he would call briefly two witnesses.

Mr. Ciaran Reid, Secretary of the appellant company gave evidence. The appellant company was set up in 2006 to look at how access to education and employment might be provided to the disadvantaged. As part of the Ballyfermot Partnership Project household surveys were

taken; there were also meetings with community organisations. It became clear from these and other researches that the provision of childcare was extremely low in the area, in part due to what it described as the “*cycle of disadvantage*”.

Mr. Reid indicated that Cherry Orchard was a local authority housing estate which had been established in the 1970s. He pointed out that 51% of the households were headed by a lone parent (which is double the national average) and therefore there was a significant need for supporting families where the parent is living alone. In addition, the population of Cherry Orchard is very young in age. There is a very poor public infrastructure with just one school, one shop (which is not a supermarket) and one General Practitioner service.

Mr. Reid said he and the others behind the formation of the company saw that the principal purpose of the establishment of the appellant company was to provide childcare in a context of breaking the cycle of disadvantage in the area. In this regard, the organisation recognised the importance of pre-school care, in accordance with the High Scope study previously carried out, so as to improve the educational and social prospects of people living in a disadvantaged area such as Cherry Orchard.

Mr. Reid also pointed out that only 16% of the local population went on to third level education (which was significantly below the national level of 60%) as noted in the survey of Cherry Orchard in 2006. The principal object in his view, therefore, was not simply the provision of childcare but rather the provision of childcare to assist the parents, and indeed the children involved, in breaking the cycle of disadvantage in chronically affected areas.

In cross-examination he accepted that the respondent had written to the appellant, *inter alia*, on the 28th April 2011, pointing out that the Memorandum of Association did not comply with the requirements of Section 3 (in the view of the respondent) but indicating that the appellant would be able to amend the Memorandum of Association and apply again for exemption.

Mr. Billy Mangan, the Manager of the appellant, also gave evidence. He indicated there were eight full-time and seven part-time people employed in the centre now. Funding for the operation of the centre came in the main from the Childcare Community Subvention Scheme

which, he noted, only funded not-for-profit organisations. This provided 65% of the funding of the organisation. He said the funding provided was based on the circumstances of the parents utilising the service so that if a parent was on social welfare there would be funding of €100 per week provided; the parent then had to pay the balance which, for full-time care, was a sum of €30 per week. However, he indicated that because of the chronic disadvantage within the area very few parents could take up the offer of full-time childcare as they were unable to find the additional €30 per week to do so. He indicated that 95% of the parents who did utilise the service were benefiting from the Childcare Community Subvention Scheme, though he noted that there were other schemes available to assist parents.

Mr. Mangan indicated that the childcare facility was far more than simply a location at which to deposit children. He indicated that in developing their educational methods the appellant sought to implement the High Scope study so that children were encouraged to think for themselves and make decisions for themselves also. In his view, the organisation was of very considerable benefit to the community in Cherry Orchard having regard, in particular, to the fact that there was a very high level of people who left school early, a situation which he hoped would be addressed by the provision of childcare and leading hopefully to more people staying on later in school. He noted also that the level of disadvantage in the area was such that there could be three generations living in the one house who would all be on social welfare; this was obviously a matter that needed to be addressed urgently. He noted that there were offices within the facility in question but made it clear that these were entirely and exclusively ancillary to the main function of the building; he also gave evidence that the building in its entirety is used for the main function of providing childcare to break the cycle of disadvantage, as noted by the previous witness and as further amplified by himself in his own evidence.

The Respondent's Evidence

On behalf of the respondent, Joanne Duggan, Valuer, gave evidence. She inspected the premises on the 29th June, 2010 and the relevant certificate issued in October 2010. Ms. Duggan indicated that in her view the Memorandum of Association did not comply with the requirements of Section 3 of the Act because the Memorandum of Association did not state as its main object a charitable purpose, and therefore the appellant could not bring itself within the definition of "*charitable organisation*" within the meaning of the Act. She indicated that apart from this there was no other basis on which the respondent was objecting

to exemption, as the appellant was otherwise qualified within the meaning of Section 3, as well as within the meaning of Schedule 4, paragraph 16 of the Act.

The Appellant's Submission

The appellant contended that Clauses 3 and 4 of the Objects Clause should be read together. He agreed that Clause 3 on its own would not be enough; however, he contended that if they were read together "*holistically*", it was clear that the main object of the appellant organisation was indeed stated to be a charitable purpose.

The Respondent's Submission

On behalf of the respondent, Mr. Dodd refers to the decision of the High Court in **Nangles Nurseries –v- The Commissioner of Valuation [2008] IE HC 73** ("**Nangles Nurseries**") in which it was made clear that provisions providing exemption are to be interpreted strictly against the rate payer. Mr. Dodd submitted the appropriate test in order to consider whether an entity comes within Schedule 4, paragraph 16 is to see firstly if the organisation in question qualifies as a "*charitable organisation*". Thereafter the appropriate step was to see if the organisation used the premises in question exclusively for charitable purposes.

Mr. Dodd submitted that although Section 3 of the Act allowed a charitable organisation's Memorandum of Association to state "*as its main object or objects, a charitable purpose*", in reality this means that if it has more than one main object, each of these main objects must state a charitable purpose. In his view, this was the only way to read this provision as being consistent with Schedule 4, paragraph 16, which requires the property in question to be used "*exclusively for charitable purposes*". In his submission, it was not acceptable for an organisation to have a main charitable purpose and another main non-charitable purpose if they wished to qualify as a "*charitable organisation*" within the meaning of the Act. In his submission, if an organisation is a charity then that is all it is and that is all it can be.

Mr. Dodd also referred us to the decision of the Tribunal in **VA05/2/034 - Mellow Spring Childcare Development Centre Ltd.** ("**Mellow Spring**") in which it was made clear that childcare of itself is not and could not be a charitable purpose. In the instant case there was no reference in the objects clause to people who were most in need or to poverty or to disadvantage. He noted in passing that 51% of the population of Cherry Orchard (according to the 2006 Census referred to in the submissions) appear to be "*at work*".

Mr. Dodd also referred us to **VA10/2/024 - Togher Community Project Group Ltd. (“Togher Community”)**. In that case there was no mention of need or poverty in the objects. Again, it is clear from the Determination of the Tribunal that childcare on its own could not constitute a charitable purpose.

Mr. Dodd noted the various matters set out in paragraph 3 of the Memorandum of Association. In his submission, none of those could constitute a charitable purpose. He noted also the various matters set out in paragraph 4. In his submission, this was the second main objects clause. However, the only element of this which could constitute charitable purpose was the provision which obliged the company to promote, support, assist and engage in “ [...] (c) *community development, designed to benefit and to promote the welfare of local communities or to deal with the causes and consequences of economic disadvantage or poverty*”. (emphasis added). While this latter sub-clause on its own could constitute a charitable purpose, there is no similar provision contained in the other main objects clause. Further, in his submission, it was significant that this appeared to be listed as an alternative main object, rather than the main object.

Mr. Dodd accepted that the levels of social deprivation and disadvantage within Cherry Orchard were closer to that experienced in the Finglas area under consideration in Mellow Spring than in the Togher Community decision. In his submission the respondent had dealt with the matter fairly by writing to the appellant and pointing out the various difficulties with the Memorandum of Association and how they could be resolved.

In response, the appellant suggested that the figure of unemployment of 18% in the area in 2006 was likely to have increased significantly since. He submitted that the relief of poverty was not the only “*charitable purpose*” and that advancement of education and benefit to the community can and do also constitute charitable purposes. In his view, the main objects clause complied with these requirements. He submitted that the objects should be read together and there is no need separately to detail the relief of poverty or the advancement of education or the benefit to the community.

Both parties had also provided submissions setting out the relevant legal provisions which were of considerable assistance to the Tribunal.

The Law

Section 3 of the Act defines “charitable organisation” as meaning “company or other body corporate ...which complies with the following conditions –

(a) *In the case of a body corporate which is not a company, or of an unincorporated body of persons, there exists a constitution or deed of trust in relation to it that –*

(iii) *states, as its main object or objects, a charitable purpose and specifies the purpose of any secondary objects for which provision is made to be the attainment of the main object or objects.”*

Sub-section (b) of Section 3 requires the Memorandum of Association of a company to comply with, *inter alia*, (iii) as set out above.

Schedule 4 of the Act deems certain “relevant property” to be “not rateable”. Included in this are (at paragraph 16) “Any land, building or part of a building which is occupied by a body, being either – (a) a charitable organisation that uses the land, building or part exclusively for charitable purposes and otherwise than for private profit”.

It may be helpful to set out the relevant excerpts of the Memorandum of Association of the company. Paragraph 1 of the Memorandum sets out the name of the company. Paragraph 2 states:

“2. *The main objective for which the Company is established is:*

3. *To provide the Children and Parents of the Cherry Orchard area with high quality, affordable and accessible childcare facilities including the following*

3.1 *to provide full-time and sessional care to children from age three month to fourteen years*

3.2 *to provide after-school and out of school services to children up to the age of fourteen years*

3.3 to provide such other child minding services as may be agreed from time to time by the Board of Directors

3.4 to foster consistent and healthy child development in the area

3.5 to maximize the parental involvement in each child's development

4. To promote, support, assist and engage in (a) social development, (b) enterprise development to facilitate urban regeneration or (c) community development, designed to benefit and to promote the welfare of local communities or to deal with the causes and consequences of social and economic disadvantage or poverty.”

Paragraph 5 of the Memorandum of Association then provides as follows:

“5. The following objects set out hereafter are exclusively subsidiary and ancillary to the main object set out above and these objects are to be used only for the attainment of that main object and any income generated therefrom is to be applied for the main object only:”

There are thereafter 12 subsidiary objects set out which it is not necessary to list here, though they do provide for, *inter alia*, the promotion of social inclusion and economic development.

Having regard to the authorities referred to and the provisions of the statute, it seems to us the following principles apply:

- (i) Although the 2001 Act is not to be seen in precisely the same light as a penal or taxation statute, the same principles are applicable. Of particular significance is the obligation to interpret exemptions or relieving provisions strictly against the rate payer. See **Nangles Nurseries** above paragraph 39.
- (ii) It is not possible (and the parties do not suggest) that “*childcare*” should be regarded itself as a “*charitable purpose*” within the meaning of Section 3 of the 2001 Act. See in this regard the Determinations of the Tribunal in **Mellow Spring** and **Togher Community** referred to above.

In order to comply with the definition of “*charitable organisation*” as set out in Section 3 of the Act, the Memorandum of Association (or Articles of Association as the case may be) must state where it has only one main object a charitable purpose.

- (iii) In our view, where a charitable organisation chooses to state more than one main object then both of those objects must each be a charitable purpose in order for the organisation to come within the meaning of “*charitable organisation*” as set out in the Act. In our view, this interpretation allows for a harmonious reading of Section 3 of the Act and Paragraph 16(a) of Schedule 4 of the Act.
- (iv) Having regard to the above principles, regrettably it does not appear possible to interpret paragraph 3 and paragraph 4 of the objects clause in the Memorandum of Association of the appellant as being anything other than a statement of two main objects. At paragraph 3 the main object is stated to be a purpose which on its face does not appear to be a charitable purpose. The fact that paragraph 4 includes as an alternative under one sub-heading a charitable purpose, does not in our view imbue paragraph 4 with the necessary charitable exclusivity required of the Memorandum of Association of what would under the Act be required of a “*charitable organisation*”.

We should add that it is therefore with some regret we must come to the conclusion that the appellant, by virtue of the failure of its main object(s) clause(s) to state as their exclusive objective, an exclusively charitable purpose, cannot be regarded as a “*charitable organisation*” within the definition set out in Section 3 of the Act, and consequently cannot avail of the exemption from rating available to qualifying organisations under Schedule 4 (and in particular in the instant case, paragraph 16 thereof) of the Act. We know that the clear evidence provided in the précis submitted by the appellant, as well as the compelling evidence given by Mr. Reid and Mr. Mangan, on behalf of the appellant, establishes that the entity in question is undoubtedly wholly and exclusively concerned with the day to day implementation of a charitable purpose. Indeed it is notable that the respondent fully accepts that the appellant is without doubt a charitable organisation carrying out an exclusively charitable purpose on the lands in question, in all other respects save for the unfortunate shortcoming identified above in relation to the Memorandum of Association.

It is clear that this is not simply an entity which provides childcare facilities; it does so as an integral part of an attempt to break what is memorably described by one witness as the cycle of disadvantage in an area where there appears to be considerable social disadvantage of long-standing. The appellant is to be commended for the manner in which it operates the entity in question in such circumstances. Nevertheless, however, as a matter of law we are unable to conclude that the appellant's property is not rateable. The option of applying to Dublin City Council to ask for a waiver of rates is of course an option still open to the appellant for the period in question for which the rate is struck, though obviously this Tribunal has no role in relation to any such application.

However, we note that the appellant has sought to keep in issue the quantum of the valuation. We would urge the parties to attempt to agree if at all possible the issue of quantum. We say this in particular having regard to the straitened financial circumstances of the appellant. However, should the parties require the matter to be relisted in order for the Tribunal to rule on the issue of quantum this will of course be done.

Determination

The Tribunal determines the appellant is not a "*charitable organisation*" within the meaning of Section 3 of the Valuation Act, 2001 and consequently is not entitled to have its property deemed to be "*relevant property not rateable*" within the meaning of Schedule 4 of the Act.

And the Tribunal so determines.