Appeal No. VA15/1/004

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Broadford Community Childcare **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

In Relation to the Issue of Quantum of Valuation in Respect of:

Property No. 2199128, Crèche, Broadford Community Childcare, Broadford, Charleville, County Limerick.

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 5th DAY OF MAY, 2017

B E F O R E:

Niall O'Hanlon – Barrister-at-Law	**Deputy Chairperson**
Michael Connellan – Solicitor	**Member**
Thomas Collins – PC, FIPAV, NAEA, MCEI, CFO	**Member**

1. A Notice of Appeal in respect of Property No. 2199128 (hereafter "the Subject Property") was received by the Tribunal on the 2nd of January, 2015. The grounds upon which the Appellant considered the valuation of the Subject Property to be incorrect were specified in the Notice of Appeal to be:

"It is a not for profit organisation with a Charitable Status"

2. Hearings in respect of the appeal took place in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 9th day September, 2015, and the 9th day of February, 2016. Mr. Dermot Francis Sheehan B.L., instructed by Nolan Farrell & Goff, Solicitors, appeared on behalf of the Appellant; Mr. Gerard Meehan B.L., instructed by the Chief State Solicitor, appeared

on behalf of the Respondent. Ms. Margaret Roche gave evidence on behalf of the Appellant whilst Mr. Paul Ogbebor gave evidence on behalf of the Respondent.

The Substantive Issues Arising on this Appeal

3. The Appellant seeks to raise two substantive issues, namely;

(i) Whether the rateability of the Subject Property falls to be determined by reference to the provisions of the Valuation (Amendment) Act, 2015, ("the 2015 Act"), by virtue of section 45 of that Act;

(ii) In the alternative, whether the Subject Property falls to be treated as relevant property not rateable, pursuant to section 15 (2) of the Valuation Act, 2001, ("the Principal Act") on the basis that it comes within paragraph 16 (a) of Schedule 4 of that Act.

The Preliminary Procedural Issue

4. On the first occasion on which this matter came before the Tribunal, the Respondent objected to the issue of the applicability of the 2015 Act being raised by the Appellant in circumstances where, although it had been included in the Appellant's legal submissions, it had not been included in the Notice of Appeal. The Tribunal adjourned the hearing to allow both parties to make further submissions both on the preliminary issue thus arising and on the underlying substantive issue of whether the 2015 Act was applicable.

5. It was argued that, to allow the introduction of a new ground of appeal, would place the Respondent at a procedural disadvantage and unfairly hinder it in carrying out its public duty to all ratepayers on the valuation list. In response, the Appellant noted that Rule 10 of the Valuation Act, 2001, (Appeals) Rules, 2008, (hereafter "the Rules"), permits amendment of a Notice of Appeal in exceptional circumstances and submitted that the enactment of legislation during the currency of the Appeal, which legislation it was sought to be argued, exempted the Subject Property, was an exceptional circumstance. The Appellant further submitted that the Respondent should be deemed to be on notice of the enactment of the 2015 Act.

6. In essence, the Tribunal is asked to strike a balance between the procedural question that is raised by the Respondent, and the substantive question that is raised by the Appellant.

7. Rule 10 provides:

"The Notice of Appeal shall set out exhaustively the Grounds of Appeal upon which the appellant intends to rely. These Grounds of Appeal may not be changed or extended (and liberty to amend will not be granted) save in exceptional circumstances. The Tribunal shall not entertain any amendments to the grounds of appeal at hearing and in particular the adducing of new grounds of appeal other than in exceptional circumstances. The Tribunal will adjudicate on such matters having regard to the Rules of the Superior Courts."

8. The Tribunal notes that the 2015 Act was enacted on the 23rd of April, 2015 and that it is common case between the parties that the Act was commenced on the 8th of June, 2015. The Notice of Appeal in the present case (which was received by the Tribunal on the 2nd of January, 2015), is dated for the 19th of December, 2014. In circumstances where the legislation at issue was enacted, between the preparation and filing of the Notice of Appeal and the hearing of the said Appeal, the Tribunal is satisfied that the Appellant could not have specified the ground of appeal, which now gives rise to the first issue between the parties, at the time the Notice of Appeal was lodged. Accordingly, the Tribunal is satisfied that there exists, within the meaning of Rule 10, exceptional circumstances, and accordingly, it grants liberty, to the Appellant, to amend its Grounds of Appeal, so as to encompass the first issue arising between the parties.

9. The Tribunal, in light of the Respondent's concerns regarding procedural disadvantage, adjourned the hearing on the 9th of September, for the purpose, *inter alia,* of allowing the Respondent the opportunity to make further submissions on the issues arising between the parties. The Tribunal notes that, in the period between the first and second hearing dates, comprehensive submissions were prepared on behalf of the Respondent.

The Background to the Appeal

10. This case concerns an appeal against the decision of a Revision Officer, dated the 4th of January, 2013, to issue a No Material Change of Circumstances Notice, pursuant to section 28(4) of the Principal Act, in respect of the Subject Property, following an application, dated the 26th of March, 2012, to the Respondent, for a revision of valuation. The said decision was appealed, pursuant to section 30 of the Principal Act, to the Respondent, who, on the 25th of November, 2014, disallowed the appeal. In turn, the decision of the Respondent was, pursuant to section 34 of the Principal Act, appealed to the Tribunal. Accordingly, it is clear that the first issue that the Appellant now seeks to raise before the Tribunal, could not have arisen before either the Revision Officer or the Respondent.

The First Substantive Issue

11. Insofar as the first substantive issue is concerned, it is agreed between the parties that section 45 of the 2015 Act applies to the present appeal. Section 45 of the Act, insofar as is relevant to the present appeal, provides:

> *(1) Where, before the relevant date, there has been issued to a person … a notice under section 28, … of the Principal Act …, and–*
>
> *…*
>
> *(b) before that date–*
>
> *…*
>
> *(ii) the relevant person has appealed against the matter to the Tribunal under section 34 … of the Principal Act but the Tribunal has not determined the appeal,*
>
> *then, on and from the relevant date, the Principal Act shall, in its un-amended form, have effect as respects–*
>
> *(i) the relevant person's entitlement to appeal (and the entitlements and obligations of any other person), and*
>
> *(ii) all steps and stages consequent on any such entitlement being invoked,*
>
> *in relation to that … notice."*

The Submissions of the Parties on the First Substantive Issue

12. The Appellant argues that only the *"entitlement to appeal"* and *"all steps and stages consequent on any such entitlement"* are now governed by the Principal Act in un-amended form and that the phrase *"and the entitlements and obligations of any other person"* must be read with the preceding phrase *"entitlement to appeal"* and such that it preserves only the procedural rights of any other person and not the substantive issue of whether the Subject Property is relevant property. The Appellant further argues that, the maxim of statutory interpretation, *expressio unius est exclusio alterius* applies, and that the substantive matter of whether the Subject Property is rateable, is governed by the 2015 Act.

13. It is the Respondent's position that the Appellant is attempting to argue that the 2015 Act should apply to an appeal where the appeal has commenced before the Tribunal before the date for the commencement of that Act, the 8th of June, 2015, but the said appeal has not been fully determined by that date and that, accordingly, the Appellant is seeking to have the 2015 Act applied retrospectively to an appeal that commenced before the 8th of June, 2015. The Respondent asserts that the phrase "*all steps and stages"* necessarily includes the substantive decision on the appeal itself and that, accordingly, the provisions in issue are not limited to procedural steps.

14. Section 45, insofar as it is relevant, provides that where, before the relevant date, there has been issued to a person, a notice under section 28 of the Principal Act, and before that date, the relevant person has appealed against the matter concerned to the Tribunal under section 34 of the Principal Act, but the Tribunal has not determined the appeal:

> *"…*
>
> *then, on and from the relevant date, the Principal Act shall, in its un-amended form, have effect as respects—*
>
> *(i) the relevant person's entitlement to appeal (and the entitlements and obligations of any other person), and*
>
> *(ii) all steps and stages consequent on any such entitlement being invoked,*
>
> *in relation to that … notice."*

15. Having considered the submissions of the parties, the Tribunal is of the view that to interpret the phrase *"entitlement to appeal"* as being confined to procedural rights would require it to read in a limitation to the phrase which has simply not been included by the Oireachtas. Further, to hold in favour of the Appellant's argument that the phrase *"entitlement to appeal"* preserves only procedural rights arising under the Principal Act would seem to the Tribunal to raise a question, upon which it expresses no concluded view, as to what the Oireachtas had contemplated when enacting that part of section 45 which provides that the Principal Act shall, in its un-amended form, have effect as respects, *"all steps and stages consequent on any such entitlement being invoked"*.

The Second Substantive Issue

16. In the alternative, the Appellant argues that the Subject Property falls to be treated as relevant property not rateable, pursuant to section 15 (2) of the Principal Act, on the basis that it comes within paragraph 16 (a) of Schedule 4 of the said Act. Schedule 4 provides that relevant property not rateable includes:

> *"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, …"*

17. The Appellant argues that as a non-profit making body, providing childcare services and focusing on poor, special needs and/or children on the "at risk" register, it is engaged in activities that

constitute, *per* Lord Macnaghten, in *Commissioners for Special Purposes of Income Tax v. Pemsel* **[1891] A.C. 531**, at 583, both the relief of poverty and other purposes beneficial to the community.

18. Ms. Margaret Roche, giving evidence for the Appellant, indicated that Appellant focused on children from low income and socially deprived families and those on the at-risk register. Ms. Roche stated that there was *"a 50/50 mix between children who have special needs (Down Syndrome, Autism, on the At Risk Register), those from medical card holders and poor and socially deprived who cannot afford the full cost of childcare."* Ms. Roche indicated that children, who were socially deprived and were referred through the HSE, were exempt from fees whilst, in relation to special needs children, each case was taken individually in reaching a decision on fees. However, it was also the evidence of Ms. Roche that, in the case of special needs children, meals, transport, extra staff and a sensory room were provided without extra charge.

19. Notwithstanding the fact that contributions were received from parents, it is clear that such contributions fell short of expenditures. The Appellant's Income and Expenditure Account for the year ended 31st of December, 2012, showed that for 2011, the last year for which figures were available prior to the Appellant seeking a revision of valuation, total expenditure was €470,746 whilst parents' contributions by way of crèche income amounted to just €277,531, or less than 60% of total expenditure. In any event, in both 2011 and 2012 the accounts disclosed that total expenditure exceeded total income.

Does the Appellant Constitute a Charitable Organisation?

20. The Respondent advances two arguments in response to the Appellant's claims pertaining to the Principal Act. *Firstly*, the Respondent argues that the Appellant does not meet the definition, contained in section 3 of the Principal Act, of what constitutes a charitable organisation. The relevant part of section 3 provides:

> *"(b) in the case of a company—*
>
> *(i) the memorandum of association or articles of association, as appropriate, of*
>
> *the company comply with the conditions specified in subparagraphs (iii) and (vii) of paragraph (a) of this definition …"*

21. Subparagraph (iii) of (a) provides:

> *"(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,"

22. In this regard, the Respondent notes that the Appellant put in place a memorandum and articles of association when it was incorporated in 1997 ("the First Memorandum and Articles of Association"). Thereafter, by a submission to the Companies Registration Office, dated the 26th of January, 2012, the Appellant amended its memorandum and articles of association ("the Second Memorandum and Articles of Association"). Subsequently, an application, dated the 26th of March, 2012, was made to the Respondent, for a revision of valuation. It was the Second Memorandum and Articles of Association that, the decision, the subject of the present appeal, related to. That decision, the Respondent contended, was published on the 4th of January, 2013. Subsequently, by a submission to the Companies Registration Office, dated the 10th of January, 2013, the Appellant further amended its memorandum and articles of association ("the Third Memorandum and Articles of Association").

23. The Respondent submitted that, insofar as it was necessary to consider the Memorandum and Articles of Association of the Appellant, the Tribunal should consider the Second Memorandum and Articles of Association and that the Third Memorandum and Articles of Association was irrelevant in that it post-dated the Appeal. The facts relied upon by the Respondent in this regard were not contested by the Appellant who, nevertheless, sought to rely on the Third Memorandum and Articles of Association at the hearing of the Appeal. The Tribunal, having considered the parties' submissions on this point, holds in favour of the Respondent's argument that the Third Memorandum and Articles of Association is irrelevant in that it post-dates the Appeal.

24. It is agreed between the parties that the objects contained in the Second Memorandum and Articles of Association are as follows:

"(a) To carry on for the benefit of the community the provision of housing and associated amenities for persons in deprived or necessitous circumstances.

(b) To provide for relief of poverty and deprivation caused by poor housing conditions and homelessness or other social and economic circumstances.

(c) To carry on, for the benefit of the community, a crèche and community childcare facility and associated amenities."

25. In *Commissioners for Special Purposes of Income Tax v. Pemsel* **[1891] A.C. 531**, at 583, Lord Macnaghten stated:

> *""Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."*

26. The Tribunal is satisfied that the first two objects contained in the Second Memorandum and Articles of Association are concerned with the relief of poverty and that the third object is concerned with other purposes beneficial to the community. Accordingly, the Tribunal rejects the Respondent's argument on this point and holds in favour of the Appellant. The Tribunal notes that, in the course of argument, the Respondent referred to the Tribunal's decision in **VA05/3/072 Coolock Development Council Ltd.** However, the Tribunal did not find this case to be of assistance as it was concerned with the separate question of whether the promotion of community enterprise could be regarded as a charitable purpose.

Use Exclusively for Charitable Purposes

27. *Secondly*, the Respondent argues that the Appellant does not comply with the requirements of paragraph 16 (a) of Schedule 4 of the Principal Act, which provides:

> *"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, …"*

28. Specifically, the Respondent maintains that the Appellant does not use the Subject Property *exclusively* for charitable purposes in circumstances where some parents were paying full fees. In that regard, the Respondent based its argument upon the judgment of the Tribunal in **VA14/2/008 Bree Community Development Group Ltd**, where, on similar facts, it answered the question of whether a property could be said to be used exclusively for charitable purposes, in circumstances where many of the parents were paying full fees, in the negative.

29. The Tribunal, having read the judgment in **VA14/2/008 Bree Community Development Group Ltd,** notes that it appears to have been decided without the benefit of the decision in *Barrington's*

Hospital v. Commissioner of Valuation **[1953] I.R. 299.** In that case, which was referred to by the Appellant in its written submissions in the present appeal, it was contended that the Appellants did not qualify for exemption from rating pursuant to section 63 of the Poor Relief (Ireland) Act, 1838. In the course of finding for the Appellants, Kingsmill Moore J. noted, at 317 to 318:

> *"Counsel for the Commissioner next contended that the words "used exclusively for charitable purposes," were equivalent to "used exclusively for the treatment of the poor" and that the treatment given must be entirely free: or at least that any substantial contributions in respect of such treatment were sufficient to deprive a hospital of the right to be regarded as used exclusively for charitable purposes. In my opinion, a short and decisive negation of this contention is to be found in the section itself. When the framer of the section wished to make exemption depend on the charitable benefit being conferred exclusively on the poor he knew how to say it. He did say it, a couple of lines previously in the section, when he provided for the exemption of "church, chapel, or other building ... exclusively used for the education of the poor." I have not heard, and am unable to imagine, any reason why if he meant to confine exemption to hospitals "exclusively used for the treatment of the poor" he should have departed from his former precedent and adopted instead the phrase, "used exclusively for charitable purposes." The choice of this latter phrase is, to my mind, conclusive that he meant to include hospitals even if they were not exclusively used for the treatment of the poor and this consideration alone would dispose of the main contention of the Commissioner."*

30. Of course, a question that arises is the extent to which the dicta of Kingsmill Moore J. are applicable given that the present Appeal concerns the interpretation of Schedule 4 of the Principal Act, not section 63 of the 1838 legislation. Further, whilst section 63 makes reference to "the poor", no such reference is made in Schedule 4. However, Kingsmill Moore J. went on to state, again, at 318:

> *"Having regard, however, to the numerous and not always uniform decisions given upon the section as a whole, and the dicta contained in those decisions, it seems desirable to consider in more detail by "charitable purposes" in the section and what effect should be given to the use of the word "exclusively." In so doing, it seems simplest to begin by ascertaining the ordinary legal meaning of "charitable purposes" and then to see how far such meaning is narrowed by any express wording of the section or other provisions of the rating code."*

31. Kingsmill Moore J. went on to refer to the *Commissioners for Special Purposes of Income Tax v. Pemsel* **[1891] A.C. 531,** wherein the legal meaning of "charitable purposes" in Ireland and England was examined by Lord Macnaghten. Kingsmill Moore J. stated, at 319:

"I venture to quote once more the most famous passage, at p.583:—"How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do directly or indirectly"

Lord Macnaghten's words were considered and developed in Verge v. Sommerville **[[1924] A.C. 496]** *where Lord Wrenbury gave the opinion of the Privy Council. "His [Lord Macnaghten's] fourth head does not contain the word 'poor.' He does not say 'beneficial to the poorer members of the community'; he says, 'beneficial to the community.' Did he mean his words to be confined to the poor? Education and religion, two of the heads which he had just mentioned, do not require any qualification of poverty to be introduced to give them validity. If he was going by general words to add a fourth class in which poverty must be an ingredient, he would surely have said so. He goes on to say: 'The trusts last referred to' (i.e. the fourth class) 'are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor.'*

"Upon the word 'incidentally' might, perhaps, have been founded an argument that the trust is invalid as a charitable trust if it benefits the rich in any way other than indirectly—but for the fact that Goodman v. Mayor of Saltash **[7 App. Cas. 633]** *had nine years before upheld as charitable a trust under which rich as well as poor could, not incidentally but directly, claim to share the benefit. Their Lordships understood Lord Macnaghten's words as meaning 'beneficial to the community' and not 'beneficial to the poor members of the community.'"*

In Webb v. Oldfield **[[1898] 1 I.R. 431]** *Walker L.J. says, at p. 448:—"As early as 1767 the Lord Chancellor gave a definition of charity under the statute [43 Eliz. 1, c. 4] as 'a gift to a general public use which extends to the poor as well as the rich.'"*

32. Following extensive consideration of the authorities Kingsmill Moore J. noted, at 323 to 324, that the following conclusions emerged: *Firstly,* that the care of the sick in the community in general or of any limited portion of the community was a charitable purpose within the fourth class mentioned in *Pemsel's Case.* In the present appeal, the Tribunal has already indicated that, it is satisfied that

the third object, of the Appellant's Second Memorandum, constitutes a charitable purpose, within the meaning of the fourth class in *Pemsel*.

33. *Secondly,* it is no less a charitable purpose if the persons benefitted are rich as well as poor. In the present appeal, whilst there was no evidence that any of the parents of the children attending the crèche could properly be described as rich, there was evidence that some parents paid more by way of fees than other parents and that such differentiation was related to income levels.

34. *Thirdly,* it is no less a charitable purpose if the care is not given gratuitously, provided that the institution in or by which it is afforded is not so conducted as to show habitually a surplus of receipts over expenditure. The evidence adduced by the Appellant included income and expenditure accounts for the years 2011 and 2012. As noted in paragraph 19 of this judgment, in each year total expenditure exceeded total income.

35. *Fourthly,* the mere fact that some pay more than the cost of their treatment, or that a portion of the institution is so run as to show a profit does not prevent the institution from being one which is solely devoted to charitable purposes if the profit is applied for the benefit of the poorer patients and the institution as a whole does not show a profit. In the present appeal, there was no evidence adduced to indicate that any of the parents of the children (the service users) were paying more than the cost of the service provided. Indeed, the evidence of Ms. Roche suggested that even where the parents of special needs children were paying what she described as, a full fee, such children were receiving services for which their parents were not paying the Appellant. Nor was there any evidence to suggest that the Appellant was running the crèche to show a profit.

36. Accordingly, the Tribunal finds in favour of the Appellant, insofar as it sought to advance its argument by reference to the second substantive issue arising between the parties and, accordingly, holds that the Subject Property is relevant property not rateable, pursuant to section 15 (2) and Schedule 4, paragraph 16 (a) of the Principal Act.