Appeal No: VA19/5/0492

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

NA hACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015

Kangakare Arklow Ltd **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

In relation to the valuation of
Property No. 2200885, Office(s) at 3/B PT Lamberton, Arklow, County Wicklow.

B E F O R E
Dairine Mac Fadden - Solicitor **Deputy Chairperson**
Ken Enright - Solicitor **Member**
Raymond Finlay - FIPAV, MMII, ACI Arb, TRV, MCEPI, PC **Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 23rd DAY OF MARCH, 2023

1. THE APPEAL
1.1 By Notice of Appeal received on the 14th day of October 2019 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV') of the above relevant Property was fixed in the sum of €**31,600.**

1.2 The sole ground of appeal as set out in the Notice of Appeal is that the determination of the valuation of the Property is not a determination that accords with that required to be achieved by section 19 (5) of the Act because :
"1. The subject property is a modern purpose built creche in Arklow

2. The appeal is part grounded in quantum (ground floor) and part grounded in legal (first floor)

3. To the appellants knowledge, there is only one creche let in Arklow. This property was let at €29,760 per annum on a 3-year lease from 1st May 2018 and was fully fitted by the landlord. It was formally valued by the commissioner under PN 2194574 and was removed from the valuation list due to exemption for ECCE. The letting devalues at €74.40 per sqm. Bearing in mind the Bridgewater is prime real estate in Arklow in every sense, it's impossible that the subject could exceed this level.

4. In regard to the ground floor quantum, the Commissioner has taken a near uniform approached to creches across the entire Wicklow rating are at €90 per sqm. This is in spite of the fact that a very significant value and demographic differences apply the largest towns in the County, primarily dependent on their distance from Dublin. This is best illustrated by the approach taken in regard to other categories of property. Furthermore, the price of childcare in Bray is different to Arklow or Baltinglass, with the former significantly more expensive than the later.

5. The only comparison not valued by the Commissioner at €90 per sqm ground floor is PN 2194899 in Baltinglass at €60 per sqm

6. The legal case concerns ECCE use at first floor level, being its sole use.

7. The Valuation Tribunal has determined including VA16/1/015, that ECCE i.e., the preschool year paid in full by the state constitutes education by the state under Schedule 4 Section 10. For the avoidance of doubt, the subject qualifies under (a)(ii)- expenses wholly defrayed.

8. Indeed, Early Days Academy located on the 3rd floor of the Bridgewater Shopping Centre, Arklow- has been exempted by the commissioner on this basis. This property was referenced by the appellants in representations under PN 2194574 and has since been removed from the valuation list. This property is also referenced regarding the quantum as it is rented.

9. Lest there be no doubt as to whether part of a building can qualify, the Commissioner has already allowed part of PN 5002535 (Rocking Horse Creche and Montessori). The creche section remains on the list at €7,000 NAV with the balance of the property exempted as ECCE.

10. The appellants therefore contend that the first floor should be exempted under schedule 4. Section 10-education by the State.
1. The subject property's 1st floor is ECCE only. This section of the property should be excluded in line with the decision of the Valuation Tribunal in VA16/1/015.
2. The appellants contend that this section of subject property is exempt under Section 10, Schedule 4 of the Valuation Act 2001:
10.—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 (ii) 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).
3. The rental value as ascribed to the ground floor is excessive. The subject property is in a residential location with only 1 other commercial property in close proximity. The rental value would not exceed €55/m2 based on the comparison noted below."

1.3 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €12,300.

2. REVALUATION HISTORY

2.1 On the 15th day of March, 2019 a copy of a valuation certificate proposed to be issued under section 24(1) of the Valuation Act 2001 ("the Act") in relation to the Property was sent to the Appellant indicating a valuation of €31,600.

2.2 Being dissatisfied with the valuation proposed, representations were made to the valuation manager in relation to the valuation. Following consideration of those representations, the valuation manager did it not consider it appropriate to provide for a lower valuation.

2.3 A Final Valuation Certificate issued on the 10th day of September, 2019 stating a valuation of €31,600.

2.4 The date by reference to which the value of the property, the subject of this appeal, was determined is the 15th day of September, 2017.

3. THE HEARING

3.1 The Appeal proceeded by way of an oral hearing held remotely, on the 11th day of July, 2022. At the hearing the Appellant was represented by Mr. Eamonn S. Halpin B.Sc.(Surveying) M.R.I.C.S. M.S.C.S.I. and the Respondent was represented by Frank Kennedy BL instructed by the Chief State Solicitor and Mr David Maguire, Valuer, of the Valuation Office was called to give evidence.

3.2 In accordance with the Rules of the Tribunal, the parties had exchanged their respective reports and précis of evidence prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief in addition to giving oral evidence.

4. FACTS

4.1 From the evidence adduced by the parties, the Tribunal finds the following facts.

4.2 The property is a purpose-built creche facility constructed in 2007 in a residential estate in Arklow.

4.3 It has a ground floor area of 225.14m^2 and a first floor area of 180.08m^2, agreed by the parties.

4.4 The ground floor area hosts a creche business and all the facilities associated therewith.

4.5 The first floor provides, exclusively, early childhood care and educational facilities fully-funded by the State.

4.6 The business is conducted for the purpose of making a private profit.

5. PRELIMINARY ISSUES

5.1 A preliminary issue was heard and dealt with by the Tribunal.

5.2 The issue concerned the Appellant's objection to the admission of the Respondent's legal submissions on the basis that they were submitted out of time and without leave. Mr Halpin stated that he had seen an email just before the hearing which he understood contained the Respondent's legal submissions but that he had not had an opportunity to read them.

5.3 Mr Kennedy, for his part, apologised to the Tribunal for the lateness of the submissions, provided explanations and acknowledged that Mr Halpin would not have had time to digest the submissions. He said that all of the issues contained in the submissions were dealt with in the appeal Faylinn Education Limited v Commissioner for Valuation (VA18/2/0015) ("Faylinn") and that the submissions were merely an expansion on some of these points. Consequently, he believed, that to allow the submissions would not result in prejudice to the Appellant. He suggested Mr Halpin could be given some time to read the submissions.

5.4 Mr Halpin said at this stage, whatever the submissions contained, any reading he might do would not give him time to respond on the day of the hearing. He said he had read the Faylinn case as it was contained in the Respondent's précis so he would be able to deal with any issues arising out of that – and he acknowledged that the Appellant's counsel could make oral submissions in any case – but he was not happy to address or admit the written submissions, not having seen them.

5.5 The Tribunal, having considered the matter, noted that the submissions were made out of time and without leave or direction of the Tribunal on the day of the hearing, Monday 11 July 2022, following a communication from the Appellant to the Tribunal office on the previous Thursday. In the circumstances, the Tribunal was of the view that it would be unfair to the Appellant to admit the written legal submissions. Consequently, the Tribunal refused to so admit them.

6. RELEVANT STATUTORY PROVISIONS

6.1 All references hereinafter to a particular section of the Valuation Act 2001 ('the Act') refer to that section as amended, extended, modified or re-enacted by the Valuation (Amendment) Act, 2015.

6.2 The net annual value of the Property has to be determined in accordance with the provisions of section 48 (1) of the Act which provides as follows:

"The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value."

6.3 Section 48(3) of the Act as amended by section 27 of the Valuation (Amendment) Act 2015 provides for the factors to be taken into account in calculating the net annual value:

"Subject to Section 50, for the purposes of this Act, "net annual value" means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably be expected to let from year to year, on the assumption that the probable annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant."

6.4 Section 13 of the Act states:

13.—The Commissioner shall provide for the determination of the value of all relevant properties (other than relevant properties specified in Schedule 4) in accordance with the provisions of this Act.

6.5 Section 15 of the Act states:

15.— (1) Subject to the following subsections and sections 16 and 59, relevant property shall be rateable.

(2) Subject to sections 16 and 59, relevant property referred to in Schedule 4 shall not be rateable.

6.6 Schedule 4 of the Act lists 22 types or categories of relevant property which are designated as "not rateable" by Section 15(2). The two paragraphs of Schedule 4 relevant to the arguments made in this appeal are paragraphs 10 and 22.

6.7 Paragraph 10 provides as follows:

10.—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

(ii) 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).

6.8 Paragraph 22, which was inserted into the Act on June 2015 by the Valuation (Amendment) Act 2015, provides as follows:

22.—Any land, building or part of a building used exclusively for the provision of early childhood care and education, and occupied by a body which is not established and the affairs of which are not conducted for the purpose of making a private profit.

7. APPELLANT'S CASE

7.1 Mr Halpin said that there were two parts to his case. Firstly, a quantum issue concerning the valuation applied by the Commissioner to the ground floor. Secondly, a legal issue as to

whether the first floor should be exempted from valuation on the grounds that it was being used exclusively for the provision of Early Childhood Care and Education ("ECCE") fully funded by the State. By virtue of that use, argued Mr Halpin, the first-floor property was property described by Schedule 4 paragraph 10 and thus, per the provisions of Section 15 of the Act, not rateable.

7.2 Mr Halpin identified the location of the property at Woodlands, Lamberton, Arklow, County Wicklow, a residential estate of approximately 300 houses on the south-west side of Arklow, 2 kilometres from the town centre.

7.3 Referring to the photographs in his précis, Mr Halpin described the property – a large dormer bungalow – as a purpose-built creche, constructed in 2007. He said the ground floor was "a conventional creche" and the first floor was dedicated to ECCE preschool.

7.4 Mr Halpin confirmed the floor areas were 225.14m^2 on the ground floor and 180.08m^2 on the first floor.

7.5 The property was held, he said, in freehold tenure.

7.6 Mr Halpin said that, as far as the Appellant was aware, there was only one creche or preschool let in Arklow, the Early Days Academy, located on the 3rd floor of the Bridgwater Shopping Centre. This property, said Mr Halpin, had been removed from the list by the Commissioner because of the ECCE exemption but it was let, he said, at €29,760 per annum on 3-year lease from 1st May 2018, fully fitted by the landlord. Mr Halpin said that this rent devalued at €74.40/m^2 on the basis of a floor area of 400m^2 and argued that because the Bridgewater was "prime real estate in Arklow in every sense", it would be impossible for the subject to exceed that level.

7.7 Mr Halpin said that the Commissioner applies a near uniform rate of €90/m^2 to creches across the entire Wicklow area notwithstanding what he saw as very significant differences between the largest towns in the county in terms of demographics and market values based, he said, primarily on their distance from Dublin. Mr Halpin presented a table showing how the Commissioner approached other categories of property in Wicklow, which approach, he said, illustrated the differences.

Town	**Prime Retail Zone A (Main Street)**	**Town Centre Office (Office House)**	**Prime Industrial (> 500m^2)**	**Supermarket 2 (500-2,500m^2)**
Bray	€420	€120	€60	€95
Greystones	€550	€120	€52	€90
Blessington	€220	€80	€45	€70
Wicklow Town	€220	€90	€50	€80
Arklow	€180	€90	€50	€80
Baltinglass	€160	€60	€35	€60

7.8 In the light of the table, Mr Halpin identified what he saw as three distinct valuation levels in the county. Bray and Greystones, he said, were the prime locations; Blessington, Wicklow Town and Arklow were secondary, and Baltinglass was tertiary. While acknowledging that uniformity between the categories was not absolute, Mr Halpin said that the Commissioner had obviously recognised relative values for other categories but that in valuing all of the creches in the county at a uniform €90, the Commissioner had not taken sufficient account of the relativity between the various locations. Mr Halpin further argued that the price of childcare in Bray is significantly more expensive than it is in Arklow or Baltinglass.

7.9 Mr Halpin had two tone-of-the-list comparisons. His first was Park Academy Childcare in the Bray Retail Park, Southern Cross, Bray. This property comprised a ground floor only and, like the subject property, was valued at €90/m^2. Mr Halpin described this as the largest and best located creche in the county, ideally situated for safe drop-off and pick-up in Bray Retail Park. It served, he said, a population of 32,600 and full-time creche costs were €1,400 per month per child, a rate significantly higher than that charged by the Appellant.

7.10 The Appellant's second comparison was Little Feet Creche in Baltinglass, which property, at €60/m^2 ground floor, Mr Halpin identified as the only creche in the county not valued at €90/m^2. Mr Halpin said that by reference to the relative values for other property categories, Arklow was superior to Baltinglass but inferior to Bray. He argued that if the valuation of the subject property was to be commensurate with general relativities across the county and the rental evidence from Arklow, a ground floor level of €70/m^2 was appropriate, resulting in a valuation for the ground floor of €15,760.

7.11 Responding to a question from the Tribunal, Mr Halpin confirmed that if the Tribunal were to decide against him on the legal point, he was seeking a valuation of €49/m^2 for the first floor, which represented 70% of what the ground floor value he asked for.

7.12 The Appellant's submission concerned the first floor which was used, Mr Halpin said, solely for ECCE. Mr Halpin claimed that this part of the property qualified for an exemption under Schedule 4 paragraph 10 of the Act. The first floor was, said Mr Halpin, part of a building occupied by an educational institution and used exclusively by that institution for the provision of educational services and otherwise than for private profit. Going on to refer to sub-paragraphs (a) and (b) of paragraph 10, Mr Halpin acknowledged that sub-paragraph (a) (i) did not apply because the business was conducted for private profit but argued that the property qualified under the provisions of the alternative sub-paragraph (a) (ii) because the expenses incurred were defrayed wholly or mainly by the State. He said that the property likewise satisfied the requirements of sub-paragraph (b) because the services provided were available to the general public.

7.13 Mr Halpin referred to the decision of the Tribunal in Sharon Smyth v Commissioner for Valuation VA16/1/015 ("Sharon Smyth") and said that this judgment was "key to the Appellant's case" and that the circumstances of the first floor of the subject property "fit[ted] the bill" per the terms of the Sharon Smyth decision.

7.14 Mr Halpin said it was "universally accepted" that the provision of ECCE constitutes education by the State and that it was accordingly exempt under the terms of Schedule 4 paragraph 10. He said that one of his comparisons, the Early Days Academy in Bray, had

previously been valued and put on the list but had since then been, as he put it, "exempted as ECCE".

7.15 Anticipating a possible objection that *part* of a property might not qualify for the exemption, Mr Halpin referred to another property, Rocking Horse Creche and Montessori (PN5002535), part of which, he said, was exempted, as well as the provisions of Schedule 4 paragraph 10 which explicitly make reference to "a building or part thereof."

7.16 Under cross-examination by Mr Kennedy, Mr Halpin confirmed that the Appellant occupied the ground-floor and the first floor and that the property was a modern, purpose-built creche with a normal range of creche services, Montessori, and child-minding facilities.

7.17 Mr Halpin agreed with Mr Kennedy that the business was run for profit but expressed some difficulty at characterising the use of the first floor as "commercial" because the Appellant was, he said, prohibited from charging fees for ECCE, was supervised by the Department of Education and was obliged to comply with the Department's requirements.

7.18 Mr Kennedy asked Mr Halpin about the Early Days Academy in the Bridgewater Shopping Centre in Arklow, to which property Mr Halpin had included in his evidence as a rental comparable as well as in his representations to the Commissioner, as recorded on page 6 of his précis. Mr Kennedy noted that Mr Halpin had put the floor area of this property at $400m^2$ but it was the Commissioner's evidence – set down on page 26 of the Respondent's précis – that the floor area of the property was only $250.58m^2$. Mr Halpin confirmed he had not inspected that premises as he had not been allowed access and said he obtained the floor area details from the Commercial Lease Register. Before the hearing concluded, Mr Halpin put into evidence the details from the Commercial Lease Register to the effect that the area of the comparison premises was "$400m^2$ gross intern." He confirmed that these details dated from 2008 and acknowledged that he had not inspected the property and that it might have been developed since.

7.19 Mr Kennedy put it to Mr Halpin that the reason that his second tone-of-the-list comparison, Little Feet Creche and Pre-School was valued lower than the subject property was because it was not a purpose-built creche, but a house. Mr Halpin denied that this invalidated the comparison and said that while the Commissioner took account of such distinctions, the market did not. The Little Feet property was, he said, once a house but it was completely renovated to make it, effectively, a purpose-built creche. Mr Halpin added that the difference between Baltinglass and Bray was pretty startling in terms of the valuation of other properties and it was this difference that should be recognised and accounted for.

7.20 Mr Kennedy accepted that Mr Halpin had acted for Park Academy and could, accordingly, give evidence of the cost of childcare there – at €1,400 per child per month on a full-time basis, at the valuation date – but suggested to Mr Halpin that, other than that single example, Mr Halpin had no statistical evidence of the cost of childcare generally in the county and that consequently, his claim that childcare in Bray was significantly more expensive than that in Arklow or Baltinglass was without foundation. Mr Halpin acknowledged the limited evidence and accepted he was giving an opinion only but the opinion, he said, was based on his experience of dealing with valuations in Wicklow for 40 years. Arklow has had, he said, quite a bit of unemployment and social housing and was weak enough, relatively speaking, in terms of the available spend on childcare.

7.21 Mr Kennedy put to Mr Halpin the Respondent's view that the Bridgewater Shopping Centre was prime real estate but for retail only, and not for a creche and that the majority of purpose built creches in Wicklow were located in residential areas. Mr Halpin declined to accept this. He said that the preference of operators is to put their creche close to a small neighbourhood centre or in a commercial development adjoining residential areas. He acknowledged that the Commissioner's view was correct to an extent in that there can be an attraction in certain housing developments but it depended, he said, on what kind of houses were in the development and what level of childcare spend was available. He said that Bridgewater had a number of advantages in that it was centrally-located with access to several housing developments around Arklow. As well as this, it had, he said, lots of parking which made it easy to drop and pick up children at any time.

7.22 Mr Kennedy put it to Mr Halpin that it was fundamentally incorrect to say – as Mr Halpin had on page 18 of his précis – that it was "universally accepted" that the provision of ECCE constitutes education by the State and thus qualifies for the exemption under Schedule 4, paragraph 10 of the Act. Mr Halpin replied that the only person who does not accept the exemption is the Commissioner. He outlined his experience acting for the Association of Creches and Montessori Teachers which, he said, was the forerunner of Early Childhood Ireland and said that all stakeholders and participants in the sector had been assured on many occasions at countless meetings over the last 20 years by various people – he referred to TDs and ministers, as well as briefing notes prepared by the Valuation Office and County Councils – that if an operator provided ECCE only then the building was exempt.

7.23 Mr Halpin accepted that he was appearing before the Tribunal as a valuer and could not give evidence as an expert witness on matters relating to childcare and nor could he give evidence on behalf of other participants in the sector but that, even leaving aside what he had heard, the matter was dealt with in minute detail in the Sharon Smyth case which decision, he argued, confirmed his position five years ago, in the face of objections from the Commissioner, to the effect that a building operating ECCE only was exempt under Schedule 4, paragraph 10.

7.24 Mr Kennedy put to Mr Halpin that, in addition to the Commissioner, there was at least one other dissenting view, namely that expressed by Tribunal in Faylinn. Mr Halpin said that Faylinn did not alter Sharon Smyth because Faylinn was concerned with Schedule 4, paragraph 22, and not Schedule 4, paragraph 10. Mr Halpin said that paragraph 10 applied to this appeal, as it had to the Sharon Smyth appeal, and that accordingly, it was the Sharon Smyth decision that applied here and Faylinn, which had been concerned with the provisions of paragraph 22, was not relevant.

7.25 Mr. Halpin accepted Mr Kennedy's point that Schedule 4, paragraph 22 was not in force during the time period with which the Sharon Smyth case was concerned but did not accept that the change in the legislation had any effect on the exemption under paragraph 10. He said that the reason paragraph 10 existed was to cover the very type of facility the subject property contained and that there would have been "bedlam in Dáil Eireann" if they thought that the paragraph 10 exemption "was being done away with" by the inclusion of the new paragraph.

7.26 Challenged by Mr Kennedy that he had no basis for making statements about the intentions of the Oireachtas, Mr Halpin said he didn't need to rely on his views in this regard but relied on the legislation. He said that paragraph 10 was put in the Act to deal with these

types of facilities as well as other educational institutions and that the Oireachtas, when it inserted paragraph 22, made no change to this provision.

8. RESPONDENT'S CASE

8.1 Before adopting his précis Mr Maguire corrected two matters within it. The first was at paragraph 3 page 26 which he amended to the effect that the rent in the Early Days Academy in the Bridgwater Shopping Centre devalued to €118.77/m^2. He confirmed to Mr Kennedy that his measurement for the floor area in this property, at 250.58m^2 was taken at the last inspection which occurred in 2008 (although, later on, under cross-examination from Mr Halpin, he clarified that the latest revaluation of this property must have occurred under the 2015 Revaluation order). He said he did not know how Mr Halpin had come up with a floor area of 400m^2 when he had not measured the property.

8.2 The second correction was at paragraph 7.1 where he had said that 3 items of market information informed the valuation scheme which was used to estimate the NAV for the subject property. He confirmed he could only say for certain that his first Key Rental Transaction (KRT) was used to inform the scheme and that his other two KRTs, details of which were obtained from the Commercial Lease Register, might not have been used to inform the scheme.

8.3 Mr Maguire confirmed the location of the property in the Woodlands estate, approximately 2 kilometres from Arklow Town Centre and agreed his description of the property accorded with that of Mr Halpin.

8.4 Mr Kennedy referred Mr Maguire to Section 6.4, paragraph 3 of his précis where he agreed that the Bridgewater Centre was prime real estate but, he said, this applied in terms of retail only. Mr Maguire did not agree it was prime location for a creche.

8.5 Mr Maguire said that all of his comparisons were located in residential areas.

8.6 Mr Maguire said that the fact that all of his comparison creches were located in – or, in one case, beside – a residential area backed up what he said in his précis that the majority of purpose built creches in Wicklow are located in residential areas. He said it also confirmed his view that most parents preferred a creche that is either close to their home or work and that, in the light of this, the Bridgewater shopping centre was not a prime location for a creche. Mr Maguire added that local authorities, when granting permission for the development of a residential estate, often insert a condition that a purpose built creche be included in the development.

8.7 Mr Maguire confirmed to Mr Kennedy what he had said in his précis, that "purpose built creches are not as location sensitive as other categories of properties such a retail or industrial. These types of properties rely on an immediate catchment area, hence they are all in or very close to residential areas." Mr Maguire took the view that the subject property was, considering its use, better located than the Bridgewater property. He said that retail depends on footfall and that the footfall in Bray would be very different to that of Arklow or Baltinglass or Blessington and that these differences would account for the corresponding differences in the values. Industrial valuations, he said, would also be more sensitive to location because industrial properties have to be near arterial routes and urban areas.

8.8 When referred by Mr Kennedy to section 6.4.5 of his précis wherein he had said the Baltinglass comparison was valued at a lower level because it was not a purpose built creche but rather a house converted into use as a creche, Mr Maguire said that the reason for this was that the specification would be lower on such a property. It was, he said, valued as an Office (House) type property.

8.9 Acknowledging the Appellant's point that the Early Days Academy had been exempted, Mr Maguire accepted that the Commissioner had in the past applied Schedule 4, paragraph 10 to creches, including the Early Days Academy, in order, he said, to assist them. However, he added that if Early Days were to be listed for Revision now it would have to satisfy the provisions of Schedule 4, paragraph 22 in order to obtain the exemption. He said that this was now the opinion of the Commissioner and the same circumstances would apply to the Rocking Horse Creche and Montessori in South Dublin, mentioned by the Appellant in his precis.

8.10 Mr Kennedy asked Mr Maguire to explain why Park Academy in Bray had been given the same valuation per square metre as the subject property. Mr Maguire replied that he had taken the view that these properties were not location sensitive and that all purpose-built creches located close to urban areas in Wicklow – of which he said there were eleven – had been given the same value.

8.11 Referring to his first KRT, full details of which are set out in the Appendix (N/A to public), Mr Maguire identified its location in a town in Wicklow and said it was a purpose-built creche in a residential location providing ECCE. Mr Maguire said it was valued in common with all of the Respondent's other comparisons at €90/m^2 ground floor NAV and €63/m^2 first floor. The overall NAV was €59,700. Mr Maguire said the property was let on an FRI lease commencing on a date within two years of the Valuation Date of 15 September 2017 for a term of 10 years. He provided details of the net effective rent (NER), set out in the Appendix (N/A to public). No representations were received and the valuation, he said, was not appealed.

8.12 Referring to his second KRT, full details of which are set out in the Appendix (N/A to public), Mr Maguire identified its location in a town in Wicklow and said it was a purpose-built creche in a residential location providing ECCE. Mr Maguire said it was valued in common with all of the Respondent's other comparisons at €90/m^2 ground floor NAV and €63/m^2 first floor. The overall NAV was €65,600, which he said, was "a fairly conservative level" when compared to the rent, details of which he provided. Mr Maguire said the property was let for a term of 15 years commencing on a date within 12 months of the Valuation Date of 15 September 2017. He provided details of the NER, set out in the Appendix (N/A to public). No representations were received and the valuation, he said, was not appealed.

8.13 Referring to his third KRT, full details of which are set out in the Appendix(N/A to public), Mr Maguire identified its location in a town in Wicklow and said it was a purpose-built creche in a residential location providing ECCE. Mr Maguire said it was valued in common with all of the Respondent's other comparisons at €90/m^2 ground floor NAV and €63/m^2 first floor. The overall NAV was €40,200. The property was subject to a lease commencing on a date within 12 months of the valuation date for a term of 25 years. He provided details of the NER, set out in the Appendix (N/A to public). No representations were received and the valuation, he said, was not appealed. Again, Mr Maguire expressed the view that the valuation was quite

conservative when one compared it to the passing rent, details of which are set out in the Appendix (N/A to public). He said no representations were received and the valuation was not appealed.

8.14 Directed by Mr Kennedy to his tone-of-the-list comparisons, Mr Maguire said his first comparison, Cocoon Group in Blessington, was a purpose-built creche of 545.75m^2, located beside a residential area, providing ECCE and valued at €90/m^2. It had a total NAV of €49,100. He said no representations were received and the valuation was not appealed.

8.15 Mr Maguire said his second tone-of-the-list comparison, Little Harvard in Rathnew, was a purpose-built creche of 293.27m^2, located in a predominantly residential area, providing ECCE and valued at €90/m^2. It had a total NAV of €26,300. He said no representations were received and the valuation was not appealed.

8.16 Mr Maguire said his third tone-of-the-list comparison, Little Explorers in Wicklow, was a purpose-built creche of 446.88m^2, located in a residential area, providing ECCE and valued at €90/m^2. It had a total NAV of €40,200. He said no representations were received and the valuation was not appealed.

8.17 Mr Maguire's fourth tone-of-the-list comparison was Park Academy in Greystones, was a purpose-built creche of He confirmed that no representations were received and the valuation, he said, was not appealed.

8.18 In the light of these valuations, Mr Maguire said there was a strong emerging tone of the list for creches in Wicklow.

8.19 Asked by Mr Halpin under cross-examination when the Early Days Academy valuation was last revised, Mr Maguire first said the latest revaluation occurred in 2008 but, on further questioning, agreed a revaluation must have occurred under the 2015 Revaluation Order, with a valuation date of 15 September 2017. Mr Maguire agreed with Mr Halpin that a proposed valuation certificate for Early Days would have issued in March 2019 but, when asked why the Early Days Academy was deleted from the Valuation List before the final certificates were issued on 10 September 2019, Mr Maguire said he did not have an answer.

8.20 Mr Maguire confirmed to Halpin that the Rocking Horse creche (located in the south Dublin rating area) was a two-storey property and further agreed that the ground floor was rated but that the first floor (occupied by the same person) was excluded when it was last revised because it was used for ECCE only.

8.21 Asked by Mr Halpin if this was a case of the Commissioner saying he was doing one thing but actually doing another, Mr Maguire referred to his statement that if the property were to be listed for revision now, the first floor would have to satisfy the terms of Schedule 4, paragraph 22 in order to avail of an exemption. Noting that paragraph 22 was inserted in 2015 and the revaluation was done in 2019, Mr Halpin asked Mr Maguire if the property satisfied the provisions of paragraph 10. Mr Maguire replied that this was a legal question and he was there to answer questions of fact.

8.22 Turning to Mr Maguire's first KRT, Mr Halpin asked him if this property, located in a large residential apartment scheme adjoining a commercial office and residential development,

at a location identified in the Appendix (N/A to public), could in value terms be comparable to the subject property, which Mr Halpin said was a building of lesser quality located, as he put it, "at the back end of a housing development in Arklow". In the light of this, Mr Halpin put it to Mr Maguire, that even if the buildings were of the same quality, they couldn't be of the same value given their relative proximity to Dublin, the KRT 1 being much nearer than the Arklow property, with an almost an hour's shorter commute at peak time, according to Mr Halpin. Mr Maguire acknowledged the properties "were far away from each other" but said they were both modern purpose-built creches located in urban residential areas. Mr Maguire, responding to Mr Halpin's suggestion that the comparison was "a super building", acknowledged it was "of good quality."

8.23 After confirming to Mr Halpin that his second KRT was located in a particular residential development on the outskirts of a residential town (identified in the Appendix - N/A to public), Mr Maguire agreed that the comparison adjoined the neighbourhood shopping centre and was a good quality building. Referring to the rent this property achieved under the lease, Mr Halpin asked if it was fair that the subject property, located in Arklow – where values, said Mr Halpin, were a fraction of values in the town where KRT 2 was located – could be set at the same NAV as this comparison. Mr Maguire said the Commissioner had taken the view that purpose-built creches in urban areas were not otherwise location sensitive.

8.24 Mr Halpin put it to Mr Maguire that there had to be some range in values and that account should be taken of factors such as location, size, quality of buildings, number of children and so on. Mr Maguire repeated that this was not the Commissioner's view.

8.25 In response to questions from the Tribunal, Mr Maguire confirmed it was his own view, as well as the view of the Commissioner, that retail valuations – higher in Bray and Greystones than they would be in Arklow – had no relationship to the valuation of purpose-built creches. Mr Maguire was further asked by the Tribunal if the fact that Bray and Greystones were located closer to Dublin and were (based at least on the evidence of the retail valuations) better business towns than Arklow should have any bearing on the valuation of creches. Mr Maguire replied that he did not believe so.

9. LEGAL SUBMISSIONS

9.1 By way of a preliminary point, Mr Kennedy addressed Mr Halpin's evidence about the apparent inconsistencies in the manner in which the exemption for ECCE had been applied to various creche facilities in the past. Mr Kennedy noted that his witness, Mr Maguire, had acknowledged the inconsistencies but had given evidence to the effect that the Commissioner was now clear in his view that paragraph 10 does not provide an exemption for ECCE. Mr Kennedy argued that past mistakes, anomalies or an inconsistent application of the law should not be relied upon as a reason to disregard the clear meaning of a statute. In this regard, he quoted from the decision of the High Court in The Commissioner of Valuation v Seven Wonders Ltd. [2020] IEHC 474, in which Meenan J. expressed the view that "even if anomalies exist, the Valuation Tribunal is bound to apply the provisions of the Act of 2001." Thus, argued Mr Kennedy, the fact that certain occupiers might have, in the past, benefitted from an exemption granted upon an erroneous or inconsistent interpretation of the law was not an argument to continue to misapply the exemption in the future.

9.2 The essence of Mr Kennedy's argument then, was that no matter what previous interpretations or concessions that might have been brought to bear by the Commissioner, Schedule 4 paragraph 22, which commenced in 2015, was the provision that dealt with the

exemption for early childhood care and education, and it did so exclusively. If an occupier is to avail of the exemption it must, Mr Kennedy argued, satisfy the criteria laid down in that paragraph. This, said Mr Kennedy, had been recognised by the Tribunal in Faylinn.

9.3 Mr Kennedy said that the law has changed since the introduction of paragraph 22 and that this is now the provision that must be relied upon if one is a supplier of ECCE and wishes to obtain an exemption from rates. If an operator does not fulfil the criteria in paragraph 22, it cannot rely on the criteria in paragraph 10.

9.4 Mr Kennedy further submitted that the Sharon Smyth case was, in any event, wrongly decided and should not be followed. He argued that the provision of ECCE was not something ever contemplated by the terms of paragraph 10. He said that neither Kangakare or the Appellant in the Sharon Smyth case were "educational institutions" as contemplated by the Act because they were profit-making bodies that had childcare, rather than education, as their primary purpose. Moreover, he said, that in circumstances where the exemption applied to land or buildings used "exclusively [by the relevant institution] for the provision of educational services", the provision of ECCE, unlike the use of property by other educational providers (he referred to primary, secondary, tertiary and adult education services wherein "education" was the sole purpose), had a parallel purpose in that, in addition to the provision of education, it contained a significant childcare element. Thus, he argued, even if paragraph 22 was not the provision that applied exclusively to any exemption from rates for ECCE, the Appellant could not avail, in the alternative, of the provisions of paragraph 10 because it was not an educational institution using its buildings exclusively for the provision of educational services.

9.5 In respect of what might be termed Mr Kennedy's first argument – that, as a result of the introduction of paragraph 22 in the 2015 Act, the provisions of that paragraph were the provisions that must be adhered to by a provider of ECCE claiming an exemption from rates – Mr Kennedy referred to a number of principles of statutory interpretation.

9.6 In construing the language of a statute, Mr Kennedy said one must have regard to the intention of the legislature and, he continued, the only way this intention can be determined is by having regard to the language itself. Referring to authority , including the decision in Lawlor v Flood [1999] 3 IR 107, Mr Kennedy argued that the Tribunal must apply the ordinary meaning of the words in the statute in order to interpret and enforce the intention of the legislature.

9.7 Mr Kennedy said that in construing the plain meaning of a provision, it should not be read in isolation but rather in the context of the enactment as a whole. He argued that if one reads paragraph 22 in the full context of Schedule 4, it was clear that that paragraph was enacted in order to introduce the sole exemption for ECCE. He argued that if one followed through on Mr Halpin's logic, to the effect that paragraph 10 *does* include an exemption for ECCE, then – given the provisions of paragraph 10 sub-paragraph (a) (ii) and the fact that ECCE is, in all cases, wholly or mainly funded by the State (Mr Halpin had given evidence to the effect that the provider was, in fact, *prohibited* from charging fees for ECCE) – it would mean that every single occupier of a building used exclusively to provide ECCE would be able to avail of the exemption in paragraph 10. This, argued Mr Kennedy, would result in what he called the preposterous situation whereby the Oireachtas, in enacting paragraph 22, gave effect to a

completely meaningless piece of legislation. Therefore, said Mr Kennedy, Mr Halpin's interpretation could not be correct as a matter of law.

9.8 Mr Kennedy submitted that on the construction contended for by Mr Halpin there was clearly a contradiction or tension between the provisions of paragraph 10 and paragraph 22. He contrasted this with his own view – taking account of his opinion that the Sharon Smyth case was wrongly decided – that the two paragraphs applied to different things and were therefore compatible. In putting forward this view, Mr Kennedy made it clear, at the same time, that the Tribunal did not need to agree with him on the Sharon Smyth point in order to decide in favour of his client, emphasizing that all the Tribunal needed to decide was that ECCE was governed by paragraph 22.

9.9 In respect of the apparent contradiction, Mr Kennedy referred to the decision of the Supreme Court in McLoughlin v Minister for the Public Service [1986] I.L.R.M. 28 ("McLoughlin") as authority for the proposition that where two provisions are in conflict or lack congruity with each other, the later provision should prevail because, in the words of Henchy J., "it represents the later thinking of the Oireachtas."

9.10 Mr Kennedy further referred to R v Moore [1995] 4 AER 843 in which the following passage from Lord Herschel in the nineteenth-century case, Institute of Patents Agents v Lockwood [1894] AC 347, concerning how to deal with conflicting provisions in the same enactment, was cited with approval:

"You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other."

9.11 While noting that one could, very easily, in his view, reconcile the provisions of the two paragraphs 10 and 22 by simply saying that, contrary to what the Tribunal decided in Sharon Smyth, ECCE is not addressed at all in paragraph 10, Mr Kennedy went on to say that if the Tribunal did not wish to do that, it must decide which of the two paragraphs is the leading provision and which the subordinate provision. He submitted that in the light of the McLoughlin decision, in circumstances where paragraph 22 was enacted after paragraph 10, that paragraph 22 was the leading provision and paragraph 10 must give way to it.

9.12 Mr Kennedy next invoked the well-known maxim of interpretation, *generalia specialibus non derogant*, the principle that a general provision does not derogate from a special one. In other words, as Mr Kennedy outlined, where a piece of legislation deals at one point with an issue in specific terms and, at another point, with the same issue in more general terms, then, in the case of conflict, it is the terms of the specific provision that take precedence. Mr Kennedy added that it was crystal clear in this instance which of the two paragraphs contained the specific provision and which contained the general provision. Paragraph 10, he said, if it was concerned with ECCE at all – and Mr Kennedy again reminded the Tribunal of his view that it was not – dealt with it in a general way under the heading of "educational services". Paragraph 22, he argued, was the special provision because that paragraph referred specifically to "the provision of early childhood care and education." Thus, said Mr Kennedy, if there is a conflict between the two provisions, it was paragraph 22 that should prevail.

9.13 Turning to the Faylinn decision, handed down by the Tribunal on 8 May 2022, Mr Kennedy said he understood that it might be the subject of a Case Stated but that, in the meantime, pending a ruling from of the High Court, the decision stood. More importantly, he said, from his point of view, he was bringing Faylinn to the attention of the Tribunal because the judgment in that case, in its consideration of the issues, set out the law on exemptions for ECCE as he saw it.

9.14 Mr Kennedy noted that the property in Faylinn was a single-storey premises with two rooms dedicated to ECCE. Then, in addition to identifying certain arguments made by Mr Dodd, the counsel for the Respondent in Faylinn, that were similar to his own in the current appeal, Mr Kennedy extracted from the "Findings and Conclusions" section of Faylinn, a number of other points.

9.15 Firstly, in its decision that transcripts of parliamentary debates were inadmissible, the Tribunal in Faylinn, said Mr Kennedy, had correctly followed the decision in Crilly v T & J Farrington [2001] IESC 60, [2001] 3 IR 251 ("Crilly") wherein the Supreme Court rejected the use of Oireachtas debates as an aid to interpretation. In circumstances where debates concerning the passage of legislation through the Oireachtas were, on the authority of that case, not to be considered as an aid to interpretation then, said Mr Kennedy, the Tribunal could still less, in its efforts to construe the meaning of the legislation, have regard to assurances given by unidentified politicians to various interest groups at meetings attended by Mr Halpin.

9.16 Secondly, Mr Kennedy noted the Tribunal's reliance on the seven principles applicable to the interpretation of the provisions of the Act, as enunciated by MacMenamin J. in Nangles Nurseries v Commissioner for Valuation [2008] IEHC 73 ("Nangles Nurseries"). In particular, Mr Kennedy referred to the fourth, fifth and seventh principles, which provide that "exemptions or relieving provisions are to be interpreted strictly against the rate payer", that "ambiguities, if they are to be found in an exemption are to be interpreted strictly against the rate payer" and, per the seventh principle, that "in the case of ambiguity, the Court must have resort to the strict and literal interpretation of the Act, to the statutory pattern of the Act, and by reference to other provisions of the statute or other statutes expressed to be considered with it."

9.17 Mr Kennedy said that these principles accorded with the other principles of interpretation he had already outlined and in the light of these principles, argued firstly, that paragraph 10 should not be looked at in isolation but in the context of the Act as a whole; secondly, that, given that these are exempting provisions, they must be construed strictly and with any ambiguities interpreted against the rate payer.

9.18 Mr Kennedy quoted extensively from the decision in Faylinn, drawing the Tribunal's attention to paragraphs which endorsed the arguments made by Mr Dodd for the Respondent in that appeal, many of which had been taken up by Mr Kennedy in the current appeal. In the light of the Tribunal's view that paragraph 22 was the applicable provision and the evidence that the creche in Faylinn was established for profit, the Tribunal concluded that the property in that appeal did not qualify for the exemption. Referring to Mr Halpin's evidence to the effect that the subject property was, likewise, run to make a private profit, Mr Kennedy stated that the same circumstances applied in the present appeal and urged the Tribunal to come to a similar conclusion.

9.19 Mr Kennedy summarised his points as follows:

- It is, he said, paragraph 22, not paragraph 10, that deals with ECCE.
- If he were wrong in that, and if ECCE is allowed for under paragraph 10, Mr Kennedy said that the Appellant was not "an educational institution": it was, he said, primarily a creche provider.
- To the extent that there was any contradiction between paragraphs 10 and 22 – and Mr Kennedy reminded the Tribunal of his view that there was no such contradiction – one should, he said, adopt the more recent provision.
- If, contrary to Mr Kennedy's view, the Tribunal decided that paragraph 10 did encompass ECCE, then Mr Kennedy argued that the more specific provision, paragraph 22, must prevail over the more general provision, paragraph 10.
- Finally, he said that the Sharon Smyth decision had no application because it was decided before paragraph 22 was introduced. He argued that paragraph 10 was not the same paragraph 10 before and after the introduction of the 2015 amendment. One must, he said, look at paragraph 10 in the context of the whole Act, and the difference between paragraph 10 before and after the amendment is that paragraph 22 had arrived on the scene.

9.20 The Appellant was not legally represented but the Tribunal invited Mr Halpin to respond, if he wished, to Mr Kennedy's submissions.

9.21 Mr Halpin agreed with Mr Kennedy that, on the basis of the evidence put before the Tribunal in Faylinn, that appeal was correctly decided. The property in Faylinn was, he said, a mixed property: the rooms were used for ECCE, but not exclusively. Consequently, he said the Tribunal correctly found that the Faylinn property was a rateable entity.

9.22 While confirming that the subject property could not qualify under paragraph 22, Mr Halpin said it was important to look at the purpose of that paragraph and the reason why it was introduced. He said that community childcare facilities around the country provide multiple services, including ECCE but also full creche services. He said that if these facilities went for exemption under paragraph 10 then, while they would be able show their ECCE services qualified under the relevant paragraph, they could fall into the problem of not being able to show that their creche services met the provisions. Therefore, he said, there was a need to clarify the situation – to ensure that not-for-profit community childcare services, whether they be ECCE or creche facilities, would be exempt – and that is why the legislature introduced paragraph 22. However, he said, that when this came up for amendment in 2015, there was "no question" but that occupiers were told that any part of a building that carried out ECCE and which was separate from the rest would not be rateable because such facilities would continue to be exempt under paragraph 10.

10. FINDINGS AND CONCLUSIONS

10.1 On this appeal the Tribunal has to determine the value of the Property so as to achieve, insofar as is reasonably practical, a valuation that is correct and equitable so that the valuation of the Property as determined by the Tribunal is relative to the value of other comparable properties on the valuation list in the rating authority area of Wicklow.

10.2 This appeal concerns legal issues as well as quantum. It is common case that the ground floor of the subject property is rateable but the rate to be applied is in dispute. The legal issue concerns the first floor and whether it is relevant property not rateable by virtue of the Section 15(2) of the Act, being property referred to in Schedule 4. The Appellant claims that the first floor is exempt by virtue of the provisions of paragraph 10 of Schedule 4 in that it is used exclusively to provide ECCE. The Respondent says, *inter alia*, that the provisions of paragraph 22 apply to ECCE property and that those provisions take precedence over, or indeed, exclude entirely, the provisions of paragraph 10. The Tribunal will deal with the legal issue first.

10.3 Schedule 4, paragraph 10 applies to a building or part of a building occupied by an educational institution and used exclusively by that institution for the provision of the educational services referred to in the paragraph. It requires that, in order to avail of the exemption, the occupier, per the terms of sub-paragraph (a) (ii), does not seek to make a profit or, alternatively, per the terms of sub-paragraph (a) (ii), where expenses are incurred that these are wholly or mainly defrayed by the Exchequer.

10.4 The paragraph goes on to provide, at sub-paragraph (b), that the educational services must be available to the public. It is not in dispute that the services provided at the subject property are available to the public.

10.5 Mr Halpin argues that the Appellant, as an entity offering early childhood care and education to the public, is an educational institution providing such services as are contemplated by paragraph 10 and that, while it does not qualify under the terms of paragraph 10 sub-paragraph (a)(i) – in that it is a business concerned with making a profit – it does qualify under (a)(ii) because its expenses are defrayed by the State. Thus, says Mr Halpin, the exemption should be available to the Appellant.

10.6 Mr Kennedy has a number of counter-arguments, one of which can be summarised to the effect that paragraph 10 does not apply to the provision of ECCE and has not done so since, at least, the introduction of paragraph 22, inserted into the Act on 8 June 2015 by the Valuation (Amendment) Act 2015. Mr Kennedy contends that paragraph 22 applies to ECCE and that it does so exclusively. Mr Kennedy argues in the alternative that if both provisions apply to ECCE and are in conflict with one another, the provisions of paragraph 22 should prevail over those of paragraph 10. The Appellant's difficulty if either such view were to be upheld is that the same circumstances which preclude the subject property from qualifying under sub-paragraph (a)(i) of paragraph 10 carry with them the consequence that the property cannot qualify under the provisions of paragraph 22 because, under that paragraph, the building or part of a building used exclusively for the provision of early childhood care and education must be occupied by a body whose affairs "are not conducted for the purpose of making a private profit."

10.7 Mr Kennedy cites, in support of his argument, certain principles of statutory interpretation. Against this, and in support of his own interpretation of the law, Mr Halpin relies on a number of points, presented for the purposes of this decision, in the following order: firstly, assurances he states were given by politicians and representatives of the Commissioner to himself and various childcare interest groups; secondly, the apparent historical practice of the

Commissioner in exempting properties under paragraph 10; and, thirdly, the decision of the Tribunal in Sharon Smyth.

10.8 Before addressing these arguments, the Tribunal notes that the burden of proof in all appeals lies with the Appellant. The Tribunal also takes account of the principles of interpretation of the Act set out by MacMenamin J. in Nangles Nurseries, referred to by Mr Kennedy in his submissions and quoted in full and applied by the Tribunal in the Faylinn appeal. Having regard to these principles, it is clear that exemptions or relieving provisions in the Act are to be interpreted strictly against the ratepayer. In the case of ambiguity, the Tribunal must, in the words of MacMenamin J., "have resort to the strict and literal interpretation of the Act, to the statutory pattern of the Act, and by reference to other provisions of the statute or other statutes expressed to be considered with it." Ambiguities, if they exist in exempting provisions, are to be interpreted against the ratepayer.

10.9 Mr Halpin's first argument concerns the assurances he says were given by unnamed politicians and representatives of the Commissioner which accord with his own and, indeed, what he called the "universal" view, to the effect that a building or part of a building in which ECCE is exclusively provided was exempt under paragraph 10 and remained so notwithstanding the introduction of paragraph 22. Mr Halpin garnished this argument with speculation as to the "bedlam" that might have ensued in the Oireachtas if a contrary interpretation was suggested. The Tribunal notes the decision in Crilly wherein the Supreme Court rejected – unanimously and for a variety of reasons – the use of Oireachtas debates to construe the meaning of a legislative provision. In circumstances then where the Tribunal cannot, as an aid to interpretation, refer to the statements of ministers, TDs and senators made in the Houses of the Oireachtas during the passage of legislation, then it follows, *a fortiori*, that it cannot use for the same purpose any statements such office-holders might have made *outside* the relevant chambers. There is no basis in law either for the Tribunal to have any regard to statements made by representatives of the Commissioner at public meetings as an aid to its interpretation of statutes. Thus, Mr Halpin's statements in this regard, even if they were admissible under the rules of evidence, could not be considered in the interpretation of the relevant provisions.

10.10 Mr Halpin's second argument relies on what he takes to be – or, at least, to have been – the Commissioner's own interpretation of the legislation evidenced by previous instances in which he appears to have granted exemptions to properties similar to the subject property on the same basis as the Appellant now seeks its own exemption. Mr Halpin referred in particular to the Early Days Academy in Bray and the Rocking Horse Creche and Montessori in South Dublin, noting in both instances that the relevant valuation dates were subsequent to the introduction of paragraph 22 in 2015. Mr Maguire acknowledged that in the past, various premises, including the two mentioned, had been exempted but stated that the Commissioner's view is that properties such as these, if they were to be listed for revision *now*, would have to satisfy the provisions of Schedule 4, paragraph 22 in order to avail of an exemption for ECCE. Mr Maguire was not clear in his evidence as to the reasons why the Commissioner had previously exempted these properties – whether it was by way of concession, oversight, a misinterpretation of the legislation only lately recognised, or some other reason – but he was clear as to the Commissioner's current view, that an exemption for ECCE is not available under paragraph 10.

10.11 The Tribunal notes Mr Kennedy's arguments in this regard and his reference to the decision of Meenan J. in Seven Wonders. In that case, the court (at paragraph 12 of the

judgment) having decided that the "right to street furniture" should be taken into account for rating purposes, went on to conclude, rather unsurprisingly, that, notwithstanding the previous inconsistent application of the law – where in some cases the relevant right had not been taken into account by the Commissioner – the Tribunal was bound to apply the provisions of the Act. In the light of this, if the Tribunal were in the current appeal to take the view that paragraph 10 does not apply to ECCE properties (or that, if it did, it was subordinate to the provisions of paragraph 22) then, the fact that the Commissioner might in the past have taken a different view – and incorrectly or inconsistently applied paragraph 10 – is no reason to incorrectly apply it into the future.

10.12 Mr Halpin's third argument relies on the decision in Sharon Smyth. In that appeal the Tribunal decided that the property concerned fulfilled the requirements of paragraph 10 because it was an educational institution used exclusively for the provision of Montessori teaching and summer camps (which the Tribunal held were educational services as contemplated by the Act), and whose expenses were mainly defrayed by the Exchequer. Mr Halpin argues that on facts similar to those of Sharon Smyth, and in circumstances where paragraph 10 remains on the statute books, the Tribunal should, in the current appeal, come to a similar decision and exempt the Appellant's property.

10.13 The Sharon Smyth judgment, which issued on 7 July 2017, does not explicitly identify within it the valuation date relevant to that appeal but it is clear from the judgment it occurred before the introduction of paragraph 22 on 8 June 2015. Obviously then, since Sharon Smyth, the law has changed. Mr Halpin argues that there has been no change to paragraph 10, so it still applies. Mr Kennedy disagrees and argues, *inter alia*, that as a result of the introduction of paragraph 22, the provisions of that paragraph are the only provisions that apply to someone seeking an exemption for ECCE, or if they are not, then they do, at least, prevail over the provisions of paragraph 10. He said that one must read the enactment as a whole and that when one does so it is it clear that paragraph 22 was enacted to introduce the sole exemption for ECCE.

10.14 The Tribunal must apply the law as it finds it on the date by reference to which the value of the subject property is to be determined, that is, 15 September 2017. The Tribunal agrees with Mr Kennedy that it must construe the relevant provisions not in isolation but in the light of the Act as a whole, having regard to the plain meaning of the text.

10.15 If one accepts Mr Halpin's argument – endorsed by the relevant division of the Tribunal at least for the time period the Sharon Smyth case concerned – that paragraph 10 deals with ECCE, then there is undoubtedly some element of incongruity between the provisions of paragraph 10 and paragraph 22 in that the former paragraph would provide an exemption for ECCE in circumstances where the operator seeks to make a profit provided expenses are wholly or mainly defrayed by the Exchequer, whereas the latter paragraph, in all cases where the relevant business is conducted for the purpose of making a private profit, excludes the entitlement to an exemption. Mr Kennedy invites the Tribunal to avoid the incongruity by concluding that paragraph 10 does not apply to ECCE property at all or, alternatively, to resolve the incongruity by concluding that paragraph 22 prevails over the provisions of paragraph 10.

10.16 Mr Kennedy refers to McLoughlin as authority for the proposition that where two provisions lack congruity with each other that the later provision should prevail because it represents, in the words of Henchy J. "the later thinking of the Oireachtas".

10.17 Mr Kennedy also refers to the decision of the Court of Appeal in England and Wales in R v Moore and its approval of the "rectifying construction" of Lord Herschell in Institute of Patent Agents v Lockwood as persuasive authority for the proposition that where there is an inconsistency between provisions, a court or tribunal must seek to determine which is the leading provision and which is the subordinate provision.

10.18 Mr Kennedy further asks the Tribunal to have regard to the maxim "*generalia specialibus non derogant*" endorsed by the Supreme Court on a number of occasions including in McGonagle v McGonagle. The Tribunal notes that the maxim is usually applied to the effect that a later general enactment should not be held to interfere with an earlier specific enactment, and so it was in McGonagle. However, the maxim has also been applied – for example, in the decision of Murphy J. in The National Authority for Occupational Safety and Health v Fingal County Council [1997] 1 ILRM 128 – in the context of conflicting provisions in the one enactment, similar to the situation in the current appeal.

10.19 The Tribunal notes that paragraph 22 was introduced after paragraph 10 and is thus, obviously, the later provision. Moreover, in contradistinction to the earlier paragraph which refers in a general way to the provision of "educational services", paragraph 22 refers to "the provision of early childhood care and education". Accordingly, paragraph 22 is the more specific or "special" provision and, in the view of the Tribunal, must also, for the same reason, be regarded as the leading provision on the subject of the exemption for ECCE.

10.20 These observations, when considered in the context of the cases referred to above, lead the Tribunal inexorably to the view that where there is an incongruity between paragraph 10 and paragraph 22, the latter provision must prevail. The Tribunal does not need, for the purposes of this decision, to consider Mr Kennedy's argument that paragraph 10 does not deal at all with ECCE because it takes the view that even if paragraph 10 did so deal with ECCE, the two provisions would, at best, be incongruous and, in those circumstances, paragraph 22, as the leading, later and more specific provision must take precedence over paragraph 10.

10.21 In circumstances then where the Tribunal finds that paragraph 22 prevails, the Appellant, because it conducts its business for the purpose of making a private profit, cannot avail of an exemption under Schedule 4.

10.22 Clearly, Mr Halpin believes the legislature intended something different when it enacted paragraph 22 but, as outlined above, the Tribunal must ascertain the intentions of the Oireachtas by having regard only to the plain language of the legislation, read according to the accepted principles of statutory interpretation.

10.23 In the light of this conclusion, arrived at for the reasons aforesaid, the Tribunal does not need to consider the other arguments put forward by Mr Kennedy in respect of the legal issues.

10.24 Turning then to the issue of quantum, the valuation of the ground floor and the first floor must be considered.

10.25 All of Mr Maguire's comparisons – both his tone-of-the-list and KRT properties – were purpose-built creches located in or (in one case) beside a residential area. His KRTs differed somewhat in terms of their rents but all of his comparisons (he had three KRTs and four tone-of-the-list comparison) had been valued by the Commissioner at €90/m^2 ground floor NAV, a

sum considerably less than the passing rent in those cases where the rent had been identified. In no cases were representations received or appeals brought. Thus, Mr Maguire's evidence was that the emerging tone of the list for such properties in Wicklow was €90/m^2. Mr Maguire said that purpose-built creches located in urban, residential areas – of which the subject property was one such example – were not as location sensitive as retail or industrial premises.

10.26 Mr Halpin's single KRT comparison, the Early Days Academy in Arklow, was the victim of a double misfortune from Mr Halpin's point of view in that he had not been allowed to inspect it and it had been excluded from the valuation list in circumstances outlined above in paragraph 10.10. According to Mr Halpin, based on the floor area of 400m^2 recorded in the Commercial Lease Register, the rent on this property devalued to €74.40/m^2. Mr Halpin, however, acknowledged that the entry on the Commercial Lease Register dated from 2008 and the property could have been developed since. Consequently, in circumstances where Mr Maguire gave evidence that the floor area was only 250.58m^2, the Tribunal is of the view that it would be unwise to have any regard at all to this property as a rental comparison.

10.27 Mr Halpin described his first NAV comparison, the Park Academy in Bray, as a larger and better-located property than the subject, being situated in a retail park with excellent drop-off and pick-up facilities, and commanding fees of €1,400 per month per child which, Mr Halpin said, were much higher than that of the subject. Notwithstanding this, he noted, the subject and the Park Academy had been valued at the same level.

10.28 Mr Halpin's other tone-of-the-list comparison, the Little Feet Creche in Baltinglass, is valued at €60/m^2. Mr Halpin speculated that this value, lower than the subject, and the only creche in Wicklow not valued at €90/m^2, must be a consequence of the inferiority of Baltinglass as a location. Mr Maguire maintained that the reason this property was valued lower was because it was not a purpose-built creche but a domestic residence converted to a creche and was accordingly valued in line with Office (House) properties in Baltinglass. When one compares the single external photo of the Little Feet creche provided by Mr Halpin in his précis with the photos of the subject, then, based on this, admittedly rather limited evidence, the subject appears to be a much superior property.

10.29 Taking the two of these comparisons together, Mr Halpin argued that if the Baltinglass property was valued lower than the subject because of its inferior location in Baltinglass then the subject should be valued lower than Park Academy because of what he regarded as its inferior location in Arklow. Mr Halpin argued that Bray is a much better retail town than Arklow and the valuation of creche properties should bear some analogical relationship to retail and industrial values.

10.30 As already noted, the burden of proof in all appeals to the Tribunal rests upon the Appellant. Mr Maguire argued that purpose-built creches were not location sensitive in the same way as retail and industrial properties and demonstrated, by reference to his comparisons, that there was a very clear emerging tone of the list for purpose-built creches located in or near urban residential developments in Wicklow, at an NAV of €90. The Little Feet creche in Baltinglass is something of an outlier, being the only creche in Wicklow not valued at €90m^2. The Tribunal is satisfied with Mr Maguire's explanation of the reason for this and, given that the property is categorised differently to that of the subject and all the other properties brought forth in evidence, the Tribunal attaches little weight to it as a comparison. Mr Halpin did not provide for comparison the fees of the subject or those of any other creches in Wicklow to compare with Park Academy. The Appellant did not bring forth evidence either of any

disadvantage the subject property might have had, vis-à-vis Park Academy, with its own drop-off and pick-up facilities. The Tribunal notes the retail valuations brought forth by Mr Halpin and the fact that such valuations are stronger in Bray than they are in Arklow but the Appellant has not proven to the satisfaction of the Tribunal that the location of Park Academy – in a retail park in Bray – was superior to that of the subject property – in a residential location in Arklow – to the extent that it should have any bearing on the subject's valuation as a purpose-built creche facility.

10.31 In the light of this, the Tribunal confirms the valuation of the ground floor of the subject property at €90/m^2 NAV.

10.32 The Tribunal notes that in all of the two-storey properties put forward by the parties for the purpose of comparison, the first floor was valued at 70% of the ground floor value and so the Tribunal confirms the valuation of the first floor of the subject property at €63/m^2 NAV.

DETERMINATION:

Accordingly, for the above reasons, the Tribunal disallows the appeal and confirms the decision of the Respondent

RIGHT OF APPEAL

In accordance with section 39 of the Valuation Act 2001 any party who is dissatisfied with the Tribunal's determination as being erroneous in point of law may declare such dissatisfaction and require the Tribunal to state and sign a case for the opinion of the High Court

This right of appeal may be exercised only if a party makes a declaration of dissatisfaction in writing to the Tribunal so that it is received within 21 days from the date of the Tribunal's Determination and having declared dissatisfaction, by notice in writing addressed to the Chairperson of the Tribunal within 28 days from the date of the said Determination, requires the Tribunal to state and sign a case for the opinion of the High Court thereon within 3 months from the date of receipt of such notice.