

**Appeal No: VA19/5/1064**

**AN BINSE LUACHÁLA  
VALUATION TRIBUNAL**

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

**CASTLEROSS NURSING HOME LIMITED**

**APPELLANT**

**AND**

**COMMISSIONER OF VALUATION**

**RESPONDENT**

**In relation to the valuation of**

Property No. 2169052, Tullyvaragh Lower, Carrickmacross, County Monaghan ("the Property")

**TRIBUNAL     Carol O'Farrell – BL  
                    John Stewart - FRICS FSCSI MCI Arb  
                    Dairine Mac Fadden – Solicitor**

**Chairperson  
Deputy Chair  
Deputy Chair**

**JUDGMENT OF THE VALUATION TRIBUNAL  
ISSUED ON THE 3<sup>rd</sup> DAY APRIL 2023**

**1.     THE APPEAL**

- 1.1     A Notice of Appeal was received on the 11th of October 2019 from KM Healthcare Enterprises Limited 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 €430,000.00.
- 1.2     By Order dated the 10<sup>th</sup> of December 2021 Castleross Nursing Home Limited was substituted as appellant in this appeal.
- 1.3     The Appellant lodged extensive and overlapping grounds of appeal in the form of legal submissions running to 30 pages but in essence the underlying grounds of appeal are:
- (i)     the Respondent's determination does not accord with the requirements of section 19(5) of the Valuation Act 2001 as amended ('the Act').
  - (ii)    the Respondent's determination was made on the unlawful presumption that the Property, including all parts of the Property, is relevant rateable property. No enquiry was made to establish the nature of the occupation of the Property by its resident occupiers or any other person to determine whether the Property is relevant property within the meaning of paragraphs 1 and 2 of Schedule 3.

- (iii) The Property, if held to be relevant property, is relevant property not rateable by reference to paragraphs 6 and/or 8 and/or 14 of Schedule 4 of the Act.
  - (iv) The Respondent unlawfully valued 'beds' or 'bed spaces', which do not constitute relevant property, in determining the valuation of the Property.
  - (v) The Property was valued without any survey or inspection being carried out and the valuation was not carried out on the Contractor's Basis. The Property has not been properly valued.
  - (vi) The description and details of the Property on the valuation certificate and the valuation list are not correct in material respects.
  - (vii) The Valuation Tribunal has a statutory duty to serve on the residents of the appeal Property a copy of the notice of appeal pursuant to section 36(1) of the Valuation Act, 2001 ("the 2001 Act").
  - (viii) The residents of the Property, the Director General of the Health Service Executive ("HSE"), the Chief Executive of the National Treatment Purchase Fund ("NTPF"), the Chief Executive Officer of Health Information and Quality Authority ("HIQA") and the Minister for Health are persons directly affected within the meaning of section 36(2) of the Act by the Tribunal's decision and should be served with all written documents and information submitted in connection with this appeal and given notice of their right to be heard and to adduce evidence at the hearing of the appeal.
- 1.4 The Appellant considers that the valuation of the Property ought to have been determined at a nil valuation.
- 2. VALUATION HISTORY**
- 2.1 The Respondent made a Valuation Order on the 6th of October 2017 for the rating authority area of County Monaghan.
- 2.2 On the 29th of March 2019 a proposed valuation certificate was issued in relation to the Property indicating a valuation of €430,000.
- 2.3 Despite written representations made on behalf of the KM Healthcare Enterprises Limited, the former registered provider, to the valuation manager on the 7th of May 2019, a final valuation certificate issued in respect of the Property on the 10th of September 2019 confirming the valuation at €430,000.
- 2.4 The date by reference to which the value of the Property was determined is the 15th of September 2017.

### **3. THE HEARING**

- 3.1 The Appeal proceeded by way of an oral hearing held at the Valuation Tribunal Offices in Holles Street, Dublin 2 on the 28th April 2022. At the hearing, the Appellant was represented by Mr Ciaran Craven S.C. instructed by O’Loghlin Hughes Solicitors. Ms. Jane Foy, the General Manager of the Appellant’s designated centre was called to give evidence. The Respondent was represented by Mr David Dodd BL instructed by the Chief State Solicitor.
- 3.2 In accordance with the Valuation Tribunal (Appeal) Rules 2019 (‘the Rules’), the Appellant filed a précis of evidence and legal submissions prior to the hearing. The Respondent failed to comply with Tribunal’s direction to file a précis of evidence and did not apply for an extension of time to file a précis. Accordingly, no evidence was given at the hearing on behalf of the Respondent. The Respondent’s participation in the hearing was limited to the cross-examination of the Appellant’s witness and to making submissions on the evidence adduced on behalf of the Appellant.
- 3.3 At the hearing, Ms Foy was the sole witness called on behalf of the Appellant and under oath gave evidence concerning the Property, the residents, the manner in which the Property is operated and how the services provided by the Appellant at the Property are funded.

### **4. ISSUES**

- 4.1 This is an appeal that turns on the proper construction of certain provisions of the Act. The key underlying issues are:
- (i) Whether there is a statutory duty on the Tribunal to serve upon each resident of the Property a copy of the notice of appeal pursuant to section 36(1) of the Act.
  - (ii) Whether there is a statutory duty to serve all written documents and information submitted in connection with this appeal on the residents of the Property, the Director General of the Health Service Executive (“HSE”), the Chief Executive of the National Treatment Purchase Fund (“NTPF”), the Chief Executive Officer of Health Information and Quality Authority (“HIQA”) and the Minister for Health and to give them notice of their right to be heard and to adduce evidence at the hearing of the appeal.
  - (iii) Whether the Property is a relevant property within the meaning of the section 15 and Schedule 3 of the Act.
  - (iv) Whether the Property described by the Respondent as “nursing home” is a domestic premises as defined in section 3 of the Act and referred to in paragraph 6 of Schedule 4.
  - (v) Whether the Property is used for the purposes of caring for sick persons or for the treatment of illnesses by a body that is established and whose

affairs are conducted otherwise than for the purpose of making a private profit from the provision of such care or treatment as referred to in paragraph 8 of Schedule 4 or alternatively a body the expenses of which are incurred in the provision of care or treatment which is made available to the general public (whether with or without a charge being made therefor) are defrayed wholly or mainly out of moneys provided by the Exchequer.

(vi) Whether the Property is occupied for the purpose of caring for elderly, handicapped or disabled persons by a body that is not established and the affairs of which are not conducted for the purpose of making a private profit from such care provision or a body the expenses incurred by which in carrying on such care provision are defrayed wholly or mainly out of moneys provided by the Exchequer as referred to in paragraph 14 of Schedule 4?

(vii) Whether the valuation as determined by the Respondent is incorrect?

(viii) Whether paragraph 8 or 14 of Schedule 4 constitutes unlawful State aid.

4.2 The first two procedural issues were raised in eight other appeals (VA17/5/172, VA17/5/179, VA17/5/182, VA17/5/184, VA17/5/185, VA17/5/188, VA17/5/189, VA17/5/194 VA17/5/195) concerning designated centres and it seemed to the Tribunal proper and expedient to come to a decision on those issues before dealing with the primary grounds of appeal in those appeals. The procedural issues in each of those appeals were heard over the course of four days in November 2018. The Tribunal's Decisions were delivered on the 23<sup>rd</sup> January 2019.

4.3 The Tribunal decided the procedural issues against the appellants and determined that in each of the appellant's appeals there was no obligation on the Tribunal under section 36 of the Act to serve a copy of the relevant documents on the residents in each of the nursing homes involved, or on any other persons identified by the appellants. In March 2019 the appellants obtained leave by way of judicial review [High Court Record No. 2019 No. 137 JR] to apply for a declaration that the Tribunal had erred and misdirected itself in law and an order of certiorari quashing the Decisions. At the time this appeal was heard the judicial review application stood listed for hearing on the 13th October 2022. The application was withdrawn and struck out by the High Court on the 15th November 2022.

4.4 The parties on those eight appeals were represented by the same Counsel as the parties on this appeal and to avoid unnecessary repetition Counsel agreed to adopt the same arguments as were made in those other appeals on issues (i) and (ii) above. Those arguments are reproduced below in summary format only.

## **5. RELEVANT STATUTORY PROVISIONS**

5.1 The NAV of the Property must 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.”

Section 48(3) of the Act provides for the factors to be considered 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 average 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.”

5.2 A ‘domestic premises’ is defined in section 3(1) of the Act as meaning

“any property which consists wholly or partly of premises used as a dwelling and which is neither a mixed premises nor an apart-hotel”

A ‘mixed premises’ is defined in the same section as meaning

“a property which consists wholly or partly of a building which is used partly as a dwelling to a significant extent and other purposes to such an extent”

5.3 Schedule 4 under the heading “Relevant Property Not Rateable”, so far as material to the issues on this appeal, provides

6.- Any domestic premises (but subject to section 59(4) (which provides that apartments are rateable in certain limited circumstances)).

8. - Any land, building or part of a building used by a body for the purposes of caring for sick persons, for the treatment of illnesses or as a maternity hospital, being either—

(a) a body which is not established and the affairs of which are not conducted for the purpose of making a private profit from an activity as aforesaid, or

(b) a body the expenses incurred by which in carrying on an activity as aforesaid are defrayed wholly or mainly out of moneys provided by the Exchequer and the care or treatment provided by which is made available to the general public (whether with or without a charge being made therefor).

14. - Any land, building or part of a building occupied for the purpose of caring for elderly, handicapped or disabled persons by a body, being either—

- (a) a body which is not established and the affairs of which are not conducted for the purpose of making a private profit from an activity as aforesaid, or
- (b) a body the expenses incurred by which in carrying on an activity as aforesaid are defrayed wholly or mainly out of moneys provided by the Exchequer, other than a body in relation to which such defrayal occurs by reason of the Nursing Homes Support Scheme Act 2009.”

Section 13(1) of the Act provides

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.

Section 15(2) of the Act provides

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

## **6. PRELIMINARY APPLICATION**

- 6.1 An application was made on behalf of the Appellant for ‘summary disposal’ of the appeal based on the Respondent’s procedural non-compliance with Rule 34 of the Valuation Tribunal (Appeals) Rules 2019 (‘the Rules’). It was contended that the appeal should be considered as unopposed, and a finding made by the Tribunal in the Appellant’s favour that the Property is not relevant property and ought to be excluded from the valuation list or alternatively, a finding of a nil valuation in respect of the Property.
- 6.2 The Tribunal did not accede to that application. The Rules do not require or permit the Tribunal to allow an appeal simply on the basis that the Respondent has not filed a précis of evidence. While there is no provision in the Rules to sanction a party for failure to comply with directions issued under Rule 34, failure to comply with directions does carry an obvious consequence for the Respondent in that it cannot present evidence or file submissions on an appeal without applying for and securing an extension of time to file a précis of evidence or legal submissions. However, the failure to file a précis of evidence does not of itself bar the Respondent from taking part, albeit a limited part, in the appeal.
- 6.3 The function of the Tribunal in every appeal against a determination of value made under section 19 of the Act is to determine whether an appellant has established on the balance of probability that the Respondent’s determination is incorrect. That can only be done by the Tribunal taking account of the evidence concerning the appeal property, its use, the terms upon which it is let (if relevant) and the comparable properties relied upon (if any) and by giving proper consideration to the merits of the arguments and submissions made in order to be satisfied both in fact and in law that the Respondent’s determination is incorrect. The mere fact that the Respondent does not file a précis of evidence does not relieve the Tribunal of its statutory duty to decide the appeal having

regard to the requirements of section 19 of the Act or empower the Tribunal to allow an appeal without considering its merits. On this appeal the Tribunal has a duty to conduct a full hearing on the material, evidence and submissions put before it on behalf of the Appellant and to issue a written judgement setting forth the reasons for its determination as required by **paragraph 4(3) of Schedule 2 of the Act as otherwise it would fall into error.**

## **7. APPELLANT'S CASE**

- 7.1. Ms Jane Foy, the General Manager of the Property, gave evidence on behalf of the Appellant. She said that she has worked in the Property for eleven years and is very familiar with its operations.
- 7.2 The Property is registered with the Chief Inspector of Social Services every three years and its current certificate of registration expires in November 2022. The Property was built in 2011. Ms Foy took the Tribunal through the layout of the Property by reference to a floor plan dated the November 2019 describing the accommodation provided in each of the four households, namely, Lisdoonan House, Broomfield House, Creevey House and Killany House and said each was decorated differently but all in a homely manner. She explained that the routine in each household is different, as are the working shift patterns.
- 7.3 The cost of the regulated care in the Property is covered by the Nursing Home Support Scheme, known as Fair Deal, in respect of one hundred and fifteen residents, private fees are paid in respect of five residents and the HSE funds two residents, one with disability and the other receives transitional care.
- 7.4 Ms Foy gave a broad outline of the facilities and services available to residents such as hairdressing, chiropody and physiotherapy. She said independence, individuality and choice is paramount for residents and so no schedules are imposed, and each resident is given freedom to plan their day. A resident can decide when to get up, when to wash, when to eat and come and go as he or she pleases. Residents can decide who may visit and the timing of such visits. Residents can potter in the garden and those who can, may on occasion walk into the village.
- 7.5 When cross-examined Ms Foy accepted that the Appellant operates the Property to make a profit. She clarified that sixty three rooms are occupied by high dependency residents. There are no kitchens in bedrooms. There are no nursing stations. Each household has its own dining space. Residents with dementia are cared for in Lisdoonan House and the residents in Killany House have different levels of dependency. When asked whether a resident was showing early signs of dementia or a resident who posed a risk of absconding would be required to move into Lisdoonan House, Mr Foy said that the resident would be advised to move but if a move was resisted the resident would be permitted to stay in his or her allocated room.

## **8. FACTS**

- 8.1 From the evidence adduced by the Appellant the Tribunal finds the following facts.

- 8.2 The Property is situated in Tullyararagh Lower between Carrickmacross and Castleblaney in County Monaghan, just off the N2 motorway. There is a retirement village of thirty one residential bungalows on the same site of the Property but those properties have no relevance to this appeal.
- 8.3 The Property is occupied and provided by the Appellant as a designated centre for older people within the meaning of s.2 of the Health Act, 2007 as amended. The Property is registered with and assessed by the Chief Inspector of Social Services to ensure that it complies with regulations and the National Standards for Residential Care Settings for Older People in Ireland (3 May 2016) applicable to designated centres. In that respect the Property is operated within the same regulatory environment as any other designated centre whether run and managed by the HSE, a religious order, a charitable organisation, a voluntary body or a private body engaged by the HSE. The 2007 Act prohibits the operation of a designated centre unless it is registered with the Chief Inspector.
- 8.4 The Appellant is the registered service provider of the Property since the 27th November 2019 and the Property is subject to ongoing monitoring and inspection by the Chief Inspector.
- 8.5 The Property is predominantly a single storey purpose built structure. It was constructed in 2011 and subsequently extended. It comprises ninety one (91) single bedrooms and seventeen (17) double bedrooms with ensuite facilities. It is divided into four households, namely, Lisdoonan House, Broomfield House, Creevey House and Killany House each of which has its own front door, kitchen, dining room, living room, private back garden, communal spaces and bedrooms. Each household is managed by a homemaker and household co-ordinator and supervised by a nurse on a twenty four hour basis. The Property also has a community room, treatment room, washrooms, specialised bathing and shower facilities, oratory, family room, coffee shop, hair salon, internal and external courtyards, offices and ancillary space for services. The administrative offices are located in the small first floor area at the rear of the Property. The area of ground surrounding the Property is partly general amenity ground, court yards and gardens and partly for the purpose of vehicular access to the Property and car parking space for use by staff and visitors.
- 8.6 The Property is being operated by the Appellant for the provision of certain residential services to dependent persons in relation to their specific care and support needs and assistance with their daily living activities in accordance with its Statement of Purpose.
- 8.7 The Property is a nursing home as defined in section 2 of the Health (Nursing Homes) Act 1990. No person under the age of sixteen years is permitted to occupy the Property.
- 8.8 The Appellant is established as a private company under the provisions of company law and is a private profit making company.
- 8.9 At the valuation date, there were one hundred and twenty three (123) residents in the Property, the maximum number permitted at that time, and their levels of dependency varied. The five levels of dependency are categorised as follows: Independent, Low



Dependency, Medium Dependency, High Dependency and Maximum Dependency. Sixty three (63) residents require maximum dependent care, nineteen (19) high dependency care, seventeen (17) medium dependency care, sixteen (16) low dependency care and eight (8) are independent.

- 8.10 At the valuation date, the residential care of five persons was privately funded and the residential care of one hundred and fifteen persons was defrayed under the Nursing Homes Support Scheme Act 2009.
- 8.11 The residents' use, and enjoyment of the Property is monitored and regulated by the Health Act 2007 (Care & Welfare of Residents in Designated Centres for Older People) Regulations 2013 as amended ('2013 Regulations'). The term "resident" is defined in the 2013 Regulations as meaning "a person living, and provided with services, in a designated centre". The Property must be operated within the regulatory environment prescribed by the Health Act 2007 as amended and the 2023 Regulations made thereunder.
- 8.12 The Property was not inspected by the Valuation Office when the revaluation of the rating authority area of County Monaghan was carried out during 2019. It had previously been inspected in February 2018 when a revision officer was appointed to value the property following the completion of the extension works.

## **9. SUBMISSIONS FOR APPELLANT**

- 9.1 Senior Counsel for the Appellant relied on the grounds set out in the Notice of Appeal and the representations made to the valuation manager. His Submissions in summary were as follows:
- (i) The residents are in the immediate use and occupation of the Property. Section 36(1) of the Act envisages that individuals other than the Appellant may be required to be served with a copy of the notice of appeal. Occupation is not concerned with questions of title or of legal possession or with the extent of a grant as it is simply a question of fact. Occupation should not be confused and elided with rateable occupation and issues such as exclusivity or paramountcy of occupation do not arise in the context of section 36(1). He contrasted the definition of "occupier" in section 124 of the 1838 Act which provides that the word "occupier" shall include every person in the immediate use or enjoyment of any hereditaments rateable under this Act" (emphasis added) with the definition of "occupier" in section 3(1) of the 2001 Act which defines occupier "in relation to property" rather than relevant property.
  - (ii) At the very least the residents of the Property ought to appear to the Tribunal to be persons who will be directly affected by the decision on the appeal in circumstances where the commercial rates burden sought to be imposed in relation to the Property, directly or indirectly, is and will be passed on and borne by them.

- (iii) Apart from the residents of the Property, the following four individuals may be directly affected by the Tribunal's decision on the appeal: the Director General of the HSE as that body provides funding for nursing home care under the Fair Deal Scheme; the Chief Executive of NTPF as that body negotiates and agrees with registered providers of designated centre the maximum price (i.e. the Fair Deal rate) to be charged for the provision of residential care services to Nursing Home Support Scheme residents by reference to the costs reasonably and prudently incurred; the Chief Executive Officer of HIQA as that body has a statutory duty to uphold and vindicate the statutory, regulatory and constitutional rights of nursing home/designated centre residents and, in that regard, the National Standards for Residential Care Settings for Older People in Ireland published by HIQA pursuant to section 8 of the Health Act 2007 confirming residents' entitlement to occupy the Property; and the Minister for Health who, by the 2013 Regulations vested residents with statutory rights which, inter alia, recognises their legal and contractual rights not only to occupy the Property but to use and enjoy the Property in a manner that is supervised and protected by HIQA. In the exercise of its discretion the Tribunal must consider and determine whether or not these individuals will be directly affected by the Tribunal's decision on this appeal.
- (iv) The language of section 36 is mandatory rather than merely directory and that compliance with subsections (1) and (2) thereof is a condition precedent to the hearing of the Appellant's appeal.
- (v) No measurement of the floor area of the Property is recorded in the valuation certificate. The valuation certificate indicates a floor area of '0'. It is reasonable to infer from this certificate that the floor area was assessed at nil. The valuation was impermissibly carried out by reference to 123 bedspaces. Neither people nor bed spaces fall within of any of the categories of property within paragraph (1) of Schedule 3 of the Act.
- (vi) An inspection of the Property was not undertaken prior to determining its value. In reliance on *Harper Stores Limited v Commissioner of Valuation* [1968] IR 166 it was submitted that the Respondent is obliged to determine the NAV of the Property in its actual state.
- (vii) The objective of valuation is to achieve equity and uniformity among ratepayers. The provenance or origin of the €3,500 multiplier applied to a unit of bedspace is arbitrary. The multiplier corresponds to the maximum number of permitted residents. The Appellant was not informed as to how the valuation was computed or of any comparators relied upon by the Respondent. On that basis the Property should be valued at nil.
- (viii) A property is only relevant property if it satisfies the requirements of paragraphs 1 and 2 of Schedule 3. Prior to determining the NAV, the Respondent made no enquiries about the Property or the nature of its occupation and whether such occupation is rateable occupation. The valuation process proceeded on an a

priori assumption that the Property is rateable by virtue of being a designated centre.

- (ix) Alternatively, if the Tribunal decides that the Property is relevant property, it is not rateable as it is entitled to exemption under paragraphs 6, 8 and 14 of Schedule 4. The designated centre is in fact the home of the resident occupiers and has all the indicia of an ordinary home and domestic environment which is no different from that of a person who has a disability or suffers from dementia and lives at home. The Property has all the characteristics of domestic premises and can only be used as it is being used and cannot be used for anything else. Senior Counsel relied on the following passage from the *Kerry County Council v Kerins* [1996] 3 IR 493 at page 506

“Now there is no doubt whatsoever on any assessment of the situation that these chalets are dwellings, are used as dwellings and can only be used as dwellings. It is quite true that the rated occupier does not occupy them as a dwelling for himself and his family; he used them for the commercial purposes of letting them out to other people who would reside in them for short periods during vacation and use them as their dwelling for those particular periods but the actual fact is that these chalets can only be described as dwellings and the definition does not require that the dwelling be used by the rated occupier, does not require that it cannot be used for commercial use in the sense of being let out for dwellings during the holiday period and I am satisfied that these chalets come within that definition of a domestic hereditament ....”

- (x) A dependent person is defined by s.1 of the Health (Nursing Homes) Act, 1990 as a person who requires assistance with the activities of daily living such as dressing, eating, walking, washing and bathing by reason of (a) physical infirmity or a physical injury, defect or disease or (b) mental infirmity. If a dependent person lives at home and avails of such services they are not liable for rates whereas if he or she lives at the Property each resident has to bear part of the rates burden.
- (xi) Without prejudice to the foregoing, section 13 of the Act requires the Respondent to value all relevant properties in accordance with the Act other than relevant properties specified in Schedule 4. Designated centres whether operated in the private, voluntary or public sector are subject to the same regulatory environment and are in competition with each other. Designated centres operated by the State (through the HSE or on behalf of the HSE) and by charitable or religious organisations are exempt under the Act from the payment of rates whereas the designated centre operated by the Appellant and other bodies not falling within Schedule 4 are not. This difference of treatment offends constitutional principles and Article 4, Title VII, Chapter 1, section 1, Article 18 and Articles 101 to 109 of the Treaty on the Function of the European Union (TFEU)
- (xii) This difference of treatment results in different financial burdens in respect of the same regulated market and amounts to the application of dissimilar measures by

the State to equivalent services within a territory comprising the European Union which have the effect of fragmenting and or distorting the internal market. It has the effect of conferring an unfair economic advantage on other operators and constitutes State aid for the purposes of European law.

- (xiii) The Tribunal was referred to paragraph 61 of the Judgment of McKechnie J. in *Dun Laoghaire-Rathdown County Council v West Wood Club Limited* (2019) IESC 24 and paragraph 35 of the Judgment of the CJEU (Grand Chamber) in *Minister for Justice and Equality and Or v Workplace Relations Commission* (Case C-378/17 4 December 2018) as supporting the Appellant's argument that the Tribunal is not only entitled but is obliged to apply EU law and, if necessary, disapply any conflicting provisions of national law. It was submitted that the in determining this appeal the Tribunal should refuse to apply sections 13 and 15(2) of the Act.

## **10. SUBMISSIONS FOR RESPONDENT**

10.1 Mr Dodd made brief submissions in reply.

- (i) The word "occupier" is defined in section 3 of the Act for the particular statutory context to which it belongs. The Appellant argues for a literal and plain meaning of the word. "Occupier" appears 87 times in the Act. If the Appellant's interpretation of "occupier" were to be accepted, certain unintended consequences would arise for each occupier such as the liability to pay rates which he said pointed against the interpretation being contended for by the Appellant.
- (ii) The Appellant's interpretation of the word "occupier" is wrong as a matter of law. If the residents of nursing home are held to be occupiers having the immediate use or enjoyment of the Property, it would create a significant administrative burden for the Respondent and the Valuation Tribunal which was not what the Legislature or the legislative scheme intended.
- (iii) Reference was made to several authorities which support his submission that "occupier" as defined in section 3 of the Act has to be understood as the person who is or may be liable for rates: *Carroll v. Mayo County Council* [1967] IR, *University of Limerick v Commissioner of Valuation* of the 2nd of June 1998, *John Laing & Son Ltd v Kingswood* [1949] 1 KB 344, *Telecom Éireann v Commissioner of Valuation* [1994] 1 IR 66, *Harper Stores Ltd v Commissioner of Valuation* [1968] IR 166 and *Aer Rianta CPT v Commissioner of Valuation* [1996] 11 JIC 0606.
- (iv) The residents are not tenants and have no right to exclude any person from the Property. The provisions of the 2013 Regulations copper fasten the fact that it is the registered provider who manages and controls the Property and is the person who has the immediate use and enjoyment of the Property.
- (v) The Tribunal does not decide rates liability. It is the rating authority who

decides the amount of the annual rate to be levied on valuation for each financial year. Indirect affects do not engage s.36(2). The words “directly affect” are defined in the online Oxford Dictionary as “with nothing or no one in between” and in the online Cambridge Dictionary as “without anything else being involved or in between.” The person who will be directly affected by the Tribunal’s decision is the registered provider and not the residents or the statutory parties who have been identified by the Appellant as they have no liability for rates in respect of the Property. The Tribunal’s decision will have no impact at all as the statutory remit of the NTPF is to assess the costs reasonably and prudently incurred by a registered provider for the purpose of negotiating the price to be charged for the provision of residential care services to Nursing Home Support Scheme residents.

- (vi) The valuation of €430,500 as stated on the valuation certificate is deemed by s.63 of the Act to be correct and any challenge to the correctness of that figure requires evidence, yet no valuation evidence was adduced by the Appellant to support the contention that the valuation is excessive or that the valuation should be nil.
- (vii) Some grounds of appeal stem from an erroneous interpretation of the wording of the valuation certificate either due to a lack of familiarity with the wording of valuation certificates or an appreciation of the valuation methodology employed in valuing nursing homes. Every nursing home is relevant property and is included on a valuation list.
- (viii) The Property is not exempt under paragraph 6 of Schedule 4 as it is not a domestic premises. The Appellant is the rateable occupier and does not use the Property as a domestic premises but provides care services to resident occupiers. The Property is a mixed property and as such is excluded from the definition of domestic premises.
- (ix) The principles to be followed in interpreting the Act are set out by MacMenamin J. in *Nangle Nurseries Limited v. Commissioner of Valuation* [2008] IEHC 73.
- (x) As to the ‘State Aid’ point no evidence was led to establish the necessary proofs for establishing that the defrayal of expenses incurred in the provision of care services constitutes ‘State Aid’.

## **11. FINDINGS AND CONCLUSIONS**

- 11.1 The Tribunal has fully considered the Appellant’s evidence and the submissions made by Counsel representing both parties in arriving at its determination. If any argument or matter of evidence is not expressly referenced in this decision, it should not be assumed that it was not fully and properly considered by the Tribunal.
- 11.2 Many of the grounds of appeal assert that in determining the valuation of the Property the Respondent acted in a manner that was ultra vires its statutory powers or otherwise unlawfully. In the circumstances, it is worth clarifying that the Tribunal does not have

jurisdiction on an appeal made to it under section 34 of the Act to determine the type of jurisdictional or procedural arguments commonly advanced on a judicial review applications. An appeal to the Tribunal is a de novo appeal and on such appeal the Tribunal is required to hear the appeal and come to its own conclusions on the evidence and the documents presented on the appeal. If a person considers that a determination of value was reached without jurisdiction or in breach of fair procedures, the determination may be challenged on an application to the High Court by way of judicial review or a statutory appeal on the merits may be pursued or, depending on the circumstances, both a judicial review application and an appeal may be pursued. If a person opts solely for the statutory appeal, as the Appellant did in this case, then any issues that could have given rise to an application for judicial review will fall away and the powers exercisable by the Tribunal are limited to such orders as are permitted by section 37 of the Act.

### **Procedural Grounds**

- 11.3 The text of the Act is and must be the primary indication of the intention of the Oireachtas in enacting legislation. The Tribunal is satisfied that section 3(1) intends that the word "occupier" to be understood uniformly throughout the Act. Section 20(2) of the Interpretation Act 2005 provides that "where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning".
- 11.4 In the Tribunal's view the definition of "occupier" is to be understood in the context of the Act as referring to the person who has immediate possession of the property and physically occupies and uses the property for business purposes, in other words, the rateable occupier. The Appellant is an owner in possession and as the registered provider, is the person carrying on the business of the designated centre. The Appellant has contracted to provide bedrooms which are reserved for the use of dependent persons with whom the Appellant has contracted to provide residential care services. These bedrooms do not cease to be in the possession and occupation of the Appellant whilst they are made available for the use and enjoyment of the residents.
- 11.5 The residents use and enjoy the Property as contractual licensees, but they are not occupiers within the meaning of section 3 of the Act. None of the residents have independent or exclusive possession of any part of the Property. They have a contractual right to reside in and, to receive care services at, the Property but those rights are entirely subordinate to the Appellant's occupation of the Property which is at all times governed, managed and controlled by the Appellant. The residents right to use and enjoy the Property is akin to that of a lodger. As Henchy J. said in *Carroll v Mayo County Council*;
- “...in the case of a lodger or hotel guest, the occupier of the room may have the exclusive use of it as far as third parties are concerned, but the landlord or hotelier concurrently occupies and uses the premises for the purposes of his business and is therefore the rateable occupier.”
- 11.6 For so long as the Appellant is providing care services to the resident occupiers, the Appellant retains such a sufficient degree of control over the Property to be regarded as being the person “in the immediate use or enjoyment of the property” regardless of the

contracts held by the residents. The Appellant exclusively occupies the Property for the purpose of the permitted nursing home user which user is beneficial to the Appellant. The residents could not reasonably expect from their contracts of care to be able to use and enjoy their bedrooms, the other facilities that are made available to them and to maintain an independent existence without any interruption, intervention or engagement by the Appellant.

- 11.7 The words “every person” in the definition of ‘occupier” appear to contemplate a situation in which more than one person may simultaneously be entitled to be in the immediate use or enjoyment of property. There can be situations where a number of persons seemingly have rights of occupation in the same property. It is well established that where more than one person or set of persons have rights to be in or upon a property the person or set of persons having the control and regulation of the property is treated for the purpose of rating law as the rateable occupier. The leading case on exclusivity is the House of Lords decision in *Westminster Council v Southern Railway & Ors* [1936] AC 511 where it was held that a person will be in exclusive occupation for the purpose of rating if the person’s position in relation to the occupation of land is paramount for the purpose for which the land is used. Lord Russell of Killowen said:

“Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases, there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every case must be one of fact, namely, whose position in relation to occupation is paramount, and whose position in relation to is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises.”

- 11.8 The right or entitlement to be served with a copy of the notice of appeal as provided for in section 36 (1) is given context by the whole Act and its overall provisions. Upon receipt of an appeal, the Tribunal is obliged to serve a copy of the appeal on the relevant rating authority, the Commissioner and the occupier of the property, the subject of the appeal. If the occupier of the property, the subject of the appeal is the appellant, then under section 36 (1) the Tribunal need only serve a copy of the notice of appeal on the relevant rating authority and the Commissioner. The Appellant’s occupation and use of the Property is paramount for the purpose for which the designated centre/nursing home is occupied so it is the Appellant who is “the person in the immediate use and occupation” of the Property. The residents are merely occupiers living on the Property. Accordingly, there is no obligation upon the Tribunal to serve a copy of the notice of appeal on the residents.
- 11.9 Subsection (2) of section 36 of the 2001 Act requires the Tribunal to serve all other documents and information in writing submitted by any party in connection with the appeal on the occupier of the property, the subject of the appeal, and any other person who appears to the Tribunal will be directly affected by its decision on the appeal. As the Tribunal has determined that for rating purposes the Appellant is the occupier of the Property, the question that remains to be decided is whether the residents, the Director

General of the HSE, the Chief Executive of NTPF, the Chief Executive Officer of HIQA and the Minister for Health are persons who will be “directly affected” by the Tribunal’s decision on the appeal.

- 11.10 It is impossible to read this provision without seeing that the purpose of the legislative scheme is to anxiously safeguard all interests that might be affected by any decision made by the Tribunal on an appeal pursuant to section 37 of the 2001 Act as amended. However, the key word in subsection (2) of section 36 is “directly”. This word eliminates not just the mere busybody but also the person who might have an interest in the outcome of this particular appeal but who is only indirectly affected by that outcome. So, a person who might have an interest in the outcome of this particular appeal but who is only indirectly affected by that outcome does not come within subsection (2) of section 36.
- 11.11 It is difficult to see how it can be said that the residents and the four named individuals will be “directly affected” by the Tribunal’s decision. The decision under appeal is that made by the Respondent determining the net annual value of the Property. The appeal is brought by the owner and occupier of the Property against the decision made by the Respondent. Although the residents may be ‘affected’ in the ordinary sense of that word in the outcome of the appeal as they may eventually have to pay a percentage or portion of any rates that may be levied as part of the amount that they pay towards their nursing home care fees whilst they live on the Property, nevertheless they will not be “directly affected” by any decision the Tribunal might make on this appeal as that phrase is to be properly understood. If the appeal is unsuccessful, they clearly are not directly affected in any adverse sense as they have no estate or interest in the Property and they are not in rateable occupation. Their obligation to pay any contribution towards rates arises not by virtue of any decision the Tribunal may make on this appeal but by virtue of their contractual obligation to contribute toward the cost of their nursing home care. If the appeal were to be successful, again there would be no direct effect upon them in the sense of taking any direct benefit from a determination that the Property is not relevant property or is relevant property not rateable. The persons who will be “directly affected” by any decision the Tribunal might make on this appeal are the Appellant, the Respondent and the rating authority.
- 11.12 The Tribunal accepts that a person whose interests are capable of being directly affected by any decision the Tribunal may make should be afforded an opportunity to be heard and to make submissions prior to the determination of the appeal. However, the mere fact that rates are a cost, or an expense reasonably and properly incurred by a nursing home, the fact that the HSE and the residents make contributions to the payment of rates does not suffice to establish a right to be heard. The Tribunal does not see that any injustice or unfairness, let alone a breach of natural or constitutional justice, will arise from the fact that the residents and the statutory individuals will not be consulted or heard prior to the determination of the appeal.
- 11.13 It is difficult to conceive of any circumstances in which the Tribunal would consider the Director General of the HSE, the Chief Executive of NTPF, the Chief Executive Officer of HIQA and the Minister for Health as persons who will be “directly affected” by the Tribunal’s decision on the appeal. They have no estate or interest in the Property, and they are not the rateable occupiers. The fact that the NFT negotiates the Fair Deal rate with the registered provider by reference to the costs reasonably and prudently incurred



in the running of the nursing home, the fact that the HSE defrays in whole or in part the amount payable to the nursing home in respect of any Fair Deal resident and the fact the Minister has an interest in the welfare of the residents in the nursing home is just not sufficient. The operation of the Fair Deal scheme is concerned solely with providing financial support to help persons pay for the cost of nursing home care. Even if those persons had an interest or concern about the rates payable by the nursing home and the Tribunal has heard no evidence of any such interest or concern, any decision the Tribunal may make on the appeal will not directly affect them.

- 11.14 Therefore, neither the residents of the Property nor the Director General of the HSE, the Chief Executive of NTPF, the Chief Executive Officer of HIQA or the Minister for Health appear to the Tribunal to be persons who will be “directly affected” by the decision the Tribunal may make on the appeal.

### **Substantive Grounds**

- 11.15 In the first instance the Appellant claims that the Property is not relevant property. A property is relevant property if it satisfies the conditions of paragraphs 1 and 2 of Schedule 3. Paragraph 1(a) of Schedule 3 provides that ‘buildings’ are relevant property for the purposes of the Act. No argument was made that the condition in paragraph 2(a) of the Schedule 3 was not satisfied.
- 11.16 Based on the evidence of Ms Foy the Tribunal is satisfied that the Property is a building and the whole of the Property is occupied for the purpose of the Appellant’s business. The Appellant occupies and through its employees has the direct and immediate control of the day to day running of the premises as a designated centre and that occupation is of benefit to the Appellant. The possession of the Property for the provision of residential services at the Property has been ongoing since about 2011. Such occupation was not prior to the valuation date for too transient a period. Accordingly, as the three essential ingredients of rateable occupation are satisfied regardless of whether the Property falls to be described as a nursing home or a designated centre, the Property is a relevant property.
- 11.17 An argument was advanced that the Respondent had unlawfully valued ‘beds’ or ‘bed spaces’, which do not constitute relevant property. This argument is somewhat disingenuous. Not all relevant properties can be valued for rating purposes by the rental method using a floor area metric. Often the valuation approach has to be by another means depending on the nature of the property. For example, the use of a bed or room multiplier is a check method that allows a valuer to measure and compare revenue generated during a specific period of time to ascertain the rental value of properties such as a hotel or a bed and breakfast property for rating purposes and that metric then serves as a useful benchmark to consider and compare with valuations for similar properties.
- 11.18 The Appellant’s next contention was that if the Property is relevant property, it is relevant property exempt from rates on the grounds that it is

- (i) a “domestic premises” within the meaning of s. 3 of the Act and as such falls within paragraph 6 of Schedule 4
- or, if the Tribunal finds that it is not a domestic premises
- (ii) it is a building used by a body that meets the requirements of paragraph 8 (a) or (b) of Schedule 4 for the purposes of caring for sick persons or for the treatment of illnesses
- or, alternatively,
- (iii) it is a building occupied for the purpose of caring for elderly, handicapped or disabled persons by a body that meets the requirements of paragraph 14 (a) or (b) of Schedule 4.

11.19 In support of the argument that the Property is a domestic premises Counsel relied *Kerry County Council v. Kerins* [1996] 3 IR 493 which considered whether holiday chalets constituted domestic hereditaments pointing out that the Supreme Court made clear that the definition of “domestic hereditaments” did not require the rated occupier to make private use of the chalets or prevent their use for commercial advantage as holiday lettings. The fact of this appeal are manifestly distinguishable from the facts in *Kerins*.

11.20 The Property is clearly not an apart-hotel and nor is it a mixed premises as it is used solely for one purpose, namely the residential care and welfare of older people. The question as to whether a particular type of premises can be described as a 'domestic premises' cannot be answered solely by looking at it from a single point of view. Regard must be had to factors such as the Appellant's control over the premises, the extent of control over the admission of persons to the premises, whether and to what extent persons are engaged (whether for payment or voluntarily) to provide services at the premises and the degree of independence which the residents have in relation to their activities and routines there.

11.21 The Tribunal finds that the Property is not used wholly or partly as a domestic premises. The Property is a residential building used as a private nursing home that is registered as a designated centre and was occupied at the valuation date by 123 persons. The use and character of the Property is the provision of residential care and welfare services to those 123 persons who are being looked after, supported and made comfortable in their daily lives because due to their respective health issues independent living or care in their own homes for whatever reason is no longer possible. The Property is not of a kind similar to a domestic premises referred to in paragraph 6 of Schedule 4. A domestic premises tends to be the dwelling of a household comprising one person living alone or a group of people (not necessarily related) on a short term or long time basis. A 'domestic premises' is not required to be registered with and monitored by the Chief Inspector of Social Services or to be operated in compliance with the Health Act 2007 and the National Standards for Residential Care Settings for Older People.

11.22 The Appellant occupies the Property as the service provider responsible for exercising real and substantial management and control of the residential services required to be provided pursuant to its Statement of Purposes. In terms of management, it is the

Appellant, not the resident occupiers, who decides who will be accommodated in the Property. The existing residents are not individually consulted prior to any person moving into the Property or moving from one household to another household and while it may be the case that some of the less dependent residents have freedom of choice over their daily routines and activities, it is the Appellant who exercises substantial control over their care, welfare and living arrangements.

11.23 In the alternative, the Appellant also claimed that the Property is exempt from rateability by reference to paragraphs 8 and/or 14 of Schedule 4 of the Act.

11.24 The two requirements to be satisfied for the Property to fall with the ambit of paragraph 8 of Schedule 4 are

(a) that the building or part thereof is used for the purposes of caring for sick persons, for the treatment of illnesses or as a maternity hospital  
and

(b) that the Appellant is not established, and its affairs are not conducted for the purpose of making a private profit from such activity

or

the expenses incurred by the Appellant in carrying on such activity are defrayed wholly or mainly out of moneys provided by the Exchequer and the care or treatment provided is made available to the general public.

The Appellant offered no evidence of caring for sick persons or giving treatment for illnesses and Ms Foy accepted that the Appellant operates the Property to make a profit. The Appellant, therefore, cannot bring itself within the ambit of subparagraphs (a) or (b) of paragraph 8 of Schedule 4.

11.25 The requirements to be satisfied for the Property to fall with the ambit of paragraph 14 of Schedule 4 are that the building or part of the building is occupied for the purpose of caring for elderly, handicapped or disabled persons by a body being either

(a) a body which is not established and the affairs of which are not conducted for the purpose of making a private profit from an activity as aforesaid, or

(b) a body the expenses incurred by which in carrying on an activity as aforesaid are defrayed wholly or mainly out of moneys provided by the Exchequer, other than a body in relation to which such defrayal occurs by reason of the Nursing Homes Support Scheme Act 2009.

Ms Foy gave evidence that elderly and one disabled person are cared for at the Property and she accepted that the Appellant provides care services for the purpose of making a profit. Given that the expenses incurred in caring for one hundred and fifteen persons at the Property is defrayed under the Nursing Homes Support Scheme Act 2009, the Appellant cannot bring itself within the ambit of subparagraphs (a) or (b) of paragraph 14 of Schedule 4.

11.26 For the reasons given the Tribunal concludes the Appellant is not entitled to claim exemption from rates under paragraphs, 6, 8 or 14 of Schedule 4.

- 11.27 That leaves the alternative grounds of appeal relating to the failure to value the Property on the Contractor's Basis, the description and details of the Property on the valuation certificate and the valuation list and the State aid argument.
- 11.28 The contention that the valuation methodology used by the Respondent to determine the value of the Property is unlawful in so far as the 'bed spaces' are not property for the purposes of paragraph 1 of the Schedule 3 of the Act has already been dealt with above.
- 11.29 In so far as 'bed spaces' appears to have been used to value the Property, the Appellant argued that the NAV was improperly reached by the bed space multiplier without regard to (i) actual occupancy as of the valuation date or (ii) average occupancy over an extended period or (iii) any other matter. It was also argued that as the valuation was not carried out on the Contractor's Basis, the Property was not properly valued. The difficulty the Tribunal has with these arguments is that the Appellant accepted that there were 123 residents at the valuation date. Furthermore, the Appellant did not call a valuer to give evidence to support the argument that the wrong valuation method was used or that the 'bed space' valuation was inappropriate or that the valuation amount as determined by the Respondent is incorrect for non-compliance with the requirements of section 19(5) of the Act and did not itself proffer any calculations, analysis or evidence in support of these argument or adduce any evidence as to what amount ought to have been determined as the value of the Property if the Contractor's Basis method of valuation had been utilised.
- 11.30 The Appellant contended for a nil NAV on the basis that the Property is not relevant property or, if held to be relevant Property, is exempt from rates or, in the further alternative, the determination of value did not accord with the requirements of section 19(5) of the Act. In the absence of the Appellant putting forward expert valuation evidence or comparative rental evidence of similar circumstanced properties on the valuation list to argue for a lower figure, the Tribunal has no jurisdiction to interfere with the valuation as determined by the Respondent.
- 11.31 The Appellant argued that the description of the Property as a nursing home is incorrect and "in the interest of legal preciseness" ought properly to have been described as a designated centre as opposed to a nursing home. Section 2 of the Health Act 2007 as amended contains a detailed legal definition of 'designated centre'. Essentially there are three categories of designated centres:
- (a) an institution at which residential services are provided by the Executive, the Agency, a service provider under the Act or a person that is not a service provider but who receives assistance under section 39 of the Health Act 2004 (i) in accordance with the Child Care Act 1991, (ii) to persons with disabilities, in relation to their disabilities, or (iii) to other dependent persons, in relation to their dependencies;
  - (b) an institution that is a special care unit and,
  - (c) an institution that is a nursing home as defined in section 2 of the Health (Nursing Homes) Act 1990.

11.32 The interpretation of a valuation certificate should not be overly pedantic. The 'Use' description of the Property as a nursing home is not a misnomer or misdescription rather it is a description of use of the Property as commonly understood. The Tribunal considers that the description 'nursing home' is not altogether inappropriate with regard to the particular use to which the Property is put and it certainly would be a stretch to call it an error of fact.

11.33 The final ground of appeal to be considered is whether, in the event the Tribunal holds that the Property is relevant property and not entitled to claim exemption under Schedule 4, the Tribunal should disapply the provisions of section 13 and 15(2) of the Act for being contrary to EU law. Essentially, the Appellant, in requesting the Tribunal to disapply section 13(1) and section 15(2) of the Act, is seeking to stop the State from granting aid in the form of an exemption from rates to bodies who, like the Appellant operate designated centres, but who, unlike the Appellant, do satisfy the conditions contained in paragraph 14 of Schedule 4.

11.34 Article 107 of TFEU provides:

11.22 "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market"

11.35 This issue requires the Tribunal to determine whether the matters complained of constitute:

- (i) an aid, in the sense of a benefit or advantage which is
- (ii) granted by the State or through state resources in any form whatsoever which
- (iii) distorts or threatens to distort competition and which
- (iv) affects trade between Member States.

11.36 These matters are not pure issues of law and nor are they easily decided. To succeed on the state aid issue, the Appellant had to establish that the differential treatment by the granting of an exemption was a state aid and that would depend on the facts. The state aid issue was addressed solely in submissions. No relevant facts relating to the state aid were agreed. There was simply no evidence presented to the Tribunal to establish that those bodies entitled to claim exemption under Schedule 4 are in a comparable legal and factual situation to the Appellant, that those bodies can be considered as competitors with private operators such as the Appellant, that the activities of these bodies distort or threaten to distort the competitive position of its rivals, the private operators, or that their activities affect trade between Member States to lay the foundation for a claim that exemption conferred by paragraph 14 of Schedule 4 constitutes state aid in breach of

Article 107(1) of TFEU. As the arguments put forward on behalf of the Appellant were based on conjecture as to facts this ground of appeal is refused.

## **12. DETERMINATION**

In conclusion, the Appellant's appeal on the stated grounds is disallowed and the Respondent's determination of value is confirmed.