

Appeal No: VA17/5/185

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

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

RYEVALE NURSING HOME KILDARE LIMITED

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

**In relation to the valuation of 14C Newtown, Leixlip, County Kildare
Property No. 1739626 ("the Property")**

TRIBUNAL	Carol O'Farrell – BL	Chairperson
	Donal Madigan - MRICS, MSCSI	Deputy Chairperson
	Liam Daly - MSCSI, MRICS	Member

**JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 24TH DAY MAY 2023**

1. THE APPEAL

- 1.1 A Notice of Appeal was lodged on the 5th of October 2017 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 €589,000.
- 1.2 Extensive and overlapping grounds of appeal in the form of legal submissions running to 23 pages were lodged by a firm of Solicitors on behalf of the Appellant. The Tribunal was informed on the 7th October 2022 that the Solicitors were no longer acting for the Appellant. 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 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.
- 1.3 The Appellant considers that the valuation of the Property ought to have been determined at a nil valuation.
- 1.4 The procedural issues raised in this appeal and eight other appeals (VA17/5/172, VA17/5/179, VA17/5/182, VA17/5/184, VA17/5/188, VA17/5/189, VA17/5/194 VA17/5/195) concerning designated centres and the Tribunal decided that it was appropriate and expedient to come to a decision on those issues before dealing with the primary grounds of appeal. The arguments on procedural issues were heard over the course of four days in November 2018. At that time all nine appellants were legally represented by the same firm of Solicitors and by Senior Counsel. The Tribunal's Decisions were delivered on the 23rd of January 2019.
- 1.5 The Tribunal decided the procedural issues against the appellants and determined that there is no obligation on the Tribunal under section 36 of the Valuation Act 2001 to serve copies of the relevant documents on the residents in each of the nursing homes involved, or on any other persons identified by the appellants as interested parties. 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 for an order of certiorari quashing the Decisions. The judicial review application was withdrawn and struck out by the High Court on the 15th November 2022.

2. THE HEARING

- 2.1 The Appeal proceeded by way of remote hearing on the 31st of March 2023. At the hearing, the Appellant was represented by Ms. Eileen Gallagher, a member of the Board of Directors of the Appellant company. The Respondent was represented by Mr Keith Rooney BL instructed by the Chief State Solicitor.
- 2.2 The Appellant filed a short statement of evidence prior to the hearing. The Respondent did not provide a précis of evidence and did not call a witness to give evidence at the hearing.

3. ISSUES

- 3.1 This is an appeal that turns on the proper construction of certain provisions of the Act. The key underlying issues are:
- (i) Whether the Property is a relevant property within the meaning of the section 15 and Schedule 3 of the Act.
 - (ii) Whether the description and details of the Property on the valuation certificate and the valuation list are not correct in material respects.
 - (iii) 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.
 - (iv) 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.
 - (v) Whether the valuation as determined by the Respondent is incorrect.
 - (vi) Whether paragraph 8 or 14 of Schedule 4 constitutes unlawful State aid.

4. RELEVANT STATUTORY PROVISIONS

- 4.1 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.”

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

“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.

5. REVALUATION HISTORY

5.1 The Valuation Order for the rating authority area of County Wicklow was made on the 6th October 2017.

5.2 A proposed valuation certificate issued on the 10th of March 2019 under section 24(1) of the Valuation Act 2001 ('the Act') in relation to the Property indicating a valuation of €655,000.

5.3 Representations were made by the Appellant to the valuation manager and a final valuation certificate issued on the 7th of September 2017 stating a valuation of €589,000.

6. FACTS

6.1 The Property is a registered nursing home within the meaning of section 2 of the Health (Nursing Homes) Act, 1990 and a designated centre for the care of the elderly within the meaning of section 2(1) of the Health Act 2007.

6.2 The Appellant is the owner of the Property and is the registered provider of the designated centre.

6.3 The Property was reconstructed in 1985 for the provision of additional bedrooms. Following more recent development in January 2022, the Property is a 172-bedroom facility. At the valuation date the Property had a maximum capacity for 131 residents and 129 persons were in residence.

6.4 The residents at the Property include approximately 21 under-65 years old, 19 Residents from Mental Health Services and 29 Residents with a diagnosis of behavioural and psychological symptoms of dementia in the High-Support Unit

7. APPELLANT'S EVIDENCE

7.1 At the outset Ms. Gallagher confirmed the non-procedural grounds that the Appellant wished to advance at the hearing.

- 7.2 Ms. Gallagher previously gave evidence to the Tribunal that she had been personally involved in negotiations with the NTPF since 2009 and that the NTPF “*reduce, reduce, reduce*” and negotiations were akin to horse trading. She said that the NTPF price just covered basic bed and board. At the hearing Ms Gallagher pointed out that similar designated centres run by or on behalf of the HSE (which she identified as HSE Community Units) do not pay rates and yet those nearest to the appeal Property in Maynooth CCU, St. Mary’s and Cherry Orchard receive higher Fair Deal fees than the Appellant at €1,870, €2,058 and €2,194 respectively. She stated that the NTPF do not consider rates an additional expense and no account is taken of that expense in setting the maximum price to be charged by the Appellant for the provision of long-term residential care services to Nursing Home Support Scheme residents. She pointed out that since 2018 no price increases were made in 2018 or 2019 and that increases of just €10 were made in the following three years.
- 7.3 Ms Gallagher made clear that the Appellant has no difficulty with paying rates for the areas of the Property that are not occupied by the Residents and considered that the dependent residents at the Property are being discriminated against by reason of the fact that they are residing in a privately run designated centre. The Appellant was of the view that the room of each resident is their own private residence and as such local property tax (‘LPT’) should be payable in respect of these private areas and rates paid in respect of the common areas of the Property. Ms Gallagher pointed out that if a resident was living across the road in a studio apartment with less space and amenity areas then they would only be charged LPT and that the imposition of rates will inevitably lead to an increase in the fees charged to the residents .
- 7.4 Ms Gallagher observed that the HSE agreed to 6.5% rise in staff pay over the next 2 years and that it was financially impossible for the Appellant in terms of its own staff to match that increase. She also commented upon the fact that the reforms to the State pension scheme are just over a year away and that these factors combined with energy and cost of living increases have left the Appellant struggling.
- 7.5 Under cross-examination Ms Gallagher accepted that the Appellant is a private company that operate for profit and commented that for the past six years profits have fallen year on year and that profit is becoming non-existent largely due to the fact that the NTPF price is inadequate. She also confirmed that only 5 to 15 of the residents are privately funded and the remaining residents are ‘Fair Deal’ recipients under the Nursing Home Support Scheme.
- 8. SUBMISSIONS FOR RESPONDENT**
- 8.1 Mr. Keith Rooney BL submitted that, despite the heartfelt argument put forward on the Appellant’s behalf, an entitlement to claim exemption under paragraphs 8 and 14 does not arise. The Appellant is a private for profit company and it cannot be said that its expenses are defrayed wholly or mainly out of moneys provided by the Exchequer.

- 8.2 In *Glendale Nursing Home v Commissioner of Valuation [2012] IEHC 254* [Bermingham J. as he then was] stated at para 26.

“Over and above what the HSE intends to do, what it is actually doing is contributing to the cost of care for the individual elderly person, alleviating the burden on the elderly person in obtaining care. It might be said that the State/HSE defrays the expenses of the individual elderly person in need of care but it cannot be said that they are defraying the costs of Glendale.”

- 8.3 The property is relevant rateable property. The residents are not the rateable occupiers. In its Preliminary Decision the Tribunal held that the Appellant’s occupation and use of the Property is paramount and it is the Appellant who is *“the person in the immediate use and occupation”* of the Property.

- 8.4 The evidence given on behalf of the Appellant does not demonstrate discriminatory treatment. There is nothing inherently wrong in treating one category of property differently from another, for example, properties occupied and used for beneficial and private purposes and those occupied and used for charitable or public purposes. *Wesley College & Ors v Commissioner of Valuation [1982] IESC 8*. The legislation is for purpose and the grounds put forward in paragraph 3.14 of schedule 3 of the Notice of Appeal that the difference in treatment under the Act of privately operated designated centres from other publicly owned and voluntary designated centres is unconstitutional or contrary to EU law are unsubstantiated. The State is entitled to provide relief in the form of exemption from rates to State run designated centres or those run by voluntary or charitable organisations.

9. FINDINGS AND CONCLUSIONS

- 9.1 The Tribunal has fully considered the Appellant’s evidence and the submissions made by Counsel representing the Respondent in arriving at its determination.

- 9.2 Many of the grounds of appeal asserted that in determining the valuation of the Property the Respondent acted in a manner that was ultra vires 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 application. 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 fall away and the powers exercisable by the Tribunal are limited to such orders as are permitted by section 37 of the Act.

- 9.3 The Appellant contended 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.
- 9.4 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 care services at the Property has been ongoing since at least 1985. Accordingly, 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.
- 9.5 The argument was advanced in the notice of appeal 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.
- 9.6 The Appellant argued that the description of the Property as a nursing home is incorrect and that it 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.
- 9.7 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.

- 9.8 The Appellant contended that the Property is exempt from rateability by reference to paragraphs 8 and/or 14 of Schedule 4 of the Act.
- 9.9 The two requirements to be satisfied for the Property to fall within 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.

Ms. Gallagher accepted that the Appellant operates the Property to make a profit and gave uncontested evidence that the Appellant cares for sick persons. However, the Appellant offered no evidence to satisfy the Tribunal that the expenses incurred by the Appellant in carrying on residential care services are defrayed wholly or mainly out of moneys provided by the Exchequer. The Appellant, therefore, cannot bring itself within the ambit of subparagraphs (b) of paragraph 8 of Schedule 4.

- 9.10 The requirements to be satisfied for the Property to fall within 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 Gallagher gave evidence that elderly persons 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 all but ten of the 129 residents at the Property are 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.

- 9.11 For the reasons given the Tribunal concludes the Appellant is not entitled to claim exemption from rates under paragraphs 8 or 14 of Schedule 4.
- 9.12 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, contended that 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.

9.13 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 paragraphs 8 or 14 of 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, by 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 8 or 14 of Schedule 4.

9.14 Article 107 of TFEU provides:

“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”

9.15 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.

9.16 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 the Notice of Appeal. There was simply no evidence presented to the Tribunal to establish that those bodies entitled to claim exemption under paragraphs 8 or 14 of 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, or 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 paragraphs 8 or 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.

10. DETERMINATION

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

NOTIFICATION OF APPEAL RIGHTS

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.