

## THE HIGH COURT

[2011 No. 1783 SS]

## IN THE MATTER OF THE VALUATION ACT, 2001 AND IN THE MATTER OF THE VALUATION OF PREMISES

## BETWEEN:

GLENDALE NURSING HOME

APPELLANT

AND

THE COMMISSIONER OF VALUATION

RESPONDENT

## JUDGMENT of Mr. Justice Birmingham delivered the 15th day of June 2012

1. The Valuation Tribunal has stated a case for the opinion of the High Court arising from its determination of the 4th January 2011.
2. The issues on which the opinion of the High Court is sought are whether:

- (1) The HSE in making payments to nursing homes under the Nursing Homes Support Scheme Act 2009, is, within the ordinary meaning of the word, defraying expenses of the nursing home in its purpose of caring for the elderly;
- (2) The HSE for all intents and purposes is 'the State' as defined for the purposes of the Valuation Act 2001, as was held by MacMenamin J. in *Health Service Executive v. Commissioner for Valuation* [2008] IEHC 178 and by natural extension is therefore acting on behalf of the Exchequer when it makes payment;
- (3) The relevant property falls within the ambit of paragraph 14(b) of the fourth schedule to the Valuation Act 2001;
- (4) Glendale Nursing Home is a body the expenses incurred by which in carrying on an activity as a nursing home caring for the elderly are defrayed by the Exchequer;
- (5) In the event that the answers to the above questions are yes, did the Tribunal err in law in holding that expenses incurred by Glendale were not wholly or mainly defrayed out of monies provided by the Exchequer when the uncontested evidence before the Tribunal was that between the 10th January 2010, and the 10th June 2010, the proportion of Glendale's income that came from the HSE ranged from 60.51% to 51.92%?

3. By way of background it should be explained that Glendale is a nursing home located at Tullowphelim, Tullow Rural, Carlow. The proprietors of the nursing home contend that it should be exempt from rateability. During the course of an oral hearing, held before the Valuation Tribunal on the 21st September 2010, and the 10th November 2010, at which it may be noted the appellant was not legally represented, it was agreed that the appellant's claim to be entitled to an exemption from rateability fell to be determined by reference to para 14(b) of Schedule 4 of the Valuation Act 2001. That schedule so far as material provides: **"Relevant Property Not Rateable"**

"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."

4. It is agreed that the promoters of the nursing home have sought to make a profit so that the home is not one to which para 14(a) applies. In effect the real question at issue, which will decide whether the nursing home is rateable or is exempt from rates, is whether it is the case that its expenses are defrayed wholly or mainly out of monies provided by the Exchequer. In that regard it is no longer in dispute between the parties that payments by the Health Service Executive are the equivalent to payments by the State. Accordingly the question posed at (b) in the cases stated was not argued and it does not appear either appropriate or necessary to answer this question.

**The Valuation Tribunal**

5. At the hearing before the Valuation Tribunal it was submitted on behalf of the nursing home that in excess of fifty percent of its income was derived from the Nursing Home Subvention Scheme and the Nursing Home Support Scheme paid by the HSE in compliance with the Health (Nursing Homes) (Amendment) Act 2007, and the Nursing Homes Support Scheme Act, 2009. On that basis, it was argued that the appellant met the criteria under para 14(b) of Schedule 4 to the 2001 Act and accordingly was entitled to an exemption from rateability.

6. On behalf of the Commissioner it was submitted that in order to avail of the exemption from rates, in accordance with the provisions of para 14(b), it was necessary for the appellant to establish that expenses incurred were wholly or mainly defrayed by the Exchequer. It was further submitted that State support or subvention is a payment applied for by a person in order to assist that person procure services of their choice from the market place and that the HSE does not involve itself in defraying expenses incurred by Glendale Nursing Home or indeed by any other private nursing home and that the HSE does not have the statutory objective or purpose of defraying the expenses of Glendale Nursing Home.

7. Before the Valuation Tribunal it was agreed by the parties that the Tribunal should determine the issues arising from the submissions that had been made to it in advance as a preliminary legal issue. In doing so, the Tribunal first referred to the definition of the word 'defray' that appears in the Oxford English Dictionary, 2nd Edition, Volume IV which is as follows:-

"1. To pay out, expend, spend, disburse (money). 2. To discharge the (expense or cost of anything) by payment; to pay, meet, settle. 3. To meet the expenses of; to bear the charge of; pay for. 4. To pay the charges or expenses of (a person); to reimburse, to entertain free of charge."

The Tribunal then continued:-

"The HSE, in making payments to nursing homes under the Nursing Homes Support Scheme Act 2009, is, within the ordinary meaning of the word, defraying expenses of the nursing home in its purpose of caring for the elderly. The HSE for all intents and purposes is 'the State' as defined for the purposes of the Valuation Act 2001, as was held by MacMenamin J. in *Health Service Executive v. Commissioner for Valuation* [2008] IEHC 178 and by natural extension is therefore acting on behalf of the Exchequer when it makes a payment.

The Tribunal finds that the relevant property falls within the ambit of Paragraph 14(b) above, and further, that Glendale Nursing Home is a body the expenses incurred by which in carrying on an activity as a nursing home in caring for the elderly are defrayed by the Exchequer.

However, the Tribunal was not provided with sufficient evidence to establish that the aforementioned expenses are defrayed wholly or mainly out of monies provided by the Exchequer.

Accordingly, the Tribunal finds that in the absence of evidence, the subject property does not qualify for relief under Schedule 4, Paragraph 14(b)."

### **The role of the High Court**

8. The role of the High Court when dealing with cases of this nature was recently the subject of comment by MacMenamin J. in *Health Service Executive v. Commissioner for Valuation* [2010] 4 I.R. 23, where he commented as follows:

"[5] By virtue of s.39 (5) of the Act of 2001, the High Court shall determine *any question or questions of law arising on the case* and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Valuation Tribunal with the opinion of the Court, or make such other order as the Court shall think fit.

[6] Thus, the remit of this Court is not now confined to a narrow consideration of affirmation or denial of the Valuation Tribunal's conclusion."

### **The relationship between the Valuation Tribunal and the High Court**

9. There is no doubt but that the Valuation Tribunal is an administrative tribunal, the members of which are individuals with expertise and experience in relation to the issues likely to come before a Valuation Tribunal. So much is clear from the decision of the Supreme Court in *Bulmers Limited v. Commissioner of Valuation* [2009] 1 I.R. 503 and the earlier decision *Premier Periclase Limited v. Commissioner of Valuation* (Unreported, High Court, Kelly J. 24th June 1999). On this basis there is no doubt that ordinarily the Court would be slow to intervene with a decision of such a body and would be minded to do so only on the basis of an identifiable error of law or unsustainable finding of fact. However, the matter before the Court is an exercise in pure statutory interpretation. In those circumstances it does not seem to me that the doctrine of curial deference is of any real significance.

10. The question that then arises is how the Court should approach its task of interpreting this statute. The approach that a court should take was addressed by MacMenamin J. in *Nangles Nurseries v. Commissioners of Valuation* [2008] I.E.H.C. 73, where he commented as follows:-

"I would therefore summarise the principles which are applicable in an interpretation of this statute in the light of the authorities as follows:

- (1) while the Act of 2001 is not to be seen in precisely the same light as a penal or taxation statute, the same principles are applicable;
- (2) the Act is to be strictly interpreted;
- (3) impositions are to be construed strictly in favour of the rate payer;
- (4) exemptions or relieving provisions are to be interpreted strictly against the rate payer;
- (5) ambiguities, if they are to be found in an exemption are to be interpreted against the rate payer;
- (6) if however there is a new imposition of liability looseness or ambiguity is to be interpreted strictly to prevent the imposition of liability from being created unfairly by the use of oblique or slack language;
- (7) 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."

11. Insofar as the provision in the schedule under consideration is one that provides an exemption or is a relieving provision, it is paras. 4 and 5 which are of particular relevance. Accordingly, it is a provision that falls to be interpreted strictly against the ratepayer and ambiguities, if found, are to be interpreted against the ratepayer.

12. The approach of interpreting exemption provisions against a ratepayer or tax payer is a long-standing one. The rationale was addressed by Kennedy C.J. in *Revenue Commissioners v. Doorly* [1933] I.R. 750, where the Chief Justice, dealing with provisions that

exempt from liability, commented:-

"I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes, ... The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the Taxing Act as interpreted by the established canons of construction so far as applicable."

### **The role of the HSE**

13. The HSE interacts in two ways with the private nursing home sector of which Glendale forms a part. The first in time was the Subvention Scheme which has been in existence since 1993. From October 2009 the Subvention Scheme has been replaced by the Nursing Homes Support Scheme, provision for which had been made by the Nursing Homes Support Scheme Act 2009, better known as the Fair Deal Act. Since then no new entrants are admitted to the Subvention Scheme but those who are already on that scheme may elect to stay on there or may transfer over to the new Nursing Homes Support Scheme.

14. Under the Nursing Homes Support Scheme a person in need of care makes a contribution towards the cost of their care and the State pays the balance. This applies whether the nursing home is public, private or voluntary.

15. For those seeking entry to the Nursing Homes Support Scheme there are potentially three steps to the application process. Step one is an application for a care needs assessment. The care needs assessment identifies whether or not an applicant is in need of long-term nursing home care. Step two is an application for State support. This involves a financial assessment which will determine the contribution to be made by the applicant to their own care and then the corresponding level of financial assistance from the State by way of State support. Then, in some circumstances there will be an optional third step which arises if the applicant is seeking a nursing home loan under the Ancillary State Support provisions of the 2009 Act.

16. As might be expected, there are elaborate provisions setting out the manner in which the contribution to be made by an applicant is to be calculated which involves a detailed financial assessment. The HSE informs the individual of the contribution they will be required to make to their own care and whether they are eligible for State support. It will then provide the applicant with a list of nursing homes to choose from which will include public nursing homes, voluntary nursing homes and approved private nursing homes. The individual is then free to choose any home on the list. If the individual selects a public nursing home then they pay their contribution to the HSE. If they choose a voluntary nursing home, they pay their contribution to the voluntary home each week and the HSE pays the balance. Approved private nursing homes are homes which have agreed the price that will be charged for care with the National Treatment Purchase Fund and have been approved for the purpose of the scheme. Again, if the individual selects a private nursing home, the individual entering into care pays a contribution to the nursing home provider each week and the HSE pays the balance.

17. To complete this overview of the operation of the Nursing Homes Support Scheme it is appropriate to refer to the Nursing Home Loan element of the scheme. This can arise in these circumstances. In assessing the contribution to be made by an individual, one has regard to the income and the assets of the applicant for care. An individual will contribute eighty percent of their assessable income and five percent of the value of any assets per annum. Assets below a particular threshold are excluded from consideration. Significantly, there is a provision whereby when the applicant's assets include land and property in the State, the five percent contribution based on such assets may be deferred and collected at a later stage from the applicant's estate. The nursing home loan element of the scheme is referred to as "Ancillary State Support". In effect this means that in the case of certain individuals the HSE/the State can expect to recoup some of the monies it has expended on their behalf.

18. Under the previous subvention regime there was provision for people who entered registered private nursing homes to receive a subvention from the Health Service Executive if they were in need of full-time care and attention and if they passed a means test which took account of income and assets. The subvention was designed to assist individuals meeting the cost of nursing homes. It was not designed to meet the full costs. In general there was a maximum weekly subvention rate of €300.

### **The Court's Assessment**

19. By way of general observation, I think it can fairly be said that the focus of both State support and subvention was on the individual in need of care rather than on the care provider. One indication of the emphasis on the individual is that under both schemes an individual could choose a nursing home in Northern Ireland if it is registered by a Health and Social Services Board there. It seems to me that it is beyond argument that under both schemes what the State, through the HSE, has sought to do is to offer support and assistance to those requiring care rather than setting out with the objective of assisting private or voluntary care providers. That is not necessarily the end of the matter but it is a matter of some significance.

20. Turning more directly to the basis on which the claim for exemption is advanced there are two aspects of para 14(b) of Schedule 4 which require consideration. There is, first of all, the question of whether the expenses incurred by Glendale in carrying out the task of caring for its elderly residents are defrayed by the Exchequer. Then, if it is concluded that the expenses are in fact defrayed by the Exchequer/HSE, whether the extent to which that happened is such that it can properly be said that the expenses are "wholly or mainly" defrayed.

21. In determining the preliminary legal issue before it, the Valuation Tribunal (correctly in the submission of Glendale), gave the word 'defray' what it saw as its ordinary meaning which, according to the Shorter Oxford English Dictionary, was *inter alia* to "discharge" (the expense or cost of anything by payment).

22. On the other hand, the Commissioner of Valuation analyses the nature of the payments made by the HSE and says that what is involved is the making up of a shortfall in the price charged by the nursing home to the consumer. In that regard attention is drawn to the long title of the Nursing Homes Support Scheme Act 2009, which provides:

"An Act to provide for the establishment of a scheme to be known as the Nursing Home Support Scheme under which financial support may be made available to persons in respect of long term residential care services out of resources allocated to the Health Service Executive for the purposes of the scheme ..." [Emphasis provided by the Commissioner of Valuation].

The Commissioner contends that the State support defrays the costs of the care of the elderly person in need of care. This scheme is designed to assist in covering the cost of care to the individual who is in need of care.

23. It seems to me that it is important not to focus just on the word "defrayed" but on the context in which it appears. What is in issue is whether the expenses of Glendale incurred by it in caring for the elderly are defrayed by the HSE.

24. In that regard it is worth noting that para 14(b) is couched in the passive tense. That being so, the question is not whether the State/HSE intended to support Glendale by defraying its expenses or still less whether that was the primary motivation of the State/HSE, but whether that is what in fact happened, i.e., whether it can legitimately be said that the expenses of Glendale are being defrayed by the HSE.

25. I am of the view that such would be a wholly strained, contrived and artificial use of language.

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.

27. If a delicatessen draws its clientele to a significant extent from amongst the ranks of public servants, could it seriously be said that the State, as pay master of the public servants, was defraying the expenses of the delicatessen? If an adjoining cafe is frequented by employees of a large company that provides its employees with luncheon vouchers redeemable at various locations across the city, could it be said that the employer in providing the vouchers which were used in the cafe was defraying the costs and expenses of that cafe? If a public house draws its clientele from the students of a third level college who are in receipt of grant cheques from the Department of Education could it be said that the expenses of the public house are being defrayed by the Department?

28. I am not at all convinced that it could ever be said that the State, by agreeing to offer financial support or subvention to individual elderly people in need of care, could be said to be defraying the expenses of Glendale. I have already pointed out that individuals are entitled to opt for a nursing home in Northern Ireland. On that basis can it be said that the expenses of Northern Ireland nursing homes are being defrayed by the HSE?

### **"Wholly or mainly"**

29. Notwithstanding my views that it cannot be said that the expenses of Glendale are defrayed by the HSE, it is necessary to focus on the question whether, if that could be said, it would be the situation that the expenses were being defrayed "wholly or mainly" out of money provided by the HSE. In order for a body to come within the ambit of para 14(b), that body's expenses must be defrayed wholly or mainly out of monies provided by the Exchequer. In this case it is not contended by the appellant that its expenses are defrayed wholly from the public purse. It is argued, however, that as more than fifty percent of the income of Glendale came from the Health Service Executive over a particular period, its expenses are defrayed mainly out of the monies provided by the Exchequer.

30. At the outset it may be noted that while the section in the schedule speaks of defraying *expenses*, the evidence produced on behalf of Glendale was directed to establishing that over a particular period, more than fifty percent of its *income* came from the HSE. Information about the source of income tells us nothing about how expenses are met. In particular circumstances the income of the body may allow it meet its expenses in full and provide for a handsome surplus. In other cases the entire income of a body may not be sufficient to allow it meet its expenses and a body may find itself insolvent. However, providing information about the amount of the income of a body or the source of that income does not, of itself and without more, tell us anything about the capacity of the body to meet its expenses. In a situation where the evidence before the Tribunal was that the proportion of Glendale's income that came from the HSE ranged between 60.51% and 51.92%, there has been much discussion as to what is meant by the word "mainly". However, even if it was established that 99% of its income came from the HSE, I do not believe that would provide a basis for concluding that the expenses of Glendale were mainly met by the HSE. We would still be completely in the dark about the extent to which the entire income of Glendale enabled it to meet its expenses or its costs of operation.

31. Glendale contends that the word 'mainly,' if given its ordinary meaning, means "for the most part," "in the main," "chiefly" or "principally" and refers in that regard to the definition contained in the *Shorter Oxford English Dictionary*. The Commissioner disputes the contention by Glendale that 'mainly' is anything more than 50%. In that regard it relies on the case of *R. v. Radio Authority* [1997] 3WLR 1094 where, at pg 1103, Lord Woolf observed:-

"Wholly or mainly is a phrase the meaning of which is not free from ambiguity. Clearly it requires a proportion which is more than half. But how much more? 51 per cent. or 99 per cent. and anything in between are candidates...

Here it has to be construed as a part of a provision which restricts the ability of AIBS [Amnesty International] to promote itself on the media by advertising. This constitutes a restriction on freedom of communication... In view of this the restriction the ambiguous words "wholly or mainly" should be construed restrictively. By that I mean they should be construed in a way in which limits the application of the restriction to bodies whose objects are substantially or primarily political. This corresponds with the *Shorter Oxford English Dictionary's* meaning of "mainly" as being "for the most part, chiefly or principally." Certainly a body to fall within the provision must be at least midway between the two percentages I have identified, i.e. more than 75 per cent."

32. By reference to this case the Commissioner contends that the word 'mainly' was intended by the Oireachtas to mean more than 75%.

33. Lord Woolf was dealing with a situation where a highly respected body such as Amnesty International was being denied access to the broadcasting media and in that context he concluded that the phrase "wholly or mainly" should be construed restrictively so as to apply only to bodies whose objects are substantially or primarily political. For my part, while fully understanding the desirability of interpreting the phrase in a restrictive manner so as to minimise the restriction of freedom of speech, I find the decision to set a minimum threshold of 75% surprising. Even if one concluded that the fifty percent threshold had to be comfortably and clearly exceeded, would 66.66% or 70% not achieve this?

34. In any event where what is under consideration is measuring how costs or expenses are defrayed it seems to me that the task lends itself to a more mathematical approach than was regarded as appropriate in *R. v. Radio Authority*. There is a difference between considering whether it can be said of a human rights' organisation that its objects were "mainly of a political nature" and whether expenses are mainly defrayed from a particular source. It seems to me that if there is evidence to establish that more than fifty percent of the expenses of a body are defrayed by a particular individual or from a particular source, it is proper to say that those expenses were mainly so defrayed. However, that is not the situation here. On the contrary, even if one took the view that expenses

were being defrayed by the HSE there was no evidence about the extent to which that was happening and it would be impossible to say that the expenses of Glendale were being wholly or mainly defrayed by the HSE.

35. In the circumstances I will answer the questions posed as follows:-

- (1) The HSE is not defraying the expenses of the nursing home.
- (2) This question no longer arises.
- (3) The relevant property does not fall within the ambit of para 14(b).
- (4) Having regard to the answers to earlier questions, the question does not require an answer