Neutral Citation Number: [2009] IEHC 113

THE HIGH COURT

2007 404 SS

IN THE MATTER OF THE VALUATION ACT 2001

BETWEEN/

ST. VINCENT'S HEALTHCARE GROUP LTD

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr Justice Cooke delivered on the 26th day of February, 2009.

Introduction

1. On 19th December, 2006, the Valuation Tribunal ("the Tribunal") issued its determination on an appeal by St. Vincent's Hospital Healthcare Group Ltd. ("the appellant") against the fixing by the Commissioner of Valuation of €1,400 as the rateable valuation of a "relevant property" comprising a car park at lot 103 – 127A (part of) Merrion Road, D, Pembroke East, in the County Borough of Dublin. The property in question is a purpose built, stand alone, multi-storey car park which is built, owned by and operated for the appellant within the grounds of its hospital at Merrion Road, Dublin 4.

2. The appellant, having expressed dissatisfaction with that determination, required the Tribunal to state this case pursuant to s. 39 of the Valuation Act 2001 ("The Act"). The sole issue that is raised for the opinion of this Court is whether the Tribunal's determination that the property in question is not a "relevant property not rateable" in accordance with Schedule 4 of the Act, is correct. In effect, the issue thus raised turns upon the question as to whether this car park in the grounds of the appellant's hospital is entitled to be treated as exempt from rates under one or other of headings No's. 8 and 16 of the list of properties designated as "relevant properties not rateable" in that Schedule.

3. The Act has the effect of repealing and re-enacting in consolidated but substantially revised and modernised form almost the entirety of the law relating to the valuation of property for rating purposes in this jurisdiction since 1838. The terminology familiar to practitioners in this field of rateable "hereditaments" and "tenements" has been replaced by the term "rateable property" and Schedule 4 of the Act lists 19 types or categories of relevant property which are designated as "not rateable" by s. 15(2) of the Act.

4. The properties specified at headings 8 and 16 of Schedule 4 are defined as follows:-

> "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 –
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> (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).
>
> 16. - Any land, building or part of a building which is occupied by a body, being either –
>
> (a) a charitable organisation that uses the land, building or part exclusively for charitable purposes and otherwise than for private profit, or
>
> (b) a body which is not established and the affairs of which are not conducted for the purpose of making a private profit and –
>
> (i) the principal activity of which is the conservation of the natural and built endowments in the State, and
>
> (ii) the land, building or part is used exclusively by it for the purpose of that activity and otherwise than for private profit."

The case stated

5. The primary facts relating to the history, status and the use of the car park are not disputed by the parties and, so far as relevant for the purpose of this judgment can be extracted from s. 1 of the case stated and summarised as follows:-

> A) The car park was built by the appellant in the grounds of its hospital at a cost to it of €17 million funded by bank borrowing and from its own resources. The building is vested in a wholly owned subsidiary of the appellant but occupied by the latter under a full repairing and insuring lease for a term of nine years and eleven months from 1st October, 2002, at an initial yearly rent of €375,000:
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> B) The daily operation of the car park is managed for the appellant under a service contract by Q Park Ireland Ltd;

C) The car park is a three storey structure with 450 car spaces which are available to all potential users on a first come, first served basis, no spaces being reserved for any particular user or category of user;

D) The car park is available for use by hospital staff, by patients, by visitors and others having business with the hospital and also by the general public whether visiting the hospital or not;

E) Staff users are charged a rate lower than that paid by others and on average staff account for about 50% of use. There are other car parks in the hospital specifically reserved for the use of staff;

F) There are about 2,500 staff in the hospital, most working on a shift basis;

G) All receipts from use of the car park go into the general accounts of the hospital and any surplus over costs and expenses accrues to the benefit of the appellant.

6. It is not disputed that the appellant is a "charitable organisation" within the definition of that term in s. 5 of the Act such that, where appropriate, its purposes would be "charitable purposes" within the terms of heading 16 of Schedule 4.

7. The essential basis of the Tribunal's determination that the car park is not exempt under the two headings of Schedule 4 as set out in paras. 5-8 of the case stated and can be summarised as follows:-

(a) On the face of it, the car park is not used for "the purposes of caring for sick persons, for the treatment of illnesses or as a maternity hospital":

(b) If it could be shown, however, that the use of the car park was "inextricably linked to the carrying out" of the aim of caring for sick persons, it would be exempt under heading 8;

(c) Unlike the case of the Tribunal's decision VA04/1/001, City of Dublin VEC "the provision of car parking is not a necessary operative element in the functioning" of the hospital. While car parking may be desirable it is "not essential to the provision of medical services in the hospital";

(d) The car park is occupied solely for the purpose of providing car parking to a wide variety of users on a temporary basis subject to the payment of an appropriate charge. This "has all the elements of a commercial activity and is so remote from the provision of medical services as to be not capable of being considered related to the main objects of the appellant."

(e) So far as heading 16 of schedule 4 is concerned, the Tribunal considered that the car park would be exempt if its use is "wholly ancillary to or directly facilitates the carrying out of the appellant's charitable objects" and the test in that regard is similar to its being "inextricably linked" to the carrying out of the appellants aims for the purposes of heading 8;

(f) The provision of car parking for staff, patients, visitors and others is neither wholly ancillary to nor directly facilitates the applicants charitable objects;

(g) The fact that surplus monies from the operation of the car park go to the benefit of the appellant is not sufficient to qualify for exemption under heading 16.

Arguments of the parties

8. The appellant submits that there is here no dispute as to primary facts or as to the inferences to be drawn from primary facts by the Tribunal. The issue in dispute is a mixed question of law and fact namely, whether the appellant's occupation of the car park comes within heading 8 and/or heading 16. This is a matter of statutory interpretation.

9. The fundamental conclusion of the Tribunal is unsustainable namely, that a car park is not a necessary operative element in the functioning of a hospital. The Tribunal applied the wrong test in holding that it was not "directly related to" or "inextricably linked" or "essential" to the provision of medical services. The correct test is not whether its use is essential to the provision of medical services but whether the occupation of the car park is for the purpose of the hospital. The issue is not the fact that cars are parked in the car park but why they are parked there.

10. A residence for nurses or a visitors' restaurant are not essential to the provision of medical services in a hospital, yet they would undoubtedly be entitled to exemption.

11. It is to be noted that heading 8 is not confined to buildings or parts of buildings but extends to "land used for the purposes of caring for sick persons".

12. The Tribunal erred in attaching undue significance to the fact that the car park is run at a profit.

13. The Tribunal erred in believing that the use of the property for car parking excluded the possibility of its also being used for the purpose of a hospital.

14. The respondent's submissions so far as not already reflected in the finding of the Tribunal summarised in para. 7 above are as follows. While the commissioner considers that there is no problem treating a canteen or overnight accommodation for staff as essential parts of "the core function of a hospital" it is submitted that the factual circumstances demonstrate that this particular car park is a commercial activity on the part of the appellant and therefore outside the exemption headings 8 and 16 of Schedule 4.

15. Furthermore, the Tribunal has made findings of fact in that regard which dispose of the issue and with which the Court should not interfere.

16. The case is distinguished in particular by the fact, as found by the Tribunal, that the car park is made available by the

appellant for use by all-comers in return for a commercial charge irrespective of whether or not the user has any business in the hospital.

17. By so doing the appellant has stepped outside its status as an exempt body for the purposes of Schedule 4. Thus the user is essentially a business user even if some of the users may be staff of the hospital and it cannot therefore be said to be used exclusively for charitable purposes.

18. The provision of car spaces is not necessary for the pursuit of the purposes of a hospital and their provision on a commercial basis is so remote from the purposes covered by headings 8 and 16 that it cannot be said to be an activity which is ancillary to or which facilitates the pursuit of the purposes of the hospital.

Finding of the court

19. There can hardly be any doubt but that no part of this car park is used by the appellant, literally, for the purpose of caring for sick persons, for the treatment of illnesses or as a maternity hospital. There is no evidence or suggestion that it has any function as a waiting area for those seeking admission to the A & E department or even as a holding area for ambulances. It is a purpose-built structure for the parking of cars and is used, upon payment of a periodic charge, by staff, patients and visitors and is available to the general public whether visiting the hospital or not.

20. Nevertheless, it is reasonably clear and not really disputed by the parties that such a strict, literal interpretation cannot be applied to heading No. 8. It is accepted by reference to the case law on the analogous treatment of hospital properties under the "charitable purposes" provisions of the earlier legislation now repealed, that it was not intended by the Oireachtas to deprive non-charitable but non profit-making institutions of the exemption previously accorded to hospital properties when occupied by a charitable organisation.

21. It seems clear, therefore, that the introduction of the heading No. 8 in Schedule 4 while maintaining heading 16 as a continuation of the more general exemption in favour of organisations with charitable purposes, is intended by the Oireachtas to accord to non-charitable but non-profit making or publicly funded hospitals the same treatment as is available to the hospital properties of charitable organisations.

22. A strictly literal interpretation of heading No. 8 which would limit the exemption to buildings or parts of buildings in which sick persons are physically present for treatment, is also excluded by a number of other considerations. The exemption extends to "land" which presumably includes land without any buildings or structures. The adjacent grounds or gardens of a hospital can hardly be intended to be rated separately on the basis that no care of the sick of treatment of illness will normally take place in the open air.

23. Secondly, because the heading covers both entire buildings and parts of buildings, to confine the exemption to those parts of a building where care of the sick or treatment of illness is actually carried out would necessarily lead to the result that areas such as the accounts department or rooms occupied by technicians responsible for maintaining hospital equipment and computer systems would require to be separately rated. It is accepted by the respondent however, that such typical hospital facilities as a staff canteen or a television room for staff off duty, could be covered by the exemption as part of the hospital premises because they are "inextricably linked to" or are part of "the core functions of the hospital".

24. It is also clear, however, that it is not the location or physical proximity of such non-medical facilities to the parts of the hospital comprising wards, operating theatres and nursing stations which permit such areas to come within the exemption of heading No. 8. A separate building housing the hospital's accounts department, its information technology department, a laboratory or a staff canteen can still be considered to be used for the purposes of caring for "sick persons or the treatment of illnesses". The respondent would again presumably accept that proposition upon the basis that such facilities are ancillary to or directly related to, the provision of the hospital's medical services.

25. It is accepted that although the pre-2001 legislation comprising the Valuation Acts from 1838 onwards are now repealed, many of the analogous cases considered in judgments on those provisions still remain useful and authoritative in considering these questions. It is important to bear in mind, however, that in the case law prior to the introduction of heading No. 8 of the current Act, the exemption of hospital properties turned upon their use for "charitable purposes". Thus, the cases which deal with issues such as the use of a building for a nurses' home or the residence of a church employee are heavily influenced by the concept of "charitable purposes" in the sense of eleemosynary, gratuitous or voluntary endeavours. Because heading No. 8 accords exemption to hospital properties independently of the possible charitable object of the occupying body, it is necessary to exercise some caution in having recourse to that case law for the purpose of construing heading No. 8. It is clear nevertheless that to be eligible, hospital bodies must be non-profit making. This does not however preclude such bodies making commercial charges for particular services, (as for example, when a pathology laboratory with spare capacity might carry out tests for third parties for a fee) provided that the overall objective and effect for the institution concerned remains non-profit making.

26. In that connection, the judgments of the High Court and Supreme Court in *Clonmel Mental Hospital v. Commissioner of Valuation* [1958] I.R. 381 were cited to this Court as particularly apt. In that case, the charitable hospital in question had purchased an existing dwelling-house with fourteen acres of land. It had adapted the house for use as a residence for nurses and farmed the land. The house in question was adjacent to the hospital but separated from it by a boundary wall into which a gate was put to give access between the two buildings.

27. It was argued on behalf of the Commissioner that although the purposes of the hospital in question were clearly charitable, the house was merely a residence and it was quite irrelevant how those who resided there occupied themselves when not within its walls. It was contended that the use of the house fell to be considered separately from that of the hospital and its residential use was not charitable. It was irrelevant to enquire, it was argued, as to the reason or object of that user.

28. This argument was rejected by Davitt P. in the High Court and by the Supreme Court on appeal. In the Supreme Court Lavery J. pointed out that:-

> "It is the hospital which, if it satisfies the test of being used exclusively for charitable purposes, is to be exempt from rateability. It is not a particular section of the hospital which is to be notionally severed from the rest of the

institution and then to be considered as to whether so regarded it qualifies for exemption".

29. He also says:-

> "If the building is part of a hospital used exclusively for charitable purposes the section seems to provide that as a whole it is to be exempt from rating. If it is not part of such a hospital it is certainly not exempt."

He also points out that a hospital is not a simple organism and had many facilities other than those directly used to accommodate or treat patients.

> "A hospital … is a complex organisation. It comprises wards and rooms for patients, recreation halls and so on for convalescence – operation theatres, laboratories for radiological and pathological and other work and many other facilities and staff accommodation, living room – refreshment rooms and so on."

30. Two propositions at least can be said to follow from that case in this context. The fact that a building is a separate structure not part of the same building in which patients are treated does not prevent it being regarded as "a part of the hospital" so as to come within the exemption accorded to "a hospital or other building used exclusively for charitable purposes" in the proviso to s. 63 of the Poor Relief (Ireland) Act 1838.

31. Secondly, the use of a building or part of a building does not cease to be a use for the charitable purposes of a hospital by reason only of the fact that its particular use, if treated in isolation, would not itself be regarded as involving a service of care for the sick or the treatment of illnesses. A building housing a restaurant or a computer servicing business will not attract exemption, but if one is the hospital canteen and the other is its information technology department, they may well do so.

32. In other words, it is necessary to ask not only what the nature of the actual user is but why that use is made by the occupier.

33. Heading 8 of Schedule 4 uses the words: "…used by a body for the purposes of caring for sick persons, for the treatment of illnesses or as a maternity hospital".

Heading no. 16 uses the words: "Any building or part of a building occupied by a body that uses (it) exclusively for charitable purposes, etc."

34. It is therefore not just the nature of the activity carried on in the building (the user) but also the reason or objective (that is, the purpose) of the occupying body in engaging in that use which gives rise to the exemption.

35. The court considers, therefore, that the Tribunal erred in law in the test it applied namely, that the user must be inextricably linked as a matter of necessity to the proper operative elements of the functioning of the hospital. There may well be many convenient activities or facilities within a hospital which could be said to be unnecessary to the operative element of its functioning or to "the carrying out of its stated aims namely, the caring for sick persons". A coffee shop or a kiosk selling newspapers may be desirable but they are not necessary. Nowadays it is probably feasible to contract out many services including those of computer and equipment maintenance or even laboratory work so that a hospital could function without such departments of its own. But it is not the role of the Tribunal or of this Court to decide how a hospital should be organised and what is necessary in that sense.

36. When the correct test is applied namely, that of ascertaining the purpose of the appellant in using the structure as a car park, the court considers that its use clearly comes within the scope of heading No. 8. The car park is so provided and located because the hospital is situated in a built-up urban area and attracts large volumes of traffic by those using or visiting the hospital. It may not be "necessary" in the literal sense, to provide car park spaces in order to care for the sick or treat illnesses, but it may well be a highly necessary part of the efficient management of the hospital as a whole to ensure that traffic in and out of the hospital, including ambulances, is efficiently accommodated and organised. The car park exists and is so located because of the hospital and not otherwise. It is there because the hospital is there. In that sense therefore, the use of the car park is note "remote" from the main activity of the appellant. It is used predominantly by those having business at the hospital and staff alone account for 50% of its user. While no figures are given by way of breakdown of other users it is probably significant that there does not appear to have been any evidence before the Tribunal of any material use by drivers having no business whatsoever at the hospital notwithstanding the emphasis placed in argument on the fact that the spaces are available to the general public on a first come first served basis.

37. The court also considers that the Tribunal's determination appears to have been heavily influenced by the fact that users are charged a fee by time for use of the car park and that while staff have a preferential rate they have no allocated spaces. This has led the Tribunal into drawing what the court considers is an erroneous inference to the effect that:-

> "This activity has all the elements of a commercial activity and is so remote from the provision of medical services as to be not capable of being considered related to the main objects of the appellant."

38. The court considers that it does not necessarily follow from these charging arrangements that the operation of the car park is a commercial venture on the part of the hospital which is distinct from its activity in providing medical services. No doubt any surplus revenue is welcome when applied to the purposes of the hospital but it does not appear to follow from the facts before the Tribunal that a conclusion was warranted to the effect that the construction and operation of the car park had a speculative commercial objective apart from that of accommodating the cars belonging to staff, patients, visitors and others coming to the hospital. As with all metered parking in urban areas, the primary function of a periodic charge for parking is to discourage the use of private transport and to encourage a rapid turnover in the use of available spaces.

39. The mere fact that a charge is made does not of itself warrant the conclusion that the car park is provided and operated as a commercial venture in the sense of one undertaken for the primary purpose of making a profit. Moreover and in any event, it appears to be accepted that the appellant is a body which qualifies under one or both of paras. (a)

and (b) of heading No. 8 and that it is not a body which is conducted for the purpose of making a private profit from its medical services. The fact that a charge is made for the use of a particular facility of the hospital and any surplus over the cost of providing that facility accrues to the benefit of the hospital and its activities does not deprive the property of its entitlement to exemption under heading No. 8.

40. The court cannot, therefore, accept the argument made with considerable emphasis by counsel on behalf of the respondent to the effect that this car park is taken outside the ambit of headings 8 and 16 by the distinguishing characteristic that it is "open to all comers" in return for a commercial charge and must thus be distinguished from a non-medical facility such as a nurses' residence provided for the exclusive use of staff working in the hospital.

41. Counsel for the respondent also submitted that the findings of fact made by the Tribunal disposed of the case and, as primary findings of fact, could not be overturned by this Court. Reliance was placed upon the dictum to that effect of Kenny J. in *Mara v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421. In particular, it was submitted that the Tribunal had found as a fact that the construction and operation of the car park was a commercial venture on the part of the appellant which took it outside its status as an exempt body by making the car park available to all comers in return for a fee.

42. The court cannot agree. The court finds that the Tribunal has misinterpreted the two relevant provisions of Schedule 4 and has thereby been led into applying an incorrect test for the application of those two headings of exemption. The Tribunal may have justifiably found as facts that charges made for the use of the car park and that any surplus accrues to the benefit of the hospital's activities. However, it is drawing an inference as to the legal consequence of those facts when it bases its determination upon the proposition that the appellant has engaged in a commercial activity which takes it outside the scope of the Schedule.

43. For all of the above reasons the court will answer the question posed in the case stated as follows:-

> "No, the Tribunal was incorrect in law in determining that the property concerned is not relevant property, not rateable in accordance with Schedule 4 of the Valuation Act 2001."