

Appeal No. VA10/5/033

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Fingal County Council

and

APPELLANT

Commissioner of Valuation

and

RESPONDENT

NSCDA (Operations) Limited

NOTICE PARTY

RE: Property No. 2170864, Sports & Leisure Centre at National Aquatic Centre,
Snugborough Road, Blanchardstown, County Dublin.

B E F O R E

Fred Devlin - FRICS.FSCS.

Deputy Chairperson

Brian Larkin - Barrister

Member

Veronica Gates - Barrister

Member

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 18TH DAY OF FEBRUARY, 2011

By Notice of Appeal dated the 20th day of August, 2010 the appellant appealed against the determination of the Commissioner of Valuation that the property concerned was entitled to exemption from rates under Section 15 and Schedule 4 of the Valuation Act, 2001.

The grounds of appeal are set out in the Notice of Appeal and in an accompanying document, copies of which are attached at the Appendix to this judgment.

The appeal proceeded by way of an oral hearing and was held in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 1st day of November, 2010. At the hearing the appellant was represented by Mr. Paul Butler, SC, and Mr. John Doherty, BL, instructed by Ms. Helen O'Neill, Law agent for the appellant. Ms. Geraldine O'Hara, Senior Legal Assistant, Mr. Martin Allidine, Administrative Officer, Fingal County Council and Mr. Des Bruton, Snr. Executive Officer, Head of Finance Unit, Fingal County Council also attended. Mr. Séamus Connolly, BSc (Surveying), a Valuer in the Valuation Office, appeared on behalf of the respondent but did not give evidence. Ms. Grainne O'Neill, BL, instructed by the Chief State Solicitor, acted for the respondent who attended on behalf of the Valuation Office. Mr. Denis McDonald, SC, instructed by Mr. Cormac MacDermada, Solicitor, McCann Fitzgerald, appeared on behalf of the Notice Party, NSCDA (Operations) Limited. Mr. Dan Collins, Trainee Solicitor, McCann Fitzgerald, Mr. David Conway, NSCDA Development Manager, and Mr. Donagh Morgan, Assistant Secretary, Department of Tourism, Culture and Sport also attended on behalf of the Notice Party.

The Issue

Rateability, viz whether the occupation of the National Aquatic Centre by NSCDA (Operations) Limited is occupation by the State.

Rating History

Arising from the revaluation of properties in the Fingal County Council area the NAV of the subject property concerned was fixed at €1,668,000, but as the property was deemed to be directly occupied by the State, the property was not rateable and no liability for rates arose for NSCDA (Operations) Limited, the occupier. The appellant, being dissatisfied with the Commissioner's decision, lodged an appeal to this Tribunal under Section 34 of the Valuation Act 2001 (hereinafter "the 2001 Act").

Submissions on behalf of the Appellant, Fingal County Council

Mr. Patrick Butler SC, on behalf of the appellant, confirmed at the outset that there was no dispute between the parties on the factual elements of this appeal, but that his client, on the other hand, vigorously contended that occupation by NSCDA (Operations) Limited of the National Aquatic Centre was not occupation by "the State".

Distinguishing NSCDA (Operations) Limited from NSCDA - albeit acknowledging that the former was a wholly owned subsidiary of the latter which was established under Part 2 of the

National Sports Campus Development Authority Act, 2006, (hereinafter “the 2006 Act”) - Mr. Butler contended that the occupation was a far cry from “state occupation” and was “semi-state”. The activity, he added, whether it was commercial or non-commercial was not determinative of anything, but in the event, here the occupier was engaged in a commercial enterprise in competition with similar enterprises in the Fingal area. Consequently, Mr. Butler argued the occupier was not the State nor an Office of State for the purpose of Section 15 of the 2001 Act and thus the premises were rateable.

Mr. Butler submitted that he would rely heavily on previous decisions of the Tribunal which identified the criteria for occupation by “the State” and “Office of State” and which focused on:

- (1) closeness to the epicentre of Government policy
- and
- (2) degree of integration and control by the State

In particular, Mr. Butler indicated that the decision of McCarthy J in **Personal Injuries Assessment Board (PIAB) v The Commissioner of Valuation [2006] No. 891 SS**, delivered on 15th November, 2010, which reversed an earlier Tribunal determination granting exemption from rates, was highly relevant in the present context and was fundamental to his case, while the judgment of McMenamin J in **Health Service Executive v The Commissioner of Valuation [2008] IEHC A8** of 13th June, 2008 was also of interest.

Opening the **PIAB** judgment to the Tribunal, Mr. Butler selectively referred to various passages that were of assistance to his appeal, and concentrated emphatically on the concepts of accountability, ministerial control and closeness to the epicentre of Government policy. Likening the PIAB situation to that which was now before the Tribunal and wherein the learned judge ruled that the notion of making of assessments by PIAB to be at the epicentre of Government policy was a proposition that could not be supported, was particularly apposite here, Mr. Butler stated. How could it be rationally argued, Mr. Butler submitted, that decisions concerning the operation of an aquatic centre could be deemed to be regarded as activities at the epicentre of Government policy?

Mr. Butler continued by referring to paragraph 29 of McCarthy J’s judgment in **PIAB**, wherein he considered a number of other Tribunal decisions, including **VA04/2/038 - Legal**

Aid Board, VA05/3/003 - FETAC, VA06/4/001 - Health Service Executive (HSE), etc in which the Tribunal granted exemption from rates on the grounds that the occupier was “the State” or an “office of State” and quoted as follows:

“each of these cases hinge, effectively on the degree of integration between the bodies concerned with the State and whether or not they were at the epicentre of Government policy (and, so far as the Health Service Executive was concerned, whether or not provision of health services was the function or responsibility of Government, i.e. whether or not the activities were Government type business). The question of integration, of course, involved consideration of the question of control in all of these cases.”

The central theme in these cases, Mr. Butler submitted, dealt with the level of control and the degree to which, on a day to day basis, the Government is concerned with the activities of the particular body.

Crucially, however, referring to paragraph 21 of the **PIAB** judgment, despite the extensive control exercised by the Minister, Mr. Butler submitted, there must be more than that; there must be the exercise of that control in implementing a central core part of Government policy. It should also be noted, he said, that in the same judgment at Paragraph 24, McCarthy J recognised that a commercial semi-state body was at a greater distance from Government even where the Minister is the sole shareholder.

Mr. Butler then concluded by drawing the Tribunal’s attention to the decision of McMenamin J in the **HSE** case and how it is distinguishable from **PIAB** and the subject appeal. In **HSE** the learned judge came to the conclusion that, due to the centrality of the exercise by the Minister of Government policy on health and safety matters, it was at the core of a Government’s obligation to provide health and care for its people. By contrast, Mr. Butler asked if it could be said that one of the core functions of the State was to see that its citizens are provided with an aquatic centre, with day-to-day assessment of its operations in terms of its contribution to the national well being? Referring to paragraph 52 of the **HSE** judgment, Mr. Butler made striking reference to the words of McMenamin J when he characterised bodies as being “State” or “office of State” and the basis on which they can be distinguished, quoting as follows *“This position is entirely distinct from the relative peripherability of semi-State bodies, whose functions do not lie at the core of government activity”*

Mr. Butler contended that it was clear that the operations of the National Aquatic Centre had to be run on a commercial basis. It was competing directly with like operations providing sports and fitness facilities within the functional area of Fingal County Council and on a greater scale within the entire Dublin area, e.g. the Santry Health and Fitness Club Ltd., Total Fitness, Westpoint Fitness Centre and Jackie Skelly Fitness Centre. These were all commercial operations which were obliged to pay rates.

If the occupier's argument is correct, Mr. Butler submitted that semi-state bodies such as the port companies, founded on exactly the same statutory basis, Allied Irish Bank and NAMA should be exempt from rates and clearly this is not so.

In summary, Mr. Butler, on the basis of the above authorities and criteria, contended that NSCDA (Operations) Limited is not the State for the purpose of Section 15 of the Valuation Act, 2001 and that its occupation of the National Aquatic Centre is rateable.

Submissions on behalf of the Occupier, NSCDA (Operations) Limited

On behalf of the occupier, Mr. McDonald submitted that the National Aquatic Centre had been correctly revalued by the Valuation Office in its Revaluation List published on 31st December, 2009 on the basis that the National Aquatic Centre is directly occupied by the State, or by an office of State, and that no rates liabilities arise.

Background

Mr. McDonald outlined the background to NSCDA (Operations) Limited by reference to paragraph 2 of his written legal submissions already before the Tribunal as follows:

Paragraph 2.1: *“Prior to 30 November, 2006, the NAC had been operated and occupied by a private company, namely Dublin Waterworld Limited, under the terms of a lease. However, following the conclusion of litigation against Dublin Waterworld Limited for breaches of the lease, a State-owned company, namely Campus & Stadium Ireland Development Limited (“CSID”) went into occupation of the NAC. In the same year, the National Sports Campus Development Authority Act, 2006 (the “2006 Act”) was enacted. Section 32 of that Act provided for the dissolution of CSID. That dissolution took place on 1 January, 2007 and CSID was replaced by the National Sports Campus Development Authority (the “NSCDA”)*

which was established under Part 2 of the 2006 Act for the purposes of developing a sports campus on the site (which incorporates the NAC) and for the purpose of encouraging and promoting the use of the sports campus by people participating in sport at professional and amateur levels and by members of the public generally. See Section 7 of the 2006 Act.”

Paragraph 2.2: *“The NSCDA is a statutory body. Its power and functions are set out in the 2006 Act. Each of the members of the NSCDA are appointed by the Minister for Tourism, Culture and Sport.”*

Paragraph 2.3: *“The NSCDA has granted a lease of the NAC to a subsidiary, namely NSCDA (Operations) Limited a wholly owned subsidiary of the NSCDA.”*

Paragraph 2.4: *“NSCDA (Operations) Limited under its former name, CSID (Operations) Limited, was incorporated prior to the enactment of the 2006 Act and the formation of the NSCDA. However, by section 28(7) of the 2006 Act, it is deemed to be a subsidiary formed and established by the NSCDA under the 2006 Act. In this context, Section 28(1) of the 2006 Act permits the NSCDA, with the approval of the Minister for Tourism, Culture and Sport, given with the consent of the Minister for Finance, to establish a subsidiary for the purposes of performing such functions of the NSCDA as it may determine. Thus, although NSCDA (Operations) Limited is a subsidiary company, it is nonetheless performing like functions of the NSCDA itself. In those circumstances, it is submitted that no distinction is to be drawn between the NSCDA on the one hand and NSCDA (Operations) Limited on the other.”*

Legal Argument Advanced by the Occupier

Mr. McDonald submitted that considerable guidance was available from previous decisions of the Valuation Tribunal in support of the subject appeal e.g. **Legal Aid Board, FETAC, VA06/2/089 - National Breast Screening Board, HSE, VA07/4/001 – Foras Áiseanna Saothair (FÁS)**, and **VA09/2/008 – Higher Education Authority (HEA)**. These decisions, he added, identified criteria which were relevant in establishing whether a property is *“directly occupied by the State (including “any office of State”)*, as follows:

- a) *Was the body occupying the premises established under an Act of the Oireachtas or a Ministerial Order?;*
- b) *Is there a level of integration by the body with and control over the body by the State;*

- c) *Does the body have a national or State character;*
- d) *Is the body close to the epicentre of Government policy;*
- e) *Are the functions performed by the body integral to Government policy;*
- f) *Is there a strong level and wide evidence of Government/Ministerial control?;*
- g) *Do accounts have to be submitted to the Comptroller and Auditor General for audit in each financial year and do reports have to be sent to the Minister and laid before the Houses of the Oireachtas?;*
- h) *Are the Chairman and members of the body appointed by the relevant Minister?;*
- i) *Are the members of the body civil servants, or alternatively, are the members of the body public sector employees with Ministerial involvement in their appointment and remuneration? In this regard, however, the fact that staff are not civil servants is not determinative?;*
- j) *Are expenses incurred by the Minister in the administration of the governing Act paid out of monies provided by the Oireachtas?;*
- k) *Does the body receive Government funding?;*
- l) *Are funding and governance of the body Government controlled?;*
- m) *Does the Minister have power to issue general policy directives or, in the alternative, has to be consulted in respect of nearly all the body's functions?;*
- n) *Is Ministerial approval required for the purchase or sale of land?"*

Mr. McDonald submitted that the above factors, which went to what constituted the State or an office of State, were affirmed by the High Court in **HSE** by McMenamin J. At paragraph 30 of the judgment he identified a four-part test which defined the features of the public authority:

- "1) Its nature and function;*
- 2) Its proximity to Central Government and Ministerial control;*
- 3) Its finance, control of expenditure, funding, financial and administrative accountability;*
- 4) Its staffing arrangements and function."*

The fact that an entity was legally distinct from the State was also not dispositive of the issue in McMenamin J's view. *A fortiori*, Mr. McDonald drew to the attention of the Tribunal its determination in **Higher Education Authority**, in which the Tribunal referred to

McMenamin J's statement of criteria as "*the benchmark guidance and binding authority*" in its decision making with regard to Section 15 of the Valuation Act, 2001.

Moving on to the subject case, Mr. McDonald, acknowledging that each case required to be decided on its own facts, contended that the occupier, NSCDA (Operations) Limited, clearly fell within the ambit of Section 15(3) of the Act. Mr. McDonald cited the following, referring to the 2006 Act, in support of his contention:

- a) Both the NSCDA and NSCDA (Operations) Limited were established under the 2006 Act.
- b) Each of the members of the NSCDA is appointed by the Minister for Tourism, Culture and Sport.
- c) The functions performed by the NSCDA/NSCDA (Operations) Limited as detailed in Section 7 of the 2006 Act are integral to Government policy. It is clear from the website of the Department of Tourism, Culture and Sport that one of its functions is the promotion of sport. Thus, the Government sees the promotion of sport as one of national importance which is epitomised in the nomenclature and functions of the National Aquatic Centre – a national swimming facility constructed to state of the art standards and including:
 1. 50m FINA competition pool with 2,500 spectator seating; and
 2. FINA standard diving pool.

These factors went towards satisfying the proximity test also. The National Aquatic Centre differs from other privately owned enterprises in the Fingal area which are operated on a commercial basis, ie., The Santry Health & Fitness Club Limited, Barkisland (Developments) Limited, Total Fitness Limited and Map Dance Limited.

- d) The NSCDA and NSCDA (Operations) Limited are required to have regard to Government policy under Section 24 of the 2006 Act
- e) The Director of operations at the National Aquatic Centre is a Development Manager of the Authority and his remuneration, etc. is provided for in the 2006 Act.
- f) Under Section 28(4) of the 2006 Act, the Memorandum and Articles of Association of NSCDA (Operations) Limited are required to be in a form consistent with the 2006 Act.
- g) The manner in which the Minister may exercise control is exemplified by the provisions of Section 28(5) of the 2006 Act, which provides that the Minister may

give a direction in writing to the NSCDA on any matter relating to a subsidiary and the NSCDA shall comply or secure compliance with such a direction. A copy of a letter dated 15 January, 2008 (which was submitted to the Tribunal) from the Office of the Minister for Arts, Sport and Tourism to the CEO of the NSCDA, referring to the availability of a Government subsidy of €1.03m is an indication of the extent of Ministerial authority.

- h) Clear evidence of satisfaction of the third and fourth legs of the **HSE** test in finance and staffing is contained in particular within the provisions of Sections 12 and 14(1) respectively of the 2006 Act, viz:

Section 12 Remuneration and expenses of members of Authority and committee

12.—*“A member of the Authority or a committee shall be paid by the Authority, out of moneys at its disposal, such remuneration (if any) and allowance for expenses incurred by him or her (if any) as the Minister may from time to time with the consent of the Minister for Finance, determine.”*

Section 14 Staff of Authority

14.—(1) *“Subject to section 33, the Authority may, with the approval of the Minister given with the consent of the Minister for Finance –*

- a) appoint such and so many persons to be members of the staff of the Authority as it may from time to time determine, and*
- b) determine the grades of such staff of the Authority and the number of staff in each grade,”*

The fact that certain employees are hired on a contract basis by the National Aquatic Centre directly did not conflict with the third and fourth legs of McMenamin J’s criteria, Mr. McDonald submitted, particularly as their wages were defrayed in part by Government subvention. Mr. McDonald rejected the appellant’s argument that if the case put forward by the occupier is correct then AIB and the ports should be exempt from rates also as they were founded on a statutory basis. Mr. McDonald argued, by contrast, that AIB and the ports did not reflect Government activity; AIB was simply a bailout and the ports were in a commercial category.

In conclusion, Mr. McDonald submitted that his case for exemption from rates under Section 15 of the 2001 Act fell squarely within the parameters of the **HSE** test and was in line with previous Tribunal determinations. The decision of McCarthy J in **PIAB**, he added, which overruled a previous Tribunal decision to exempt from rates, and on which the appellant relied so heavily here, could be distinguished on the facts. **PIAB**'s core function was the assessment of compensation in personal injuries claims.

Submissions on behalf of the Respondent, Commissioner of Valuation

Ms. Grainne O'Neill, BL, on behalf of the respondent, supported the case put forward by the occupier for exemption from rates on the grounds that the subject property, while relevant property, is not rateable as it is occupied by the State.

Ms. O'Neill reiterated the essential arguments advanced by the occupier and was satisfied that NSCDA (Operations) Limited met the 4 criteria laid down in the **HSE** case and the other Tribunal decisions.

In summary Ms. O'Neill submitted as follows:

- a) NSCDA (Operations), the occupier was established under the National Sports Campus Development Authority Act, 2006 and is tasked *inter alia* with promoting excellence in and access to sport.
- b) In performing its functions it must have regard to government policy. Its Memorandum and Articles of Association were approved by the Minister and a development plan must be submitted and approved by the Minister. Also the Minister can make directions. Board appointments are approved by the Minister.
- c) It does have a national character by virtue of the services it provides and its objective to promote excellence in sports can be seen from the training of elite athletes for international competition.
- d) There is ministerial involvement in appointment and removal of staff.
- e) Expenses incurred in the administration of the Act by the Minister are paid out of funds provided by the Oireachtas.
- f) The body receives government funding.
- g) The Minister can issue policy directives.
- h) Ministerial approval is required for the purchase of lands.

Ms. O'Neill also distinguished **PIAB** from the **HSE** and other authorities on the basis that its core function, the settling of civil claims, was not at the core of government activity and, consequently, that the property was not an office of State. The nature of the organisation occupying the premises had to be looked at, which in the subject case was concerned with the promotion of excellence in and access to sports - a central facet of Government policy.

The Law

The following were the relevant legislative sources canvassed:

Statute Law

- The Valuation Act, 2001
- The National Sports Campus Development Authority Act, 2006
- State Authorities (Public Private Partnership Arrangements) Act, 2002

Case Law

- **The Health Service Executive v The Commissioner of Valuation [2008] 1 EHC 178** McMenamin J, 13 June, 2008 (Under appeal to the Supreme Court)
- **Personal Injuries Assessment Board v Commissioner of Valuation**, High Court [2006] No. 891 SS, McCarthy J, 1 November, 2010

Valuation Tribunal Decisions

- **VA04/2/038 - Legal Aid Board**
- **VA05/3/003 - FETAC**
- **VA06/2/089 - National Breast Screening**
- **VA06/4/001 – Health Service Executive**
- **VA07/4/001 – Foras Áiseanna Saothair**
- **A05/3/061 – Personal Injuries Assessment Board**

Findings

At the hearing the parties were represented by Counsel and the Tribunal is indebted to them for the depth and quality of their submissions, both oral and written, which referred the Tribunal to a range of authorities and legal precedents.

1. The National Aquatic Centre (the NAC) was completed in March 2003 at a cost of €2.5 million wholly funded by the State and on lands owned by the Department of Agriculture, Fisheries and Food.
2. The NAC was constructed to the highest modern standards with a view to being a centre of excellence for athletes to train in and including state of the art facilities such as:
 - a) 50m FINA competition pool with 2,500 spectator seating and
 - b) FINA standard diving pool.
3. The NAC hosts, on an annual basis, the National Swimming Championships and the National Diving Championships and also hosted the European Short Course Championships in 2003.
4. The NAC is operated by NSCDA (Operations) Limited, the occupier of the subject property in this appeal.
5. NSCDA (Operations) Limited is a wholly-owned subsidiary of the NSCDA (National Sports Council Development Authority) set up under the 2006 Act. It is wholly owned by the State, operates under Ministerial control, and, consequently, it is not an entity with independent limited liability. Consequently, it is an emanation of the State within the meaning of Section 15 (3) of the Valuation Act, 2001.
6. Object 2(a) of the Memorandum of Association of NSCDA (Operations) Limited states that the company was established *“To operate and maintain, under licence from Campus and Stadium Ireland Development Limited, [now the National Sports Campus Development Authority] the National Aquatic Centre and lands comprising its demesne and the lands, building and facilities that will comprise the National Sports Campus at Abbotstown, Dublin 15.”*
7. NSCDA (Operations) Limited operates the NAC for leisure and swimming activities. Through Swim Ireland, the National Governing Body of Swimming in Ireland, the NSCDA provides free hours to Swim Ireland to facilitate the development of swimming in Ireland and the hosting of swimming galas and competitions. This promotion of swimming extends to other groups, such as the National Community Games, the Paralympics Council of Ireland and affiliates of Swim Ireland.
8. The NAC is not a commercial enterprise in competition with similar enterprises in the Fingal area which are privately owned and operated on a commercial basis. The fact that a charge is levied for certain services within the NAC does not mean that a State

body such as NSCDA (Operations) Limited loses its status under Section 15 of the 2001, Act.

9. The NAC is a public facility and is accessible to all members of the public. The comparators urged by the appellant, Fingal County Council, are limited to members only, all of whom pay an annual membership charge. On the contrary, the NAC, in effect, is a national institution.
10. The law in relation to occupation of property by “The State” or “office of State” within the context of Section 15 of the Valuation Act, 2001 is reflected in many Valuation Tribunal determinations such as **Legal Aid Board, FETAC**, etc which were canvassed by Counsel. There is a consistency in those decisions.
11. The criteria identified in Mr. McDonalds’s submissions, viz:
 - “Was the body occupying the premises established under an Act of Oireachtas or a Ministerial Order?
 - Is there a level of integration by the body with and control over the by the State?
 - Does the body have a national or state character?
 - Is the body close to the epicentre of Government policy?
 - Are the functions performed by the body integral to Government policy? Etc” were affirmed and summarised by McMenamin J in the **HSE** judgment, when he outlined a four-part test for determining whether a body is “the State” or “office of State”, as follows:
 - “(1) Its nature and function;*
 - (2) Its proximity to Central Government and Ministerial control;*
 - (3) Its finance, control of expenditure funding, financial and administrative accountability and;*
 - (4) Its staffing arrangements and functions.”*
12. The **HSE** criteria remain the benchmark guidance and binding authority in this regard.
13. The Tribunal is satisfied that the decision of McCarthy J in **PIAB**, overruling a determination of the Tribunal granting relief under Section 15 of the 2001 Act, was distinguishable on its own particular facts.

Determination

NSCDA (Operations) Limited, the occupier of the National Aquatic Centre (“NAC”) falls within the ambit of Section 15(3) of the Valuation Act, 2001 as being “the State” or “office of

State”. The property is deemed to be relevant property not rateable on the basis of occupation by “the State”.

Consequently, the appeal by Fingal County Council against the decision of the Commissioner of Valuation exempting the said property from liability for rates in the 2009 Revaluation is dismissed.

And the Tribunal so determines.