

THE HIGH COURT

2011 1077 SS

Between:

Fingal County Council

Appellant

And

Commissioner of Valuation

Respondent

And

NSCDA (Operations) Limited

Notice Party

Judgment of Mr Justice Michael Peart delivered on the 21st day of December 2011:

This matter comes before the Court by way of Case Stated dated 31st May 2011 filed on the 2nd June 2011, following a decision by the Respondent dated 14th March 2011 with which the Appellant is dissatisfied. That decision was that the property in question herein, namely the National Aquatic Centre (hereinafter referred to as "the NAC"), was occupied by "the State" for the purposes of Section 15 of the Valuation Act, 2001 and was therefore not rateable.

The issues raised in the Case Stated for the opinion of the Court are:

"whether: (1) the Tribunal was correct in law in its determination that the Notice Party, as occupier of the National Aquatic Centre, falls within the ambit of Section 15 (3) of the valuation Act, 2001 as being "the State" or "office of State";

(2) the Tribunal was correct in law in finding that the Notice Party was not liable to pay rates on the relevant property."

The agreed facts are set forth as follows:

"3. Prior to November 2006, the National Aquatic Centre had been operated and occupied by a private company, Dublin Waterworld Limited, which held the premises under a Lease. Following the conclusion of litigation against Dublin Waterworld Limited for breaches of that Lease, a State-owned company, namely Campus and Stadium Ireland Development Limited (CSID) went into occupation of the National Aquatic Centre. In the same year, the National Sports Campus Development Act was enacted. Section 32 of that Act provided for the dissolution of CSID, and that dissolution took place on the 1st January 2007, when CSID was replaced by the National Sports Campus Development Authority (NSCDA), which was established pursuant to Part II of the 2006 Act, for the purposes of developing a sports campus on the premises and for the purposes of encouraging and promoting the use of the sports campus by persons participating in sport at professional amateur levels and by members of the public generally.

3.2 The NSCDA is a statutory corporation and the powers and functions of the NSCDA are set out in the 2006 Act. Each of the members of the NSCDA is appointed by the Minister for Tourism, Culture and Sport.

3.3 The NSCDA granted a Lease of the NAC to a subsidiary, namely NSCDA (Operations) Limited. This company was formerly called CSID (Operations) Limited. NSCDA (Operations) Limited is a wholly-owned subsidiary of the NSCDA.

3.4 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. Pursuant to Section 28 (7) of the 2006 Act, however, this company is deemed to be a subsidiary formed and established by the NSCDA under the 2006 Act. Section 28 (1) of the 2006 Act permits the NSCD, with the approval of the Minister, and with the consent of the Minister for Finance, to establish a subsidiary for the purpose of performing such functions of the NSCDA as it may determine. Although NSCDA (Operations) Limited is a subsidiary company, it is performing the functions of the NSCDA.

3.5 Further factual findings relevant to the decision of the Tribunal are set out in paragraphs 1-9 of the findings on pages 12-13 of the judgment of the Tribunal".

In so far as the facts in those paragraphs of the Tribunal's judgment are referred to under "Agreed Facts" in the Case Stated I should set them out also:

"1. The National Aquatic Centre (the NAC) was completed in March 2003 at a cost of €62.5 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 2500 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 NSCD ... 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 promote 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, buildings 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 for 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 other 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 a membership charge. On the contrary the NAC in effect is a national institution."

Section 15 as relevant to the present case provides as follows:

"15. - (1) Subject to the following subsections and sections 16 and 59, **relevant property** shall be rateable.

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

(3) Subject to section 16, relevant property, being a building or part of a building, land or waterway or a harbour directly occupied by the State (including any land or building occupied by any Department or office of State, the Defence Forces or the Garda Síochána or used as a prison or place of detention), shall not be rateable.

(4)

(5)"

Neither sections 16 nor 59 are relevant to the present case.

Schedule 3 of the Act sets out a comprehensive list of what property comes within the meaning of "relevant property" including "(a) buildings", and, curiously, given what is provided for in section 15 (3) above, "(o) any building or part of a building, or lands or waterways or harbours directly occupied by the State including lands or buildings occupied by any Department or office of State, the Defence Forces or the Garda Síochána or used as a prison or place of detention."

Schedule 4 of the Act then sets out a lengthy list of "Relevant Property Not Rateable". Included at paragraph 4 is "land developed for sport", but that term is defined in Section 3 of the Act as "outdoor surfaces used for sporting purposes (including football pitches, tennis courts, race courses and golf courses, but not including fixed buildings and structures)". The National Aquatic Centre is therefore clearly not within this paragraph, since it is a building.

The remainder of Schedule 4 sets out a number of categories of lands and buildings which are not rateable, these being in the main being related to enterprises not established for the purpose of making a profit. Of interest is paragraph 12 which sets out a list of properties occupied by particular bodies of a national character, namely the National Museum of Ireland, the National Library of Ireland, the National Gallery of Ireland, the Irish Museum of Modern Art Company, the Arts Council, the Heritage Council, the National Concert Hall, the Chester Beatty Library, and the National Theatre Society Limited.

The National Aquatic Centre was not in existence on the date when this Act was passed, and therefore is not included. But if it had been established on the relevant date and had been included it would not have appeared out of place, I would suggest, given the nature of those bodies which have been included. Had it been included in Schedule 4 by some provision in the National Sports campus Development Authority Act, 2006, the need for the present proceedings would have been avoided, as the position would have been clear. But the failure to do so does not mean that the property in question may not come within the provisions of Section 15 (3) of the Valuation Act, 2001, and the issue to be decided is whether the National Aquatic Centre is a property occupied by "the State" or "an office of State" and therefore not rateable.

These issues have been the subject of decisions by the High Court in relation to the Personal Injuries Assessment Board, and in relation to the Health Service Executive - the former being found to be rateable, while the latter was found to be not rateable. Each of those bodies is set up by an Act of the Oireachtas and the relevant Minister exercises a degree of control, both in terms of finance, appointment of board members, and policy. The nature of the body, the degree of such control, and whether the body exercises functions which are at the core or epicentre of government policy were relevant to those decisions, and are so in the present case too. Certain indicia have been identified in these cases as useful in deciding whether the property is occupied by the State or an office of State.

Previous decisions of the Valuation Tribunal have identified a number of factors which are considered by the Tribunal to assist in establishing whether or not a property is occupied by the State or an office of State for the purpose of Section 15 (3) of the Act. These are:

- (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 Controller and Auditor General for audit each 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?

Referring to these various indicia, McMenamin J. in his judgment in *Health Service Executive v. Commissioner for Valuation*, unreported, High Court, 13th June 2008 approved them as useful and condensed them into four categories, namely "(1) its nature and function; (2) its proximity to central government; (3) its finance, control of expenditure, funding, financial and administrative accountability; (4) its staffing arrangements and functions."

The current occupier of the NAC is NSCDA (Operations) Limited. They occupy the premises under a Lease granted to it by National Sports Campus Development Authority ("NSCDA"). NSCDA (Operations) Limited is a wholly-owned subsidiary of the NSCDA.

NSCDA was established under Part II of the National Sports Campus Development Authority Act, 2006 ("the Act of 2006"). Section 28 of the Act of 2006 provides that the functions of the NSCDA may be performed by a subsidiary *"and, accordingly, the Authority may, with the approval of the Minister given with the consent of the Minister for Finance, for the purpose of such performance, form and establish or acquire one or more subsidiaries."*

A number of provisions of the Act of 2006 are helpful when considering the level of control exercised under that Act by the Minister for Trade, transport, Tourism and Sport in relation to the NAC.

Section 4 provides:

"4. The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for finance, be paid out of monies provided by the Oireachtas and the expenses incurred by the Minister for Finance in the administration of this Act shall be paid out of monies provided by the Oireachtas."

I am informed that a sum of €63.5 million was spent from monies provided by the Oireachtas for the construction of the NAC.

Section 7 of the Act of 2006 sets out the functions of the NSCDA as follows:

"7(1) The functions of the Authority shall be to –

- (a) develop a sports campus on the site,*
- (b) furnish and equip the sports campus with such plant, machinery, equipment and apparatus as it considers appropriate,*
- (c) manage, operate and maintain the sports campus, and*
- (d) encourage and promote the use of the sports campus by persons participating in sport at professional and amateur levels and by members of the public generally.*

(2) Without prejudice to the generality of subsection (1), the Authority may –

- (a) develop and provide on the site such facilities and services of a commercial nature complementary to the sports campus, including residential accommodation, as it considers appropriate,*
- (b) arrange with any educational establishment or other body that is interested in the development of medical and research facilities for sport on the site and, if appropriate, elsewhere for the development of such facilities on such terms and conditions as the Authority considers appropriate,*

(c) arrange with a body involved in the promotion of sport at a national level for the use by the body, on such terms and conditions as the Authority considers appropriate, of the site, or a part of it, for a purpose connected with sport including the location of the body's headquarters there, and

(d) make arrangements with any person, on such terms and conditions as it considers appropriate, for the provision to it by that person of financial assistance (whether by way of the provision of funds or the undertaking of works) for the development or provision of any facilities or services or both in the sports campus and the use by that person of those facilities and services.

(3) The authority shall prepare and submit to the Minister for his or her approval a plan for the development of a sports campus on the site which shall specify particulars of the following:

- (a) the facilities and services to be developed on the site;*
- (b) the reasons for including each facility and service in the plan;*
- (c) the cost and timetable for the development of those facilities and services; and*
- (d) the phases of development of the sports campus.*

(4) The Authority may amend the plan prepared by it under subsection (3) from time to time during the development of the sports campus on the site and shall submit the plan as so amended for the approval by the Minister.

(5) The Authority shall, before the commencement of each phase of development of the sports campus on the site specified in the plan approved by the Minister under subsection (3) or (4), prepare and submit to the Minister for his or her approval a detailed plan in respect of that phase of development specifying particulars of the following:

- (a) the facilities and services to be developed on the site during that phase;*
- (b) the cost of that phase; and*
- (c) the timetable for the development of that phase.*

(6) The Authority shall, in preparing or mending a plan for submission to the Minister for his or her approval under subsection (3), (4) or (5) consult with the Irish sports Council and such bodies involved in the promotion of sport at a national level as it considers appropriate.

(7) The Minister may approve, with such modifications (if any) as he or she considers appropriate, a plan submitted to him or her by the Authority under subsection (3), (4) or (5).

(8) The Minister for Agriculture and Food shall, when so directed by the Government, convey all the estate and interest of that Minister of the Government in the land described in Schedule 1, or part of it specified in the direction, to the Authority but subject to all trusts and equities affecting that land subsisting and capable of being performed and, pending such conveyance, that Minister of the Government consents to the development of that land, or that part of it, by the Authority in accordance with this Act.

(9) In this section "sports campus" means a campus of facilities for sporting activities, whether indoor or outdoor, and facilities and services to support such activities, which includes the National Aquatic Centre and may include an indoor arena, playing pitches, sporting training facilities, a football stadium, administrative facilities for sport and medical and research facilities for sport".

It has been submitted by the respondent, supported by the Notice Party that it is evident from these provisions that the activity of the NAC is at the epicentre of government policy, for example by reference to subsection (1)(d) above, and that the functions are of a national, rather than local or limited character, for example by reference to subsection (2) thereof. It is submitted also that subsections (3) and (4) indicate control by the Minister over the plans for the NAC and any amendment to those plans, and that other subsections show this also given the need for the Minister's approval at all stages of the development.

The powers of the Authority are contained in Section 8, and while subsection provides that it shall have all powers necessary for the performance of its functions, subsection (2) requires that the Minister's approval be obtained for any agreements to be entered into with third parties, and subsection (3) limits the acceptance of gifts of money or land, on such terms as may be specified by the donor, but only so long as those are consistent with government accounting procedures. Equally, under subsection (5) the engagement of consultants or advisers may be done, but subject to any direction that may be given by the Minister.

Membership of the Authority and the appointment of members, and their removal are all set forth in Section 9 in great detail. Subsection (2) provides that it is the Minister who shall appoint the members of the Authority, and requires that the Minister be of the opinion that such appointed members have the necessary experience and capacity to perform the functions of the Authority. He/she must also ensure gender balance. Those appointed members shall, as provided in subsection (9), hold office on such terms and conditions as the Minister may determine. The Minister may remove a member in certain circumstances set forth in subsection (12) and may fill any vacancies arising under subsection (13).

The remuneration of members of the Authority is provided for in section 12 and shall be such as the Minister with the consent of the minister for Finance may from time to time determine.

The hiring of staff, the superannuation arrangements for staff are all subject to the approval of the Minister. The superannuation scheme must be laid before both Houses of the Oireachtas.

Section 19 provides:

"19. The Minister shall from time to time advance to the Authority out of monies provided by the Oireachtas such amount or amounts as the Minister may, with the consent of the Minister for Finance, determine for the purposes of expenditure of the Authority in the performance its functions."

Section 20 (4).makes provision for the keeping of accounts in a form approved by the Minister, and for their submission to the Controller and Auditor General for audit, and upon such audit, that they be laid before the Houses of the Oireachtas. The section provides also that the Chief Executive shall attend before a Dáil committee when required to do so for the purpose of giving evidence in relation to certain matters concerning the operation of the NAC, as set forth therein.

Section 20(5) provides:

"(5) In the performance of his or her duties under subsection (4), the Chief Executive shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy."

Section 24 provides:

"24. In performing its functions, the Authority shall have regard to Government policy and shall comply with any general policy direction that may from time to time be given to it by the Minister."

Section 27 of the Act of 2006 provides:

*"27. The Authority is, subject to section 7 of the State Authorities (Public Private Partnership Arrangements) Act, 2002, a **State authority for the purposes of that Act, and on the establishment day the Schedule to that Act** is amended by the addition of 'National Sports Campus Development Authority' " (emphasis added)*

Section 29 provides that the Authority may borrow money, but it may do so only with the approval of the Minister given with the consent of the Minister for Finance.

Michael Howard SC for the respondent and Hugh O'Keeffe SC for the Notice Party submit that these statutory provisions indicate such a level of control by the Minister in terms of funding, appointment of members, accountability, and functions and objectives of a wide national character, that it is beyond doubt that, even in the absence of the statement in Section 27 to the effect that for the purposes of the *State Authorities (Public Private Partnership Arrangements) Act, 2002* the authority is a State authority, it is clear that the NAC is therefore not rateable since it is occupied by "the State" for the purposes of Section 15(3) of the Act of 2001, and that the answers to the questions posed by the Case Stated should each be answered in the affirmative.

Patrick Butler SC for the Appellant on the other hand points to the fact that the NAC is not occupied by the State, given that the NAC is operated by and occupied by a limited liability company, NSCDA (Operations) Limited, which is in commercial competition with other similar entities operating fitness clubs and centres within the functional area of the Appellant, and which are rateable.

He also points to the fact that the NAC is a body established to operate on a commercial basis and is to be differentiated from many of the bodies referred to in Schedule 4 of the Act of 2001, and the exemption applying to certain kinds of bodies which are not established for the purpose of making a private profit.

Mr Butler has referred also to the fact that under Schedule 3 of the Act of 2001, harbours, piers and docks, which are operated by companies which he submits are set up under companies akin to that by which the Notice Party is operated are "relevant property" and therefore rateable, and that the position should be no different for the Notice Party.

It is submitted by the Appellant also that simply because the NAC is set up under an Act of the Oireachtas and because a certain measure of control is exercised over the manner in which the business is conducted is insufficient to establish equation with the State itself. He argues that the promotion of an activity such as swimming and associated activities cannot be equated with the functions and activities of a body such as the Health Service Executive, which affect and are relevant to every citizen in the State, in contradistinction to the limited role which swimming plays in the life of the State's citizens. If it were so, it is submitted that there should be no reason why property occupied by bodies such as Allied Irish Banks and the National Asset Management Agency should pay rates on buildings occupied by them, given their national importance now.

One issue arising is the extent to which sport may be seen as being at the core of government policy in this State. It could be said that there is nothing about sport as such which mandates that it should be at the core of such policies, unlike other areas, such as health, finance and the administration of justice which clearly in any system of government must be at the centre of government policy. But any government is free to attach a particular importance to any other area of activity which it may choose for whatever reason to treat as important to the welfare of the nation. Such a policy may be seen as of sufficient importance that it should be the responsibility of a specific Minister of government, so that national policies can be developed. For many years now there has been a Minister with specific responsibility for sport. The current Minister with such responsibility for sport is the Minister for Transport, Tourism and Sport.

The functions and objectives of the NSCDA are certainly consistent with such a policy priority, as is the extent of the funding provided by the Government for the development of the NAC. It is of some relevance that it is called the National Aquatic Centre. The Government can be seen as having adopted a policy in relation to sport, and has raised sport from the level of a peripheral activity to one at the core of government, even if it might be considered to be lower in the pecking order of policies than some of higher importance such as finance, health and the administration of justice.

The importance of the NAC as part of government policy can be seen also by the manner in which the Act of 2006 has ensured that the responsible Minister has significant control over the funding provided to the NAC, the ability to appoint and remove members of the Authority, approve or reject plans for the development of the sports campus. The Minister's approval is required in relation to the overall management and operation of the NAC and the campus generally. The Minister controls the remuneration and superannuation arrangements of the members of the Authority. The Chief Executive is required to submit accounts to the Controller and Auditor General for annual audit, and to attend and give evidence before a Dáil Committee whenever requested to do so. The Chief Executive may not question or express an opinion on the merits of any Government policy or the objectives of such a policy.

Many of the indicia to which I have referred already and which McMenamin J. concluded were useful in deciding whether the property was a property occupied by the State or an office of State are fulfilled in this case.

Such is the level of control and involvement of the relevant Minister and the Government in the establishment of, and control over the management of the Authority and its activities, and the fact that it is to be regarded as at the core of government policy, it must be concluded that it is "the State" which is the occupier of the property in question, and that it is therefore not rateable by virtue of the provisions of Section 15 (3) of the Act of 2001.

I will therefore answer each question asked in the Case Stated in the affirmative.