Status of Judgment: **Distributed**

Appeal No. VA06/1/004

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Royal Cork Yacht Club **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Club House, Quay, Jetty at Lot No. 14Ao, Carrigaline Road, Knocknagore, Templebreedy, Kinsale, County Cork
Exemption - whether property below high water mark

B E F O R E

John O'Donnell - Senior Counsel	**Deputy Chairperson**
Brian Larkin - Barrister	**Member**
Michael McWey - Valuer	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 28TH DAY OF JULY, 2006

By Notice of Appeal dated the 9th day of February, 2006, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €223.00 on the above described relevant property.

The Grounds of Appeal as set out in the Notice of Appeal are:
"Valuation includes elements which are not rateable and/or relevant property. The inclusion of the property at 6 (a) (i) namely quay and jetty. [is incorrect] The part of the property below HWM should be excluded (VA 2001 S.3.1(D); LGA 2001 S.227(1) VA 90/3/014.) Property is below HWM. Property does not fall within the definition of relevant property being not any of the property listed in Sched. 3 VA 2001."

1. The appeal proceeded by way of an oral hearing which took place in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 27th March, 2006. On behalf of the Appellant Mr. Owen Hickey, BL, appeared instructed by Coakley Moloney Solicitors. On behalf of the Respondent Mr. Colm MacEochaidh, BL, appeared instructed by the Chief State Solicitor's Office.

   Both sides also furnished written submissions.

INTRODUCTION:

2. The property is located adjacent to the town of Crosshaven, Co. Cork. It comprises a detached clubhouse building used by members and their guests. There is a fixed mooring marina with accommodation for approximately 176 berths. The property is held on a foreshore lease from the Department of Communications, Marine and Natural Resources.

3. The property was the subject of a revision of valuation in 2005. The occupier made submissions at appeal stage. Having considered the appeal the Commissioner reduced quantum from €268 to €223. An appeal to the Valuation Tribunal was lodged on the 9th February, 2006.

4. The essential issue for determination is whether the part of the marina lying outside the high water mark, i.e. the relevant parts of the berths, moorings and piers which lie outside that high water mark, ought to be excluded from valuation. In this regard the Notice of Appeal received by the Valuation Tribunal asserts (at section 6(a)) that the valuation is incorrect because "*the valuation includes elements which are not rateable and/or relevant property*".

5. At section 6(b) the Appellant says that the Valuation Certificate includes incorrect details on the basis that it includes the properties set out at 6(a)(i), namely "*quay and jetty*" . The Appellant later on asserts at section 6(c) of the Notice of Appeal that the property should have been excluded from the relevant list on the basis that "*the part of the property below HWM (High Water Mark) should be excluded."*

THE APPELLANT'S CASE:

6. On behalf of the Appellant Mr. Hickey handed in a map which showed what had been agreed between the parties as being the appropriate high water mark at ordinary tides. In his submission the issue to be determined was the meaning of the words "*land which is above the high water mark*".

7. By way of preliminary submission Mr. Hickey contended that it is in the first place a matter for the Respondent Commissioner of Valuation to establish that the areas which he seeks to value are within the relevant administrative boundaries. If the property is not within the relevant rating area then the Rating Authority has no authority to strike a rate in relation to that property. Mr. Hickey contended that the piers, berths and part of the marina below the high water mark were not within any rating area of any Rating Authority at all and that unless and until proof was adduced that they were within the relevant rating area no rate could be struck in respect of them. In this regard we were referred to the decision in **John Pettitt & Son Ltd. –v- Commissioner of Valuation (VA95/5/015)**. This determination makes it clear that where the issue of compliance is raised then the onus is on and remains on the Respondent to prove compliance in accordance with section 3(4)(a) of the Act then applicable. The validity of such an application for revision is dependent on compliance with the section where it so applies.

8. In his contention the property the subject matter of the appeal was outside of the relevant or any rating area and therefore the Rating Authority in Cork had no power to strike a rate in respect thereof.

9. Mr. Hickey also raised the issue of notification. He referred to the decision in **Trustees of Cork & Limerick Savings Bank –v- Commissioner of Valuation (VA90/3/74)** where the Tribunal held that where the issue of notification was raised then the onus was on the Respondent to prove compliance; the Tribunal also held in that case that the power to apply for revision was subject to notification and that where there had been no notification the revision was invalid.

10. In this regard also Mr. Hickey drew our attention to section 227(3) of the Local Government Act, 2001. Section 227(2)(a) deals with "*land which is above the ordinary high water mark*". Section 227(3) states that "W*here a local authority becomes aware that land referred to in subsection (2)(a) has by virtue of this section become part of its administrative area, the authority shall notify the Chief Boundary Surveyor of that fact*". For these purposes the Chief Boundary Surveyor was submitted to be the Commissioner of Valuation.

11. In response to this preliminary submission Mr. MacEochaidh, on behalf of the Respondent, submitted that this was an argument about who had the burden of proof. In the Respondent's view this was incorrect. The fact that the Respondent had formed an opinion on a particular issue does not mean that the entire burden of proof reverses and goes on to the Valuation Office. In his submission the Valuation Office had come to the conclusion that the property the subject matter of the appeal was rateable and had assessed a valuation. It was now a matter for the Appellant to prove on appeal that it was not rateable. Mr. MacEochaidh made it clear that he was prepared to accept the high water mark as set out on the agreed map. The real issue in this context was what meaning was to be given to section 227 of the Local Government Act, 2001. It was thus a matter of legal interpretation of a section of a statute rather than a matter of burden of proof and in the circumstances there was no reason why the Appellant did not go first as would happen in the ordinary course of events.

12. In response Mr. Hickey submitted that the issue raised was an issue in relation to jurisdiction of the Rating Authority rather than rateability. Mr. Hickey referred to paragraph 34 of the determination in **Pettitt** in which the Tribunal makes the point that a reasonable person must know that his property is liable to be valued and that obligations imposed by statute must be complied with.

THE DECISION ON THE PRELIMINARY ISSUE:

13. Having retired to consider the matter the Tribunal determined that the onus of proof in respect of the appeal remained on the Appellant and that it was appropriate that the Appellant should go first.

THE APPELLANT'S EVIDENCE:

14. Mr. Patrick Dorgan gave evidence on behalf of the Appellant. He has been a member of the Royal Cork Yacht Club for 30 years. He is an experienced sailor and committee member and has a boat on the marina.

15. He explained the manner in which the marina had been constructed. Posts made up of steel and timber were driven into the ground. The marina and platform itself has a steel frame with timber decking. The marina platform has a series of "*collars*" attaching the marina decking to the various posts; the marina then moves up and down with the tide. The posts or piles are inspected by a diver each year for evidence of rotting or corrosion.

16. In addition there are two access bridges. One section of the bridge is fixed. The gangway section which is on wheels then goes up and down with the marina which itself floats up and down on the tide. Mr. Dorgan gave evidence that there were a total of perhaps 50 piles for the two sections of marina with between 20-30 metres between each. In his view neap tides came in to a level of approximately 4ft. Spring tides came into a level of in excess of 15ft.

17. In his view the high water mark was not a vertical measurement. Rather, it was a type of boundary. So in his view ownership of land which was adjacent to the sea stopped at the high water mark. In his view the land above the ordinary high water mark refers to property on what might be regarded as "*the higher land*". Below the ordinary high water mark conversely therefore meant a property on what may be described as "*the lower land*".

18. In the instant case however the berths, piles and marina decking were south of the high water mark and therefore in his view should be regarded as being below the high water mark.

19. In cross-examination he accepted that the tide can frequently leave a line of seaweed or flotsam which is of assistance in gauging high water marks. Here, however, there was no such equivalent mark left on e.g. a beach because there was no such beach. He accepted that the tops of the piles or posts will ordinarily be above the high water

mark as a vertical measure. He also accepted that sometimes the marina would be above the high water mark as a vertical measure and sometimes below that mark. In his contention, however, it was inappropriate and unacceptable to simply utilise a vertical measurement as the measurement of the high water mark.

The Respondent did not call evidence.

THE APPELLANT'S SUBMISSIONS:

20. On behalf of the Appellant Mr. Hickey referred us to section 227 of the Local Government Act, 2001. It may be appropriate to set this out in full. It reads as follows:

"*(1) The maritime boundary of a county, city or town shall on the establishment day by virtue of this subsection be deemed to coincide with the ordinary high water mark for the time being, except where in accordance with section 10(4), such boundary already extends beyond that high water mark.*

(2) (a) For the avoidance of doubt and without prejudice to subsection (1) it is hereby declared that all land which is above the ordinary high water mark for the time being and which is formed by reclamation or other construction works or by natural accretion or otherwise shall, notwithstanding the provisions of any other enactment, for all purposes, including all functions conferred on a local authority by this or any other enactment, be included in and form part of the county or city to which it is contiguous or connected or where it adjoins or is connected to more than one such county or city in proportion to the extent of the common boundary and the boundary of that county or city shall stand altered accordingly.

(b) Where land referred to in paragraph (a) forms part of a county or city it shall by virtue of this paragraph also for all purposes be included in and form part of any town or any other administrative, electoral or geographical district which it adjoins and which is situated within such

county or city or where it adjoins more than one district in proportion to the extent of the common boundary of such districts.

(c) In this section and for purposes of illustration only and without restriction of the definition of land in section 2 as including a structure, land shall be read as including piers, wharves, jetties, breakwaters, walkways, bridges, pylons, tanks or other installations, equipment or apparatus.

(3) Where a local authority becomes aware that land referred to in subsection (2)(a) has by virtue of this section become part of its administrative area, the authority shall notify the Chief Boundary Surveyor of that fact."

Section 2 of the Local Government Act, 2001 provides that "*land"* has the meaning given to it by the Act of 2000. The Act of 2000 is deemed to mean the Planning and Development Act, 2000.

21. It may be appropriate also to set out for completeness the relevant part of section 2 of the Planning and Development Act, 2000 which provides that:

"*land" includes any structure and any land covered with water (whether inland or coastal);*

"structure" means any building, structure, excavation or other thing constructed or made on, in or under any land, or any part of a structure so defined, and

(a) where the context so admits, includes the land on, in or under which the structure is situate, and
(b) in relation to a protected structure or proposed protected structure, includes-

(i) the interior of the structure,
(ii) the land lying within the curtilage of the structure,

(iii) any other structures lying within that curtilage and their interiors, and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii),"

22. Mr. Hickey submitted that the floating marina in this case could not come within the definition of "*land*". Accordingly it was his contention that the property was not situated within the administrative boundary of Cork County Council. Further or in the alternative, even if it was contended by the Respondent that the floating marina in question constituted "*land*" for the purposes of section 227 of the Local Government Act, 2001, the floating marina could not be regarded as being properly "*formed by reclamation or other construction works or by natural accretion or otherwise*."

23. Insofar as section 227(2) obliges us to consider the meaning of the words "*above the ordinary high water mark for the time being*" Mr. Hickey submitted that these words must be given their ordinary literal meaning. We were referred to the comments of the late MacCarthy J in **Texaco (Ireland) Limited –v- Murphy [1991] 2 IR 449** to this effect. Our attention was also drawn to the legal presumption that a change in the law must be achieved unambiguously, either by express terms or by clear implication; in the event of an ambiguity a court should decline to interpret the provision as changing the law.[1]

24. Mr. Hickey submitted that the words following the word "*and*" (which in turn comes after the words "*for the time being*") had the effect of meaning that when a reclamation of land occurs that land is added to the boundary of the relevant county and the boundary moved out, thus the boundary of a county is extended to include reclaimed land. This he submitted was consistent with the obligation contained in section 227(3) obliging the local authority to notify the Chief Boundary Surveyor that the land has now become part of the relevant local authority's administrative area.

[1] See the Irish Legal System (Byrne & McCutcheon) (Chapter 14, paragraph 105)

25. Mr. Hickey also drew our attention to the principle of *noscitur a sociis* [**Byrne & McCutcheo**n above, paragraph 14.129]. This Latin maxim means that a thing is known by its associates. So a meaning may be attributed to a word or words by reference to the context in which it appears. In **The People (Attorney General) –v- Kennedy [1946] IR 517** Black J observed:

> "*A small section of a picture, if looked at close up, may indicate something quite clearly: but when one stands back and views the whole canvass, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.*
>
> *If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and noscitur a sociis utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given quite a different meaning when viewed in the light of its context."*

26. In this regard the *ejusdem generis* rule as applied to the interpretation of statutes means that where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them and is presumed to be restricted to the same genus as those words. The rule applies to general words following words which are less general.

27. Mr. Hickey submitted that it was appropriate in this context to look at the limitations imposed by section 227(2)(c) on the definition of land. Having read various dictionary definitions of pier, wharf and jetty Mr. Hickey submitted that the words contained in section 227(2) were intended to cover substantial fixed constructions. So when works of reclamation or fixed piers are put into the sea a new high water mark may be said to be created.

28. However, in his view this section of the Act did not contemplate something that moved up and down. The section appeared to deal with the making or creation of

new land (e.g. by the attachment of fixed piers) rather than by the attachment of a moving (in this case floating) marina which could not be regarded as new land. While he accepted that certain works carried out at sea could extend the administrative boundary of a county, a floating marina was not such a work.

29. In his submission he said the Act was clear as to what constructions could legitimately make up new land. All of the elements contained in section 227 were fixed elements above water which operated to resist water. However, in his submission they could not be said to include the floating marina described here. Nor was the foreshore area between the low water mark and high water mark relevant.

THE RESPONDENT'S SUBMISSION:

30. The Respondent contended that the marina constituted a fixed mooring. In this regard he pointed to Schedule 3 of the Valuation Act, 2001 which provides that:

> "*Property (of whatever estate or tenure) which falls within any of the following categories and complies with the conditions referred to in paragraph 2 of the Schedule shall be relevant property for the purposes of this Act …*
>
> *(d) harbours, piers, docks and fixed moorings."*

31. Mr. MacEochaidh referred the Tribunal to a previous Tribunal decision in **Trustees of Kinsale Yacht Club –v- Commissioner of Valuation (VA90/3/014)**, subsequently considered by the High[2] and Supreme[3] Court.

32. In that case the Tribunal considered whether a marina associated with the Kinsale Yacht Club came within the category of non-rateable property. The issue as to whether property of this nature was rateable was referred to the High Court by way of case stated and Judgment was given in the matter by Mr. Justice Barr. The case stated posed two questions to the High Court:

[2] [1993] ILRM P393
[3] [1994] 1 ILRM P457

1. Whether the Tribunal was correct in holding that the heraditament the subject of the appeal was not rateable as not constituting a fixed mooring, and
2. Whether the Tribunal was correct in law in concluding that the correct valuation of the subject heraditament is £2.50 as an easement under section 12 of the Valuation Act, 1852.

33. The answer given to the first question was as follows:

> "*The heraditament which was the subject matter of the appeal before the tribunal is not rateable because it comprises a development of land for sport within the meaning of reference No. 2 in the schedule to the Valuation Act, 1986. The tribunal's finding that the marina is not rateable is correct, but its reasons in support thereof are unsound."*

34. In answering the second question the learned trial Judge said:

> "*As to the second question in the case stated, I accept the argument advanced by counsel for the respondent that the tribunal was premature in fixing a rateable valuation on the subject heraditament as an easement under section 12 of the Valuation (Ireland) Act, 1852. It is not in dispute that the heraditament does comprise an easement but it is one that has not yet been valued by the respondent. The case should be sent back to him for that purpose. Accordingly, the answer to the second question is 'No'."*

35. The Commissioner of Valuation appealed this decision to the Supreme Court on, inter alia, the basis that section 48 of the Valuation (Ireland) Act, 1852 as amended provided that all fixed moorings, piers and docks be deemed rateable heraditaments.

36. In allowing the appeal the Supreme Court determined inter alia, that the decision of the High Court that the marina was a fixed mooring was a determination of a mixed question of fact and law. This determination had not been challenged on appeal. In this regard it may be noted that Barr J in his Judgment in the High Court had held no reasonable Tribunal could have made a finding of fact that the marina was not a fixed

mooring. The Supreme Court expressed the view that the marina was "*indubitably a fixed mooring*".

37. In the **Kinsale Yacht Club** case the marina in question was, like here, a floating wooden platform attached to piles which were partially driven into the sea bed (the platform could be detached from the piles and moved to another location).

38. In Mr. MacEochaidh's submission this made it clear that a floating structure such as a marina was and indeed must be regarded as a fixed mooring for the purposes of the Valuation Act, 2001. In his submission therefore it was beyond argument that the type of construction in question here, namely a marina, was a fixed mooring within the meaning of the above schedule of the Valuation Act, 2001.

39. Turning to the argument based on section 227 of the Local Government Act, 2001 Mr. MacEochaidh submitted that the section covered land which was above the ordinary high water mark for the time being and which was formed by reclamation or other construction works. By virtue of section 227(2)(c) the land is defined as including a structure and in particular including but not limited to piers, wharves, jetties, breakwaters etc. as well as other installations, equipment or apparatus. In his submission therefore one cannot simply read section 227(2) as referring to land that has in some way been reclaimed. It clearly and expressly includes structures such as piers, walkways and bridges. In his submission the fact that some part of the structure moves or floats does not take it outside of the ambit of the Rating Authority. It may be noted in any event that neither the fixed element of the bridge nor the fixed moorings, nor indeed the piers move.

40. In his submission the high water mark must be regarded as imposing a measurement not just horizontally but also vertically. Albeit the decision in **Kinsale Yacht Club** was a decision under a different Act the principle governing that decision is the same principle at stake in the instant case. Accordingly in his submission the entirety of what might be described as the marina is rateable property, notwithstanding the fact that part of the "*fixed moorings fall beneath the ordinary high water mark for the time being.*"

41. By way of response Mr. Hickey submitted that it is clear from the wording of section 227 that the section was not intended to apply to or include a floating or mobile structure but rather a fixed standing structure.

THE LAW:

42. It does seem to us that the position set out in the **Kinsale Yacht Club** decision of the High Court (and Supreme Court) is of considerable assistance notwithstanding the fact that it is a decision under a previous Valuation Act. The nature of the marina under consideration in that case was very similar to the nature of the structure under consideration here. It is true that, insofar as the design of the structure allows the marina and at times part of the walkway to move to accommodate tides in these parts, it cannot be said to be immutably fixed to any one point (although arguably the top part of the gangway is so fixed). It seems to us that the fixed nature of the structure here is illustrated by the fact that the piles or pillars around which the walkway collars are placed are themselves fixed and immutable. The piles themselves would be lacking in purpose without the existence of the decking, walking and gangway which are attached thereto. However, the fact that the walkway and gangway themselves float up and down purely and simply for the purpose of accommodating tidal movements, does not in our view make the structure as a whole something that cannot reasonably be described as a fixed mooring.

43. So far as the provisions of section 227(2) of the Local Government Act, 2001 are concerned we note that at no stage did the High Court or, on appeal, the Supreme Court in the **Kinsale** case decide that the marina in question constituted "*land*". This is undoubtedly correct. However, this would appear to be beside the point. Even if one is obliged to consider the local authority's rating jurisdiction by reference to section 227(2) it is clear beyond doubt in our view that the local authority has jurisdiction to deal with this structure. The definition of land contained in section 227(2)(c) clearly includes piers, wharves, walkways, bridges or other installations, equipment or apparatus. It seems to us that this is undoubtedly a structure which includes a bridge or bridges, walkways and piers or pylons (perhaps more properly referred to as piles or pillars).

44. We note the contention which was also emphasised in the evidence of Mr. Dorgan that a high water mark is not simply a vertical measurement of a title boundary. However, the proposition may be tested if one considers the following example: suppose there is attached to the pier just above the high water mark a concrete sloped ramp which slopes gradually out from the pier wall as far as the outer extremities of where the marina floats at present. Undoubtedly there would be times when some of that ramp would be above the high water mark; undoubtedly there would also be times when a significant amount of the ramp would be below the high water mark. Yet it would undoubtedly be included as a structure within the meaning of section 227(2) of the Local Government Act, 2001. The only distinction between it and the current structure is that the current structure has built into it a design component which allows it, while attached to the land, to float up and down in accordance with the tide (a fixed mooring on an anchored chain out in the harbour will do exactly the same).

45. It seems to us that the fact that the design of the structure allows the structure to be used effectively so as to facilitate changes in tides does not of itself prevent it from being a structure within the contemplation of the relevant parts of section 227(2)(a) and (c).

46. In our view therefore the marina in question comes within the definition set out in Schedule 3(d) of the Valuation Act, 2001 and is a relevant property capable of being rated. It is also our view that the property in question is within the jurisdiction of the Rating Authority having regard to the provisions of section 227 of the Local Government Act, 2001.

DETERMINATION:

47. The property in question is a relevant property capable of being rated and is within the maritime boundary and administrative area of the relevant Rating Authority. The appeal is dismissed.