

Appeal No. VA02/3/007

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
NA hACHTANNA LUACHÁLA, 1852-2001
VALUATION ACTS, 1852-2001

University College Cork, Mardyke Leisure (UCC) Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Sports Stadium at Lot No. 2A/2, Mardyke Walk, Gill Abbey, Mardyke, County Borough of Cork.

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Brian Larkin - Barrister

Member

Patrick Riney - FSCS FRICS FIAVI

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 16TH DAY OF DECEMBER, 2005

By Notice of Appeal dated the 22nd day of May, 2002, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €2,300.00 on the above described relevant property.

The Grounds of Appeal as set out in the Notice of Appeal are:

"University College Cork are exempt from the payment of rates and this property should be distinguished in the rateable valuation list as being exempt. The rateable valuation is excessive and inequitable having regard to the provision of the Valuation Acts and on other grounds also."

INTRODUCTION:

The appeal proceeded by way of an oral hearing in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 25th of July, 2005. At the hearing the appellant was represented by Mr. Hugh O'Neill, SC, and Mr. John Lucey, BL, instructed by Mr. James O'Sullivan of Ronan Daly Jermyn Solicitors. Ms. Susan Goggin, Acting Finance Officer, University College, Cork and Mr. Patsy Ryan, General Manager, Mardyke Arena Ltd. also gave evidence on behalf of the appellant. Mr. James Devlin, BL, instructed by Mr. Tom Sweeney of the Chief State Solicitor's Office gave evidence on behalf of the respondent, the Commissioner of Valuation.

The property the subject matter of this appeal is a large indoor sports complex situated in Cork City between Mardyke Walk and the north channel of the River Lee. The premises are a purpose-built sports facility. The accommodation includes an entrance foyer, gymnasium, sports hall, swimming pool, sauna, changing rooms, cloakrooms and stores. On the first floor there is a foyer, viewing gallery, squash courts, training rooms, offices, cloakrooms and stores. On the second floor there is a meeting room, a studio, an open plan office, cloakrooms and stores.

OWNERSHIP:

The property in question previously had on it a stand for the athletics track of UCC's sports grounds. In order to embark on the building of the property known as the "*Mardyke Arena*" (hereinafter referred to as "*the Arena*") UCC first sought and received approval from the Department of Education and Science and the Department of Finance to enter into a transaction for the capital financing of the Arena. This transaction was tax-driven; under the provisions of Section 843 of the Taxes Consolidation Act, 1997 the University were able to avail of certain capital allowances whereas the relevant banking institutions would then make a margin on the interest charge.

Accordingly the sequence was as follows:

- (i) UCC built and paid for the Arena.
- (ii) UCC then sold the Arena to a Bank of Ireland special purpose company Tenton Limited ("*Tenton*"). Tenton is a subsidiary of Lansdowne Leasing Limited which is a subsidiary of the Bank of Ireland.

- (iii) Tenton leased the sports centre to Property Management (UCC) Limited (“PMUL”) which is a wholly owned subsidiary of UCC. The lease was for 20 years and one month.
- (iv) PMUL then sub-leased the centre to Mardyke Leisure (UCC) Limited (“MLUL”). The term of this lease was 20 years and one month (less one day). MLUL is also a wholly owned subsidiary of UCC.
- (v) UCC entered into a management agreement with MLUL to cover the management and financial affairs of the Arena.
- (vi) In addition a put and call option agreement was entered into by UCC and Tenton whereby UCC will purchase and Tenton will sell the Arena upon the occurrence of certain events.

This perhaps explains why it is not UCC but an entity described in the Valuation Certificate as Mardyke Arena Limited which is referred to as the occupier. There is no doubt that MLUL is a wholly owned subsidiary of the University.

The building of the Arena cost approximately €20,000,000. €7.3 million was funded by a student levy, some of which has already accrued and some of which is projected. It is perhaps notable that this facility is being paid for in part by the students themselves. In addition, approximately €2.4 million was raised through the Section 843 financing arrangement and the remaining approximately €10.5 million was raised by donation.

THE ISSUE:

The issue between the parties is whether the property in question is entitled to exemption from rates. (We understand that the quantum is agreed at R.V. €2,000).

THE APPLICABLE LAW:

Exemption was initially sought under the Poor Relief (Ireland) Act, 1838; the valuation was struck before the Valuation Act, 2001 came into effect on the 2nd May 2002. However the appeal to this Tribunal was lodged on the 22nd May 2002. An issue therefore arose as to whether the provisions of the Valuation Act, 2001 apply.

In this regard the Appellants submitted that the applicable law in relation to the rateability of the property is the law prior to the enactment of the Valuation Act, 2001. The Respondent

likewise contended that the applicable law is the law prior to the enactment of the Valuation Act, 2001 and in particular Section 63 of the Poor Relief (Ireland) Act, 1838 ; the Appellant also suggested that so far as procedural matters were concerned the Valuation Act, 2001 was the appropriate Act to consider in this regard. This latter point is undoubtedly correct; see Section 57(7) of the Valuation Act, 2001.

It seems to us that both parties are correct in contending that the appropriate law to apply on the issue of exemption from rateability is the law prior to the coming into force of the Valuation Act, 2001. The valuation date is agreed to be the 6th November 2001, well before the 2001 Act came into effect. Sections 15 and 16 of the Valuation Act, 2001 make for somewhat tortured and in a sense circular reading. However it seems to us that insofar as we are considering whether or not the property should have been included for or exempt from valuation at the time of the valuation date of the 6th November 2001 we are obliged to apply the law in force at that date which is of course the law prior to the coming into force of the Valuation Act, 2001.

Accordingly we are of the view that the law applicable to the case is the law prior to the enactment of the Valuation Act, 2001.

EVIDENCE:

Each party furnished a written précis which they adopted as their evidence. In addition oral evidence was given on behalf of the Appellant by Ms. Susan Goggin and Mr. Patsy Ryan. The Respondent did not give oral evidence.

Ms. Goggin is the acting Finance Officer in UCC. She gave evidence in relation to the funding of the building of the Arena which was approved by government. In her view sport was and is an integral part of life in UCC and the Mardyke had played a significant part in the history and background of UCC and indeed Cork. The Department of Physical Education within the college was established some 30 years ago and while previously located on campus had now been relocated to the Arena. There are 13 staff members in the Department including a Director, a Physiologist and Groundsmen. The Department oversees the sports clubs in the University and also manages the funding for those sports clubs. In this regard she said there were a large number of sporting clubs in UCC which clubs all now use the facilities in the Arena. While previously clubs had from time to time access to a squash hall

which also doubled as a lecture theatre on campus such clubs otherwise had to use alternative facilities. For example, swimming took place in a pool provided by Cork City Council. Now all of the clubs (of which she believed there were some 52) could avail of the sports facilities directly on campus.

She indicated that the establishment of and use of the Arena was and is part of the initiative of UCC to promote sports and recreation in an attempt to get students to involve themselves in sports. Not only did this promote physical fitness but it also fostered teamwork.

In addition, Ms. Goggin said that UCC provided sports scholarships. A bursary scheme had operated from the early 1990s but in the mid 1990s this had been upgraded to a sports scholarship. There are now some 40 sports scholarships per annum which are approved and funded by UCC (with some outside funding).

Ms. Goggin also explained the way in which funding is received by the University. The majority of the funding comes through what might be known as a “*recurrent grant*” from the State. The Higher Education Authority (HEA) critically evaluates an annual submission made each year by UCC and then decides what the funding should be. Capital funding is needed for the Arena on an ongoing basis for equipment. There is no other realistic source for this type of funding. She indicated that the Arena was supposed to operate on a break-even basis but is in fact operating in deficit and has done since its commencement.

Ms. Goggin also gave evidence of the intention of UCC to establish a degree (B. Ed.) in sports studies. This would be a four-year degree which will allow graduates to coach and teach. It will be a multidisciplinary degree overseen by the Department of Physical Education together with other disciplines. It is believed this degree will be even more attractive to potential students because of the fact that all of the facilities will now be available “*under one roof*”.

In cross-examination Ms. Goggin accepted that the Arena was not physically part of the campus although it was within a short distance. The employees of the Arena are employees of MLUL; the recruitment provisions of UCC do not apply to such employees because of what was described as the “*seasonality*” of the usage of the premises.

Ms. Goggin also accepted that the Arena is not used exclusively and solely by UCC students and made it clear that this will never be the case. In order to operate on a break-even basis it must have public members using the facilities. Students may use the premises and pay a particular rate; members of the public may also use the premises paying a separate rate. To an extent it could be said that the public subsidise the use of the premises by the students.

Ms. Goggin also accepted that the B. Ed. in sport studies was not in place at the time the valuation was struck.

In re-examination she acknowledged that while the Arena was not on the original campus of the University there were other off-campus facilities such as Brookfield and The Maltings. Indeed the sports hall/squash club at The Maltings appears to have been exempted from rates. UCC own a research centre off campus as well as other sites and properties where various administrative functions for various departments occur.

Mr. Patsy Ryan, General Manager of the Arena since August 2001 (just before the opening) also gave evidence. A graduate of Thomond College of Physical Education, he has been involved in leisure management since the 1990s. The Arena has some 50 staff (full-time and part-time). There is a Board of Management which meets 4-6 times a year to manage the affairs of the Arena. Of the nine persons on the Board three are UCC employees, one is from the Student's Union and one is from the Athletics Union. The remaining four are nominees of UCC, two of whom are Governors of UCC. There is also a Board of Directors on which Mr. Ryan sits as well as other UCC staff.

The premises has three sports halls, fitness gyms and other facilities as well as an area occupied by the Department of Physical Education. The premises are used for the administration of the various clubs and sports within the University. In addition the facilities are used by various teams for fitness testing, team meetings and other such activities. The Athletics Union (which Mr. Ryan described as a kind of student version of the Department of Physical Education) also has an input into the administration and management of the various sports within the University and also operates from the Arena.

The University Sports Club has the use of the premises Monday to Friday from September to May. Non-student clubs are permitted to use the premises for two hours in the evenings.

Students and staff have the option of becoming members of the Arena or using the facilities on a “*pay and play*” basis. Graduates can also join, as can members of the public. There are 5,000 registered students on the books of the Arena either as members or on a pay and play basis. In addition up to 2,000 use the facilities through the clubs. It is the aim of the University to have 70% of the students participating in some form of sporting activity; at present there are some 15,000 students in UCC but this number is projected to rise. It may well be that if student numbers rise and student usage rises accordingly it may be difficult to facilitate non-students.

To date the Arena has accumulated losses of €500,000. Despite the intention that initially a sinking fund would be created to purchase equipment this has not been possible. So it will be necessary to obtain the approximately €1,000,000 required to replace gymnasium equipment from UCC. The Arena does not have the funds necessary for this sort of capital investment nor is it in a position to borrow such funds on a commercial basis.

Mr. Ryan said the sports hall had been used by the University for Summer exams and (when the Aula Maxima was not available) for graduation. In cross-examination Mr. Ryan said the premises are not rented out for commercial use although the college does pay a nominal fee when using the hall for exams. He accepted that the people did join sports clubs only to drop out shortly after but contended that there was less of a drop-out rate from students than members of the public. He said that in off-peak times activities were run for members of the public. An active retirement programme and swimming lessons were provided. In addition dance classes are also held which are open to members of the public and also to students. He estimated there were some 3,000 “*non-students*” (i.e. staff members, graduates and members of the public) using the premises. In addition there were some 3,000 full student members as well as 160 who joined for a term, 80 who participated on a pay and play basis and a significant number of off-peak student users. As a result he estimated the total number of students on the books as 5,000.

Mr. Ryan accepted that he was employed by the Arena rather than UCC directly. He was of the view that UCC had something in common with local authorities who arranged for persons working in similar institutions to be engaged by separate companies rather than directly by the local authority; this he said was because of what he described as the “*prohibitive*” cost for the local authority (or indeed the University) of employing such persons directly.

We were also provided with various documents relating to the structure of the financing of the acquisition of the premises, the lease, sub-lease and management agreement, the Memorandum and Articles of MLUL and the put and call option agreement.

THE APPELLANT’S SUBMISSION:

Mr. O’Neill, S.C., on behalf of the Appellant, contended that sport was an integral part of education, not just college education. Even schools without sporting facilities held sports days. He accepted that not every facility provided in a University could be regarded as integral to the core purpose of the University. However in his view sport was separate and distinct from other what might be termed “*non-educational*” facilities. The present and future facilities in the Arena and activities which took place there demonstrated the significant role played by sport in the life of the University.

We were referred to the provisions of the Universities Act, 1997. Section 12 obliges the University to include in its objects the promotion of “*the cultural and social life of society, while fostering and respecting the diversity of the University’s traditions*”. Section 13 expressly permits the University to, inter alia, establish such corporations as it thinks fit for the purpose of promoting or assisting the University and to collaborate with various interests in the State to further the objects of the University. Chapter 8 of the Act sets out various requirements imposed on a University in relation to finances. It is clear from an examination of this chapter that the University is obliged to submit statements of proposed expenditure to the HEA. The University is also required to keep accounts and records which may be audited by the Comptroller and Auditor General and submitted to the Minister for Education and Science (and thereafter laid before the Oireachtas). While the University is entitled to determine its level of fees this may be reviewed by the HEA. The University is also obliged to report on its activities to the Minister on an annual basis.

Mr. O’Neill submitted that the 1997 Act made it clear that the financial lifeblood of the University came from government through the HEA. In his view the University was in effect a (financially) State-controlled institution and so the activities are carried out in effect as directed by the State.

Mr. O’Neill then opened a series of authorities.

In his submission the rateable occupier is in effect UCC. He referred us to the decision in **Port of Cork Company –v- Commissioner of Valuation**¹. In that case the Port of Cork which had originally been exempt from rates had become vested in the Appellant company pursuant to a section of the Harbours Act. In that case Kearns J (whose Judgment was upheld on appeal by the Supreme Court) stated²:

“However as the decision in Plassey Trust Company Limited –v- Commissioner of Valuation makes clear, the fact that ownership vests in those managing the hereditament by way of a private company is not the decisive test. The real test, it seems to me, is to determine if alterations to the structure and management of the undertaking, whether intended for commercial purposes (a concept not necessarily inimical to “public purposes”) or otherwise, introduce the reality or potential for private gain or private profit, which is the essential leitmotif of rateability. This is a test of function, rather than administrative nomenclature.”

Mr. O’Neill submitted that similar circumstances applied in the instant case. The nature of the facility was the same whether it was operated directly by UCC or by a wholly owned subsidiary of the college. The aim of the facility was to break even; in the event of it making any profits these profits had to be put into a reserve fund. There was thus no question of private gain or private profit. One could not close one’s eyes to the fact that the company in question was wholly owned by UCC. In addition the management company was inextricably linked to UCC. There were clear management and reporting structures which linked it to UCC. Mr. O’Neill also referred to the **Plassey Trust Company – VA89/0/112-127** determination of the Valuation Tribunal of the 29th January 1990 and the Judgment of O’Caoimh J in **University College Cork –v- Commissioner of Valuation**³. In both cases the fact that the hereditament was owned by a private company or trustees did not operate to deprive the hereditament of the benefit of exemption on that basis.

Mr. O’Neill also referred to Section 63 of the Poor Relief (Ireland) Act, 1838 which is the principal ground on which his client’s claim for exemption is based. This provides as follows:

¹ 2002 4 IR Page 119

² Page 131

³ Unreported High Court 29th July 2004

“Provided also, that no church, chapel, or other building exclusively dedicated to religious worship or exclusively used for the education of the poor, nor any burial ground or cemetery, nor any infirmary, hospital, charity school, or other building used exclusively for charitable purposes, nor any building, land, or hereditaments dedicated to or used for public purposes, shall be rateable, except where any private, profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated as an occupier accordingly to the annual value of such profit or use.”

Mr. O’Neill submitted that the Arena was properly described as a building, land or hereditament *“dedicated to or used for public purposes”*.

In his view the Judgment of O’Caoimh J in **University College Cork –v- Commissioner of Valuation** is distinguishable for a number of reasons. The part played by sport in University life is entirely different in his submission to the part played by, for example, a crèche or a travel agent. Sport is an integrated part of the thinking and planning of the University.

Further the issue is not whether the services can be obtained elsewhere. One may wish to utilise a library outside of university but one could not argue in his submission that a library was part of the core activity of the University. Similar principles apply to dining halls. Alternative availability of facilities or resources therefore cannot be the test. In his submission sport played a major part in the thinking of UCC as to how it was to provide its various services. There is a dedicated Department of Physical Education. Bursaries and scholarships are provided to students of sporting ability. A Degree in Physical Education has been proposed. Sport is and always has been an integral part of UCC. In Mr. O’Neill’s submission the fact that some students do not use it is irrelevant; they may or may not use available dining facilities or indeed the library but that does not make the service provided any less a part of the College. In his submission the evidence suggests that UCC has actively encouraged and continues to encourage provision of the sports bursary and the scholarships. Indeed the Arena has been earmarked for delivery of an actual College degree in due course. In his submission whether one took a broad or a narrow approach to the nature and concept of education (and indeed the idea of a University), on the facts in this case the services provided by the Arena comfortably fall within the principal services provided by the University in its capacity as University.

Mr. O'Neill also referred the Tribunal to **Letterkenny RTC –v- Commissioner of Valuation⁴ - VA94/3/057-062** and **University of Limerick –v- Commissioner of Valuation⁵- VA95/5/010-014**. Insofar as ownership was concerned he reiterated that the decision in **Plassey Trust Company Limited –v- Commissioner of Valuation⁶** not only had not been expressly overruled by O’Caoimh in **University College Cork –v- Commissioner of Valuation** but had been actively approved of by Kearns J in **Port of Cork –v- Commissioner of Valuation⁷**. In his view the structure in question (being the Arena) does not introduce the reality or potential for private gain or private profit which is the essential element of rateability. However it is clearly integrated into the activities of the University as a whole.

THE RESPONDENT’S SUBMISSION:

On behalf of the Respondent Mr. Devlin, BL, first dealt with the issue of occupation. He noted the corporate structure in relation to ownership and occupation. While accepting that this does not of itself mean that the Arena cannot be exempted from rates, he observed that it was not without significance that the Arena was held at “*arms length*” from the UCC. Further it did not employ UCC employees. He noted that the management agreement does not envisage exclusive use for UCC but that non-students will also be involved.

He also commented on the **Port of Cork** decision. In that case the company in question was owned by Ministers who were accountable ultimately to the Dáil. Its ownership likewise was regulated by statute. Neither situation applied in the instant case, however, in his submission. In his view therefore there are a number of issues arising in relation to the question of ownership and the position was far from clear-cut.

Mr. Devlin next dealt with the concept of public purposes. In his submission the test set out in Section 63 is whether the property in question is used exclusively for public purposes. He contended that where the membership appeared to be five eighths students and three eighths non-students one could not say that the property was used exclusively for the public purpose of the University. A partial use for the public purpose (of maintaining a University) was insufficient. Further the use by members of the public of the Arena’s facilities did not mean

⁴ Judgment of Valuation Tribunal dated 25th August 1995

⁵ Valuation Decision 2nd June 1998

⁶ Judgment of Valuation Tribunal 29th January 1990

that this was of itself a use for public purposes. Such public users were not using it as a service provided by a University; rather they were using it as an amenity. Thus the “*public purpose*” of maintaining a University was significantly diluted by the user here of the facilities in question by the public.

While not contending that a very small usage of the facilities in question by members of the public would be fatal to a claim for exemption, Mr. Devlin submitted that here the percentage of public users seemed to be sufficiently significant to be outside of the requirement of “*exclusive use*” laid down under Section 63. In this regard he referred to the earlier decisions in cases such as **Cork Corporation –v- Commissioner of Valuation**⁸ which indicated that sporting facilities are not generally regarded as coming within “public purposes”.

Mr. Devlin also contended that there was no evidence from any educationalist as to the role of sport in UCC. In his submission therefore the Tribunal should not assume that sport was an integral part of the University’s life despite submissions to this effect. He pointed to the provisions of the Universities Act, 1997 which had been quoted. He noted that Section 12(c) directed the promotion of cultural and social life but expressed the opinion that not all sport is of itself cultural or social. The absence of a specific reference in the Act to the promotion of sport as an object or a function of the University was notable in his submission.

Referring to his written submission he contended that the subvention by the University of a particular building cannot of itself mean that the building in question is used “*exclusively for public purposes*” per se. In his view it would not be proper for the Tribunal to consider the proposed future subvention in relation to equipment. Further, even though the Arena was generating money and even though that money might be applied for charitable or public purposes, that is not sufficient to entitle the hereditaments used to generate such funds to exemption. In his submission therefore the fact that members of the public by paying funds to use the Arena were contributing to the public purpose of running the facility as part of the University ran counter to the analysis contained in the Judgment of O’Caoimh J in **University College Cork –v- Commissioner of Valuation**. Further, in his submission if there is a partial use of the subject premises for purposes which are not of a public character then it cannot be said that the building in question is used for public purposes. Indeed the

⁷ Judgment of Valuation Tribunal 29th January 1990.

fact that a premises is operating at a loss is not of itself sufficient to exempt the premises from rates.

Emphasising the observations of O’Caoimh J in University College Cork –v- Commissioner of Valuation he submitted that the building in question is not now and never was used exclusively by or for the benefit of students and therefore could not be regarded as being used exclusively for public purposes. However even if the premises were used solely and exclusively by students, the issue was whether sport would be properly regarded as a core activity of the University.

THE APPELLANT’S REPLY:

On behalf of the Appellant Mr. O’Neill submitted that the question of exclusive use was really a question of degree. In his submission what was important was the use by the membership. The evidence submitted that even if the break-down of membership was five eighths/three eighths between students and non-students it was clear that the majority of the use of the premises was by students or by sports clubs. The Arena is used during the college year by sports clubs. The office areas are used by the Department of Sport and Physical Education.

Further he contended that the use of the premises by members of the public was to enable the facilities to be used and maintained for the public purpose of maintaining and running a University. In this way he said the use by the public (which he contended was not as significant as suggested by Mr. Devlin) necessarily facilitated and promoted the public purpose of the running of the University of which sport was one of the core activities.

So far as the place of sport in the College was concerned in his view Ms. Goggin had dealt in detail with the ethos of the College and how sport fitted into that ethos.

In relation to the provisions of the Universities Act, 1997, he submitted that the Act was wide enough to allow sport to be included within the core activities of the College as an educational as well as recreational facility. In his view the fact that a Degree course was even

⁸ [1916] 2 IR 77

in the pipeline at the time the rating issue arose was of significance in showing the College's thinking on the integration of sport within the College's academic as well as general life.

Mr. O'Neill submitted that there could be no doubt but that the provision of the facility in question was clearly and manifestly within the objects of the University.

Mr. O'Neill in conclusion dealt with the submission in relation to profitability and subvention. In his submission it was of considerable significance that the land on which the Arena was built had been provided by the College. In addition donations provided by the College had helped to build it. Further a levy on students of the College had funded and continued to fund the Arena. The issue of profitability had never been put in issue during the hearing. It was clear beyond doubt that the Arena had never operated in profit and indeed its aim was only to break even. In his submission the only justification for running the unit on this basis was that the Arena formed an integral part of the College's core activities and was in the circumstances part of the facilities maintained for the public purposes of running a University.

THE LAW:

It may be helpful if we consider some matters raised under the following headings:

(i) **Occupation:**

In our view the Arena is de facto occupied by the University. We note the corporate structure established to occupy and run the Arena; we note also that the employees are not directly employees of the University. Nevertheless it seems that the decision of this Tribunal in **Plassey Trust Company Limited** and the decision of the Supreme Court in the **Port of Cork** case make it clear that we can and should look behind the corporate structures to see if the model adopted is adopted in such a way as to provide for private gain or private profit. There does not appear to be any question of a profit being made; indeed it is unclear whether a profit ever could be made given the way in which the Arena seems to require continuing ongoing financial support from the University in order simply to survive. We have been told that the financial aim of the Arena was to break even though it has not achieved this.

It also seems to us that the corporate structure makes it clear that the organisation and management of the Arena is an integral part of university. The involvement of the University personnel in the Board of Management and Board of Directors indicates that there is ongoing involvement of UCC personnel in the running of the Arena. We are therefore of the view that the corporate structure to manage and administer the Arena does not prevent the Arena being eligible for exemption having regard in particular to the fact that there appears to be no private profit derived therefrom.

(ii) **Public purposes:**

The public purposes test was examined in **University College Cork –v- Commissioner of Valuation**⁹. In that case the issue addressed was whether the foundation and user of University College Cork satisfied the public purposes test for exemption from rates. The Court held that the public purposes test was satisfied. Wright expressed the view (at page 630):

*“Let me shortly recapitulate the main facts as to the constitution and character of University College Cork. It is a college created by public statute and royal charter, dedicated to a public purpose, if ever there was one to which that phrase could be rightly applied, namely, the advancement of learning in Ireland among all classes, it is a non-sectarian college open to all classes ..., its revenue is partly public money, and partly fees earned by itself as a public teaching and training institution; and both kinds of revenue are unalterably devoted to the purposes of the College, and accounts of its annual receipts and expenditure must be laid before Parliament. On these facts, and in accordance with the decided cases, and in particularly with the decision of this Court in **The Pembroke Technical School** case¹⁰, I am of the opinion that the buildings and premises of University College, Cork are altogether of a public nature and used for public purposes ...”*

⁹ [1911] 2 IR 593

¹⁰ [1904] 2 IR 429

In his Judgment in **University College Cork –v- Commissioner of Valuation**¹¹ O’Caoimh J took the view that a crèche, student centre and a combination of shops were not entitled to exemption. The essential issue relates to the nature of the use of the subject premises together with the occupation thereof. As O’Caoimh J pointed out, it may be that the nature of the user of the property even if situated on a University campus may be such as to fall outside the scope of the University and its public purposes.

It seems to us however that the Arena should be viewed in a different light to the manner in which the crèche, student centre and shops were considered in the **University College Cork –v- Commissioner of Valuation** case. We are of the view that sport is and has been at all stages a significant part of the life and culture of UCC. It is clear that at the relevant time the University was providing bursaries and scholarships to gifted sportsmen and women to attend the University. Facilities provided in the Arena are in constant demand by the students of the University. In addition the various sports societies and clubs within the University appear to be administered from the Arena. Further, the Department of Physical Education of the University is also based in the Arena.

The argument is advanced that the provision of sports facilities within the University does not of itself fulfil the public purpose of the University since, for example, sports facilities would be available outside of the University campus which students could avail of if they so wished. One could of course say the same of eating facilities or indeed libraries. In our view the provision of the facilities offered by the Arena is not just desirable socially; it is a concrete embodiment of the integral importance which the University attaches to sport as part of the rich cultural life of the University. The evidence of Ms. Goggin and Mr. Ryan satisfies us that the sport and sporting activities are an integral part of college life rather than simply a useful or desirable facility (such as for example a crèche, licensed premises or travel shop). Nor in our view does the provision of the facilities offered by the arena simply confer upon staff and student users benefits additional or ancillary to the core activities of University. In our view the evidence establishes that the various sports activities which take place in

¹¹ High Court 29th July 2004 (unreported) O’Caoimh J

and are administered from the Arena are part of the core activities of the University not simply because the University provides bursaries to sportsmen and women who study there (and will in a short time provide a degree course in sports education) but also because of the long-established and well-recognised role of sport in the educational and cultural life of the University.

We are therefore of the view that insofar as the Arena provides sports facilities and/or administration for sports facilities and sports clubs as well as being the location of the Department of Education within the University it can reasonably be said to be used for the public purpose of providing and maintaining a University.

(iii) **Exclusive Use:**

Mr. Devlin has argued with some force that the Arena is not operated exclusively for the provision of sports facilities to staff and students of the University and therefore it cannot be said to be devoted exclusively to the public purpose of providing and maintaining a University. He points to the fact that some three eighths of the members are non-students. In his submission the number of public as opposed to student users and the amount of time during which the premises is open to the general public as opposed to staff or students means that the premises cannot be regarded as being exclusively used for the purpose of providing and maintaining a University.

The counter argument put by the University is that the concept of “exclusive” use is really a question of degree. Further it is submitted that usage by the public is permitted in order to enable the facilities to be maintained so that they can be utilised by staff and students for the public purpose of the University. In other words, the premises are open in a limited way to use by members of the public because the fees received from members of the public are utilised in providing a form of funding to the Arena in order to allow the Arena to maintain on offer its facilities to the staff and student body.¹²

¹² The position here is thus distinguishable from the situation in **Cork Corporation –v- Commissioner of Valuation [1916] 2 IR 77** which concerned swimming baths erected by Cork Corporation under the provisions of the baths and wash houses. The baths were maintained at the expense of the borough fund and all receipts from them were paid into the borough fund. Expenditure exceeded receipts. Only members of the public who complied with the specific bye-laws were permitted to use the baths no matter where any such member resided.

It seems to us that the way to look at this issue is to consider whether or not the use of the Arena by members of the general public constitutes a user for the purpose of private profit or use; if this use of the building does amount to a user for the purpose of private profit or use then the premises in question cannot be exempted from rating.

It seems to us that it is important to look firstly at the actual use made of the Arena by the general public; it is also important to look at what happens to funds paid by members of the general public. The evidence suggests that the general public are permitted to use the premises primarily during what might be regarded as “off-peak” times. The point is made that the fact that a person is a member of the Arena does not necessarily mean that he/she uses the Arena. The evidence of Mr. Ryan is that far fewer students drop out of active membership of the Arena than do public members. Further his evidence suggests that in addition to the 5,000 registered students on the books of the Arena, up to 2,000 students also use the premises through membership of their various sports clubs.

It seems to us that the facilities offered to the general public are offered to complement those facilities offered to the student body. It does appear that priority is given to University student members and users over the general public. It could be said that it would be short-sighted and possibly even churlish for the Arena to close its doors when students are not using the facility, thereby depriving members of the public from availing of what appear to be highly desirable facilities. Undoubtedly the use of the Arena by student members drops off between June and August but it seems to us that the same could be said of many, if not most, facilities offered by a University, e.g. the dining hall within the University which would not of itself deprive the University of its “public purpose” characteristic¹³.

So we are of the view that the limited off-peak use of the facilities by members of the public which is significantly smaller than the membership and usage amongst students of the University does not and should not operate to dilute or destroy the essential

The Court of Appeal concluded that the baths in question were not hereditaments of a public nature and were not used for public purposes so as to be exempt from the poor rate.

¹³ The same might also be said of libraries within the University.

purpose of the Arena in providing sporting facilities and administration as part of the core life of the University.

(iv) **Private Profit or Gain:**

It is also significant in our view to examine what happens to the funds received by the Arena from members of the public who use the facilities. Unlike, for example, the travel shop in **University College Cork –v- Commissioner of Valuation** it does not appear to us that the Arena is a commercial enterprise effectively operating on a stand-alone basis. Perhaps more significantly, the financial arrangements relating to income and expenditure in the Arena have been the subject of detailed evidence before us. It seems clear that the majority of the funding comes from the State through the University to the Arena. It was intended that the premises would operate on a break-even basis and that any surplus income would be put into a sinking fund which would be utilised to purchase equipment for the Arena. However this has not materialised and appears unlikely to occur in the foreseeable future. It appears that it will be necessary for the Arena to ask UCC for a capital grant to upgrade its equipment. It also seems clear that the accounts of the Arena containing as they do the funding from the University obtained originally from the State are accounts which are covered by the Universities Act, 1997 as accounts which are to be audited by the Comptroller and Auditor General and submitted to the Minister for Education in order to be laid before the Oireachtas (see Section 39 of the said Act).

In the circumstances therefore it appears to us that the user in question by members of the public does not constitute a use for private profit or gain. However the use in question is complimentary to and in furtherance of what we are satisfied is the significantly predominant use by students of the facilities in question. We note the comments made by O’Caoimh J (at page 53 of the unreported Judgment) that it cannot be stated conclusively that the subvention by the University over a particular building renders the same to be used for public purposes per se. We respectfully agree.

We note also his observation that the payment of a fee is not of itself determinative of the issue in this regard. O’Caoimh J indicated that he was prepared to accept that receipt of fees may not be such as to disentitle a particular hereditament to exemption.

In our view the acceptance by the Arena of fees from members of the general public in the circumstances set out above does not of itself operate to deprive the Arena of an entitlement to be considered for exemption from rating. Further it is clear to us that the limited usage made by members of the public could not possibly be said to be of value beyond what is required to maintain the property; indeed the evidence appears to suggest that the user in question cannot be regarded as being even sufficient to maintain the property in question, never mind of a value in excess of this requirement.

In the circumstances therefore we are of the view that the usage of the premises is properly regarded as being exclusively for public purposes other than for private profit and is therefore entitled to exemption having regard to the provisions of Section 63 of the Poor Relief (Ireland) Act, 1838.

DETERMINATION:

The Tribunal determines that the Appellant is entitled to exemption from rating having regard to the provisions of Section 63 of the Poor Relief (Ireland) Act, 1838.