Appeal No. VA07/1/010

**AN BINSE LUACHÁLA**

**VALUATION TRIBUNAL**

**AN tACHT LUACHÁLA, 2001**

**VALUATION ACT, 2001**

**Benildus Health & Fitness Club Ltd.** **APPELLANT**

**and**

**Commissioner of Valuation** **RESPONDENT**

RE: Sports Centre at Lot No. Pt 6B/1, Balally, Stillorgan Kilmacud, Stillorgan, County Dublin

B E F O R E

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| **John O'Donnell - Senior Counsel** | **Chairperson** |
| **Joseph Murray - B.L.** | **Member** |
| **Michael F. Lyng - Valuer** | **Member** |

**JUDGMENT OF THE VALUATION TRIBUNAL**
**ISSUED ON THE 2ND DAY OF JULY, 2007**

By Notice of Appeal dated the 16th day of March, 2007 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €225.00 on the above described relevant property.

The Grounds of Appeal are as set out in the Notice of Appeal, a copy of which is attached at the Appendix to this judgment.

The appeal proceeded by way of an oral hearing held on the 14th day of May, 2007 at the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7. At the hearing the appellant was represented by Mr. Owen Hickey, BL, instructed by Cathal N. Young, O'Reilly & Co. Solicitors and Ms. Dawn Holland of GVA Donal O Buachalla. The Principal of St. Benildus College, Mr. Sean Mulvihill, gave evidence on behalf of the appellant. The respondent was represented by Mr. James Devlin, BL, instructed by the Chief State Solicitor's Office. Mr. John Smiley, Valuer with the Valuation Office, also attended.

**THE APPELLANT'S CASE:**

Mr. Hickey, having opened the case, called Mr. Sean Mulvhill who is Principal of St. Benildus College and has been in the school for some ten years. The premises in question is a fitness club on school grounds. It was built between 1983 and 1984. It was funded through a variety of school funds and built by ANCO-funded labour and not by the Department of Education. Trustees were set up in order to administer the premises. Two squash courts were not being used (they were instead being used for weight-training by teachers). The Board of Management decided to ensure that the premises were used for the purposes of education.

Previously the premises had never been rated since it was part of the school complex and so was not rateable. S.P. Sports, the entity which sold sports equipment to the school, suggested that the premises in question be converted to a gymnasium. The idea was that the premises would be set up as a school gymnasium but that it would facilitate some private members also. While the Board of Management could not lease out the premises it was agreed that the Board of Management would licence S.P. Sports Management Ltd. in order to manage the premises.

The premises was set up and run this way for three years. It was agreed that any profit made would be split 50/50 between S.P. Sports Management Ltd. and the school. The school had limited access to the gymnasium.

The company failed to make a profit and indeed cumulated losses of some €580,000. As a result it sought to pull out of the project in 2005. The school then had the following options:

(a) It could leave the premises empty and close it down.
(b) It could keep the premises as an exclusively school facility.

(c) The school could take over the premises and run it as a gymnasium itself for the benefit of the college.

The Trustees were asked to sanction this third option. The sports management company agreed to sell the entirety of the equipment for €65,000 which would be paid at a rate of €5,000 per month for 13 months by the school. The school agreed to try to run the premises for one year to see if it could break even. However the premises was not set up to make a profit.

It was decided to set up a company in order to run the facility in question. This was done at the behest of an accountant advising the Board of Management. This company has made a small loss to date (€3,300). Mr. Mulvihill was of the view that the company could not afford to pay the rates of €15,000 and there was no contingency fund to meet this.

The personnel behind the company are all members of the Board of Management of the school. The secretary of the company is Mr. Mulvihill, who is also secretary to the Board of Management. The Board of Management believed in setting up a company on a not-for-profit basis that it would be exempt from rates.

Dealing with the day-to-day usage of the facility Mr. Mulvihill said that all of the three physical education teachers had keys to the premises. Mr. Mulvihill also has a key. The Deputy Principal and another sports teacher also each had a key.

A person is paid to manage the facility; he is paid an annual salary of €30,000. There are four full-time staff. They meet every two weeks with the representatives of the Board of Management to report on what is happening, what work needs to be done, what equipment needs replacing and other related matters.

While the premises is used daily by the school the school is be obliged to telephone the centre in question before using it. While various teams belonging to the school train there at lunchtime there could be anything from 25-30 students from the school using it at any one time for classes. Each member of the staff (of 55) and each student (of a total of 720) is deemed to be a member without being required to pay a membership fee of the centre during school hours.

The centre in question has a total membership of 740 personnel. This includes staff but does not include students. The membership fee is between €100-400 per annum, depending on the category of membership.

Mr. Mulvihill was of the view that the De Le Salle Brothers as Trustees owned the property and could close it "*in the morning*". The Board of Management could also close it though they would be obliged to seek the sanction of the Trustees to do so. Curiously, there is no written document between the college and the company regulating their relationship. Were the Board of Management to decide to close the premises they would be obliged to give staff and members one month's notice. Mr. Mulvihill remained of the view that he would not be able to run the facility without setting up the company which is used as the vehicle to run the premises. For insurance purposes it is believed that they need somebody full-time on the premises and that is why a manager is employed to manage the facility.

In cross-examination Mr. Mulvihill did not accept that the company ran the premises as a recreation facility. In his view it was run on a not-for-profit basis. In response to the suggestion that the premises were not used <u>exclusively</u> for educational purposes he believed that the premises were at all times being used to teach people how to keep fit as well as the importance of keeping fit. In his view, parents of pupils in the school would probably far prefer if the money used to pay the salary of the manager was used for direct educational facilities if that were possible but, unfortunately, this was not the case. He accepted that the company was a separate entity from the Brothers and was set up on accounting advice. It was set up in order to exempt the facility from VAT. He accepted also that on the face of it the non-school members, (i.e. 740 less 55 staff) appeared to be 695. The premises is open from 8.00am to 9.00pm Monday to Friday and from 9.00am to 6.00pm or 7.00pm at weekends. He accepted that there was a one-storey sports hall beside this premises which did not have a manager. While he accepted that the premises could be used by non-students he asserted that the school Chess club could also be used by non-students. In addition past pupils used the Computer Room and also from time to time the Soccer Club. Additionally, locals also participate in these activities. The Residents' Association used the school library and the local GAA also used the facilities. He asserted that every specialist area including this centre is the responsibility of one of the Assistant Principals.

In response to questions by the Tribunal he claimed that students always got priority. A student wishing to use the premises after 4.00pm would have to have a teacher with him. He asserted that some members did not like to use the premises because they did not like to be there while students were using it. If a pupil was to use the premises after school hours and was not accompanied by a teacher he would have to join separately as a member. In answer to a query from the Tribunal as to why a teacher could not be in charge of the premises during school hours, Mr. Mulvihill asserted that he would not allow a physical education teacher to supervise weights and other such functions which in his view might be too specialised.

The respondent did not call evidence.

**THE APPELLANT'S SUBMISSIONS:**

On behalf of the appellant Mr. Hickey contended that there was no doubt but that he had a right to appeal. He referred to the decision in **VA04/1/075 - UCD Student Centre Ltd**. It was a centre owned by a special purpose company. Here in his submission the college is in paramount occupancy of the centre. He referred to Section 30(1)(d) of the Valuation Act, 2001. He contended that the college had an interest in the property. In his submission the company in question was a permissive occupier.

We were referred to the decision of the High Court in **Carroll v Mayo County Council [1967] IR 364**. This decision makes it clear that what matters is the de facto occupation. Occupation in this sense means entitlement to immediate use and enjoyment of the premises. In his submission to all intents and purposes the college was the occupier of the premises. The existence of no written instrument was evidence of it. The Board of Management are directors of the company. The degree of control exercised by the college was a clear indicator of whose occupation was paramount; he submitted this was clear from the UCD decision referred to above. In the instant case the degree of control by the school over the club is total. We were also referred to **VA97/2/002 - Marine Terminals Ltd.** and **VA99/4/004 – Ms. Helen O'Donnell (The Hunt Museum Ltd.)**.

That staff members can enter and use the premises with classes when they wish was, in his submission, of significance. The students were also entitled to attend after 4.00pm with teachers. Control in this context meant control as to the use of the premises. The

establishment of the company was simply a device; the reality was that the school was in paramount occupation of the premises.

Mr. Hickey also referred to Schedule 4, paragraph 10 of the Act. In his submission if the school was deemed to be in paramount occupation it was in occupation for the purposes of Schedule 4, paragraph 10. In his submission physical education is part of the general educational facilities. The fact that physical education may have a recreational element is not a bar to its being part of an educational programme; nor is the fact that staff are paid in order to manage the facility in question. He noted that Mr. Devlin appeared to accept in his submission that sport may be part of an overall scheme of education when used by students – though not when the facility is open to the public. Mr. Hickey suggested that if, for example, the school was supplying French classes to both pupils and to members of the public the fact remained that the service provided in question was educational. In his submission the statute should be strictly interpreted. He did not accept that the usage could be characterised as being sports usage or leisure usage; rather it was used for the provision of educational services.

**THE RESPONDENT'S SUBMSISIONS:**

Dealing with the first point, Mr. Devlin made it clear that he did not say the appeal was not properly before the Tribunal. However, he noted that the application for revision made by the appellant named the company as the occupier. It should not now be allowed to substitute the occupier. They never explained why they wished to change the description of the occupier. He noted also that the objects clause of the company obliged it to carry on the business of promotion of sporting and leisure activities.

Dealing with the issue of paramountcy of occupation he said it was impossible to ignore the usage of the premises outside of school hours. He accepted that sport has a role and can form part of education but one cannot say that "*all sport is therefore educational and so every institution that provides a sports facility is thereby an educational institution"*. He noted that Schedule 4 also provided for the exemption of outdoor sports arenas though not indoor sports arenas. In his submission where sport was being provided in its own right rather than as part of an educational scheme it was outside of the provisions of Schedule 4, paragraph 10 of the Act.

Dealing with the specific premises Mr. Devlin noted that this was the only part of the "campus" which needed its own managers and which required boys to be members. It appears to be acknowledged by the institution itself that it is run for recreational leisure (as well as for educational purposes). He accepted that where a French class was provided inside and outside school hours the activity would still be the same.

By way of response Mr. Hickey submitted that if the school was held to be in paramount occupation it should be regarded as being exempt. The school should not be prejudiced by the fact that the company is a nominal entity running the premises. He pointed to the fact that Mr. Mulvihill did not (and accepted that he did not) appear to fully understand the legal significance of the distinction. He also submitted that the use of a premises outside school hours in order to finance the running of the premises was part of the provision of education.

**THE LAW:**

There are three issues:

(i) **The entitlement of the school to appeal:**

We note the position adopted by Mr. Hickey and the generous and appropriate concession made by Mr. Devlin. It cannot be said that the appeal is not properly before the Tribunal. It is of interest that the school originally named the company as occupier but has now suggested that the school is in fact the occupier. It seems to us that the school does have sufficient *locus standi* to bring the appeal and accordingly we have jurisdiction to hear the appeal. In this regard it is our view that the school has a sufficient interest in the occupancy of the premises in accordance with the provisions of Section 30(1)(d) of the Valuation Act, 2001.

(ii) **Occupancy**:

In our view the school has a highly significant degree of control over the subject property and activities of the company. The Directors of the company were nominated by the Board of Management of the school and are members of the Board of Management. The company appears to have been set up to manage the day-to-day running of the premises on the basis of accountancy advice. We do not believe that the company has any separate distinct interest in the management or occupancy of the premises which is not that of the Board of Management of the school also. We note

that the company was set up to run the subject property and the objects of the company are the promotion of sport and leisure activities. Applying the test utilised by Henchy J in **Carroll v Mayo County Council [1967] IR 364** we believe that the school is in paramount occupation of the premises. In **Carroll –v- Mayo County Council** Henchy J quoted with approval the dictum of Lord Russell of Killowen in **Westminster Council v Southern Railway & Ors [1936] A.C. 511**:

> ""*In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement." Later (at p. 537) he said that "rateability does not depend on title to occupy, but on the fact of occupation." Lord Wright said (at p. 562) that "what is material is not necessarily the terms of the grant, but the de facto occupation which may be greater or less than the terms convey.""*

In our view the school is in paramount occupation of the premises.

(iii) **Is the premises rateable?**

The fact that the school is in paramount occupation does not of itself determine whether or not the premises is rateable. However, Schedule 4, paragraph 10 exempts from rateability "*any land, building or part of a building occupied by a school, college, university, institute of technology or any other educational institution and used exclusively by it for the provision of educational services*."

The other two tests set out in paragraph 10 require that the institution is not established for the purpose of making a private profit (and whose expenses so incurred are defrayed wholly or mainly by the Exchequer) and that the educational services provided are open to the general public.

In our view the centre in question can not be said to be used exclusively for the provision of educational services. Though education in the physical sense (and certainly during school hours) would obviously include physical education, we do not regard the usage of the premises outside of school hours as being provision of educational services. In our view outside of school hours the centre becomes a club

which people can join in order to engage in leisure and recreation activities as they see fit. It may be that there is a degree of instruction given after hours to such members on the use of weights but even if this were so (and we have no evidence of the extent of any such instruction) it does not mean that the premises are used exclusively for educational purposes. We note that the school suggests that it needs funding from the membership in order to keep the premises open. We note also however that the premises were being used in the past for weight-training by teachers who trained boys there. In such circumstances the need to employ a manager of the unit for €30,000 per annum as well as other full-time staff who were unconnected with the school was not immediately apparent. While it is hard not to have sympathy for the school, we are precluded from considering inability to pay as a basis on which rateability can be avoided.

**DETERMINATION**

The Tribunal has jurisdiction to hear and determine the appeal in question. Both the school and the limited company are in occupation of the premises but as the school is in paramount occupation it is the occupier for the purposes of the Act. The premises in question are not used exclusively by the school for the provision of educational services and in the circumstances are not exempt from rateability under Schedule 4, paragraph 10.

And the Tribunal so determines.