

Appeal No. VA92/1/008

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 1988
VALUATION ACT, 1988

Royal Hospital Kilmainham Company

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Portion thereof comprising Master's Quarters, Great Hall and Chapel and Basement containing Restaurant and Kitchens Lot No. In 1 Military Road, Ushers Ward, County Borough of Dublin

Exemption - Public purposes

B E F O R E

Mary Devins

Solicitor (Acting Chairman)

Brian O'Farrell

Valuer

Veronica Gates

Barrister

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 6TH DAY OF JULY, 1992

By notice of appeal dated the 29th day of January, 1992, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £460 on the above described hereditament.

The grounds of appeal as set out in the Notice of Appeal are that:-

- (1) The occupation of the subject premises is occupation by An Bru Rioga Cill Mhaighneann The Royal Hospital Kilmainham Company (hereinafter referred to as "the company"), a company limited by guarantee, established by the

Government, on behalf of the Government and as such the premises are not rateable as they must be considered to be in the occupation of the Government. Furthermore the subject premises are occupied for public purposes and for the purposes of the Government and are accordingly not rateable.

- (2) Without prejudice to the foregoing, it is submitted that the subject premises are occupied for the public purposes and are exempt having regard to the proviso to Section 63 of the Poor Relief (Ireland) Act of 1838.
- (3) The Commissioner of Valuation has failed to have proper regard to the true nature of the occupation and use of the subject premises.
- (4) The entire of the premises comprise the National Museum of Modern Art and are of a nature and subject to such use as is entitled to be distinguished as exempt in the valuation list.
- (5) The subject premises does not constitute a "rateable hereditament".

Written Submissions:

A written summary of evidence to be given on behalf of the Appellant was submitted on 30th March, 1992 from Martin E. Marren & Company, Solicitors. In this precis it is stated that the appellant is a company limited by guarantee and a copy of the Memorandum and Articles of Association were attached. He said that the company was established by the Government and incorporated on the 18th April, 1985. The precis stated that it is to be noted that the Appellant is not the owner of the premises but is charged with carrying out certain activities there on behalf of the Government. He said that the property is formally vested in the Minister for Finance. The precis outlines the main and subsidiary objects as set out in the Memorandum of Association for the Company. Particular reference is made to objects A and B and to subsidiary objects A, B, F, G, H, and K at paragraph 3 of the Memorandum of Association. Reference is made to clauses 4, 5 and 9 of the Memorandum. The articles 2, 18, 19, 20, 21, 28, 44, 45 and 49 of the Articles of Association are also referred to. The precis summarises the recent history of the subject premises and its valuation history. It says that the appeal is confined to the issue exemption of the Royal Hospital Kilmainham and in particular the North wing in circumstances where the remainder of the premises has been conceded by the Commissioner of Valuation to be entitled to be distinguished as exempt in

the valuation lists. He says that the premises were at all times distinguished as exempt in the valuation lists until 1989 when on annual revision the exemption was withdrawn in relation to part of the premises with the result that the valuation of the premises in respect of which exemption was withdrawn was £950. At first appeal as issued in January 1992 the valuation was altered to £460 active and £70 exempt. He says that the premises in issue in this appeal are in what is known as the North Range or North Wing and include the Master's Quarters, Baroque Chapel and Great Hall. The premises constitute part of the Irish Museum of Modern Art and are open to public view on Sundays and during the months of July and August. He said that besides being used to house works of art the premises are used for certain dinners, lunches, State functions, occasional concerts, certain seminars and receptions. He said that the property constitutes a State Museum. He said that the use of the premises is subject at all times to Government control and the premises must be made available, when required, to the Government for special purposes. The premises have been used to promote the National Lottery (established by Act of the Oireachtas in 1986). He outlined the concerts in the period May to September 1991 and said that the number of concerts promoted by the Appellant in any one year will normally be about four and the use of the premises for the promotion of these concerts does not result in any profit to the company but represents commitment to the Arts. He said that galleries such as the Hugh Lane Gallery and the National Gallery are also used for occasional concerts and The Malahide Castle is also used for banqueting facilities such as are available at the subject premises and are not such as to deprive same from their entitlement to exemptions. He said that the entire of the premises (including that portion in respect of which exemption has already been granted) is under the management of the single Board. All of the activities are complementary to its function as a non-profit, cultural institution. All profits that are realised on the catering side of the business are all channelled back into the Arts programme. The precis said that there is no separate commercial activity operating out of the premises. The National Gallery, Dublin Castle, The Hugh Lane Gallery, The National Museum and Malahide Castle all of which are distinguished exempt in the valuation lists pursuant to the proviso of Section 2 of the Valuation Act, 1854 were all offered as comparisons.

A written submission was received on the 30th March, 1992 from Mr. Noel Lyons, B. Comm, a District Valuer in the Valuation Office on behalf of the Respondent. In this Mr. Lyons outlined the valuation history of the subject premises and commented on the grounds of appeal. Mr. Lyons said that the appeal referred only to that part of the Royal Hospital consisting of the North Range, the basement under the West Range and part of the ground

floor on the East Range which was handed over by the State to the Royal Hospital Kilmainham Company on its formation. Mr. Lyons said that the building is unique. He said that it is over 300 years old and built in a very ornate style. Mr. Lyons said that the restoration work cost £21 million on the main building and an additional £1.1 million was spent in conversion on the gallery section. He said that because of its design and age there is a high rate of obsolescence although at the same time the unique design provides a special marketable quality. Mr. Lyons outlined the Rateable Valuation of the premises as follows:-

- (a) Estimate of Net Annual Value on Great Hall, Chapel, Master's House and basement under = £73,000
R.V. = Estimate of N.A.V. £73,000 x .63% = say £460.00 Rateable
- (b) Estimate of Net Annual Value on part of Ground Floor of East wing = £11,000
R.V. = Estimate of N.A.V. £11,000 x 0.63% = say £70.00 exempt.

Mr. Lyons provided the following comparisons for rateability:-

- (1) The National Concert Hall - R.V. £1,100 (Rateable).
- (2) The Abbey Theatre - occupiers - The National Theatre Society Limited - R.V. £750 (Rateable).
- (3) The Peacock Theatre - occupiers - The National Theatre Society Limited - R.V. £75 (Rateable).

A document entitled Government Involvement in the Royal Hospital Kilmainham was submitted by Mr. Patrick Buckley on behalf of the Appellant. This document outlined the legislative role for involvement in the Arts, Government priorities in relation to development of the Arts, the Arts Council, Aosdana, heritage and a paragraph on the Royal Hospital/Irish Museum of Modern Art.

Oral Hearing:

At the Oral Hearing which took place in Dublin on 3rd April, 1992 and on the 18th May, 1992, the Appellant was represented by Mr. Aindrias O'Caomh, B.L., instructed by Messrs. Martin E. Marren & Company, Solicitors. Mr. Hugh O'Neill, B.L., instructed by the Chief State Solicitor, appeared on behalf of the Respondent.

Also present were Mr. Declan Mc Gonigle, Director of the Irish Museum of Modern Art, Mr. Frank Brennan, Company Secretary, Mr. John Coleman and Mr. Pat Buckley of the Department of the Taoiseach, Mr. John Mc Mahon of the O.P.W., Mr. Noel Lyons and Mr. Patrick Whelan of the Valuation Office.

Mr. Mc Gonigle gave evidence that he had been Director of the Museum since 1990 and that his position as Director encompassed the entire premises of the Royal Hospital, Kilmainham. He detailed the historical importance of the building, explaining that its restoration between 1980 and 1984 had made it one of the best examples of 17th century architecture. He instanced the burial grounds as being the oldest in Dublin and the unique ceiling and oak panelling in the Chapel.

Mr. Mc Gonigle stated that the North Range of the building had to be available for State activities, e.g. receptions for visiting Royalty and meetings and dinners of various Government Departments. He explained that the core activity of this part of the premises was in the field of the visual arts but that this had to be placed in the context of overall artistic interests. Several groups, for example, used the centre for concerts, with the company itself promoting only a small number of these.

In reply to cross-examination by Mr. O'Neill, Mr. Mc Gonigle said that the company did not hold the premises under a lease and that there was no rent passing. He agreed that while the actual Museum of Modern Art was open to the public free of charge, a charge was levied for the guided tours of the North Wing. He did say, however, that these charges barely covered the cost of the guides. In relation to the income raised from concerts and conferences, Mr. Mc Gonigle explained that there was a requirement on the company to produce income to defray expenses and that like other museums, the company had to top up its Government subvention.

Mr. Frank Brennan, in evidence, said that he had been Company Secretary for the last two years and that he had been involved in the preparation of the accounts which were appended to the written submission of the Appellant dated the 30th March, 1992. He explained that the figure of £100,000 shown in the accounts under rent/rates, actually related to service charge and water rates paid to the O.P.W. and Local Government. That service charge was a contribution towards the cost of work carried out by the O.P.W. on behalf of the company.

Mr. Brennan stated that the Appellant company was not the owner of the subject property but that the property was formally vested in the Minister for Finance. He explained that the entire premises were one entity run by one company, the Appellant, and maintained by public monies and Government funds. The entire board is appointed by the Taoiseach and the accounts are submitted to the Comptroller and Auditor General.

Mr. Brennan said that any income arising from exhibitions, catering or concerts, went toward the running expenses of the overall venture and he pointed out that if the Government required the premises for State purposes, commercial activities had to be refused. In his opinion, the dining and conference facilities of the subject hereditament were no different from those in Malahide Castle, The Hugh Lane Gallery or the Chester Beatty Library, all of which were exempt for rating purposes.

In reply to Mr. O'Neill, Mr. Brennan said that while Dublin Castle was directly managed by the O.P.W. and the Government could be said to be in direct occupation of it, the Royal Hospital Kilmainham was maintained by the Government and that the state subvention in the current year amounted to £900,000.

Mr. John Mc Mahon of the O.P.W. explained the function of the O.P.W. in relation to the subject premises. He said that its involvement was similar to that in Dublin Castle. The O.P.W. had executed the scheme of works in relation to restoration and was involved in the maintenance and upkeep of the building. The sum of £100,000 paid to the O.P.W. by the Appellant only contributed towards the full maintenance and upkeep. In relation to Dublin Castle, Mr. Mc Mahon agreed that O.P.W. employees did directly manage it, and O.P.W. did not receive any income therefrom.

Mr. Pat Buckley gave evidence that he had been a Principal Officer in the Department of the Taoiseach since 1983. He said that £20 million had been spent by the State in the 1980's on the restoration of the Royal Hospital Kilmainham and that in 1985 a company had been formed by the Government to manage the building. The members of the board are appointed by the Taoiseach and are unpaid. The staff and full-time employees are paid and their conditions of employment are at the discretion of the Taoiseach.

Mr. Buckley confirmed that the subject premises were in receipt of Government subvention and were also indemnified against possible damage claims. He stated that the Government contribution towards arts and culture came from Oireachtas funds and lottery funds and that it

was hoped that there would eventually be an increase in the E.C. contribution towards culture.

Replying to Mr. O'Neill, Mr. Buckley conceded that the subject property was similar in most respects to the National Concert Hall which was not exempt for rating purposes. He also confirmed that the amount of lottery funds expended on cultural interests was determined by the Department of the Taoiseach. Mr. Buckley submitted a written memorandum detailing Government involvement in the Royal Hospital Kilmainham and in the arts generally, and same is appended hereto as Appendix A.

Mr. Noel Lyons referred to his written submission dated 30th March 1992, and said that at the date of revision, November 1990, he understood that the O.P.W. were occupiers of the South, East and West wings of the Royal Hospital Kilmainham and the Royal Hospital Kilmainham Company were in occupation of the North wing and the basement part of the East wing. He felt that the level of Government control was not quite as extensive in the National Concert Hall as in the subject hereditament. He conceded that the charges in the National Concert Hall were commercially high, unlike those in the Royal Hospital Kilmainham.

In reply to Mr. O'Caomh, Mr. Lyons agreed that while the Appendix to his submission was a photocopy of an advertising feature relating to the subject premises, appearing on P.35 of the Sunday Tribune, P.34 of the same edition of that newspaper advertised Dublin Castle and Maynooth College, both of which are exempt from Rateable Valuations.

When referred to the relevant extracts from the Valuation Lists, Mr. Lyons accepted that Royal Hospital Kilmainham Company is not a public limited company as therein described and that as the premises are not let, no entry should have been made under Lessors. Again in reply to Mr. O'Caomh, Mr. Lyons accepted that, contrary to his earlier evidence, when the appellant company was formed in 1985, its role was to manage the entire Royal Hospital Kilmainham and not merely the North wing and basement of the East wing.

Legal Submissions:

Mr. O'Caomh submitted that the subject hereditament was occupied by a company which had been established pursuant to a Government decision and was merely managing the property on behalf of the Government. The title to the property is vested in the Minister for

Finance. In support of this contention, he cited a recent High Court decision which found that Aer Rianta was in occupation of airport buildings as an agent of the Government.

Mr. O'Caoimh said that if it were accepted that the subject hereditament was in Government occupation, it was not necessary to refer to the proviso to Section 63 of the 1838 Poor Relief (Ireland) Act. The promotion of the arts is a Governmental purpose and the maintenance of the subject property is part of Government policy. He referred to the case of Harte V Holmes QB 1896 (1892 Vol. 21.R.) and to the judgment of Lord Blackburn in Cameron V The Mersey Docks Trustees which found that the Crown, not being named in the Statute of Elizabeth, was therefore not bound by it. In the former case, it was found 'inter alia' that if occupation is for Government purposes, even though the occupiers may not be strictly speaking servants of the state, they are 'qua' servants, because of the purposes of the occupation.

Mr. O'Caoimh submitted that the property had been acquired by the state and that it had been restored and was maintained by public monies. He said that the property could be said to be used for 'public purposes' as defined in the Maynooth College case insofar as the premises were open to the public, the company accounts were subject to the Comptroller and Auditor General and that the Taoiseach has control over the use of the premises.

In relation to the comparisons put forward by the Respondent; The Abbey Theatre and the National Concert Hall, Mr. O'Caoimh pointed out that the former was a private theatre and had only recently begun to receive state subvention and that the Taoiseach has power to appoint only two directors to its private board. He seemed to think that the National Concert Hall may have vested in the company running the concert hall, but that, in any event, it had not been tested.

He referred to other comparisons; Malahide Castle, The National Gallery and Maynooth College, all of which had conference facilities and restaurants and all of which were exempt for rating purposes.

Mr. O'Neill submitted that the state exemption decided in the case of Harte V Holmes was based on the decision in Cameron V The Mersey Docks Trustees which referred to an English statute and that this was different from Irish Law.

Mr. O'Neill referred the Tribunal to Mr. J. Keane's 'Law of Local Government in Ireland' and cited the case of Sligo Harbour Commission 1899 21 R and said that state ownership was not of itself a ground for exemption.

He contended that the occupation of the subject hereditament was not on behalf of the Government since there was no formal agreement between the state and the company in relation to the management of the property and the control by the Government did not define the objectives of the company to manage the property on behalf of the state.

He referred also to the fixed sum 'service' charge paid by the company to the O.P.W. every year and said that this was a liability of the company and not of the Government.

Mr. O'Neill described the National Concert Hall as being very similar to the subject, as the Memorandum and Articles of Association of both companies conferred considerable control on the Taoiseach.

On the other hand, he said, Malahide Castle differed from the subject in that it was part of a 360 acre holding which was a public park in which members of the public had an interest, and that its exemption did not turn on the question of state occupancy.

Dublin Castle was clearly occupied by the State and, Mr. O'Neill said, if the subject were similarly occupied, it too would be run by the O.P.W..

While he accepted that the Abbey Theatre was a private company, he pointed out that it was prohibited from paying its dividends towards anything other than the promotion of the arts.

Mr. O'Neill submitted that even if the promotion of the arts were shown to be Government policy, the subject hereditament comprises only that portion of the Royal Hospital Kilmainham which is not concerned with the promotion of the arts but is run largely on a commercial basis.

He stated finally that there was no basis in law or in fact to say that the premises were occupied by the Government and further that since the hereditament was not "altogether of a public nature" the provisions of Section 16 of the 1852 Valuation (Ireland) Act did not apply.

Replying to Mr. O'Neill, Mr. O'Caomh pointed out that the payment of £100,000 to the O.P.W. comes from Government funds, is based on expenditure needs and represents only approximately 10% of total monies coming from the Department of the Taoiseach.

Mr. O'Caomh said that each member of the public could not be said to have an interest in the actual building of Malahide Castle and that this was what fell to be valued.

Whether Dublin Castle was occupied by the O.P.W. or by a company established by Government to manage it was, Mr. O'Caomh submitted, merely an academic argument.

The subject hereditament was not run on a commercial basis as was evidenced by the fact that it loses money. If it were to be run on a commercial basis, Mr. O'Caomh said that it would be run in a completely different way. He said that the nature of the use of a hereditament was the most important basis of rateability.

Findings:

In reaching its decision the Tribunal has had regard to the proviso to Section 63 of the Poor Relief (Ireland) Act 1838, which is set out hereunder, and to Mr. Justice Keane's "Law of Local Government in Ireland" at P.297.

Section 63 "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 hereditament 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 according to annual value of such profit or use."

Mr. Justice Keane has written that property is 'used for public purposes' where -

- (1) It belongs to the Government **or**
- (2) Each member of the public has an interest in the property.

The subject hereditament is 'prima facie' the property of the Government since title is vested in the Minister for Finance. Title however, is immaterial if the occupation of the premises is rateable.

Palles C.B. in the case of *Harte V Holmes* QB Div. 1898 quotes the judgment of Lord (then Mr. Justice) Blackburn in *Cameron V The Mersey Docks Trustees* where he says "The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers" and further on in that judgment where he refers to "public purposes of that kind which by the constitution of this country, fall within the province of Government and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered "in consimili casu".

Palles C.B. goes on to say: "in this class of cases the law appears to hold that the purpose of the occupation affects the occupier, and that as that purpose is a Crown purpose, the occupier who occupies for that purpose, is notionally, although he is not actually a servant of the Crown, and, by reason of what I may call that fiction of law, the premises are exempt from liability as such".

The Tribunal accepts the evidence given that the entire premises known as the Royal Hospital Kilmainham comprising the subject hereditament; i.e. the North Wing and basement of the East Wing, and the remainder i.e. the South wing and East wings, are all managed and run by the subject company which is entirely appointed by the Taoiseach and whose accounts are submitted to the Comptroller and Auditor General.

Clear and succinct evidence has been given by Mr. Buckley of the Department of the Taoiseach in relation to the important place occupied by the Arts in Government policy. As has been stated by Mr. Mc Gonigle, the field of visual arts must be placed in a broader framework of overall artistic interests.

Taking into account the historical importance of the subject hereditament, the excellent restoration work that has been carried out and the many and varied cultural activities that are carried out therein, the Tribunal is satisfied that the essential function of the hereditament is the promotion of the arts. The income raised from concerts, conferences and catering serves only to defray running expenses and could not justify the description of the subject hereditament as a commercial enterprise.

The Tribunal notes too the overriding right of the Taoiseach to use the premises as and when he sees fit.

While noting the National Concert Hall which is certainly similar to the subject in many ways, the Tribunal is nonetheless impressed by the many relevant comparisons offered by the Appellant; Malahide Castle, The Hugh Lane Gallery, Maynooth College and, in particular, Dublin Castle. All of these comparisons offer similar conference, exhibition and concert facilities, yet remain exempt from liability to rates.

It seems to the Tribunal that the purpose of the occupation of the premises is a Governmental purpose which determines the status of the occupiers "qua" servants of the state and the fact that there is no formal agreement between the state and the occupying company does not detract from that status.

In all the circumstances, therefore, the Tribunal finds that the subject hereditament should be exempt for the purposes of Rateable Valuation, and so determines.