RA/58/2005

LANDS TRIBUNAL ACT 1949

RATING – occupation – paramount occupation – hereditament – sports and social club on power station site – whether in separate hereditament or part of power station hereditament – held club not electricity undertaker in occupation – separate hereditament

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE OXFORDSHIRE VALUATION TRIBUNAL

BETWEEN **RWEnpower plc** **Appellant**

and

A COOPER **Respondent**
(Valuation Officer)

Re: Power Station and Premises
Didcot A Power Station
Didcot
Oxon OX11 7HA

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 12 June 2008

Richard Glover instructed by Mr P Brennan FRICS of Ruddle Merz Ltd by direct access for the appellant
David Forsdick instructed by Solicitor to HM Revenue and Customs for the respondent

The following cases are referred to in this decision:

Squibb (VO) v Vale of White Horse DC and CEGB [1982] RA 271.
Gilbert (VO) v S Hickinbottom & Sons Ltd [1956] 2 QB 40
Westminster City Council v Southern Rly Co [1936] AC 511
Case (VO) v British Railways Board [1972] RA 97
Solihull Corpn v Gas Council (1962) 9 RRC 128

The following further cases were referred to in argument:

Burton Latimer UDC v Weetabix Ltd (1958) 51 R & IT 510
London Electricity Board v Maybrey (VO) (1951) 44 R & IT 555
South Eastern Electricity Board v Rees (VO) [1961] RVR 86
South Eastern Electricity Board v Chadwell (VO) [1974] RA 257
East Midlands Electricity Board v Hudson (VO) [1986] RA 33

DECISION

1. The issue in this appeal is whether the sports and social club building at Didcot A power station should be entered in the 2000 rating list for the Vale of White Horse District or whether it should be treated, as the appellant contends, as part of its electricity hereditament. The Oxfordshire Valuation Tribunal in a decision dated 13 October 2005 on a proposal made by the appellant upheld the entry of the club in the list as a separate hereditament at £42,375 RV. It is agreed that, if the club falls to be entered as a separate hereditament, this is the correct value. Alternatively, if it is part of the power station hereditament, the entry relating to that hereditament, with its value of £18,905,000 RV, should remain unchanged.

2. There was a short statement of agreed facts and a full witness statement by Keith Polley, former Financial Controller at Didcot Power Station and Treasurer of the Didcot Power Station Sports and Social Club, who was called to give this evidence. Except to a limited extent, to which I will refer, the facts in that statement were not disputed. In addition notes of a meeting and site inspection made by Guy Richardson of the Valuation Office Agency were produced. Factual matters in those notes were not disputed.

3. Didcot A power station began generating electricity in 1970. There has been a Power Station Sports and Social Club since then. Initially it was housed in a temporary building which had been used as a canteen for the construction workforce. The building was situated on land outside the main perimeter fence and on the far side of the A4130 road, which abuts part of the site boundary. The question whether building was in the occupation of the Central Electricity Generating Board, then the owners of the power station, and so exempt from rates under section 34 of the General Rate Act 1967, was the subject of proceedings in this Tribunal (J H Emlyn Jones FRICS) in *Squibb (VO) v Vale of White Horse DC and CEGB* [1982] RA 271. Later the present building was constructed on vacant land within the perimeter fence to house the Sports and Social Club and Visitors Reception Centre. It was opened in February 1985.

4. With the privatisation of the electricity industry in 1990, Didcot power station was transferred to National Power plc, and in 2000, when National Power was divided into two companies, it was transferred to one of these, Innogy plc. In 2002 Innogy was bought by RWE, and the current owner of the power station and the appeal building is RWEnpower. During the CEGB's ownership the club paid an annual rent of about £16,700, but National Power agreed to waive these payments, and the club was allowed to continue to use the building without charge. In 2005 the building was leased to a local sports club known as Knees-up Ltd.

5. The building is constructed in brick with a pitched felt covered roof. On the ground floor there is a function room, a sports hall, changing rooms, a snooker room, a bar, a lounge and a kitchen. On the first floor there is a gym and a squash court. Outside there is a tarmacadam car park. The building and car park are surrounded by a security fence. There are two

vehicular accesses, one from the rest of the power station site and the other direct onto a roundabout on the A4130.

6. The club rules that applied on the material date, 1 April 2000, had been in operation since the 1990s. The conditions of use of the building were very much the same as those that had applied to the old club building. There was no formal tenancy or licence, but the club was allowed to use the building for its purposes and in accordance with the rules. The use was confined to the function room, which visitors would enter through the bar and where they would be shown a film and given refreshments that had been prepared in the kitchen. The use ceased in 1999.

7. The rules stated that the objects of the club were "to promote fellowship between members and to develop, encourage and provide facilities for athletic, recreational, social and cultural activities." Membership consisted of ordinary and associate members. Any employee of National Power (the rules had not been formally amended to refer to Innogy) was eligible to apply for ordinary membership, and election was by the committee. Wives, husbands and children (up to the age of 18) of ordinary members were eligible to become family members. Each ordinary member was also able to nominate any child of his and one other person to be an associate member. Any member could invite two visitors to the club.

8. The rules provided that the purchase and supply of intoxicating liquor was to be managed by the relevant committee and that it was not to be supplied to members on the premises other than by or on behalf of the club. The affairs of the club were to be managed by a management committee, consisting of the officers of the club (chairman, secretary and treasurer), a representative of the National Power management and representatives of each of six specific groups of staff. In the event of dissolution the property of the club was to be applied, after the discharge of liabilities, in such manner as the committee might determine.

9. Mr Polley said that he started working at Didcot power station in December 1984 and worked in the finance and procurement departments. On 1 April 2000 he was employed by Innogy plc as a Financial Controller in the finance department. In 1988 he was appointed treasurer of the club, and he held this appointment until May 2006, when he was transferred to RWEnpower's head office in Swindon. There had been no nominations for the post of treasurer when it fell vacant in 1988. As treasurer he was primarily responsible for the running of the club. It involved stock ordering, employing and paying the bar staff, being responsible for the club booking diary and dealing with any problems that arose in relation to the building or the club. He spent between three and five hours each week on club affairs, and he did this during his normal working week with the approval of the power station management.

10. Innogy and its predecessor, said Mr Polley, had always had the power to promote the health and welfare of their employees, and the promotion of the welfare of those employed at Didcot Power Station was the principal activity of the club as set out in its objects. Innogy, he said, exercised control over the building and club in a number of ways – over access to the site and the building, who could use the gym, and generally through the make-up of the committees and the fact that the President of the club was the power station manager. He effectively had

the final say on what could go on in the building, and he was regarded as being ultimately responsible. In the late 1990s he overturned a committee decision on stag and hen nights, and on one occasion Mr Polley had been summoned to his office to be told that a late licence for a wedding was to be obtained despite the fact that the club had decided that this would be unwise. There were no other instances of such intervention.

11. In the statement of agreed facts for the valuation tribunal it was stated that the access gate from within the power station "is generally locked" and that the access gate from the A4130" is opened by the National Power security guards at 6.30am and locked by then generally at 11.30pm". In his witness statement Mr Polley said that up to 2001 the only access to the club was through the power station main gate. At 6 pm the security guards would open the sports and social club car park gate and would lock it at 11.30pm. He said that he derived support for what was said in his witness statement from an e-mail he had received on 29 March 2001 about new security passes for the club. It was then that a security system swipe card was introduced for the whole power station site, and this was extended to include the club. Before 2001 there was a security system for entry into the club, just after the main entrance door, and there was a separate swipe card system into the gym. He could not remember what the security system had been for the power station site. It was suggested on behalf of the VO that his evidence in this respect was unreliable. Despite the incompleteness of Mr Polley's recollection, I think it probable that before the new swipe card system was introduced in 2001, which I accept occurred, entrance during the day to the club was from the power station site alone and after 6pm through the external gate. Such a system would have met the security requirements, it would have enabled access to the club by employees during the day, and it accords with what, I accept, Mr Polley honestly recalls.

12. The gym facilities, Mr Polley said, were provided by the power station management. To comply with the station's insurance policy, which covered the whole of the site including the club building, they wished to ensure that only suitable persons could use the gym facilities. They did this through a system that required approval of the person by an occupational nurse, a check on the payment of the membership fee, approval by the power station management, and the issue of a swipe card for the gym. Access to the gym facilities was free, and the management did not want them to be available to persons other than staff.

13. Mr Polley said that Innogy considered that they had the right to use the club building when they wanted to do so. Before they used the building they did not ask the club for permission but told them when the building would be required for company business purposes, and the fixture was entered in the club diary. There were very few occasions when this clashed with club users. There were 11 Retirement Employee Association functions between February 1999 and May 2002, and a further 7 functions between November 1998 and November 2002 for meetings of the Pensions Group and the Company Benevolent Society and for Investor Relations and Outage Safety.

14. Innogy, said Mr Polley, owned and provided the club building. They paid for electricity, water and sewerage, and for the internal and external repair of the building. The accounts showed a payment by the club in 1999 for light, heat and cleaning, but nothing for this in 2000.

The power station insurance policy covered the club building, although unaware of this, the club also had an insurance policy. Innogy made a grant of £12,000 in 1999 and £6,000 in 2000.

15. For the appellant Mr Richard Glover said the sole issue was whether the club was in occupation. He relied on the general rule expressed by Denning LJ in *Gilbert (VO) v S Hickinbottom & Sons Ltd* [1956] 2 QB 40 at 48 that properties within the same curtilage and in the same occupation are to be treated as a single hereditament, unless, inter alia, they are used for a wholly different purpose. The fact that it was agreed that, if the club was not in occupation, the building should be treated as part of the power station hereditament showed, he said, that the purpose for which it was used was that of the company. The club building was provided by the company for the welfare of its employees. This was the purpose for which the building was occupied, and the club was the medium through which it was achieved. Mr Polley who was both an employee of the company and treasurer of the club performed his role as treasurer during his working hours with the approval of the company.

16. Where, as here, the question was one of competing possible occupations, the paramount occupier was to be determined "in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises": per Lord Russell of Killowen in *Westminster City Council v Southern Rly Co* [1936] AC 511 at 529.

17. The company occupied the appeal premises, Mr Glover said, from 1985 to 1999 and the club did not occupy them. When the use ceased in 1999 that did not change matters. The building was still being used for the company's purposes.

18. The evidence, said Mr Glover, showed that the company controlled the building. It owned the building; took no rent; undertook the maintenance; used the building for its own purposes as and when it chose; controlled access to the premises for all but 5 hours of the day; paid for cleaning and other outgoings; paid for those who supervised the use of the building; and restricted the use that could be made of it and permitted a use that the club thought unwise. All cases such as this, Mr Glover said, should be looked at in the round.

19. For the respondent valuation officer Mr David Forsdick submitted that the club was an unincorporated association having a separate identity from the power station, as the Tribunal had found to be the case in *Squibb*. The club rules had not changed materially since *Squibb*, and the decision in that case should be followed. Membership of the club was not limited to employees, and employees were not automatically entitled to be members. It was the committee that determined membership, and only one member of the committee was to be nominated by National Power. Although the station manager was President, he was not entitled to that office as of right. The officers, including Mr Polley, were to act as officers and not employees of National Power, and the company had no control over them.

20. *Case (VO) v British Railways Board* [1972] RA 97 in the Court of Appeal was authority that, in deciding whether a social club or the company was in occupation, the question was to be decided on the basis of which of them had immediate and direct control. Decisions prior to *Case* were of limited assistance. The evidence, Mr Forsdick said, showed that it was the club that was in immediate and direct control. While it was claimed that the station manager had the power to dictate how the building could be used, in practice his intervention was very rare and on the two occasions when he did intervene – in relation to stag and hen nights and the extension of hours for a wedding – this was done for a precise purpose. The power was imply a reflection of the fact that the club was the licensee at will of the company. While the club was supported and financed by the company, this did not affect whether the club or the company was in paramount occupation. The club had its own funds, and it controlled those funds. In making its financial contribution the company did not exercise any control over expenditure.

21. None of the matters relied upon by the appellant in claiming that the company was in occupation showed that the company had the necessary control. Mr Polley's evidence on access was, Mr Forsdick said, unsatisfactory and unreliable, and was based on assumption rather than recall. In any event control of access by a landlord or licensor did not show that he was in occupation, as the *Westminster* case demonstrated. In addition to the matters mentioned in relation to the rules, there was nothing to show that the company was in overall control of the use of the club building. It was the club that was licensed for use of the bar and its hours of operation were determined by the committee. The provision by the company of the gym equipment was in reality no different from the provision of the building itself. The imposition of restrictions on who could use the equipment was insufficient to show that the company controlled the building. The number of occasions on which the building was used for company purposes was very limited, and there was nothing to show that it interfered to any significant extent with the club's use.

22. The question in this case is whether the club or the company is in paramount occupation of the club premises. If it is the club, the premises constitute a separate hereditament. If it is the company, the premises form part of the power station hereditament. The leading authority on paramount occupancy is the *Westminster* case, and the principles laid down can be derived from the following passages in the speech of Lord Russell of Killowen [1936] AC 511 at 529-30.

> "Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact – namely, whose position in relation to occupation in paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate, but who is in paramount occupation of the particular premises in question.....

> The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; ....
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> In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons."

23. As advanced by Mr Glover the case for the appellant has essentially two limbs: that in operating the premises the club was performing the function of the company to provide for the welfare of its employees; and that on the facts it was the company rather than the club that was exercised control of the premises. The first limb, under which Mr Glover sought to attribute to the company the purpose for which the premises were occupied, is in reality a contention that the club was acting as agent for the company. Authority, however, is against a claim of occupancy based on agency. The question, rather, is always one of control. In *Solihull Corpn v Gas Council* (1962) 9 RRC 128 Lord Reid said (at 132-3):

> "I think that the Lands Tribunal must have had in mind the question: Who was in control? 'Agent' is sometimes rather loosely used to denote a person who, though not a servant, has obliged himself to accept a measure of control comparable with the control exercisable by a master over a servant – a person who is merely the hand of his 'principal'. What I think that the tribunal must have meant was that the arrangements between the board and the council gave such a degree of control of the hereditament to the council. I do not doubt that an owner of property could so subject himself to the control of another that that other person could be held to be the occupier, although he never was present on the property and exercised his control solely by giving orders to the owner. But any such arrangement must be rare, and counsel were unable to find any reported English case where that had been done. In the present case, I can find nothing in the Case"

24. The cases in which it has been contended that the premises of a social club of a company or corporation are occupied by the club are numerous. They confirm that the determination of the question of who is in paramount occupation falls to be made on the basis not of the purpose of occupation (since each of them will have its purpose for occupying) but of who is in control. The leading authority is *Case (VO) v British Railways Board* [1972] RA 97, in which the Court of Appeal allowed an appeal against a decision of the Tribunal (Sir Michael Rowe QC, President) which had held that club premises, located beside the railway at Navigation Road, Altrincham, and provided under a scheme established by the Board in pursuance of a statutory duty in relation to the welfare of its staff, were in the occupation of the Board and not the staff association. The Board provided the capital for the premises and was responsible for external maintenance; it was entitled to use the premises as and when required, particularly for staff meetings; and it could at any time determine the arrangements whereby it allowed the branch

to use the premises. Russell LJ, with whom Phillimore LJ agreed, concluded that it was the branch members, through their committee and secretary, that ran and controlled the premises, and that such right as the Board had to exercise some control was too remote. He went on (at 111-112):

> "Further, it was agreed that the club use by the branch of these premises was but an instance of the fulfilment by the ratepayers of their statutory duty of maintaining machinery for the social and recreational welfare of their employees, being something stemming from the original consultations with the employees' side of the industry through the formation of the advisory council and the staff association. The use of the premises by the branch consequently, it was said, was the fulfilment of a purpose of the ratepayers; and (it was argued) in determining occupation for rating purposes it is important to see whose purpose is served by the use that is made of the premises.
>
> Now in a general sense this may well be so. But it seems to me that this is a test which supplies no golden rule. Ask any member of the Navigation Road branch whose purpose is served by the use of the premises as their club. Or ask the barman, or any inhabitant of the district whose occasions lead him frequently down Navigation Road. They, I venture to think, would not regard the purpose of the premises as other than to serve the legitimate aims of social intercourse and recreation of the members of the branch and club: though, if further questioned, they would no doubt agree that the ratepayers, as an industrial concern, were anxious that these legitimate aims should be attained by their employees in a suitable manner, and would approve the extent to which the ratepayers facilitated that attainment.
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> In the end, on this 'purpose' point, it seems to me that for rating, when there is obviously more than one purpose being fulfilled, direct and immediate control of the premises, otherwise than on a factually merely transitory basis must be the guide line. And on that note I refer back to the view that I have expressed that here the branch runs and controls the vastly preponderant activity on the premises of a club for its members."

25. Of the other cases, which are necessarily fact-dependent, it is only necessary for me to refer to *Squibb*, the case in 1982 that determined that the previous premises of the club at Didcot were occupied by the club rather than by the CEGB. The Member examined the conditions on which the club was authorised to use the premises, as set out in a letter from the Board's estates branch to the club secretary and the club rules, and he concluded that they contained all the ingredients of a normal members' club. The only unusual features were the rules relating to the audit, the appointment of an assistant treasurer and the right of the station manager to attend committee meetings if he wished to do so. The Member said (at 288):

> "The facts are, however, that the effective management and day to day running of the club is in the hands of the committee and the club is free to spend its own monies as it pleases. Applying the principles laid down in the *Altrincham* case, it seems clear to me that the club is in occupation of the appeal premises and occupies them for its own purposes rather than for the purposes of the board. It is true that the board makes use of the premises for its own purposes but on the evidence, those occasions are infrequent and during the period quoted to me there were eight meetings held in five

months, normally in one of the small rooms; and of those meetings, three were meetings of retired employees, most of whom would in any case be life members of the club under the rules."

26. On the facts there can be little doubt, it seems to me, that at the material day the club was the paramount occupier of the club premises. While the company provided the premises free of charge, so that the club was a mere licensee, the club enjoyed occupation for its own purposes for as long as the licence continued. Through its officers it controlled the day to day use of the premises, and Mr Polley, to whom the tasks of manager fell, performed these as secretary of the club rather than as an employee of Innogy. The fact that he did this during his working day is a reflection, in my view, of the fact that company sought to facilitate the club's operation since it benefited the company's employees. Intervention by the station management in the club's operation was, however, infrequent, so that only two instances when this occurred were recalled. Moreover the use of the premises for company-related meetings was very limited indeed, as it had been in the old premises.

27. In two respects the circumstances in which the club operated differed to an extent which was not insignificant from those that applied to the old club premises. Since, in contrast to the old premises, the club was situated within the power station site, access during the day was from the station (and thus via the security gate) rather than through the gate leading directly from the public highway. However, the purpose of this arrangement was not to give the company control over who might use the premises or how the premises might be used. It simply reflected the juxtaposition of the club and the power station itself, the need for security at the station and the convenience of access between the station and the club. The second difference was the gym, for which the company provided the equipment and limited its use to those approved by an occupational nurse of the company. The degree of control by the company that this implies was, however, small in relation to the premises as a whole and the activities carried on, which were otherwise controlled by the club.

28. I am satisfied on the evidence, therefore, that it was the club and not the company that was in occupation of the hereditament. The appeal is dismissed. The parties are now invited to make application for costs, and a letter dealing with this accompanies this decision, which will become final when the question of costs has been determined.

Dated 23 June 2008

George Bartlett QC, President