Appeal No. VA07/2/005

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

The Minister for Communications, Marine and Natural Resources APPELLANT

and

Commissioner of Valuation RESPONDENT

RE: Telecom Network at Lot No: (Athlone NDP Broadband), Sundry Townlands, Sundry DEDs, Utilities, Athlone County Westmeath

B E F O R E

John O'Donnell - Senior Counsel	**Chairperson**
Joseph Murray - B.L.	**Member**
Brian Larkin - Barrister	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 25TH DAY OF OCTOBER, 2007

By Notice of Appeal dated the 30th day of April, 2007 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €30.00 on the above-described relevant property.

1. The grounds of Appeal are set out in the Notice of Appeal, and in a letter attached thereto, a copy of which is at the Appendix to this Judgment. The appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin, 7 on the 10th day of September, 2007. At the hearing the Appellant was represented by Mr. Donal O'Donnell, SC, and Mr. Paul Coughlan, BL, instructed by Ms. Eve Mulconry and Mr. Peter Curran, Arthur Cox Solicitors. Also present were: Mr. Des Killen, FSCS, FRICS, IRRV, GVA Donal O Buachalla; Ms. Mary Farrell, Department of Communications, Marine and Natural Resources; Mr. Braonan Gardiner and Ms. Mary McCabe from E-Net; and Mr. David Parkinson and Ms. Sinead Cashin from Magnum Opus. Mr. James Connolly, SC, and Mr. Brendan Conway, BL, instructed by the Chief State Solicitor, appeared on behalf of the Respondent. Mr. Mark Adamson, a Chartered Surveyor and Team Leader in the Valuation Office, was also present.

INTRODUCTION

2. The subject property is a metropolitan area network ("MAN") comprising the broadband network in the administrative area of Athlone Town Council. It is agreed, however, that this property will operate as a test property for the purposes of other similar properties throughout the State.

3. Under the National Development Plan 2000-2006 the Government initiated the Regional Broadband Programme, Phase 1 of which involved the construction of metropolitan area fibre optic networks for broadband communication in 27 towns and cities throughout the country. The subject property consists of 6.5km of a 20km MAN of ducts, cables and co-location facilities serving Athlone town and environs as part of the Midlands Broadband Scheme of the National Development Plan. Construction started in 2003 and was completed in 2004.

4. The property consists of a ring network which in turn consists of ducts (through which sub-ducts pass) and fibre optic cables (which pass through sub-ducts). In addition there are co-location facilities, i.e. secure facilities to house telecommunications and IT infrastructure. Of significance is the fact that the space at these areas is sublet to various service providers who store their equipment in these spaces.

5. In essence the issue before the Tribunal is whether or not the subject property is directly occupied by the State (and in particular the Minister and/or his Department), such occupation being by its nature exclusive or paramount occupation. If the Minister and/or his Department is held to be in occupation (in the sense of being in exclusive and/or paramount occupation) then it is submitted on behalf of the Appellant that the property in question is not rateable having regard to the provisions of Section 15(3) of the Valuation Act, 2001.

THE EVIDENCE

6. At the outset the Appellant provided the Tribunal with préces of evidence from Ms. Mary Farrell and Mr. David Parkinson and a joint précis from Mr. Braonan Gardiner and Ms. Mary McCabe. By agreement between the parties the Tribunal treated the précis of evidence of each of those persons named as being their evidence. The Respondent did not wish to cross-examine any of the witnesses in question. The parties were agreed that the sole issue for determination was the rateability or otherwise of the subject property.

7. Ms. Mary Farrell is an Assistant Principal with the Department of Communications, Marine and Natural Resources. In her evidence she set out the background to the establishment of the MANs as well as their funding, development and construction. She set out the history of the appointment of E-Net (described as the "*Concessionaire"*) and the contractual relationship between the "*Contracting Authorities"* (being the Minister and the relevant local and public authorities, "Local Authorities") and E-Net. She also set out details in relation to the practical operation of the Concession Agreement as well as the regulation and control by the Contracting Authority over the MANs and E-Net. It is clear that a considerable degree of control is retained and exercised by the State in relation to the management, operation and maintenance of the MANs and indeed of E-Net's role in respect thereof. In her view, the Contracting Authority designs, funds, constructs and owns the MANs. She is also of the view that the Contracting Authority exercises such close scrutiny and control of E-Net's ongoing compliance with its various management, marketing, maintenance and operational obligations that in effect the Contracting Authority retains sufficient dominion and control over the relevant properties for it (the Contracting Authority) to be clearly the party in occupation. In her view the non-exclusive rights of E-Net to access the MAN's infrastructure for limited purposes or

to grant third party access for maintenance do not amount to an occupation (for the purposes of the Valuation Act) by E-Net of the infrastructure and equipment in question.

8. Mr. David Parkinson is a Director in Magnum Opus Limited which is an Irish company specialising in the provision of telecommunications consultancy. Magnum Opus programme-managed the construction of the MANs in question and is retained to continue to control and monitor E-Net's compliance with its various obligations under the Concession Agreement (dated 29th June, 2004) between the Minister, the relevant local and public authorities and E-Net. Mr. Parkinson set out details in relation to the construction of the MANs, the granting of licences, the connection of service providers and the role of Magnum Opus in relation to the controlling and monitoring of the MANs and E-Net. Again he was of the view that the Contracting Authority maintained sufficient control over the Concessionaire (E-Net) and control and dominion over the relevant property (being the MANs) for the purposes of being not rateable under Section 15(3) of the Valuation Act.

9. Mr. Braonan Gardiner and Ms. Mary McCabe (being the Financial Controller and Operations Manager respectively of E-Net) agreed with the statements of Ms. Mary Farrell and Mr. David Parkinson. In their joint précis they set out the various responsibilities of E-Net which might generally be described as being to "*market, manage, operate and maintain the MANs*".

10. This involves marketing, promotion, providing access to, the MANs for themselves and for service providers and other related roles. Except for the cameras which E-Net uses in its external equipment module to monitor performance, E-Net has no physical presence or equipment on the MANs which it only accesses in order to connect telecommunications operators and carry out planned (and unplanned) maintenance activities. They describe the role of E-Net as being that of a management service entity to whom certain services have been outsourced. However, E-Net does not own or have any material physical presence at or near the MANs save as described above.

11. As the issue of quantum was agreed between the parties (without prejudice to the issue of rateability) no further evidence was provided to or required by the Tribunal.

THE APPELLANT'S SUBMISSIONS

12. On behalf of the Applicant Mr. Donal O'Donnell referred to the Concession Agreement of 29th June, 2004. He explained how the MANs were installed under public roads as part of the National Development Plan in order to facilitate the roll-out of broadband which was not being done quickly enough by the market. He submitted that the State did so because it believed that the network should be established to encourage development in areas where such a facility was not already provided. In a very real sense the State was providing a utility (in the same manner as in previous times it had provided railways and canals) through which development of various facilities can be and is promoted. In his submission the issue was whether or not the MANs were *"occupied"* for the purposes of the Act and, if so, whether they were occupied by the State or by E-Net. It was agreed that there was no dispute on the facts or the relevant principles. In his submission the principal issue to be considered was whether or not what E-Net does constitutes rateable occupation.

13. Mr. O'Donnell submitted that it is possible to have a legal connection with a property (in the sense of managing that property) without being in occupation legally of the property. However, even if some form of occupation was deemed to exist by virtue of E-Net's relationship with the property, the issue is whether or not that ousted occupation by the owner. Put another way, even if E-Net were deemed to be in some form of occupation, was that occupation paramount to the occupation of the State? We were referred to the decision in **Aer Rianta v Commissioner of Valuation** (unreported Supreme Court, 5th November 1996). We were also referred to the decision in **Dublin County Council v Westlink Toll Bridge [1994] 1 IR 77**.

14. In his submission the nature of the ownership was clear. The nature of the ownership was stated to be that of the State. The MANs in question were part of the State infrastructure. The State as owner of the network achieves its purpose through the use of other entities (in this case the company E-Net). This, however, did not automatically convert E-Net into the occupier. The position of Tedcastle Oils in the **Aer Rianta** case was instructive in this regard, in that it made money by managing the location but was still not rateable. Indeed, if being paid to manage a property made an entity rateable then every management company in the country would be rateable.

15. Further, in his submission, this was essentially a State function being exercised. While the technology is 21st Century the impetus behind the project is nearer the 19th and earlier 20th Century ideals of what the State is supposed to do. The project involves the setting up by the State of a utility in order to confer a benefit on members of the public. The State in so doing has set up and wishes to retain its own infrastructure; however it wants that infrastructure managed in an efficient manner.

16. Our attention was then drawn to various aspects of the Concession Agreement; an agreement it was pointed out was put in place for the "*marketing, management, operation and maintenance*" of the MANs. Clause D (ii) refers to the Minister and the Local Authorities (collectively "*the Contracting Authority*"). It states that the Contracting Authority will grant "*a licence of each Metropolitan Area Network*" to the Concessionaire for the sole purpose of enabling the Concessionaire to comply fully with its obligations under this agreement. Such licence as is granted to the Concessionaire, E-Net, is thus limited in nature. Clause 2.1 states that the Concessionaire is appointed "*to provide the services and the customer services and perform other obligations for the term …*". Clause 2.2 grants authority to the Contracting Authority to extend the network. Clause 6.1 refers to the granting of the licence. Of significance Clause 6.2 states "*The licences granted pursuant to the Agreement shall subsist for the sole purpose of enabling the Concessionaire to perform its obligations under this Agreement and for no other purposes and shall not operate nor be deemed to operate as a demise of the MANs, the Project Assets or any part thereof nor shall the Concessionaire have or be entitled to any estate, right, title or interest therein and the Concessionaire and those authorised by it shall manage the MANs as licensee of the Contracting Authority only and, subject only to the limited interest arising under the Licences, the Contracting Authority shall have exclusive and beneficial occupation of the MANs."*

17. Mr. O'Donnell placed considerable emphasis on this licence in order to establish the extremely limited nature of the grant by the Contracting Authority to E-Net. Clause 9.1 obliges the Concessionaire to provide services to the Contracting Authority. Clause 9.6(a) makes it clear that the Concessionaire cannot enter into any material contract in connection with the Services or in connection with the Customer Services without the prior written consent of the Contracting Authority. It is also clear that the maintenance programme must be approved first by the Contracting Authority (see Clause 12.2 and

12.3). Clause 12.5(a) makes it clear that "*all MANs, together with any structures, networks, cladding, external and internal fabric, plant, fixtures, fittings, equipment or other apparatus of any kind whatsoever comprising part of any MAN, are and shall at all times remain the property of the Contracting Authority and in its exclusive occupation.*" Again considerable emphasis was placed on the impact of this clause. Clause 13 required the Concessionaire E-Net to make reports. Clause 14 restricted the rights of the Concessionaire to subcontract any aspect of its services.

18. Schedule 1 to the agreement (headed "*Product and Services Specification*") made it clear (at paragraph 2.1) that the functions of E-Net are as "*electronic communications infrastructure provider to the wholesale market over the MANs.*"

19. We were also referred (at Schedule 15) to the licence. Of particular significance are paragraphs 4.1 and 4.2. Paragraph 4.1 makes it clear that the Contracting Authority "*hereby grants the Concessionaire a non exclusive licence to have access to and to occupy the Property to maintain, operate and manage each relevant MAN thereon and carry out all other actions in order to comply with the obligations under the Agreement.*" In the submission of Mr. O'Donnell it is clear that this is qualified by what is contained in paragraph 4.2 "*The Licence granted pursuant to clause 4.1 shall subsist for the sole purpose of enabling the Concessionaire to perform its obligations under the Concession Agreement and for no other purpose and shall not operate nor be deemed to operate as a demise of the Property or any part thereof nor shall the Concessionaire have or be entitled to any estate, right, title or interest therein and the Concessionaire shall enter the Property as licensee of the Contracting Authority only. This Licence shall not be deemed to confer upon the Concessionaire a right to exclusive possession of the Property or create a relationship of landlord and tenant between the Contracting Authority and the Concessionaire.*"

20. The submission of Mr. O'Donnell is that these clauses in the licence are to be read in conjunction with Clause 6.2 and Clause 12.5 of the agreement already referred to. This made it clear that such permission as was given to E-Net was extremely limited in its nature and certainly could not be regarded as rateable occupation. Schedule 16 sets out the Code of Practice for the management and allocation of access to the MANs. In the introduction it is made clear that the network shall remain in the exclusive and beneficial

occupation of the Minister and the marketing, management, operation and maintenance of these networks may be undertaken by a management services entity ("MSE") on behalf of the owners. This, it appears, is E-Net. The definition section also referred to "*operators"* which appeared to be limited to those parties licensed by ComReg. In addition it was clear that the product itself could not be altered by E-Net. While the MSE (in this case E-Net) shall be responsible for the marketing and promoting of the availability of the MANs and any related services paragraph 3.1 makes it clear that the Infrastructure Owner is the Minister. While a drop connection can be installed by the MSE on behalf of an operator the remaining structure forms part of the MANs and remains in the exclusive beneficial ownership and occupation of the Minister (see paragraph 3.3(b) (i) of Schedule 16).

21. In his submissions the vast bulk of the relevant provisions of the agreement pointed to occupation by the Minister. The only clause which could be read in any way contrary to this is Clause 4.1 of the licence. However, it itself is limited in its effect, both by the qualification contained in 4.2 and by the other clauses already referred to in the agreement. Mr. O'Donnell submitted that management did not of itself constitute occupation. Giving a person a permission to enter onto a property in order to carry out a management function did not of itself constitute the granting of occupation.

22. We were then referred to the various legislative provisions and authorities. We were referred to the provisions of Section 15(3) of the Valuation Act, 2001. We were also referred to Schedule 3 of the said Act. We were referred to the Judgment of Barron J in **Iarnrod Eireann v The Commissioner of Valuation** (High Court unreported 27th November 1992) in which it was stated:

> "*There are three ingredients to rateable occupation:*
>
> *a. The occupation must be exclusive.*
>
> *b. It must be of value or benefit to the occupier.*
>
> *c. It must not be for too transient a period."*

23. This definition is repeated in the second edition of **Keane on Local Government** where there is also a reference to paramount occupation. Paramount occupation is also discussed in **Ryde on Rating** which quotes Lloyd LJ in **Windborne District Council v**

Brayne Construction Company and WH White & Company Limited [1985] RA 234 CA:

"*Paramountcy is a way of choosing between exclusive occupiers in that sense. The degree of control exercised by one occupier over the other, or by a third party, seems to be relevant to both questions – that is to say, to whether an occupier is in exclusive occupation for his own particular purposes, and also to which of two competing occupiers is in paramount occupation.*"

24. The issue is also discussed by Henchy J in **Carroll v Mayo County Council [1967] IR 364 at 367 and 368**. The decision of the Supreme Court in **Telecom Eireann v Commissioner of Valuation [1997] 2 IR 575** makes it clear that a person enjoying only a subordinate occupation which was subject at all times to the control and regulation of another could not be held to be in rateable occupation of the premises.

25. In **Aer Rianta v Commissioner of Valuation and Tedcastles Aviation Fuels Limited and Clare County Council** (Supreme Court unreported 6th November 1996, Murphy J) the issue of paramountcy of rateable occupation was also considered. In that case the State had established what might be described as a "*fuel farm*" in Shannon. The depot in question was managed by Tedcastles, the fuel utilised therein supplied by Aeroflot; Aeroflot aircraft could thus use this fuel to refuel at Shannon Airport. Thus the fuel was owned by Aeroflot and the farm was owned by the Minister. Tedcastles were employed by the Minister as an independent contractor to perform certain functions in the fuel farm. Tedcastles were given a licence and a permission to use the premises. However, the arrangement did not require the exercise by Tedcastles of any business initiatives. While Tedcastles were permitted to enter onto and make use of the facility to perform their functions they were performing those tasks on behalf of the Minister. Their use of the equipment and plant in achieving that purpose did not confer on them any benefit from the equipment or plant used or occupied by them. It entitled them only to the agreed remuneration for the services which they rendered. In effect Tedcastles was deemed to be in the same position as an employee or independent contractor who is permitted to go on to premises in order to render services for reward.

26. As such the Supreme Court was of the view that Tedcastles were not in rateable occupation of the premises in question. In so finding the Supreme Court expressed the

view that one would be reluctant to infer that an airport authority had "*hived off*" an intrinsic part of its core business.

27. Mr. O'Donnell submitted that the degree of control retained and exercised by the State over E-Net in the instance case is even greater than the degree of control retained by Aer Rianta in the Tedcastles case.

28. We were also referred to the decision of the Supreme Court in **Dublin County Council v Westlink Toll Bridge Limited [1996] 2 ILRM 232**. In this case the Plaintiff entered into an agreement with the Defendant for the adoption of a scheme of tolls by road authorities including the collection of tolls by a person who provides, maintains, improves, manages or operates the roads in question. Under the agreement a percentage of the proceeds of the tolls was payable to the Minister where traffic reached a stipulated level. The Supreme Court held that a person who is given the immediate use or enjoyment of a hereditament and has power to manage it for a period, including the power to collect tolls in respect of that hereditament, is an occupier of that hereditament rather than the beneficiary of a profit or use derived from the hereditament. While the tolls went to pay for a highway which was for the use of the public, a private profit or use was directly derived from those tolls by the Defendant. Therefore they could not be said to constitute a public use in themselves and so they constituted rateable hereditaments.

29. Mr. O'Donnell submitted that the **Westlink (1996)** decision was distinguishable from the current situation because Westlink were doing more than simply managing the facility. The profits so made by Westlink from the administration and management of the facility were designed to compensate Westlink for the costs incurred by it in building the road infrastructure which it had done. The Defendant, Westlink, could not be said to have been in occupation of the tolls or ancillary offices merely as an agent for the Plaintiff such as caretaker.

30. In conclusion Mr. O'Donnell submitted that the Contracting Authority, rather than E-Net, was in exclusive and/or in the alternative, paramount occupation of the MANs in question. The parties were agreed that the occupier was either the Contracting Authority (being the Minister and the relevant local and public authorities) or E-Net; there was no suggestion that the service providers were in rateable occupation

THE RESPONDENT'S SUBMISSIONS

31. On behalf of the Respondent Mr. James Connolly contended that the facilities in question were occupied both physically and legally by E-Net. In his submission the fact that there may be dual occupancy (i.e. by the Minister as well as E-Net) was irrelevant if the occupancy of E-Net was paramount occupation. This could not be viewed as being a temporary arrangement since it was clear that the agreement in question was to last for 15 years. Nor could it be suggested that no profit of any sort could be made by E-Net from the occupancy.

32. In addition to being referred to Section 15(3) of the Valuation Act, 2001 the Tribunal was also referred to Schedule 3(1)(n)(ii). This provides in effect that relevant property (i.e. property which is rateable) includes the entire networks subsumed in an undertaking including as the case may be "*…all pipeline networks and systems, including pressurising and pressure reducing equipment, together with associated site developments."* In his submission this was a clear indication that the Legislature had in passing this part of the Act intended this type of facility to be rateable. We were again referred to the decision of Barron J in **Iarnrod Eireann v Commissioner of Valuation** (High Court unreported 27th November 1992). This related to the rateability of the passenger terminal erected by Iarnrod Eireann at Rosslare Harbour. At page 5, Barron J noted:

> "*Undoubtedly those who use the concourse use it merely by passing and re-passing but I cannot see how it can be held that other persons who have not got the same rights as the Appellant and who do not and cannot exercise the rights to which I have referred can be said to be using the premises in the same way as the Appellant."*

33. It is thus clear that the fact that other persons are allowed to "*come and go"* and were on the premises of the facility in question is irrelevant. In addition Mr. Connolly submitted that since the ducts in question may not yet be filled and this is in fact the situation then E-Net cannot be regarded as the occupier of those ducts.

34. We were also referred to the Judgment of Henchy J in **Carroll v Mayo County Council** (above) where it is clear that the description which the parties have given to the

relationship may not be crucial. What is critical is the reality of what is happening on the ground.

35. Mr. Connolly also referred to the **Aer Rianta** decision (above). He pointed out that in that case Aeroflot were the sole party who were entitled to dictate what work there would be available for Tedcastles. There was also a fee arrangement in place. In the instant case Mr. Connolly suggested that the only party who has control of what work is done on the facilities in question is in fact E-Net. The "*menial service function"* which Tedcastles was described as carrying out in that case could not be said to be an appropriate label for what E-Net were providing here.

36. Mr. Connolly also suggested that the **Telecom v Commissioner of Valuation [1998] 1 ILRM 64** decision was of little assistance. Telecom Eireann were not given any exclusivity in relation to any part of the premises in St. Stephen's Green; they were just given the facility of placing telephones there. These were different circumstances to the circumstances which applied in the instant case. Here, E-Net has an express right of occupation for a period of 15 years. In addition it also has a considerable degree of control on how and by whom the premises in question may be used. E-Net are entitled to travel the country to monitor who is using the premises in question and why.

37. Mr. Connolly also suggested that E-Net could be said to come within the concept of occupation as set out in the **Westlink (1996) case** in that it was providing a service and would in due course have the opportunity to make a profit. Indeed it could not be argued but that E-Net was established in order to make a profit. Referring to the decision of the High Court in the **Port of Cork Company v Commissioner of Valuation [2002] 4 IR 119** Mr. Connolly cited with approval the comments of Kearns J (at page 131) as follows:

> "*…the fact that ownership vests in those managing the hereditaments 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"*

38. Mr. Connolly submitted that there was not only the potential but the actuality of a profit to be made by E-Net in the instant case. Indeed that was the purpose of E-Net's presence.
39. Mr. Connolly also referred in some detail to the terms of the agreement. The fact that the functions of marketing, maintaining and repairing were now the obligation and responsibility of E-Net indicated E-Net's role in the business enterprise in question. This was significantly different to the management function carried out by Tedcastle's in the **Aer Rianta** case. Mr. Connolly also asked us to read the whole of the document together. So definitions such as "Handback" and "Handover" suggest that the agreement and the licence should be read as one entire document. In this regard it was noted that E-Net was not concerned necessarily with the national structure but rather with the ducts in question. In each case the question was who was in actual physical immediate use or enjoyment of the premises in question rather than who was notionally or constructively occupying them. In addition the reference to "*Transferring Assets (defined as meaning those assets belonging to the Concessionaire which are used by the Concessionaire in the carrying out of the services and/or the customer services*)" clearly acknowledges that E-Net is entitled to use its own property in carrying out the work in question.

40. Mr. Connolly also pointed out that the financial structure within the agreement provided for a potential profit to E-Net from year 11 onwards. This is not a situation in which a payment of a fee is made by the Minister to a service provider as in the **Aer Rianta** decision. In addition Mr. Connolly submitted that although a licence appears to have been granted, the existence of a licence does not determine the issue of occupation. Reading the agreement as a whole E-Net can be said to be discharging their function in return for (from year 11 onwards) a profit. In addition it was helpful to look at clauses such as Clause 40.1 which required the Concessionaire to take out and maintain insurance. Thus E-Net would be deemed to be in control of the premises for the purposes of occupation qua tortfeasor if, for example, an accident occurred on the premises in question. It appears from Clause 40.3(a) that the insurance shall name the Contracting Authority as joint insured with the Concessionaire and any other party who may have an insurable interest in the insurance.

41. In addition it is clear that so far as relationships with the outside world are concerned, E-Net have a considerable degree of discretion and control. Any operator wishing to utilise the facility must apply to E-Net before it is permitted to do so. It is also notable that

Clause 7.1 provides that the contractual relationship of significance is that between the operator and E-Net rather than the State.

THE APPELLANT'S RESPONSE

42. In reply Mr. O'Donnell noted that any agreement between E-Net and an operator must be approved by the Minister and can only be for services E-Net is obliged to perform for the Minister in question. In addition it is clear that E-Net is obliged to indemnify the Minister.

43. In his submission, the **Port of Cork** case revolved around the issue of whether or not the premises was in occupation for public purposes or for private purposes. The concept of private profit is the leitmotif of "*private purposes*". However, the extraction of private profit does not mean that one is in rateable occupation *per se*.

44. Mr. O'Donnell submitted that the imposition of rates on the provision of a public service was illogical. The relationship between E-Net and the State was much closer to that of manager and owner rather than landlord and tenant. In effect the State here was micro-managing the process in question. The salient question to be asked was:

> "*Is this service being provided to the Minister, or is it a service built by the Minister and let out by him purely for financial gain?"*

45. Mr. O'Donnell submitted that the former was a clear example of a State process and aptly described the instant situation. If for example, a private company has set up a management company to manage property no-one would suggest that the management company was in occupation of that property.

46. Both Counsels also provided written legal submissions which were of considerable assistance to the Tribunal.

THE LAW

47. From a consideration of the authorities cited to us by Counsel and the other submissions made by Counsel the following principles emerge:

a. The legal "label" affixed by the parties to their relationship is not determinative of the issue of rateability.

b. The performance by an entity of a managerial or administrative role in relation to a property does not of itself constitute rateable occupation of that property.

c. It is possible for the occupier to grant a licence or permission to another entity to enter onto lands for limited purposes without altering the paramount nature of the grantor's occupation.

d. The extent and degree of autonomy given to an entity permitted to enter onto land is a matter to be considered in determining whether or not such an entity has in fact attained paramountcy of occupation.

e. While the terms and conditions of any oral or written agreement between the parties cannot be ignored in considering the issue of rateability of occupation, the Tribunal must give due consideration to the reality of what is happening "*on the ground*", even if this appears not to be in harmony with the oral or written agreement between the parties.

48. In our view, applying the above principles the Contracting Authority is in rateable occupation of the premises the subject matter of these proceedings being the MAN in the administrative area of Athlone Town Council. On the face of it there is a potential ambiguity contained in Clause 4.1 of the licence granted to E-Net on foot of the Concession Agreement of the 29th June 2004. However, it seems to us that the licence to have access to and to occupy the property granted by the Contracting Authority to E-Net is, even within the terms of Clause 4.1, a licence granted for a particular limited purpose. It also appears to us that the licence referred to in Clause 4.1 is qualified by the terms of Clause 4.2 which expressly limits the extent of the licence in question. In addition it appears to us that the Concession Agreement itself ensures that the Contracting Authority retains a very high degree of control over the management, maintenance and operation of the MANs in question by E-Net. There is no suggestion that the factual position "*on the ground*" (or even under the ground) is different from what had been agreed between the parties when signing up to the Concession Agreement in question.

49. There are also other areas in which the control of the Contracting Authority is evident. For example, Magnum Opus acts as agent for the Minister in issuing the Broadband Infrastructure Specification Version 3 document which is of considerable importance. The Concessionaire must also prepare annually a Planned Preventative Maintenance Programme (see clause 12 on pages 37 and 38 of agreement). The Concessionaire is responsible to the Contracting Authority for the management and supervision of all sub contractors and for the acts, omissions and neglects of its sub contractors. (Clause 14 (2) e page 44). In the area of publicity, the Contracting Authority reserves the right to publish information about the MANs it may deem appropriate from time to time, other than matters which may be deemed confidential (Clause 33 on page 39). Any refinancing of the MANs proposed by the Concessionaire should have the consent of the Contracting Authority which may be refused if the conditions in clause 22.2 (pages 57 and 60) apply. Further, if the Concessionaire persistently breaches its obligations, the Contracting Authority may issue a "warning notice" which may result in the termination of the agreement (clause 19 .2 page 54). The Concessionaire shall submit to the contracting authority's representative reports specified in schedule 8. Records shall be capable of audit by the Contracting Authority (Clause 13 pages 41 and 42). In addition the Concessionaire does not have exclusive right to market and promote the MANs. Public Bodies, which by definition include a Minister of Government, Department of Government or a Local Authority body may also promote and market the MANs situated in their county boundaries. (Clause 2.1 page 204).

50. It also appears to us that the position in question is not dissimilar to the position in **Aer Rianta.** Indeed it appears to us that the nature and extent of the scrutiny and control retained by the Contracting Authority in this case is higher and more exacting than that exercised by Aer Rianta in that earlier case. While there is some element of ambiguity as to when (or indeed if) E-Net will start to make a profit on its own account from the management services provided, we are inclined to agree with Mr. O'Donnell's submission that the extraction of a private profit from the exercise of a management role does not of itself mean that one is in rateable occupation of the property being managed. It does appear that the role exercised by Westlink Toll Bridge Limited in the **Westlink (1996)** case was rather more than a supervisory or management role. In a sense Westlink Toll Bridge Limited had, by agreement with the relevant County Council, agreed to build

and run the relevant facility. In return for so doing the County Council had agreed that part of the payment for so doing to Westlink Toll Bridge Limited would be a percentage of the proceeds of the tolls collected. In this regard it seems to us that Westlink Toll Bridge Limited is in a different position to an entity such as E-Net which is called in to manage the facility in question. In the instant case the property in question (being the MANs) have been designed, funded and constructed by the Contracting Authority; the Contracting Authority also owns the property in question.

51. We note that no argument was addressed to us on the issue of whether or not local authorities could constitute the State for the purposes of Section 15(3). We have therefore assumed with the consent of both parties that occupation by the Contracting Authority constitutes occupation by the State for the purposes of Section 15(3) of the Act. It is our view that the property in question is occupied by the State for the purposes of Section 15(3) of the Act and any such limited right of or actual occupation by E-Net is subordinate to the paramount occupation for rateable purposes by the State.

DETERMINATION

52. The property the subject matter of this appeal is occupied by the State and is therefore not rateable having regard to the provisions of Section 15(3) of the Valuation Act, 2001.

And the Tribunal so determines.