Appeal No. VA11/4/019

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

N6 (Concession) Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Property No. 2207286, Toll(s), Office(s) at Lot No. M6 Toll Road, Gortnahoon, Killalaghtan, Ballinasloe, County Galway.

B E F O R E

Sasha Gayer - Senior Counsel **Chairperson**

Fred Devlin - FSCSI, FRICS **Deputy Chairperson**

John F Kerr - BBS, FSCSI, FRICS, ACI Arb **Deputy Chairperson**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 28TH DAY OF MARCH, 2013

By Notice of Appeal received the 22nd day of December, 2011, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €3,000 on the above described relevant property.

The grounds of appeal are set out in the Notice of Appeal and an attached schedule, copies of which are attached at Appendix 1 to this judgment.

An oral hearing in relation to this appeal was held in the offices of the Valuation Tribunal, Holbrook House, Holles Street, Dublin 2 on the 5th and 26th days of November 2012. At the hearing the appellant was represented by Mr. Brian Murphy SC and Mr. Paul Coughlan BL, instructed by Arthur Cox Solicitors. Mr. James Connolly SC and Mr. David Dodd BL, instructed by the Chief State Solicitor's Office, appeared on behalf of the respondent, the Commissioner of Valuation.

Witnesses

During the course of the hearing, the Tribunal received evidence from various witnesses on behalf of the appellant and the respondent. All of the witnesses in compliance with the rules of the Tribunal forwarded to the Tribunal and exchanged a précis of the evidence they proposed to adduce at the oral hearing.

The Appellant's Witnesses

a) Ms. Audrey Birmingham, BA, ACMA, is the Financial Controller of the appellant company. Ms. Birmingham, in her evidence, said she was the person in the company responsible for dealing with the Valuation Office and the Revision Officer (Mr. Mark Adamson) throughout the revision and appeal process.

b) Mr. Gareth Gallagher, BE (Engineering), ACA, is the General Manager of N6 (Concession) Ltd. In his evidence, Mr. Gallagher outlined the background to and the main contents of the contract made between the National Roads Authority and N6 (Concession) Ltd. for the design, construction, finance, maintenance and operation of certain roads in relation to what is known as "The M6 Toll Scheme."

c) Ms. Siobhan Murphy BSc (Surv.), MSCS, MRICS, is a property advisor in GVA Donal O Buachalla with particular experience in rating valuation practice. Ms. Murphy gave expert valuation evidence in regard to the valuation of the property concerned in accordance with the relevant provisions contained in the Valuation Act, 2001. ('The Act').

The Respondent's Witness

Mr. Mark Adamson, MSCS, MRICS, is a Team Leader in the Valuation Office and was the Revision Officer appointed pursuant to Section 28 of the Act to carry out the revision which resulted in the valuation of the property concerned being assessed at a rateable value of €3,800. In his evidence, Mr. Adamson outlined the progress of the valuation from the initial assessment, the representations stage, the Section 30 appeal stage and finally to this appeal to the Tribunal.

Documents Submitted

As part of the evidence introduced to the Tribunal, a number of documents were submitted, including:

1. NRA PPP Contract
   National Roads Authority and N6 (Concession) Ltd.

2. Drawings of N6 Toll Scheme

3. NRA Bye Laws for the N6 Ballinsloe to Galway motorway made under the Roads Act, 1993 (as amended) together with Toll Road Scheme and Map.

4. Sections 57, 58 and 63 of Roads Act 1993 (as amended).

5. Financial statements of N6 (Concession) Limited for the year ending 31st December 2010 and 2011.

6. Receipts and Expenditure method of valuation for non-domestic rating - a Guidance Note prepared by The Joint Professional Institutions Rating Valuation Forum.

7. Valuation Certificate (proposed) – dated 28th September 2010.

8. Copies of emails exchanged between Ms. Birmingham of N6 (Concession) Limited and Mr. Adamson (the Revision Officer) between 29th and 30th September.

9. Letter from Ms. Birmingham enclosing representations made to Revision Officer in respect of Valuation Certificate (proposed) dated 19th October 2010.

10. Copies of emails exchanged between Ms. Birmingham and Mr. Adamson between 8th and 9th November 2010.

11. Valuation Certificate dated 10th November 2010.

12. Copies of emails exchanged between Mrs. Birmingham and Mr. Adamson on 11th November 2010.

13. Copy of valuation report dated 8th November 2010 dealing with representation made by appellant.

14. Appeal application and accompanying letter from GVA Donal O Buachalla to the Commissioner of Valuation dated 17th December 2010.

15. Valuation Certificate dated 25th November 2011.

16. Consideration of Appeal report dated 21st November 2011.

17. Précis of Evidence submitted by Ms. Birmingham (N6 (Concession) Ltd.).

18. Précis of Evidence submitted by Ms. Murphy (GVA Donal O Buachalla).

19. Précis of Evidence submitted by Mr. Gallagher (N6 (Concession) Ltd.).

20. Précis of Evidence submitted by Mr. Adamson (Valuation Office)

21. Outline Legal Submissions on behalf of the appellant.

22. Outline Legal Submissions on behalf of the respondent.

23. Book of Authorities introduced by appellant.

24. Book of Authorities introduced by respondent.

From the evidence tendered on behalf of the appellant and the respondent and a perusal of the documents submitted, the following facts relevant and material to the appeal are agreed or are so found.

The Property Concerned

The relevant property in this appeal is the "tolls" arising out of that section of the N6 between Junctions 15 and 16 and approach roads together with the ancillary buildings and structures in connection there with.

Rating History

The subject property was listed for revision in 2010 and in due course a Valuation Certificate (proposed) was issued on the 28th September, 2010 to the effect that it was proposed to enter the value of the property concerned on the Valuation List with a rateable valuation of €3,800.

Following a consideration of representations made by the appellant, the Revision Officer issued a Valuation Certificate on the 10th November, 2010 affirming the rateable valuation at €3,800.

Following a consideration of representations made by the appellant, the Revision Officer issued a Valuation Certificate in final form on the 10th November, 2010 affirming the rateable valuation at €3,800.

Following an appeal to the Commissioner of Valuation pursuant to Section 30 of the Valuation Act, 2001 (the Act), the Commissioner issued a Valuation Certificate dated 28th November, 2011 to the effect that rateable valuation of the property had been reduced to €3,000.

The appellant, being dissatisfied with the decision of the Commissioner, lodged an appeal to this Tribunal in accordance with Section 34 of the Act and specified its grounds of appeal as required under Section 35.

Preliminary Issue

In the course of his opening submission, Mr. Murray requested the Tribunal to treat as a preliminary issue the intention of the Commissioner to seek to have the value of the property concerned increased from €3,000 to €9,000. Such a proposal, Mr. Murray contended, was inappropriate in as much as it was not open to the Commissioner to impugn the valuation made by him pursuant to Section 33 of the Valuation Act, 2001. Furthermore, the proposed valuation had been made on a misapplication of the principles of the Receipts and Expenditure method of valuation particularly in regard to the treatment and apportionment of all relevant and allowable expenses in accordance with Charleton J's determination in the Celtic Roads case. Mr. Murray also pointed out that the valuation to be adduced before the Tribunal was formulated on a basis that had not previously been put forward by the Commissioner at any stage in discussion with the appellant at revision or Section 30 appeal stages. The fact of the matter was that the valuation of €9,000 now being contended for was made on the same basis that the Commissioner proposed to introduce at the Supreme Court hearing in relation to the Celtic Roads appeal.

In further submission Mr. Murray said that the Tribunal could, in accordance with Section 37, adopt one of two courses of action – firstly it could disallow the appeal and "*confirm the decision of the Commissioner"* (Section 37 (a)) or alternatively it could allow the appeal and "*amend the value....."* (Section 37 (b) (i)). Under no circumstances could the Tribunal allow the appeal and at the behest of the Commissioner increase the value of the property concerned as proposed by the Commissioner in this instance.

Mr. Connolly, in his submission, said that on receipt of Mr. Adamson's précis of evidence some weeks before the commencement of the oral hearing, the appellant was fully aware of the valuation he proposed to put before the Tribunal and the basis upon which it was calculated. To that extent the appellant was in no way disadvantaged or taken by surprise. The task of the Tribunal Mr. Connolly submitted in relation to any appeal before it is to hear all the evidence and submission in regard thereto and to then assess the correct valuation of the property concerned which in this instance is the tolls on the N6. There is nothing in Section 37, Mr. Connolly submitted, that precludes the Tribunal from determining that the correct value of the property concerned is higher than that appearing on the valuation list if it considered an increase was warranted in the light of the evidence adduced by expert valuation witnesses.

Mr. Murray in response said that there was no dispute between the parties that the property concerned is the tolls and not the tolled roads. He stated that the sole issue to be now determined was that the Commissioner had "*changed the goal posts*" and was now putting forward a valuation made on a basis contrary to that which was approved by Charleton J. in the Celtic Roads case. Further, he noted that under the Act the Commissioner is required to make valuations in accordance with the statutory provisions having regard to case law and that in the circumstances of this appeal it is not open to the Commissioner to disregard the findings of the High Court in the Celtic Roads case.

An appeal to the Tribunal, Mr. Murray said, is adversarial in nature and the appellant must specify the grounds on which it considers the value of the property "*being the value as determined or confirmed by the Commissioner under Section 33 is incorrect*" (Section 35 (a) (i)). Mr. Murray queried how, on consideration of the evidence, the Tribunal could "*allow the appeal*" and at the same time increase the value of the property concerned.

Ruling of the Tribunal

Following an adjournment of the hearing the Tribunal retired and considered the submissions made on behalf of the appellant and respondent and in due course the chairperson advised the parties that the Tribunal had arrived at the following conclusions:

- Sections 34 to 37 deal with appeals to this Tribunal arising from decisions made by the Commissioner of Valuation pursuant to Section 33.

- Under Section 36 the Tribunal is required to hold an oral hearing at which each party is to be afforded an opportunity to be heard and adduce evidence. In this regard there is a duty on the appellant to put forward an alternative valuation.

- Section 37 requires that the Tribunal consider the appeal made to it and may, as it thinks appropriate:
  (a) disallow the appeal and confirm the decision of the Commissioner made in accordance with Section 33 or
  (b) allow the appeal and in quantum cases amend the value of the property concerned as it appears on the valuation list.

- Section 63 states that *"the value of property as appearing on the valuation list shall be deemed to be a correct statement of that value"* – in other words there is a presumption that a valuation made by the Commissioner is correct.

- In the circumstances of this appeal the value of the property concerned appearing on the valuation list is €3,000 as determined by the Commissioner in accordance with Section 33 (b) (i).

- In the event of the Tribunal disallowing the appeal the value of the property shall be affirmed in the sum of €3,000 as determined by the Commissioner.

- In the event of the Tribunal allowing the appeal the value of the property concerned shall be determined at a figure less than €3,000 as it would in the Tribunal's opinion be perverse to allow the appeal and at the same time increase the value of the property

concerned. Such a course of action would do violence to the language of Section 37 of the Act.

- Having regard to Section 63 the value of the property concerned in the sum of €3,000 is deemed to be correct and the onus of proving otherwise lies with the appellant.

- The Tribunal is of the view that the Commissioner cannot disavow the valuation of €3,000 made by him in accordance with Section 33 or otherwise impugn the value of the property concerned in the sum of €3,000 as appearing on the valuation list.

Having regard to the foregoing the Tribunal found for the appellant in as much as it is not open to the Commissioner to have a valuation made by him pursuant to Section 33 (2)(b) substituted by a higher figure. Neither party expressed dissatisfaction with the Tribunal's finding.

Submissions on behalf of Appellant

Mr. Murray in a comprehensive written and oral submission said that whilst there was a large measure of agreement between the parties in regard to a number of matters such as the underlying purpose and intent of the Public Private Partnership (PPP) contract, the benefits it gives to and the obligations it imposes on the appellant, the incorporeal nature of the property concerned being the right of the appellant to collect tolls from users of a specified section of the N6 and that the most appropriate method of arriving at its value in accordance with the statutory provisions was that known as the Receipts and Expenditure Method, there nonetheless were a number of matters in dispute between the parties to be addressed by the Tribunal as listed below:

(a) That the valuation attributed to the property concerned by the Revision Officer, Mr. Mark Adamson, appointed pursuant to Section 28 of the Valuation Act, 2001 was made on the direction of others as is clearly evident from the exchange of emails between him and Ms. Audrey Birmingham on the 8th and 9th of November, 2010. The level of interference to which Mr. Adamson was subjected to was improper. In this regard Mr. Murray referred the Tribunal to the comments made by the Tribunal in the

Trabolgan Appeal (VA04/2/018) at page 4 of its judgment – *"In our view the Commissioner has no power to direct a Revision Officer as to how he should exercise his powers"*. The circumstances in this appeal are somewhat similar in that it is an appeal against a certificate of valuation which is the culmination of a process that was similarly executed because the statutory decision maker in the first instance (Mr. Adamson) was told what to do by someone (Mr. Cooney) who became involved in the decision on the final certificate issued in accordance with Section 33 which is now the subject of this appeal to the Tribunal. Such interference and intrusion was wrong in as much as we should not have the same person deciding or influencing an appeal against the original decision taken by the Revision Officer acting under the direction of the same person. This type of activity was unlawful and violated the entire revision process.

(b) Mr. Murray further contended that the respondent had erred in law in a number of respects in the entire revision and appeal process such as:

- Failure to deduct all relevant costs and expenses.
- The treatment and apportionment of operating costs and expenses.
- Failure to have regard to binding precedent in respect of the appropriate treatment and/or deductibility of costs and expenses as set out in the decision of Charleton J in **Celtic Road Group (Dundalk) Ltd. v The Commissioner of Valuation [2008] IEHC 255**.
- Errors in the interpretation of the Toll Roads Scheme pursuant to the contract dated 4th April, 2007 and the relevant bye-laws dated December, 2009.

In regard to the above Mr. Murray contended that the respondent in valuing the property concerned had chosen to disregard the facts underlying the PPP Scheme and that the appellant's right to collect the tolls arose under the contract dated 4th April, 2007. This contract was made in accordance with the relevant sections of the Roads Act, 1993 (as amended) and the associated bye-laws dated December 2009 which set the *"base tolls"* and provided the mechanism as to how they might be increased from time to time by reference to the consumer price index. The critical issue, Mr. Murray said, was that the tolls, the Roads

Act, the 2007 contract and the 2009 bye-laws are interlinked. The contract imposes on the appellant the obligation to maintain and operate the tolls, to maintain some 52.7 km of mainline roads of which only 25.5 km is subject to the toll together with 3.7 km of side roads and to hand over the roads which they are contractually obliged to maintain in a state prescribed by the contract in April 2037. If the appellant fails to meet any or all of its obligations it loses the right to collect the tolls. All necessary documents and financial information in relation to the tolls was provided to Mr. Adamson. Whilst he initially misinterpreted some of the information so provided he now agreed that the length of the mainline roads to be maintained by the appellant is 52.7 km of which 25.5 km is subject to the toll. In this respect the facts are similar to the **Celtic Roads** appeal where the operator is obliged to maintain 54.7 km of motorway of which 21.74 km is subject to the toll. In this case Charlton J went on to say *"I find it very difficult to come to the conclusion that as there is a necessity to maintain the whole of the relevant property, only the portion of it which allows the certainty of generating a toll should be subject to the statutory allowance in respect of maintenance"*. In other words Mr. Murray said *"It is the entire length of the road, the maintenance of which must be factored with the expenses"*. The High Court has decided this and therefore this principle must be applied, Mr. Murray said. Whilst the respondent has appealed the High Court decision to the Supreme Court it is not open to the respondent to put forward a valuation that is not in accordance with the findings in the **Celtic Roads** case nor is it proper for Mr. Cooney to proffer the observations as set out below to the Appeal Officer Mr. Conboy.

"*In valuing the Toll the Valuation Office does not necessarily allow the deductions of all costs incurred (projected or actual). The costs allowed are only those relating to tolled roads."*

In the subject appeal(s) the position adopted by valuation services is the position we are defending before the Supreme Court i.e. that only those maintenance costs associated with the roads over which a toll can be charged are allowable.

It is the view of valuation services management that it would be incorrect to adopt any other position in relation to the allowable costs until the Supreme Court has decided the issue."

Summaries of Evidence

1. **Ms. Audrey Birmingham, BA, ACMA**

   Ms. Birmingham, the Financial Controller of the appellant company, outlined in her evidence in some detail her contacts and discussions with Mr. Mark Adamson, the Revision Officer during the period from 4th August 2010 to 25th November 2010 when the Valuation Certificate in final form was received. During this period, Ms. Birmingham said she had provided all the financial and operational information he sought in order to enable him to assess the valuation of the tolls for rating purposes.

   On the 28th September 2010, Ms. Birmingham said the appellant received a Valuation Certificate (proposed) to the effect that it was proposed to value the tolls in the sum of €3,800. On the following day she sought information from Mr. Adamson as to the basis of the valuation and how it was assessed. Having examined the information she came to the conclusion that it contained some errors and by email dated 5th October expressed her concerns to Mr. Adamson. On the same day she received an email from Mr. Adamson acknowledging that some mistakes had been made and indicated that this could lead to an adjusted valuation of €2,900. However since he had not addressed all her concerns he suggested that she complete and send in the "Representations to the Revision Officer" form which would then be considered before the final certificate issued. The form was forwarded to Mr. Adamson on the 19th October 2010 and contained a draft valuation which resulted in a negative valuation of €2,600 or nil. Following a request received from Mr. Adamson on the same day Ms. Birmingham submitted additional information in relation to the PPP contract.

   On the 8th November 2010, Ms. Birmingham said she received an email from Mr. Adamson saying that the Valuation Office had carried out a review of how tolls were to be valued. This gave rise to an exchange of emails between the 8th and 9th

November, copies of which have been made available to the Tribunal. In the event a revised certificate was issued on 10th November 2010 stating that the value of the tolls was €3,800. Enclosed with the certificate was a valuation based on the "cost tone approach" which gave a valuation of €1,300. On the 25th November the appellant received a copy of the Valuation Report which included the consideration of the representations made by the appellant and which acknowledged that if the appellant's valuation approach was correct it would give rise to a valuation of nil.

Ms. Birmingham said that having come to the conclusion that the valuation was seriously flawed and unreasonable, it was decided that GVA Donal O Buachalla be instructed to make an appeal to the Commissioner of Valuation. In due course the Commissioner issued a certificate, the result of which was a reduction from €3,800 to €3,000, which figure is now the subject of this appeal to the Tribunal.

Ms. Birmingham was not cross-examined by the respondent.

2. Mr. Gareth Gallagher, BE, ACA

Mr. Gallagher who is the General Manager of the appellant company outlined the statutory background, by which the appellant was awarded the contract to construct, operate and maintain a road scheme from Ballinasloe East to Galway (The N6 Toll Scheme) which was completed on the 18th December, 2009. The N6 Toll Scheme involved the design, construction, operation and maintenance of roads and toll roads and all buildings and structures necessary for their operation, including toll offices, a maintenance depot and salt barn. The scope of the scheme is set out, he said, in the contract entered into between the National Roads Authority (NRA) and the appellant dated 4th April 2007 and also by reference to the NRA bye-laws made under the Roads Act, 1993 (as amended) on the 9th December 2009. Mr. Gallagher described the contract as "*a concessionary contract with a concession period of 27 years*".

Mr. Gallagher said that pursuant to the contract approximately 116.7 km of roads were constructed comprising 59.9 km of motorway and dual carriageway (known as

mainline roads) and 60.8 km of side roads. In accordance with the contract c. 60.1 km of road were handed back to the local authorities and land owners on completion. The appellant retained 52.9 km of mainline road and c. 3.7 km of side roads and ancillary buildings which under the terms of the contract the appellant is obliged to maintain until April 2037.

Set out below is a summary of the retention and handover roads.

PPP Scheme	**Total roads constructed**	**Retained by N6**	**Handed back to LA/landowners**
Mainline Roads	55.9 km	52.9 km	3.0 km
Side Roads	60.8 km	3.7 km	57.1 km
Total	**116.7 km**	**56.6 km**	**60.1 km**

Mr. Gallagher indicated that whilst initially there was some confusion regarding the length of the roads to be maintained by the appellant the above figures were now accepted by both parties for the purposes of the valuation.

Mr. Gallagher said he was aware that the appellant's valuer had advised that the Receipts and Expenditure method of valuation was the accepted method for the valuation of tolls. He was advised that this method was designed to take account of business realities and the value to be derived from the property. Mr. Gallagher said that if this was so then it followed that the cost of maintaining the roads should be allowed in full. On this assumption the value of the property concerned is nil having regard to the fact that the business is loss making.

Mr. Gallagher said that he was advised by Ms. Murphy of GVA Donal O Buachalla that the valuation made by the Commissioner was calculated on an incorrect basis. This valuation, he said, translates into an annual rates bill of €199,770. Due to lower than anticipated traffic volumes the operation of the tolls is loss making and these

losses are likely to continue. In the circumstances it is difficult to believe that an alternative operator could be found for this toll scheme.

Under examination by Mr. Murray, Mr. Gallagher confirmed that under the contract the appellant was obliged to maintain 52.9 km of mainline roads and 3.7 km of side roads and at the end of the contract period to hand back the roads in accordance with stringent requirements set down in the NRA contract. Mr. Gallagher said that during the contract period the roads have to be maintained to very high standards and that the appellant is obliged to monitor the condition of all elements of the road on a regular basis and to report its finding to the NRA. Mr. Gallagher estimated that the annual operation and maintenance costs were in the order of €6 million and that if the appellant failed to maintain the roads to the standards imposed under the contract for a period of six months or so the NRA would be empowered to take over the running of the toll. When asked about the hand back provisions, Mr. Gallagher said that the appellant had to meet the requirements set down in the contract which were there to ensure that the roads at the end of the contract period were in an excellent state of repair and would not require other than routine maintenance for some years thereafter.

Mr. Gallagher said that the tolls were a mechanism for the repayment of the costs incurred by the appellant over the lifetime of the contract. When the contract was entered into in 2007, the appellant had based its negotiations on projections of traffic volumes and toll revenues which were 40% greater than those being achieved. This gave rise to a situation where losses are being incurred annually so that accumulated losses to date are in the order of €11 million.

When asked to explain where and what is the maintenance depot, Mr. Gallagher said it was on a site selected by the NRA at Carrowkeel. Ideally it should have been located close to one or other of the toll plazas. The depot consists of an area used for storing equipment and a large store for the storage of salt necessary for winter maintenance. The depot, Mr. Gallagher said was used solely for the maintenance of the mainline roads which the appellant is contractually obliged to maintain and for no other purpose.

Under cross-examination by Mr. Dodd, Mr. Gallagher confirmed that the appellant had entered into the PPP contract with the NRA following a tender process and that the said contract which set down all the benefits accruing to the appellant was agreed following lengthy negotiations between the parties.

When asked by Mr. Dodd what he considered the property concerned to be, Mr. Gallagher indicated that it was the project road and the business of operating and maintaining the toll road which business he was at pains to point out was loss making. In response to further questioning, Mr. Gallagher ultimately agreed that it was the tolls that were to be valued and not the business in which the appellant was engaged. That said, however, the tolls were the mechanism which the NRA had set up to reward the appellant for building all the roads (117km) and meeting its ongoing obligations imposed under the contract which he accepted was freely entered into by the appellant. In regard to "the hand back requirements" Mr. Gallagher said they were onerous and would require significant capital expenditure in about twenty five years time as the roads, currently being maintained by the appellant, would have to be handed back in April 2037 in such a state that no major works would be required for the next ten years. In the interim, expenditures, other than annual routine maintenance costs, would be required from time to time as some elements of the road structure would require replacement or renewal.

In response to questions from the Tribunal, Mr. Gallagher said that total capital costs of the entire project was some €300 million of which about €100 million would be recouped from the NRA. He also confirmed that the NRA contract did not contain a proviso whereby the NRA would meet any short fall between toll revenue and operating costs. In this instance the appellant, Mr. Gallagher said, had assumed all the risk but as he pointed out in the event that the toll income exceeds anticipated levels there was a mechanism for the excess to be shared with the NRA. Mr. Gallagher said that it was his understanding that the underlying intent of the contract was that the toll income up to April 2037 would be sufficient to recoup to the appellant all costs

incurred by the appellant in building the roads, maintaining those stretches not handed back in 2009 and the cost of the hand back requirements and show a fair profit.

3. Ms. Siobhan Murphy, BSc (Property Economics), MRICS, MSCSI

Ms. Murphy is a senior property advisor with GVA Donal O Buachalla with particular expertise in the area of rating, investments and valuation. Ms. Murphy said her company was engaged by the appellant to lodge an appeal against the assessment of €3,800 placed on the property concerned in accordance with Section 28 of the Valuation Act, 2001. Following her appointment she was made aware of the interaction between Ms. Birmingham and Mr. Adamson. Ms. Murphy said that in her opinion Mr. Adamson in making his valuation of €3,800 had made a number of errors – particularly his decision to allow only 49% of the road maintenance and life cycle costs incurred by the appellant in meetings its obligations under the NRA contract. Ms. Murphy said she was given copies of the emails exchanged between Ms. Birmingham and Mr. Adamson and noted that at one stage there appeared to be a proposal that the valuation be reduced to €1,300 using what was described as the "cost tone and relative revenue" methods which, in her opinion, were inappropriate as they were based on an analysis of the valuations of other toll roads – a method which she had never heard of before. In any event the original valuation of €3,800 was made using the Receipts and Expenditure method but formulated on what she considered to be a wrong basis in that it did not allow in full the maintenance and life cycle costs incurred by the appellant.

Ms. Murphy said the appeal was lodged on the 17th December, 2010 and stated that using the Receipts and Expenditure method of valuation based on the financial model prepared by the appellant gave rise to a valuation of negative €2,600 and therefore nil. The Notice of Appeal noted on a without prejudice basis that "*if using the cost tone approach the valuation should be €1,300 and not €3,800"*. Ms. Murphy said that following a number of enquiries regarding the status of the appeal a Certificate was issued on 25th November 2011 stating that as a result of the appeal the valuation had

been reduced from €3,800 to €3,000. In this regard it is to be noted that in the "consideration of appeal" document the respondent had allowed only 49% of road maintenance and life cycle costs. The 49% being that section of the road (25.5km) subject to the toll expressed as a percentage of the total length of mainline road which the appellant is required to maintain under the NRA contract. The appellant being dissatisfied with the outcome of the appeal it was decided to lodge an appeal to the Valuation Tribunal.

Ms. Murphy said when the appeal was lodged with the Tribunal the issues between the parties were solely those in relation to what percentage of road maintenance costs and life cycle costs should be considered as "allowable expenses" using the Receipts and Expenditure method of valuation. Ms. Murphy said that in her opinion 93% of the costs under both headings should be allowable – 93% being the percentage of the roads being maintained by the appellant that is mainline road. Such an approach, Ms. Murphy said, was consistent with the findings of the High Court in the **Celtic Roads** case.

Under examination by Mr. Murray, Ms. Murphy outlined in some detail the principles behind the Receipts and Expenditure method of valuation and said that up until now this had been the preferred method of valuation used when valuing tolls for rating valuation purposes. When using the Receipts and Expenditure method it was good practice to use the actual revenues and projected revenues for a five year period and to then use the average figure as being the "Gross Receipts" for valuation purposes. The second step was to identify and quantify all allowable expenses and this was also achieved by looking at actual and projected figures for a similar five year period and take the average so calculated. It was also good practice to identify and quantify what are referred to as life cycle costs and to annualise these costs over the period of the contract. Ms. Murphy said that she and Mr. Adamson had essentially carried out the same exercise and that the difference in their valuations was down to a fundamental difference in opinion as to what costs were deductible in order to arrive at what was

called the divisible balance. Ms. Murphy pointed out that both she and Mr. Adamson had calculated the tenants share to be 10% of gross receipts.

At the request of Mr. Murray, Ms. Murphy outlined to the Tribunal her valuation approach that gave rise to a valuation of negative €2,600 or nil. Ms. Murphy said that the financial model employed by her and Mr. Adamson had been prepared by the appellant and assumed that toll revenue operating costs and road maintenance costs would all increase by 2% on a year on year basis. The model also proposed to annualise the life cycle costs over the remaining 27 years of the contract at 2.5%. Ms. Murphy said that her opinion as to what costs were allowable was in line with the findings of the High Court in the **Celtic Roads** case.

When asked to comment on the new method of valuation suggested by the Valuation Office using an analysis of the rateable valuations of other tolls, Ms. Murphy said this approach was totally inappropriate and that there was no good reason to set aside the Receipts and Expenditure method in this instance just because it produces a negative valuation.

Under cross-examination by Mr. Dodd, Ms. Murphy confirmed that the valuation of €3,000 in her opinion was excessive and that this was clearly borne out by the valuation she had made using the Receipts and Expenditure method. She confirmed that the property concerned in this appeal was the tolls and not the toll road or any other road and that the statutory exercise was to estimate the rent that a hypothetical tenant would pay to occupy the toll. In response to detailed examination Ms. Murphy conceded that in her written précis she had in places referred to the property concerned as “the asset” or “the toll scheme” and agreed that this represented incorrect and imprecise terminology. The property concerned was the tolls and the right to receive the income there from. Ms. Murphy agreed with Mr. Dodd that “the landlords share” was effectively an estimate of the rent a hypothetical tenant would pay to the landlord (The NRA) in order to occupy the tolls which in this instance generated in excess of €6 million per annum.

In the course of detailed cross-examination Ms. Murphy agreed that under the contract made with the NRA the appellant assumed a number of obligations and in return obtained the right to occupy the tolls and collect the toll fees payable by users of a 25.5km stretch of the N6. She further agreed that there was a distinction between the tolls and the toll road in as much as one was a right to receive an income flow whilst the other was a physical entity. However Ms. Murphy contended that it has to be accepted for rating valuation purposes the two are intrinsically interlinked in that the tolls were collected from users of the toll road. She agreed that the toll road was a public road and consequently not a relevant rateable property by virtue of the fact that it was not in the exclusive nor the beneficial occupation of anyone. However, Ms. Murphy said one could not envisage a situation whereby there was a toll but no toll road.

When questioned about her understanding of the Receipts and Expenditure Guidance Note, Ms. Murphy said it was proper to look at the actual accounts and use them as the basis for arriving at the valuation of the property concerned in accordance with the relevant statutory provisions and hypothesis. She agreed with Mr. Dodd that in some instances this could give rise to some difficulties in distinguishing between the actual and the hypothetical world of rating. She also agreed that the primary issue was the determination of the rent a hypothetical tenant would pay to occupy the tolls which had an income flow in excess of €6 million per annum and in this instance the appellant did not pay a rent. Ms. Murphy said that this non payment of rent was a recognition of the fact that the NRA did not bear the full cost of constructing the road in the first place nor the ongoing costs of maintaining the road not yet handed back. When asked if this non-payment of rent was in the nature of a benefit from the landlord to the tenant in lieu of rent which in compliance with the Receipts and Expenditure Guidance Note ought to have been added back, Ms. Murphy said she did not accept Mr. Dodd’s interpretation of the facts. Similarly when questioned about the “cost of purchases” and “working expenses” as referred to in the Guidance Note, Ms. Murphy agreed that they were allowable only if they were incurred as part of the venture undertaken as a result

of the occupation of the property or as a result of the operation of the undertaking within the subject property. When it was put to Ms. Murphy that she had allowed costs and expenses which were not related to the tolls but to the roads, which were not part of the tolls, she said that whilst the tolls and the roads were separate entities they were intrinsically linked for rating valuation purposes in as much as you could not have a road toll without a road.

Ms. Murphy said that she agreed in principle that one could not take the expenses and costs associated with one property and allocate them to another property. However, in this case it would be contrary to common sense to disassociate the costs and expenses included in maintaining the toll road and other roads from those of operating and collecting the tolls. As far as she was concerned the valuation made by her was prepared strictly in compliance with the Guidance Note having regard to the fact that the tolls and the roads which the appellant are obliged to maintain are intrinsically linked for valuation purposes. In valuing the tolls, Ms. Murphy said she had relied upon the financial model prepared by the appellant.

Mr. Dodd drew Ms. Murphy's attention to a comment contained in her written précis to the effect that *"All other toll roads as far as I am aware are rated based on the entire length of the roads"*. When it was put to her that this was not the case in that the tolls on the M3, N7 & N9 were valued having regard to the costs associated with that portion of the roads that can only be travelled on payment of a toll fee. Ms. Murphy agreed that while this may be the case the valuation of N7 and N9 tolls were under appeal to this Tribunal. In regard to the M3 toll, Ms. Murphy said she had no detailed knowledge of the basis on which it was valued.

In regard to the respondent's introduction of new methods of valuing tolls, Ms. Murphy expressed the view that their new methods "*were inappropriate and unfair to a loss making business in particular and inconsistent with practice to date in valuing tolls. I believe it to be inappropriate and punitive to ignore and or indeed subvert the*

profit earning ability of a property when reaching a valuation". Similarly, Ms. Murphy expressed the view that *"shortening the length of the deemed toll road is a fictitious and unreasoned exercise designed to distort the Receipts and Expenditure calculation to produce a positive and unjust rateable valuation. I am not aware of any precedent that supports this approach and no other toll operator that is required to meet this onerous burden. Indeed it is acknowledged that this approach is in line with a reviewed Valuation Office practice on toll road valuations."*

Under re-examination by Mr. Murray, Ms. Murphy reaffirmed her opinion that tolls by their nature are a non typical category of property and that it had been accepted that the Receipts and Expenditure method of valuation was now the preferred method of valuing tolls for rating purposes in this country. She said that under the circumstance it was different to understand why the Valuation Office wished to introduce new methods at this stage. The Receipts and Expenditure method, Ms. Murphy said was devised to introduce an acceptable methodology for valuing specialised properties such as public utilities and tolls which are rarely if ever let on the open market and referred to Paragraph 2.5 of the Guidance Note which described the method in the following terms; *"A method to ascertain the rental value of a property, for the purposes of rating, by reference to the receipts and expenditure, adjusted as necessary, of an undertaking carried on at that property"*.

Ms. Murphy also reiterated her opinion that it was not possible to conceive a situation where it could be possible to value a toll without a toll road. She has confirmed that her decision not to limit maintenance and life cycle costs to 25.5 km of mainline road which are subject to the toll was correct and in line with the findings in the **Celtic Road** case.

In response to questions from the Tribunal, Ms. Murphy acknowledged that the underlying basis of her valuation was the financial model prepared by the appellant which she had accepted without question or reservation. Ms. Murphy agreed that there appeared to be an inherent contradiction in assuming toll income and operating costs

would increase at 2% per annum year on year and the decision to discount the bottom line figure at 3.5% but said that any such difference did not materially affect the valuation. She agreed that a hypothetical tenant might construct a different financial model with a markedly different outcome.

Ms. Murphy agreed with the Tribunal that the Guidance note suggested that once the valuer had completed a valuation it was essential that the valuer *"review each element of the valuation to ascertain whether they had been correctly applied and produce a credible result"*. Ms. Murphy said she had carried out this exercise and was aware that in arriving at a nil valuation it could be said that she had taken an extreme view. Nonetheless it was her honestly held view that such a valuation, in light of the financial information available to her, was fair and reasonable.

4. Mr. Mark Adamson, MRICS, MSCSI

Mr. Adamson is a Chartered Surveyor and Team Leader in the Valuation Office and was the officer of the Commissioner appointed pursuant to Section 28 (2) of the Valuation Act, 2001 to carry out the revision which resulted in the valuation of the subject property being entered on the valuation list at a rateable valuation of €3,800.

In his evidence he outlined the progress of the revision from the initial assessment of €3,800 to the decision of the Commissioner to reduce the valuation to €3,000.

In his evidence Mr. Adamson said the toll scheme provided for the construction of that part of the road between junction 15 west of Ballinasole and junction 19 north of Cranmore, a total length of 56km together with other roads by way of a PPP. Mr. Adamson said that that section of the motorway between junction 15 and 16 (length 25.5km) was subject to the payment of a toll while the remainder was toll free. Under the PPP scheme the appellant is entitled to collect the tolls from December 2009 to April 2037. Under the PPP the appellant is obliged *"to maintain the road pavement and structures including the signs and lighting. They are also required to manage road*

safety and traffic management issues". The appellant is also obliged to comply with the hand back requirements *"to upgrade all the facilities associated with the road prior to the expiration of the PPP contract so that the road structure would have a further 10 year life after the expiration of the contract before any structural strengthening would be required"*.

Mr. Adamson said that his valuation of the property concerned had been prepared using the Receipts and Expenditure method and in compliance with the Guidance Notes thereto published by The Joint Professionals Institutions Rating Valuation Forum. The valuation is an estimate of the rent which a hypothetical tenant would offer to operate the tolls. By applying the Receipts and Expenditure method of valuation the operating profit to be derived from the tolls will be determined (referred to as the divisible balance) and this will provide the amount available for the tenants share, rates and rent. The receipts to be taken into account, Mr. Adamson said, are specified at Paragraph 5.12 to 5.16 of the Guidance Notes and "*should include all monies directly or indirectly derived from occupation of the property"*. The Guidance Note, he said, describes in some detail at paragraph 5.24 to paragraph 5.33 the cost of purchases and working expenses to be considered for the purpose of valuing the property concerned and paragraph 5.28 states as follows; *"Outgoings to be considered as allowable working expenses and those incurred as a result of the operation of the undertaking within the subject property. It should be noted that any rent paid for the subject property should not be deducted as a working expense since ascertaining rental value is the object of the valuation exercise"*. Mr. Adamson said that the expenditure to be taken into account in valuing the property concerned is to be restricted solely to that expenditure incurred in relation to the operation and maintenance of the tolls and should not include any expenditure in relation to maintaining the toll road or any other roads.

Mr. Adamson said that in "*return for occupying the toll, N6 (Concession) Ltd. has agreed as part of the provisions of the Public Private Partnership to design, build, manage and maintain the road in this scheme as well as meeting the hand back provisions. There are contractual obligations agreed as a result of negotiations*

between N6 (Concession) Ltd and the National Road Authority and are not charges to be payable under any enactment as provided for in Section 48 of the Valuation Act, 2001. They are a charge similar to and in lieu of rent for occupying the tolls." Hence, Mr. Adamson said none of the expenditure involved in meeting these obligations should be allowed or set off against income. Accordingly only that expenditure that relates to the operation of the tolls and necessary repairs and maintenance costs in order to maintain the tolls in their present state are allowable in accordance with the Guidance Notes. However, Mr. Adamson said, if the Tribunal concluded that the cost of maintaining the toll road were an allowable expense then such allowable costs should be restricted to that portion of the road which is subject to the toll (25.5km) and not the entire road giving a figure of 49%.

Mr. Adamson said the PPP contract obliged the appellant to upgrade all the facilities associated with the road prior to the hand back in April 2037. Their estimated life cycle costs amount to €67,339,000 (an agreed figure) which will be incurred in the period 2016 to 2036. Using an annual return of 2.5%, the annual fund necessary to meet this obligation in respect of the tolled section (25.5km), amounts to €870,747 in the event of the Tribunal finding that the only allowable expenditure is that in relation to the maintenance and lifecycle costs in relation to that section of the road which is the subject of the toll, i.e. 25.5km.

Mr. Adamson said that in this opinion the valuation of the property concerned, on the basis of only deducting the costs associated with the occupation and operation of the toll, as distinct from the toll roads is €9,000. In arriving at this valuation Mr. Adamson said his estimate of allowable costs i.e. €712,500 in the absence of information on actual costs was a "*best estimate"*. He also pointed out that this valuation was in excess of the valuation currently on the Valuation List.

Under examination by Mr. Connolly, Mr. Adamson said that tolls which are incorporeal hereditaments are relevant property under Schedule 3 (4) of the Valuation Act, 2001. The property concerned in this appeal, being the tolls, which operate

through a toll gate at Gortnahoon which was occupied by the appellant who also maintained and operated the roads. Mr. Adamson said he had prepared his initial valuation using the Receipts and Expenditure method on the basis of financial and other relevant information made available to him by the appellant. Mr. Adamson said that at the time of the revision in late 2010 there was an internal debate within the Valuation Office on the application of the Receipts and Expenditure method in valuing tolls and this had given rise to some uncertainty. This debate had continued for some time and had developed to the extent that it was now the view within the Valuation Office that the relevant property to be valued was the tolls and that when using the Receipts and Expenditure method the only allowable costs were those arising out of the occupation of the tolls. Costs in relation to the upkeep of the toll road or any other roads were not to be allowed in that the roads are not part of the relevant property nor could they be as they are public roads not in the occupation of the toll operator.

Mr. Adamson went on to say that the appellant had signed up to a contract to build and maintain roads and as part of that contract was offered the operation of the toll scheme. While the construction and maintenance of the roads and the toll scheme are linked, contractually they are not similarly linked from a rating point of view. Mr. Adamson said that he was now of the opinion that the appellant's obligations under the PPP contract was a form of rent for the occupation of the toll. It has to be understood, he said, that the NRA could itself have constructed the roads out of public funds and then introduced a toll scheme in order to recoup the cost. Having decided on the levels of the tolls to be charged the NRA could have then sought offers from prospective operators for the right to collect and operate the toll scheme and to maintain the toll gates etc. subject to the payment of an annual sum by way of rent. The purpose of the rating valuation exercise is to estimate what the rent might be. This proposition now being put to the Tribunal was the same as that which the Commissioner was pursuing in the Supreme Court appeal against the decision of the High Court in the **Celtic Roads** case. Mr. Adamson said the valuation of €9,000 which he had put before the Tribunal was prepared on the assumptions as outlined above.

Mr. Adamson said in the event of the Tribunal not accepting the revised valuation approach, he had prepared an alternative valuation which was similar to that, in many respects, being put forward by the appellant's valuer. The only major difference being that he had only allowed road maintenance and life cycle costs in respect of the section of the N6 which was subject to the payment of appropriate toll fees i.e. 25.5km; while the appellant had allowed for the costs in respect to the entire length of the N6 which the appellant was obliged to maintain under the PPP contract.

Under cross-examination by Mr. Murray, Mr. Adamson agreed that during the initial stages of valuing the property concerned he had in correspondence with Mr. Birmingham made reference to the toll, the toll scheme and the toll road but did not accept that this was a recognition by him that the toll and toll road should not be looked at in isolation. Indeed from a rating valuation perspective they must treated as being separate and that was what he done in arriving at his revised valuation of €9,000 now being put forward to the Tribunal. As far as he was concerned, Mr. Adamson said, the appellant was in the exclusive occupation of the tolls which is the right to collect the tolls at Gortnaloon up to April 2037 and it was this right to collect the tolls that had to be valued.

Mr. Adamson was closely examined in relation to his interaction with Ms. Birmingham and the role played by him at the revision and appeal stage, the involvement of Mr. Cooney at various times and the evolution of the Valuation Office's policy that gave rise to his most recent valuation of the property concerned at €9,000 and the following is the summary of his responses. At the outset the approach of the Valuation Office was to value the toll having regard to the toll revenue and offset the costs and expenses in relation to operating the tolls and maintaining that section of the road which is subject to the payment of the toll i.e. 25.5km but excluding the remainder of the road that the appellant is required to maintain under the PPP contract. On this basis and using the Receipts and Expenditure method of valuation he had prepared his valuation which gave rise to a rateable valuation of €3,800 as stated in the valuation certificate issued on (10th November 2010). Mr. Adamson said that while he had not changed his

mind about the proposed method of valuation, he had changed his mind as to what costs and expenses should be allowed. This change of mind was prompted by his revised opinion that since the "tolls" was the property concerned, it followed that only those costs in operating the collection of the tolls should be allowed and no allowance should be made for the maintenance of any section of the road whether or not it is subject to the payment of a toll fee. Mr. Adamson said this change in approach had evolved over a period of time when the Valuation Office was developing new practices in regard to the valuation of tolls based on legal advices obtained in light of the Supreme Court appeal against the High Court Decision in the **Celtic Roads** case. The situation now is that the Valuation Office considers the tolls to be the property concerned and that the only costs and expenses to be allowed are those incurred in operating and maintaining the tolls to the exclusion of all other costs and expenses. Mr. Adamson said he agreed with this revised approach which had only been finalised after the appellant had lodged the appeal with the Tribunal.

In regard to the revision and appeal process, Mr. Adamson said he was mistaken in regard to the length of the road to be maintained by the appellant under the PPP contract and that he had, in his calculations, omitted to add back the amount paid in rates and that these errors had been brought to his attention by Ms. Birmingham after the valuation certificate (proposed) had been issued on (28th September, 2010) to the effect that it was proposed to value the property concerned i.e. the Tolls at €3,800. Mr. Adamson said that in his role as the Revision Officer he was obliged to consider any representations made to him by the appellant and decide whether the proposed valuation of €3,800 should be amended or not. Mr. Adamson said that the main issue to be addressed was that Ms. Birmingham's calculations had given rise to a negative valuation of €2,600. A valuation such as this is not uncommon when using the Receipts and Expenditure method and when it happens other methods of valuation are examined. In this instance Mr. Cooney, the then Head of Valuation Services and others decided that they wished to review the entire valuation policy in relation to the valuation of tolls generally, and in particular having regard to the current economic climate. Another factor was that a number of other tolls were the subject of revision.

Mr. Adamson said he was asked to do some research into alternative valuation approaches some of which were referred to in correspondence with Ms. Birmingham but which in the end were not introduced.

Mr. Adamson said that at that stage he received more accurate information in regard to the length of the road to be maintained by the appellant under its contractual obligations and that only 49% of this length i.e. 25.5km was subject to the payment of the toll. Mr. Adamson said he was aware that if all maintenance and life cycle costs were allowed in full then the revised valuation would be nil which he felt would be unrealistic. In the event the Valuation Certificate issued on (10th November) stated that the valuation to be entered on the Valuation List would be €3,800, Mr. Adamson stated that he advised Ms. Birmingham that this Valuation Certificate had been issued on the instructions of Mr. Cooney and that there were no supporting calculations to support the valuation. Mr. Adamson said he would agree that in light of Ms. Birmingham's assistance and co-operation during the revision process, it would be correct to say that she had not been treated in a satisfactory manner.

In regard to the appeal process, Mr. Adamson said it was standard practice for the Appeal Officer to seek from the Revision Officer comments in regard to submissions received from the appellant before making a final recommendation.

In regard to Mr. Cooney's involvement in the appeal process it would, Mr. Adamson said, be incorrect to describe the observations he had made in relation to the valuation of the tolls as directions. Whether the Appeal Officer considered Mr. Cooney's observations to be directions was not for him to say.

When asked if he included the maintenance depot in his valuation, Mr. Adamson said he had not as the County Council had not required it to be valued. In any event the maintenance depot was a separate property in a separate location and not dissimilar to a situation where a standalone store used in conjunction with a shop in a different location would each have separate valuations.

Mr. Murray asked Mr. Adamson if he would agree that the critical question to be answered was the appellant's occupation of the toll and its right pursuant to the PPP contract to the possession or enjoyment of the right to collect the toll monies. Mr. Adamson agreed this to be the case and that this was the reality of the relationship between it and the NRA. However, it could not be assumed this relationship would necessarily transfer into the rating hypothesis. In his opinion the reality was that the appellant was offered the occupation and operation of the tolls as part of the contract to build a set of roads – which it did. From a rating perspective it is the tolls that are the relevant property not the roads which are public roads and hence not relevant rateable property. While there is a connection between the tolls and the roads they must be considered separate from a rating valuation point of view.

Mr. Murray asked Mr. Adamson if would be true to say that the occupation, collection and operation of the toll is in return for the financial obligations imposed on the appellant under the PPP contract including those in regard to the maintenance of the roads and he again responded by saying that the roads were not part of the property concerned in as much as the toll is a standalone relevant property. Accordingly, Mr. Adamson said, it followed that only those costs in operating and maintaining the tolls were allowable. In this regard, Mr. Adamson said that while the toll is an incorporeal hereditament, the Supreme Court in the **West Link** case, indicated that the value of any structures such as the toll gate apparatus and those used for the collection of the tolls formed part of the valuation of the tolls.

In response to questions from the Tribunal, Mr. Adamson agreed that his valuation of €9,000 was not in accordance with the findings of the High Court in the **Celtic Roads** case – nor was his alternative valuation. Mr. Adamson said his decision to put forward his valuation of €9,000 on an entirely new basis was his for the reasons already stated in evidence. When asked to comment on a statement made by the Tribunal in the **Celtic Roads** appeal – "*The nature of the arrangement between the NRA and CRG is such that the tolls during the concession period is set at levels as to reflect the*

economic benefits and risks to both parties including the ongoing responsibility of CRG to maintain and operate 54km of motorway to stipulated standards, In such a situation, it would be fair to say that the base tolls would have been set at lower levels had CRG been obliged mostly to maintain a length of 21km of motorway". Mr. Adamson said the facts in relation to N6 were different as the toll scheme was in place before any roads were built and formed part of the tender process. Mr. Adamson said the appellant had entered into a situation where they had over-estimated the income with the result that their anticipated financial return had not materialised. Mr. Adamson, when a number of scenarios were put to him, indicated that while there might be a relationship between the operation of the tolls and the level of investment made by the operator he had to estimate the rent that a hypothetical tenant would pay in order to operate and maintain the toll on the assumption that he would bear the cost of maintaining the toll which is the property concerned in this appeal. He had estimated those costs to be €712,500 and had valued the property using the Receipts and Expenditure method of valuation. Mr. Adamson said there was a distinction between the obligations imposed and benefits granted under a contract and the rating hypothesis where the property to be valued is the toll as a standalone relevant property.

When asked who first came up with the revised approach for the valuation of tolls, Mr. Adamson said it had evolved from discussions held with the respondent's legal advisors in regard to the Supreme Court appeal being taken by the respondent against the decision of the High Court in the **Celtic Roads** case. Mr. Adamson said he accepted the revised approach, that it was the toll that was the property concerned that had to be valued and that no allowance should be made for the costs and expenses incurred in maintaining any roads for two reasons - firstly the roads were not part of the property concerned and secondly they were public roads and hence not relevant rateable property. Mr. Adamson agreed that this revised approach was contrary to the findings of the high Court in the **Celtic Roads** case but said that his valuation was in line with the deposition being made by the respondent in the upcoming Supreme Court appeal. In short, Mr. Adamson said, his valuation was based on the actual and anticipated toll income presented to him by the appellant and as for the operating and

maintenance costs of €712,500 – this figure was his best estimate of what those costs might be. Mr. Adamson said he was conscious that his role at the Tribunal was that of an expert witness and as such it was his firmly held opinion that the revised valuation approach was proper and consistent with rating law.

When asked about paragraph 2.5 of the Guidance Note which defines the Receipts and Expenditure method as "*A method to ascertain the rental value of a property, for the purposes of rating, by reference to the receipts and expenditure, adjusted as necessary, of an undertaking carried out on the property*" – Mr. Adamson said "*the property*" in this instance was the tolls and "*the undertaking*" was the collection and operation of the tolls and did include the toll road – in the circumstances costs of maintaining the roads was not an allowable expense. Mr. Adamson agreed that the quantum of the tolls may have been determined having regard to the financial obligations imposed by the PPP contract - including the cost and financing of constructing the roads and their ongoing maintenance but when it came to valuing these tolls for rating purposes the first step was to identify the property concerned which in this case is solely the "tolls" and secondly to allow only those costs of maintaining and operating the "tolls". There was, he said, no link between the obligations imposed under the PPP contract and the rating hypothesis.

In response to further questioning by Mr. Murray, Mr. Adamson agreed that the appellant could not have acquired the right to occupy the toll without signing up to the PPP contract and complying with all the terms and conditions contained therein. In regard to his valuation, Mr. Adamson confirmed the valuation included those structures and buildings necessary for the operation, collection and administration of the toll including the generator building, a compound and service car park for 43 vehicles.

Findings

1. The parties to this appeal were represented by senior and junior counsel and the Tribunal is indebted to them for the depth and quality of their submissions. This,

coupled with the range and scope of authorities introduced were of immense assistance to the Tribunal.

2. The Tribunal received evidence from senior members of the staff of the appellant company and the contributions they made in relation to PPP contracts and other matters were, again, of great assistance to the Tribunal.

3. The valuers, in preparing their evidence, shared the view that the most appropriate method of valuation, having regard to the nature of the property concerned, was the Receipts and Expenditure Method. Similarly, they both used as the basis of their respective valuations the financial model prepared by the appellant. This common approach was helpful to the Tribunal, as it enabled the Tribunal to identify and focus on those matters which gave rise to diverse opinions of the rateable value of the property concerned.

4. It is common case that the property concerned is the tolls collectable from users of vehicles of all types which traverse that section of the N6 motorway between Junctions 15 and 16 and that the length of road subject to the toll is 25.5km.

5. It is common case that tolls are relevant property as provided for in Paragraph 1(h) of Schedule 3 of the Valuation Act, 2001. It is agreed that tolls by their nature are incorporeal property, but nonetheless when they fall to be valued for rating purposes the valuation of essential corporeal elements needed for the operation and collection of the tolls may be included in the valuation to be determined.

6. The tolls in this instance came about by way of a PPP contract between the National Roads Authority (NRA) and the appellant for the design, construction, financing, completion and commissioning of some 116.7km of roads in accordance with Section 57 of the Roads Act, 1993, as amended. The contract was entered into following a tender process.

7. It is common case that on completion of the construction phase of the contract, 60.1km of roads were handed over and that the remainder, i.e. 52.9km of mainline roads and 3.7km of side roads, are to be maintained, operated, managed and kept open in compliance with the terms and conditions of the contract by the appellant up to 3rd April, 2037.

8. It is common case that in accordance with the contract the appellant is required, at the end of the contract period in April 2037; to hand back those roads currently being maintained by the appellant in compliance with the "Hand Back Requirements" as set down in Schedule 25 of the contract.

9. It is agreed that in the event of the appellant being in default of its obligations under the NRA contract, the NRA has the ultimate power to terminate the contract in its entirety by notice in writing. Details of the levels of default are set down in Schedule 22 of the contract.

10. In the Tribunal's opinion, the genesis of the contract between the NRA and N6 (Concession) Ltd. was in line with the Government's policy to have the private sector participate in the provision of strategic pieces of public infrastructure. The bargain struck between the NRA and N6 (Concession) Ltd was that N6 (Concession) Ltd. would finance the procurement of a road scheme from Ballinasloe East to Galway (i.e. the N6 Toll Scheme), which was completed in December 2009. In addition, N6 (Concession) Ltd. would undertake to operate, maintain, and keep open 52.9km of mainline roads and 3.7km of side roads up to April 2037, in accordance with stringent standards set down by the NRA. In return, N6 (Concession) Ltd obtained the right to operate a system of tolls over a section of the roads they were obliged to maintain and operate, i.e. that section between Junctions 15 and 16, a length of 25.5km, in accordance with the Toll Scheme Bye-laws which also set down the base tolls and provided how they could be increased from time to time over the term of the contract. In the Tribunal's opinion, the base tolls (and the mechanism that they may be increased from time to time) were set at levels that would enable N6 (Concession) Ltd to recoup

over the term of the contract the capital and outgoing costs of maintaining 52.9km of mainline roads and 3.7km of side roads, as provided for in the contract, and also to enable them to make a reasonable profit commensurate with the risks they had undertaken. In this regard, the contact provides a profit-sharing mechanism when revenues exceed stipulated levels. At the end of the contract period, the State in the guise of the NRA will, at no direct cost, obtain and take possession of an important piece of public infrastructure in pristine condition.

11. There is, in the Tribunal's opinion, a causal relationship between the anticipated toll income receivable by N6 (Concession) Limited over the period of the contract and the financial responsibilities assumed by it. In other words, the base tolls were set at levels having regard to the likely capital expenditures and ongoing costs to be incurred by N6 (Concession) Limited over the period of the contract in meeting the obligations imposed on it under the terms and conditions of the said contact. In other words, the lesser the obligations and costs associated therewith, the lower the base tolls might have been. This line of reasoning is similar to that of the Tribunal in the Celtic Roads (Dundalk) Ltd. Case which found approval in the High Court.

12. In many respects, the facts of this appeal are similar to those in the Celtic Roads (Dundalk) Ltd. Appeal. In that case, Celtic Roads (Dundalk) Ltd. (CRG) entered into a similar NRA contract to design, construct, finance, operate and maintain for a period of 30 years an 11.1km stretch of the M1 motorway from Ballymascanlon to Haynestown, together with 7km of new link roads and associated bridges and other structures. In addition CRG also undertook to operate and maintain the existing motorway from Haynestown to Gormanston which included 21.74km of motorway which was subject to tolls. In total, the length of motorway to be maintained and operated by CRG is 54.7km. In return, CRG are entitled to an agreed proportion of the toll for revenues which they are obliged to collect.

13. In the Celtic Roads case, the Tribunal concluded that the cost of maintaining and operating 54.7km of motorway was an allowable expense when using the Receipts and

Expenditure Method of Valuation in order to determine the Net Annual Value of the toll. This conclusion was upheld in the subsequent appeal to the High Court, which is now the subject of an, as yet unheard, appeal to the Supreme Court. Unlike the respondent, the Tribunal is of the view that it cannot disregard the findings of the High Court in this matter and hence it follows that the costs incurred by the appellant in maintaining 56.6km of road and providing for life-cycle costs therewith should be allowable in full. To that extent, therefore, the Tribunal finds for the appellant.

Other Legal Issues

14. Mr. Murray, in his submissions, contended that the interference and intrusions of persons other than the appointed Revision Officer, Mr. Mark Adamson, and the similar involvement of persons other than Mr. Conboy, the Appeal Officer, in the Section 30 appeal process, was wrong and that this activity was *"unlawful and vitiated the entire revision process*." In particular, *"Mr. Cooney's involvement in directing that a High Court judgment be ignored at the appeal stage* […] *is an irregularity that contaminates the entire process."*

The Statutory Framework

15. The Valuation Act, 2001 which came into effect on 2nd May, 2002 is the sole statute dealing with the valuation of property throughout the State for rating purposes.

16. The 2001 Act provides for the revaluation of relevant property in the State from time to time and for the revisions of property on the valuation lists which are subject to a "*material change of circumstances*" as defined in Section 3. Until such time as a revaluation is carried out pursuant to Section 19, the existing valuation list for each Rating Authority Area shall remain in place.

17. The Commissioner of Valuation is the statutory person responsible for the valuation of property for rating purposes and "*shall be independent in the performance of his or her function*". (Section 9(10)).

18. Section 11 enables the Commissioner to delegate his or her functions and states:

11.—(1) The Commissioner may delegate in writing a specified function of the Commissioner under this Act to any officer of the Commissioner.

(2) Where a function is delegated undersubsection (1), the officer concerned shall perform the function under the general direction and subject to the general control of the Commissioner and in accordance with such (if any) limitations as may be specified in the delegation in relation to the area or period in which or the extent to which he or she is to perform the function.

(3) Any function, when performed by an officer to whom it has been delegated under this section, shall be deemed to have been performed by the Commissioner.

(4) A delegation under this section may relate to the performance generally of a function or to the performance of a function in a particular case or class of case or in relation to property in a particular area.

(5) The Commissioner may revoke a delegation under this section at any time either generally or in relation to a particular case or class of case or in relation to property in a particular area.

(6) Where, as respects a particular case or class of case, a delegation of a function is revoked at a time when the function has not been fully performed, the Commissioner himself or herself or another officer of the Commissioner to whom a delegation in respect of that function has been made under this section may continue the performance of the function as respects the case or class of case.

(7) The Minister may give such general directions in writing to the Commissioner in relation to the exercise of his or her powers under [2001.] Valuation Act, 2001. [No. 13.] this section as the Minister considers appropriate and the Commissioner shall comply with any such directions.

(8) Subsection (7) shall not be construed as enabling the Minister to exercise any power or control in relation to the exercise in particular circumstances by the Commissioner of his or her powers under this section.

19. Section 28, which deals with the revision of valuation lists at subsection (2) provides as follows:

The Commissioner may of his or her own volition appoint an officer of the Commissioner to exercise, in relation to such one or more properties as the Commissioner considers appropriate, the powers expressed by this section to be exercisable by a revision
officer, and such an officer who is so appointed is referred to in this Act as a ‘‘revision officer’’.

20. In the context of this appeal, Mr. Adamson was the officer appointed by the Commissioner of Valuation pursuant to Section 28(2) of the Valuation Act, 2001 as the Revision Officer and to exercise his powers under the Act as he considered appropriate. In the first instance Mr. Adamson proposed that the valuation of the property concerned be entered on the valuation list at a rateable valuation of €3,800 and issued a Valuation Certificate (proposed) to this effect on 28th September 2010. However, it is clear from the exchange of emails between Ms. Birmingham and Mr. Adamson between the 8th and 9th November 2009, which are referred to later in this judgment, that Mr. Adamson was no longer, at this time, acting on his own volition and that the ultimate decision to enter the valuation of the property concerned at €3,800 was taken on instructions from Mr. Patrick Cooney, Managing Valuer.

21. There is a view that the Commissioner of Valuation or any other officer acting on his behalf has no statutory power to direct the Revision Officer on how to exercise his power under Section 28(4) of the Act. This view was upheld by this Tribunal in the appeal **VA04/2/018 - Trabolgan Holiday Centre v The Commissioner of Valuation.** However, the facts in this case are materially different in two respects – firstly, the direction to the Revision Officer in the **Trabolgan** Case came after he had issued the Valuation Certificate (proposed) and resulted in a revised certificate being issued and secondly the direction to that Revision Officer was in regard to rateability and not quantum.

22. *Inter alia* Section 11 of the Act provides:

> *"11.—(1) The Commissioner may delegate in writing a specified function of the Commissioner under this Act to any officer of the Commissioner.*
> *(2) Where a function is delegated undersubsection (1), the officer concerned shall perform the function under the general direction and subject to the general control of the Commissioner…"*

23. The Valuation Office prepares in-house guidelines as to how various categories of property are valued. Copies of these guidelines are available to ratepayers and their advisors alike. This policy is in line with that of other valuation bodies in other jurisdictions which operate a similar rating valuation system. The purpose of these guidelines which do not have any statutory authority is two-fold – firstly it gives a ratepayer a greater understanding of the statutory basis of the valuation and how each individual assessment is made and secondly it ensures that within the Valuation Office itself there is a consistency of approach which should lead to a uniform level of valuation. Whether or not the issuing of guidance notes interferes unduly with the perceived role of the Revision Officer is a moot point but on balance it would be surprising if such guidance notes were not issued or that the actions of the Revision Officer were not subject to some degree of oversight if only to ensure that proper valuation procedures are being adhered to so that each valuation is fair in itself and consistent with other valuations on the valuation list. There is a fine line between this type of oversight and that what might be described as the inappropriate interference which would appear to have occurred in this instance where Mr. Adamson was directed to issue a Valuation Certificate, the contents of which he did not agree with.

24. In regard to the internal Valuation Office guidance notes generally it is to be assumed that they would from time to time be amended to reflect the findings of relevant Tribunal or High Court determinations which in relation to motorway tolls would be the findings of the High Court in the Celtic Roads appeal which ruled that the costs incurred by the appellant in maintaining the motorway in accordance with its

contractual obligations was an allowable expense. In other words the costs were not limited to that section of the motorway subject to the toll.

25. Sections 30 to 33 of the Act deal with appeals arising from a revision of valuation (Section 28) or a valuation carried out under Section 19. Section 33(5) states:

The Commissioner may employ such procedures as he or she considers appropriate for the purposes of the consideration of the appeal.

And section 11(3) states:

Any function, when performed by an officer to whom it has been delegated under this section, shall be deemed to have been performed by the Commissioner.

In the context of this appeal:

(i) Mr. Mark Adamson is the Revision Officer;
(ii) Mr. Paschal Conboy is the Appeal Officer;
(iii) Mr. Jim Gormley is the Appeal Manager;
(iv) Mr. Paddy Cooney is Head of Valuation Services.

26. In the appeal **VA06/2/045 – Orange Tree Ltd.**, the Tribunal examined the Section 30 appeal process in some detail and made reference to an internal Valuation Office memo issued by Mr. Jim Gormley, Appeal Manager, dated 24th January, 2004 and titled "*New Appeal Procedures*", paragraph 6 of which states:

- *"In cases where the Appeal Officer is satisfied that all of the issues raised by the appellant have been dealt with at revision/representation stages, he may decide the appeal without reference to the Revision Officer.*
- *Where issues are raised at appeal, which appear not to have been taken into account by the Revision Officer, the Appeal Officer will refer the case to the Revision Officer for comment or clarification on the specific issues. In such cases the Revision Officer will deal only with the issues specified by the Appeal Officer.*

In some cases further discussion between the Revision Officer and the appellant may be required.

- *The Revision Officer will report back to the Appeal Officer within one month in the majority of cases.*
- *The practice of agreement with the agent/appellant is being discontinued. The Appeal Officer will decide the appeal in all cases."*

27. In the absence of any evidence suggesting that new procedures have been adopted, it would appear from the above that the Appeal Officer's role is to investigate the grounds of appeal submitted by the appellant and, having taken such actions as he or she considers necessary or appropriate in the circumstances, including the taking of observations from the Revision Officer, will decide the appeal and, accordingly, advise the Appeal Manager, who supervises the entire appeals procedure and orders the issuing of the Valuation Certificate which gives effect to the Appeal Officer's decision.

28. It is clear from "the Gormley memo" that the appeal procedure allows for a level of interaction between the Appeal Officer and the Revision Officer, but not necessarily with the appellant. In the **Orange Tree** appeal, the Tribunal made reference to this element of the appeal procedure and went on to say:

> *An appeal is defined in Black's Law Dictionary as being* "a proceeding undertaken to have a decision reconsidered by a higher authority". *Any appeal process must, procedurally, be and be seen to be carried out in a transparent manner and in compliance with the principles of fairness and in accordance with the law. Rating is a form of taxation and it is important therefore that any appeal process dealing with the valuation of property for rating purposes must not only be fair in operation, but be clearly seen to be so if it is to maintain respect and acceptance by the ratepayer. In the circumstances of this appeal, we have no doubt that Mr. McMorrow performed his function in a manner that he considered to be fair, but the absence of any report or notes setting out his thought processes, his consideration of the Revision Officer's valuation*

methodology, his consideration and ultimate rejection of the appellants' representations and the absence of any conclusions upon which he arrived at his final determination do little to enhance the reputation of the appeal process as presently operated by the Valuation Office. Moreover, the degree of ongoing interaction and communication between the Appeal Officer and the Revision Officer in this appeal could give rise to the impression that the Appeal Officer had not acted independently. This level of engagement compared to that between the Appeal Officer and the appellant's representatives perhaps added to the perception that both parties were not being treated equally.

The Jurisdiction of the Tribunal

This Tribunal is a creature of statute and its powers are set down in Section 37 of the Valuation Act. In the case ***VA05/3/054 - Pfizer Ireland Pharmaceuticals*** *the Tribunal expressed the view*

> "that the existence or otherwise of the declaratory jurisdiction in the Valuation Tribunal is a matter of considerable uncertainty. However even if the Tribunal did have such a declaratory jurisdiction it is in our view not a jurisdiction we would exercise in the instant case. It is not clear to us that there has been such a flagrant breach of the obligation to provide fair procedures that the entirety of the process culminating in the Appeal Officer's decision should be deemed to be a nullity. We note that there was a suggestion by Mr. McMillan that despite their offer to attend a meeting with the Appeal Officer no meeting in fact took place. However they were able to correspond with the Appeal Officer and there is no suggestion that the Appeal Officer did not consider the correspondence in question."

In our opinion, the chain of events in this case is not dissimilar to that in the Pfizer case and hence we come to a similar conclusion as the Tribunal arrived at in the Pfizer case, viz. that it would in all the circumstances be inappropriate to declare the process before the Appeal Officer a nullity and strike out the

valuation. Nonetheless, we are strongly of the view that it would be expedient for the Commissioner of Valuation to review and amend the appeal procedure within the Valuation Office in order to render the process more transparent and visibly equitable in operation. In particular, we would suggest that the Appeal Officer be required to record and maintain in writing all steps taken and conclusions reached by him or her in arriving at his or her determination. We would also suggest that the Revision Officer's role in the appeal process be kept to a minimum and be restricted to that in the nature of responding to requests for clarification on specific issues and commenting on some new material introduced by the appellant. Under no circumstances should the Revision Officer have access to the Appeal Officer's file nor have any further contact with the appellant as part of the appeal process. After all, once the Revision Officer has carried out his function he has no further role in the matter, which is now in the hands of the Appeal Officer. The introduction of such procedures will, we believe, improve the process and clearly indicate that an appeal will be treated in a transparent, independent manner that conforms with all the requirements of fair procedure. In no circumstances should correspondence regarding an appeal be directed to any party other than the Appeal Officer and the appellant or his/her representatives.

We note that the memo from Mr. Gormley, Appeal Manager, dated 24th January 2004 and entitled "New Appeal Procedures" states:

> "The practice of agreement with the agent/appellant is being discontinued. The Appeal Officer will decide the appeal in all cases."

We consider this directive to be unduly restrictive and an interference with the independence of the Appeal Officer to conduct the appeal process in the manner he considers appropriate. Indeed, this Tribunal has always accorded more weight to those valuations that have been agreed at whatever stage in the

review/appeal process than to those where the valuation has merely been accepted.

In making our suggestions for changes in the appeal procedure, the Tribunal is conscious that it has no power to interfere with the independence of the Commissioner of Valuation in the performance of his duties. Nonetheless the Tribunal is mindful of its own role in the valuation appeal process and the suggestions are put forward in an effort to improve the procedure by making it more transparent in operation and manifestly conducted in an independent manner in accordance with the precepts of fair procedure. Such changes may indeed have the effect of reducing the number of appeals to this Tribunal.

29. It is clear from Mr. Adamson's evidence that there was at the time of the revision and appeal processes, considerable discussion and debate within the Valuation Office in regard to the valuation of tolls and the appropriateness of using the Receipts and Expenditure Method of Valuation in arriving at their Net Annual Values. The backdrop to these discussions was a combination of a number of factors, including the preparation for the upcoming Supreme Court appeal in regard to the Celtic Roads case and the legal advices obtained in relation thereto. It would also appear that there were concerns that the use of the Receipts and Expenditure Method in the current economic climate, taking into account the findings of the High Court in the Celtic Roads case, could give rise to nil valuations in respect of the N6 and other tolls which were being valued at or about the same time.

30. It is also clear from Mr. Adamson's evidence that the Valuation Office wished to explore other valuation approaches which in turn gave rise to what was referred to as "the cost tone" method and, in due course, the valuation put forward by Mr. Adamson at the oral hearing. In these circumstances, it is not surprising that senior staff members became involved.

31. In accordance with Section 37, the Tribunal is obliged to hold an oral hearing in respect of an appeal made to it under Section 34 and hear evidence and submissions from the appellant, the respondent and any other person entitled to be heard. Where the grounds of appeal allege that the revision was flawed and not carried out in accordance with the statutory provisions or in a manner which is not in accordance with the principles of natural justice, then it must surely be right for the Tribunal to investigate fully the matter and make such determination as it considers appropriate in the light of the evidence received. From the evidence received in this appeal it is obvious that others were involved in the decisions made by Mr. Adamson, the Revision Officer, and Mr. Conboy, the Appeal Officer. However, in the light of our findings set out above, the Tribunal has come to the conclusion that it would not, in the circumstances of this appeal, be appropriate to find the involvement of persons other than Mr. Adamson and Mr. Conboy in the revision and appeal procedure were of such a nature or extent as to render the entire revision process unlawful. Nonetheless, the Tribunal shares the concerns regarding the appeal procedures expressed in **VA06/2/045 – Orange Tree Ltd.** that it would be of assistance to all if the appeal process was more transparent in operation and visibly equitable in operation.

The Valuation Evidence

32. The statutory basis for valuing property is contained in Section 48 and 49, as follows:

48.—(1) The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.
(2) Subsection (1) is without prejudice to section 49.
(3) Subject to section 50, for the purposes of this Act, ‘‘net annual value’’ means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes

and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant.

49.—(1) If the value of a relevant property (in subsection (2) referred to as the ‘‘first-mentioned property’’) falls to be determined for the purpose of section 28(4), (or of an appeal from a decision under that section) that determination shall be made by reference to

the values, as appearing on the valuation list relating to the same rating authority area as that property is situate in, of other properties comparable to that property.

(2) For the purposes of subsection (1), if there are no properties comparable to the first-mentioned property situated in the same rating authority area as it is situated in then—

(a) in case a valuation list is in force in relation to that area, the determination referred to in subsection (1) in respect of the first-mentioned property shall be made by the means

specified in section 48(1), but the amount estimated by those means to be the property's net annual value shall, in so far as is reasonably practicable, be adjusted so that amount determined to be the property's value is the amount that would have been determined to be its value if the determination had been made by reference to the date specified in the relevant valuation order for the purposes of section 20,

(b) in case an existing valuation list is in force in relation to that area, the determination referred to in subsection (1) in respect of the first-mentioned property shall be made by the means specified in section 48(1) and by reference to the net annual values of properties (as determined under the repealed enactments) on 1 November 1988, but the amount estimated by those means to be the property's net annual value shall, in so far as it is reasonably practicable, be adjusted so that the amount determined to be the property's value is the amount that would have been determined to be its value if the determination had been

made immediately before the commencement of this Act.

33. In this instance, the valuation arose out of a request for a revision pursuant to Section 28, so that the relevant Section is Section 49. There being no comparable properties in the County Galway rating authority area, the property concerned fell to be valued in accordance with Section 49(2) (b) as set out above.

34. There is no statutory requirement that a specific category of property, other than those provided for under Section 58, be valued using a particular one of the four recognized methods of valuation. The fact that a particular method has in the past been used when valuing properties of similar category to the property to be valued, does not necessarily mean that all other methods are to be disregarded. Case law indicates that all methods are equally valid and in the final analysis the method to be preferred in any particular instance is the one most likely to provide a fair and proper valuation of the property concerned.

35. There are a number of tolls similar to the property concerned in this appeal elsewhere in the State which have been valued for rating purposes. These valuations were made using the Receipts and Expenditure Method. In valuation terminology, these assessments provide a body of credible comparable evidence which may be devalued or analysed as a valuer considers appropriate.

36. In this appeal both valuers elected to use the Receipts and Expenditure Method and each took as their starting point the financial model prepared by the appellant showing actual and projected toll income and operating costs for the years 2010 to 2015. In this regard it must be said that neither valuer subjected the model to a robust critical examination, nor did they question the key assumptions made in regard to future revenue flows and operating costs. It should also be said that actual and anticipated revenue flows are considerably lower than those used in an earlier model for use in the negotiations with the NRA for the same 6-year period.

37. It is clear from the evidence of Mr. Adamson and Ms. Birmingham that there was a high level of interaction during the period leading up to the issuing of the Valuation Certificate (Proposed) on 28th September, 2010. It is also apparent that the appellant in the person of Ms. Birmingham was helpful to quite a remarkable degree in making available to Mr. Adamson all information in relation to the PPP contract, the Toll Scheme Bye-laws, the financial statements of the company for the years ending 31st December, 2010 and 2011 and any other information he considered necessary for him to make his valuation. Ms. Birmingham also provided Mr. Adamson the financial model she had prepared for the years 2010 to 2015, which he subsequently used as the basis of his valuation.

38. It is clear also from the evidence that Ms. Birmingham was becoming increasingly concerned about the outcome of her discussions with Mr. Adamson following on from the representations she made after receipt of the Valuation Certificate (proposed) dated 28th September, 2010. These ongoing concerns culminated in a remarkable exchange of emails between the 8th and 9th November, 2010 which may be summarised as follows:

(a) 8th November 2010 @ 10.35 – Adamson to Birmingham).
Adamson advised that as a result of a review of how toll roads are valued, it was being proposed to reduce the value of the property concerned from €3,800 to €1,300 by employing a "cost tone" derived from the valuations of other tolls. Attached to this email was a set of calculations showing how the valuation of €1,300 was determined.

(b) 8th November 2010 @ 12.17 – Birmingham to Adamson. In this email, Birmingham acknowledged receipt of the Adamson email and a copy of the calculations supporting the proposed valuation of €1,300. Birmingham said she had examined the calculations and advised that in her opinion they were incorrect.

(c) 8th December 2010 @ 17.07 - Adamson to Birmingham. In this email, Adamson wrote as follows: *"My manager has reviewed this and other toll valuations and, following a meeting this afternoon, is of the opinion that the N6 valuation should be valued at around €5,000. This is based on a relativity of 1988 revenue to a rateable valuation of 0.0016295 derived from the M1 toll valued in 2006. The N6 revenues of €5,565,246 equate to €3,168,054 at 1988 levels which at 0.006295 = €5.162 RV.*

Accordingly, I have been instructed to issue the final certificate at the earlier figure of €3,800." (Emphasis Added)

(d) 8th November 2010 17.21: Birmingham to Adamson. *"I understand that it is out of your control but we are very disappointed at the last minute change. It seems to be a process which has changed from previous valuations of tolls and it is difficult to understand why the numbers and calculations which we have been reviewing over the past number of weeks are now being changed at the very last minute, 17.13 on the day when the final valuation is due for our toll. Can you please send us the following items so that we can assess the calculation?*

(i) The final calculation in relation to the costs by .015 cent per year.
(ii) The basis for the relativity of 16M. Revenue of .0016245.
(iii) The final calculation of €3,800 and how it was arrived at."

(e) 9th November 2010 @ 10.08 Adamson to Birmingham. In this email Adamson responded as follows:

(i) The 0.015 cent per km is arrived at as follows. The costs determined by each of the N1, N4 and N8 as at the dates they were valued are back dated to 1988, then divided by the length of the toll road in each case and then by the volume of traffic in 2009/10 so as to compare with the N6.

N1 - €4m/21.7 km/11.505,000	=	0.016 cent
N4 - €4m/37 km/7,586,800	=	0.014 cent
N8 - €2m/17.5/7,637,500	=	0.015 cent

(ii) The N1 RV divided by N1 revenues at the date it was valued, back dated to 1988; RV €13,520 / €8,297,000 = 0.0016295.

(iii) There is no supporting calculation for the figure of €3,800. This figure has been issued on the instructions of Mr. P. Cooney, Managing Valuer. (Emphasis added).

On the 10th November 2010 a Valuation Certificate in final form issued to the effect that the valuation of the property concerned would be entered on the Valuation List at €3,800.

39. Rates are a form of taxation based on the actual or notional beneficial occupation of property raised at local level to defray in part the costs incurred by the local rating authority in providing a range of public services. In the circumstances it is unacceptable for the Valuation Office as the body charged with preparing valuations for the purposes of rates to advise a ratepayer that "*there is no supporting calculations for the figure of €3,800*". The very least a ratepayer/taxpayer can expect is to be advised of the quantum of their liability and how it was assessed. In this regard it has to be said that Mr. Adamson in his evidence said that neither the appellant nor Ms. Birmingham were treated satisfactorily given the level of cooperation by them in the revision process.

40. It is clear from Ms. Adamson's evidence that at the time of the revision and appeal there was within the Valuation Office ongoing debate regarding the valuation of tolls and the appropriateness of using the Receipts and Expenditure method in arriving at an estimate of Net Annual Value. This debate was fuelled by a combination of factors including legal advices received in regard to the upcoming appeal to the Supreme Court against the decision of the High Court in the Celtic Roads case. Another factor would appear to be that the application of the Receipts and Expenditure Method, having regard to the decision in the Celtic Roads appeal, would in all probability give

rise to a nil valuation in respect of the property concerned in the instant appeal. Mr. Adamson was involved in the in-house debate and the uncertainty arising there from gave rise to the email exchange between 8th and 9th September, 2010.

41. When it came to the Section 30 appeal stage, it would appear that policy of the Valuation Office had evolved to the extent that they had dropped the cost tone approach or any other innovative approach and had decided that the valuation of the property concerned be determined using the Receipts and Expenditure Method having regard to the observations contained in the note issued by Mr. Paddy Cooney, Head of Valuation Services, on 16th September, 2011. At this stage, Mr. Adamson had altered his opinion and recommended to the Appeal Officer that the valuation of €3,800 be reduced to €3,000 "*in line with revised V.O. practice on toll road valuations*." In due course the Appeal Officer reduced the valuation to €3,000 and in his report said "*Please see hard copy file for documentation provided by Patrick F. Cooney, Manager Valuation Services, which should be read in conjunction with this Appeal Report*." The document referred to is dated 16th September, 2011 and states as follows:

> **Appeals to the Commissioner**
> **Response/observations of Valuation Services management**
>
> 1. N 25 Toll – Property numbers 2205506 (RV €960), 2206590 (RV €1,970) and 2207682 (RV €2370)
> 2. M6 Toll – Property number 2207286 (RV €3,800)
> 3. M 7 toll – Property number 2207750 (RV € 12,000)
>
> **In the case of "tolls", the method of valuation used to determine the net annual value is the Receipts and Expenditure Method.**
>
> In valuing the toll the Valuation Office does not necessarily allow the deduction of all costs incurred (projected or actual). The costs allowed are only those relating to the tolled road.
>
> The Valuation Tribunal in *Celtic Roads Group (Dundalk Ltd. V Commissioner of Valuation* [VA05/3/008 & 009] and subsequently the High Court in a case stated [*Celtic Roads Group (Dundalk) Ltd. V Commissioner of Valuation and Louth County Council*] [2006 No.565 & no.688 SS] both found against the position of the Valuation Office in the matter of allowable

costs in applying the R & E method to the valuation of tolls. The Commissioner has appealed this decision to the Supreme Court.

In the subject appeals the position adopted by Valuation Services is the position we are defending before the Supreme Court, i.e. that only those maintenance costs associated with the roads over which a toll can be charged are allowable.

It is the view of Valuation Services management that it would be incorrect to adopt any other position in relation to the allowable costs until the Supreme Court has decided the issue.

The results of the adoption of this position in applying the R & E methodology to the valuation of the items under appeal are as follows;

1. N25 – Total RV €5,300 increased to €5,500 [Property numbers 2205506 (RV €4,600), 2206590 (RV €900)]
2. M6 – Total RV €3,800 reduced to €3,000
3. M7 – Total RV €12,000 reduced to €10,300

_____
Patrick F Cooney
Head Valuation Services
16 September 2011

42. In his evidence to the Tribunal, Mr. Adamson said that it was now his opinion that the rateable valuation of the property concerned is €9,000, calculated on an entirely new view of what costs and expenses were allowable.

43. In the Tribunal's opinion, Mr. Adamson's valuations are flawed on a number of counts:

- Firstly, they are formulated in a manner that is contrary to the findings of the High Court in the Celtic Roads case.
- Secondly, since it is clear that the base tolls reflect the obligations imposed on the appellant by the contract under which the property concerned is occupied, it is wrong to disregard the costs associated with meeting these obligations when using the Receipts and Expenditure Method of Valuation. Consequently, the cost of maintaining the non-tolled section of road must be taken into account.

- Thirdly, the valuation must be based on common sense and have regard to the actual circumstances which have given rise to the occupation of the property concerned.

44. Ms. Murphy's valuation is based on an unquestioning acceptance of the financial model prepared by the appellant. In light of her arrival at a substantial negative valuation, it was in the Tribunal's opinion, incumbent on Ms. Murphy to reconsider her valuation approach and, as the R&E Guidance Note suggests at paragraph 5.59, she should have "stood back and looked" in order to "*review each of the elements to ascertain whether they have been correctly applied and produce a credible result.*" Paragraph 5.60 is also relevant and further suggests "*that the valuer should consider the valuation produced against the background of valuations relating to similar properties and/or businesses."*

45. In the circumstances, the Tribunal has some reservations regarding Ms. Murphy's valuation. It is to be noted in this regard that in the Notice of Appeal submitted by Ms. Murphy she stated that the rateable value of the property concerned ought to be €1,300.

Conclusions

Having regard to all the evidence adduced and submissions made, the Tribunal concludes as follows:

1. The task of the Tribunal is to determine the Net Annual Value of the property concerned in accordance with the relevant statutory provisions. In this regard there is a nexus between the obligations imposed under the NRA contract and those contained in Section 48 of the Valuation Act, 2001. In other words, the Tribunal cannot ignore or set aside the commercial realities that gave rise to the occupation of the tolls by the appellant and the factors that were taken into account when fixing the base tolls. This common-sense approach was accepted by Mr. Justice Charleton in the **Celtic Roads** appeal when he allowed the full costs of maintaining the whole road and not just that

section which was the subject of the payment of a toll or indeed any lesser length of road.

2. The Receipts and Expenditure Method has become the preferred method of valuing tolls such as the property concerned in this State and has received juridical approval in the **Westlink** and **Celtic Roads** appeals. There is, therefore, no good reason why its use should be set aside or questioned if its proper application produces a nil valuation. Nonetheless, it has to be clearly understood that it is an aid to arriving at an estimate of Net Annual Value and not a rigid or inflexible technique and this is clear from the comment contained in paragraphs 5.59 and 5.60 of the Guidance Note headed "Stand Back and Look". The Receipts and Expenditure Method is more than a valuation by formula. It is up to the valuer to obtain a good understanding of the nature of the undertaking being carried on at the property concerned and to use all his/her experience, expertise, professional judgement and common sense in order to arrive at an estimate of Net Annual Value in accordance with the relevant statutory provisions and case law.

3. Tolls on national roads generate substantial revenue flows which are subject to increases from time to time in line with the provisions contained in the Toll Scheme Bye-laws.

4. The toll revenue and operating costs of the property concerned are currently at levels which make the operation of the toll a loss-making undertaking at this time. This is not an uncommon feature in new ventures for the first few years of their operation.

5. Since the tolls have only been in operation for a relatively short period, both valuers concluded that it would be proper to anticipate future income flows and operating costs for a period of years in order to obtain a more comprehensive overview of the operation of the undertaking than that to be obtained from an examination of the accounts for the years ending 31st December, 2010 and 2011. In the event, both valuers

relied upon the financial model prepared by the appellant for the years 2010 to 2016 and did not question the underlying assumptions upon which it was predicated.

6. Financial models such as that relied upon by both valuers are useful tools, but they are to be treated with some caution in as much as the final outcome is highly sensitive to a number of fundamental inputs such as projected revenue growth, projected operation costs, and treatment of future additional investment. Even relatively minor changes to any or all of the core inputs can lead to markedly different results. In certain circumstances it would, as in this case based on an unquestioning acceptance of the financial model prepared by the appellant, arrive at a nil valuation. In principle, the Tribunal, in line with legal precedent, would have little hesitation in making a nil determination if it considered it to be sustainable. However, in this instance the Tribunal is of the opinion that the financial model as presented is limited in scope and would have been accorded greater credibility if it had been accompanied by a sensitivity analysis which provided for different estimates of future income flows and outgoings and the manner of treating future maintenance costs of a capital nature.

7. The Tribunal is of the opinion that the occupation of the property concerned is a benefit with a profit earning ability which is a basic element in determining Net Annual Value. In short, the value of the property is to be assessed as it stands with all its privileges, opportunities and disabilities (including the current economic climate) on the basis of a tenancy from "*year to year*" and on the assumption that the tenancy will endure for an indefinite period until determined.

8. The hypothetical tenant envisaged in rating law would be aware of the financial information contained in the 2010 and 2011 accounts and the current loss-making position of the undertaking. Armed with this information, the hypothetical tenant would formulate an opinion of rental value taking into account profit-making potential based on its own estimates of future revenue flows, operating and maintenance costs and how best to provide for future costs of a capital nature in respect of works of renewal as distinct from ongoing maintenance costs. In the Tribunal's opinion, the

hypothetical tenant would be prepared to take a tenancy of the property concerned and pay a rent.

9. The nature of the valuation evidence presented to the Tribunal is such as to make it difficult for the Tribunal to arrive at an estimate of Net Annual Value. For reasons already stated, the Tribunal attaches no weight to Mr. Adamson's valuations as they are formulated on a basis contrary to the findings of the High Court in the **Celtic Roads** appeal. Similarly, the Tribunal has reservations in regard to Ms. Murphy's valuation, based as it is on an unquestioning acceptance of the financial model prepared by the appellant and the basic assumptions contained therein in relation to future revenue flows and operation costs. In our opinion, the appellant's financial model takes a conservative view which does not fully reflect the profit-making potential of the undertaking due to future improvement in economic circumstances.

10. The Tribunal notes that the appellant in its Notice of Appeal dated 22nd December, 2011 stated at Section 6(a)(ii) thereof that the rateable valuation of the property concerned should be €1,300.

Determination

Having regard to the findings and conclusions set out above, the Tribunal, in accordance with Section 37(1)(b) of the Act, allows the appeal and determines that the rateable valuation of the property concerned as stated in the Certificate of Valuation issued under Section 33(2)(b)(i) of the Act be reduced to €2,000, based on an estimated Net Annual Value of €400,000 in accordance with Section 49(2) of the Act.

And the Tribunal so determines.

VA11/4/019 – N6 (Concession) Ltd.

List of Appendices

Appendix 1

1. Copy of Notice of Appeal to Valuation Tribunal and accompanying schedule, submitted on behalf of the appellant by GVA Donal Ó Buachalla and signed by Ms. Siobhán Murphy, dated 22nd December, 2011.

Appendix 2

1. Copy of Valuation Certificate (proposed) issued on 28th September, 2010.
2. Copy of Valuation Certificate issued on 10th November, 2010.
3. Copy of Valuation Certificate issued on 25th November, 2011.

Appendix 3

1. Valuation submitted by Mr. Adamson. (page 13 of précis)
2. Alternative valuation submitted by Mr. Adamson. (page 14 of précis)
3. Valuation submitted by Ms. Murphy.

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