

Appeal No. VA11/4/020 & 021

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Celtic Roads Group (Waterford) Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property No. 2206590, Toll(s) at Lot No. N25 Waterford Bypass (pt of), Granny, Aglish, Waterford No. 2, County Kilkenny & Property No. 2205506, Toll(s), Office(s), Store at Lot No. N25 Waterford Bypass (pt of), Gracedieu, West, County Borough of Waterford.

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 1ST DAY OF JULY, 2013

1. By Notices of Appeal received on the 22nd day of December, 2011, the appellant appealed against the determinations of the Commissioner of Valuation in fixing valuations of €00 (VA11/4/020) and €5,100 (VA11/4/021) on the above described relevant properties. The grounds of appeal are set out in the respective Notices of Appeal, copies of which are attached at Appendix 1 to this judgment.

With the consent of the parties involved, the oral hearing in relation to this appeal was held concurrently with that in relation to Celtic Roads Group (Portlaoise) Limited (VA11/4/022) on the 11th and 25th March, 2013. At the hearing the appellant was represented by Mr. Brian Murray 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 Solicitors Office appeared on behalf of the respondent, the Commissioner of Valuation.

2. Witnesses

- I. Mr. Lorcan Wood, MBA, BSc (Engineering), Diploma in Certified Accountancy, Construction Law and Contract Administration is the General Manager of Celtic Roads Group (Portlaoise) Limited. In his evidence Mr. Wood outlined the background to the tender process and negotiations which culminated in the NRA PPP contract being entered into on 21st April, 2006 between the National Roads Authority and Celtic Roads Group (Waterford) Limited. Mr. Wood also dealt in some detail with the main obligations in relation to the construction of the road scheme, the operation of the toll scheme and the main obligations imposed on the company under the PPP contract in regard to maintenance and meeting the hand back requirements at the end of the contract period on the 20th April 2036.
 - II. Ms. Louise Irvine, ACIMA, with a degree in Business Studies Accounting is the Finance Manager of Celtic Roads Group (Waterford) Limited. In her evidence Ms. Irvine said she prepared the financial spreadsheet showing the actual and projected income and operating costs for the final year period 2011 – 2016 to include life cycle costs.
 - III. Ms. Siobhan Murphy, BSc, MSCS, MRICS gave expert valuation evidence on behalf of the appellant.
 - IV. Mr. Mark Adamson, MRICS, MSCSI gave expert valuation evidence on behalf of the respondent, the Commissioner of Valuation.
3. Prior to the commencement of the oral hearing and in accordance with the rules of the Tribunal, each party forwarded to the Tribunal and exchanged a précis of evidence it was proposed to adduce at the oral hearing together with outline submissions to be made and which were elaborated upon and expanded during the course of the hearing. As part of the evidence a number of documents were submitted as set out in Appendix 2 attached to this

judgment. From the evidence so tendered and additional evidence received during the oral hearing the following facts relevant and material to the appeal were agreed or are so found:

- (a) In accordance with Sections 57 and 58 of the Roads Act, 1993 as amended, the National Roads Authority (the NRA) made a scheme for the construction, operation and maintenance of a road linking the N25 north of Slieverue in County Kilkenny to west of Kilmeaden in County Waterford (The N25 Waterford Bypass) which scheme was finally approved by the NRA on 21st April, 2006.
- (b) Following a competitive tender process the appellant entered into the NRA PPP contract on the 21st April 2006 to design, construct, operate, maintain and finance a road scheme known as the N25 Waterford Bypass. The term of the contract including the construction period is for 30 years from 21st April, 2006.
- (c) Under the contract the NRA obliged the appellant pursuant to Section 63 of the Roads Act to provide, supervise and operate a system of tolls in accordance with the *“Toll Bye-Laws for the N25 Waterford Bypass”* made under the Act and signed on 12th May, 2009. In the event the toll collection scheme commenced on the 19th October 2009 and will, under the contract, operate until 20th April, 2036.
- (d) It is agreed that the NRA PPP contract and the associated Toll Bye-Laws scheme were entered into by informed parties who at the time the contract terms were negotiated, agreed and signed were fully cognizant of the likely costs of procurement, cost of finance, maintenance costs - routine and life cycle costs and the financial implications of meeting the hand back obligations. The parties were also aware of the base toll fees and the provisions for their increase from time to time in accordance with the Toll Bye-Laws during the operational period of the PPP contract.

- (e) It is agreed that the PPP scheme encompassed the construction of some 23 kms of dual carriageway (to include the new bridge over the River Suir and some 16 kms of single carriageway roads). Part of the works included two grade separated junctions, one at Knockhouse Upper, the Western Link Junction and one at Grannagh. In accordance with the PPP contract some 16 kms of roads were handed over to the local authority on completion in late 2009. The remainder, some 23.1 kms of dual carriageway approach roads and the new bridge is to be maintained and managed by the appellant, to standards set down by the NRA until the end of the contract period at which time they are to be handed over in pristine condition in compliance with the hand back requirements set down in Schedule 27 of the contract.
- (f) It is agreed that in return for meeting its obligations under the PPP contract to design, construct and finance the provision of some 39 kms of roads including the new bridge over the River Suir at an estimated cost of €338 million and meeting its ongoing obligations to maintain some 23.1 kms of road including the new bridge and comply with the hand back requirements the appellant was granted a concession to operate and maintain a toll scheme in accordance with the relevant provisions of the PPP contract and the Toll Bye-laws for the N25 Waterford Bypass made under the Roads Act, 1993 as amended, dated May 2009 for the operational period of the said PPP contract which will continue until the 20th April, 2036.
- (g) It is agreed that of the 23.1 kms of road to be maintained by the appellant the use of only 5.5 kms (including the new bridge over the River Suir) is subject to the payment of the appropriate toll fee. The use of the remaining road – some 17.5 kms (76%) is toll free to all users thereof.
- (h) It is agreed that in the event of the appellant being in default of its obligations under the PPP 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.

4. Preliminary Issue

At the outset of the hearing a preliminary question arose.

The Certificates of Valuation which had been prepared by the Valuation Office allowed for the cost of maintenance of part of the roadway. Therefore the only issue, at the date of the delivery of the Certificates, between the parties was whether maintenance costs for all or part of the road should be allowed. In the written Submissions delivered by the Respondent, it was argued that there should be no allowance for the cost of maintenance on any part of the roadway and that only maintenance costs relating to the toll booth and toll gate, etc., could be taken into account. This meant that the Respondent was now contending that the property should have a higher valuation than that contained in the Valuation Certificates issued by it.

In considering whether the Respondent could do this, the Tribunal had regard to Section 37 of the Valuation Act, 2001. This provides as follows:

- “(1) The Tribunal shall consider an appeal made to it under Section 34 and may, as it thinks appropriate –*
- (a) disallow the appeal and, accordingly, confirm the decision of the Commissioner, or*
 - (b) allow the appeal and accordingly, do whichever of the following is appropriate –*
 - (i) amend the value of, or any other detail in relation to, the property, the subject of the appeal, as stated in the Valuation Certificate issued under paragraph (b)(i) or (b)(ii) of Section 33(2),*
 - (ii) decide that the property, the subject of the appeal, ought to be included in, or, as the case may be, ought to be excluded from, the relevant valuation list and in the case of a decision that the property ought to be so included, determine the value of the property,*
 - (iii) amend any detail in relation to the property, the subject of the appeal, stated in the notification made under Section 33(2)(b)(iii).”*

Accordingly, the Tribunal was of the view that if the Appeals were allowed it would follow that the Tribunal would substitute for the valuations contained in the Valuation Certificates,

either the values contended for by the Appellant, or such other figures deemed to be appropriate by the Tribunal, which were less than the figures contained in the Valuation Certificates. However, it was clear from the language of Section 37(1)(a) that if the Tribunal disallowed the Appeals it had to confirm the decision of the Commissioner. There is no statutory power to substitute figures higher than those contained in the Valuation Certificates.

Further, Section 63 of the Valuation Act, 2001 provides that:

“The statement of the value of property as appearing on a valuation list shall be deemed to be a correct statement of that value until it has been altered in accordance with the provisions of the Act.”

In the circumstances, the Tribunal ruled that the Respondent could not in effect seek to impugn its own decision. However, it was indicated to the parties that the Tribunal was mindful of the fact that an expert witness could not be constrained from giving his or her expert opinion as to what the appropriate or true valuation of the relevant property might be. Further, the Tribunal confirmed that both parties were entitled to canvass all available arguments fully at the appeal hearing.

5. The Issue

Having regard to the findings of the Tribunal in relation to the preliminary issue, the sole issue in dispute is the net annual value of the property concerned to be determined in accordance with Section 49 of the Valuation Act, 2001 and more particularly the valuations contained in the Valuation Certificates issued by the Commissioner of Valuation in the exercise of his powers under Section 33 of the Act as set out hereunder:

(a) VA11/4/020

Kilkenny County Council €900

(b) VA11/4/021

Waterford City Council €5,100

6. The Evidence

Mr. Lorcan Wood

Mr. Lorcan Wood in oral evidence to the Tribunal outlined in some detail the extent and range of obligations imposed under the PPP contract in regard to maintenance. These

obligations, he said, ranged from normal routine road repairs and replacement to what he describes as “*heavy maintenance*” such as the obligation to rehabilitate the road surfaces and other elements of the road and bridge structure from time to time over the course of the contract period. Under the contract the appellant was also obliged to maintain and renew the complex toll electronic equipment and to provide the NRA with routine information of traffic volumes in regard to the various categories of users. Mr. Wood highlighted the fact that failure to remedy a breach of the obligation to maintain the road could lead to the concession to collect the tolls being withdrawn.

Mr. Wood said that the projected traffic volumes upon which the contract was negotiated and agreed were over-estimated to the extent that actual volumes were only 30% of the anticipated figures. As a consequence the operation of the toll was a loss making enterprise when proper allowances were made for maintenance and life cycle costs. Mr. Wood said the primary purpose of the bypass and new bridge was to provide an alternative route into and through Waterford as traffic over the existing Rice Bridge was subject to congestion at peak times. However, due to the economic downturn, loss of jobs in and around Waterford and the reduction in the economic strength of the area, actual levels of traffic volumes had declined to such an extent that the economic imperative to avail of the bypass and pay the toll fee had lessened. Mr. Wood said tolled bypasses were to be distinguished from tolled motorways in as much as potential users of a bypass had a realistic choice which motorway users did not have.

In relation to maintenance and life cycle costs, Mr. Wood said the Commissioner’s decision to allow only a proportion of their costs as “*allowable expenses*” was a proposition he could not accept. As far as the appellant was concerned it was obliged under the NRA PPP contract to maintain 23.1 kms of road in order to retain the concession to collect the tolls.

Under cross-examination Mr. Wood acknowledged that the 23.1 kms of road that the appellant was obliged was a ‘public road’ and that the use of only 5.5 kms was subject to the payment of a toll fee. Mr. Wood also agreed that the appellant had no control over who used the non-tolled road but pointed out that equally it had no control over those who traversed the tolled section as the appellant was not entitled to stop the driver of a vehicle continuing on his/her journey without paying the toll. Non payment of the appropriate toll fee was an offence which was recorded and persons involved would be prosecuted in the normal manner.

Ms. Siobhan Murphy

Ms. Murphy is a senior property advisor with GVA Donal O Buachalla with particular expertise in the areas of rating, investments and asset valuation. Ms. Murphy said that her valuation of the property concerned was prepared using the Receipts and Expenditure method of valuation which she said was the method to be preferred when valuing tolls. In arriving at her opinion of net annual value, Ms. Murphy said she took as her starting point the financial model/spreadsheet prepared by Ms. Louise Irvine, the Financial Manager of the appellant company. Ms. Murphy said that when it came to identifying and quantifying “*allowable expenses*” she had concluded that it was proper to allow in full the maintenance and life cycle costs in respect of 23.1 kms of road which the appellant was obliged to maintain under the PPP contract and not just the costs apportioned to the 5.5 kms section which is the subject of the toll. Such a course of action, Ms. Murphy said, was taken in the light of the findings of the High Court in the **Celtic Roads (Dundalk) Limited** appeal. Ms. Murphy said she had also decided that ‘legal and professional fees’ and ‘bank charges’ contained in Ms. Irvine’s summary of operating costs should also be treated as “*allowable expenses*” as they were incurred in the course of normal business activities. A copy of Ms. Murphy’s valuation is contained in Appendix 3 attached to this judgment. In her valuation of the property concerned, Ms Murphy contended that a nil value be attributed to the property.

Under examination Ms. Murphy said that the valuation put forward by the Commissioner was flawed in a number of respects. Firstly, it had been prepared on a basis contrary to the **Celtic Roads (Dundalk) Limited** case where maintenance and life cycle costs in respect of the roads that the appellant was obliged to maintain were considered to be “*allowable expenses*” in full. Secondly, the 14% figure of the total costs which the Commissioner considered to be an “*allowable expense*” was incorrectly calculated and should in fact be 23.8 % i.e. 5.5 kms expressed as a percentage of 23.1 kms. The Commissioner in arriving at the 14% had included some 16 kms of road that was handed over on completion to the local authority.

Mr. Mark Adamson

Mr. Mark Adamson is a Chartered Surveyor and Team Leader in the Valuation Office and was the Officer of the Commissioner appointed pursuant to Section 28 (1) of the Valuation Act, 2001 to carry out the revision which resulted in the valuation of the property concerned being originally entered on the valuation list as follows:

- Kilkenny County Council €1,970
- Waterford City Council €960
- Waterford County Council €2,370

Following appeals to the Commissioner of Valuation, the Commissioner issued Valuation Certificates pursuant to Section 33 of the Act as follows:

- Kilkenny County Council €900
- Waterford County Council €5,100
- Waterford City Council €0 (valuation struck out)

Mr. Adamson said that his valuation approach was similar in many respects to that of Ms. Murphy in that he also took as his starting point the financial model prepared by Ms. Irvine. Mr. Adamson contended that the allowable maintenance and life cycle costs should be limited to that section of the road which was subject to the payment of the tolls i.e. 14% of the road which the appellant is obliged to maintain under the PPP contract.

Mr. Adamson said the decision was also taken that the professional and legal fees and bank charges were not “*allowable expenses*” when using the Receipts and Expenditure method of valuation. A copy of Mr. Adamson’s valuation is contained in Appendix 4 attached to this judgment.

In his evidence Mr. Adamson indicated that the valuations of €5,100 and €900 put forward by him were solely for the purpose of supporting the valuations contained in the Valuation Certificates issued by the Commissioner on 25th November, 2011 in the exercise of his powers under Section 33 of the Act. Mr. Adamson said that in his expert opinion, which he was obliged to express to the Tribunal, those valuations did not accurately represent the position between the hypothetical tenant and the hypothetical landlord envisaged under Section 48 which he summarized as follows, “*the rent a hypothetical tenant would offer to occupy the relevant property (the tolls) on the basis that the hypothetical tenant will incur all the outgoings necessary to maintain the relevant property (the tolls) in their current state and pay all other statutory charges in relation to the relevant property (the tolls)*”.

Inter alia, he also commented as follows:

In the rating hypothesis, the property is to be considered to be vacant and to let. The payment of a revenue share is not expenditure necessarily incurred to earn the toll income but a

division of the income or profits between the occupier and the landlord. It is a payment arrived at as a result of an agreement entered into between Celtic Roads Group (Waterford) Ltd. and the NRA as part of their negotiations and is not as a result of an imposition by any legal enactment. Consequently, no deduction is to be made from the tolls income for the revenue share although it is understood that no such payments have been made to the NRA.”

Rent:

In return for occupying the toll, Celtic Roads Group (Waterford) Ltd. has agreed as part of the provisions of the Public Private Partnership to design, build, manage and maintain the roads in this scheme as well as meeting the handback provisions. These are contractual obligations arrived at as part of the negotiations between Celtic Roads Group (Waterford) Ltd. and the National Roads Authority and are not charges to be payable under any enactment as stated in section 48 of the Valuation Act, 2001. They are a charge similar to and in lieu of rent for occupying the tolls.

As specified in the guidance note on “The Receipts & Expenditure Method of Valuation for Non-Domestic Rating”, at paragraph 5.28 ‘...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’. Accordingly, none of the expenditure involved to meet these obligations should be allowed to be set off against income.

Repairs and Maintenance:

As stated above, only that expenditure that relates to the operation of the tolls is to be taken into account and includes necessary repairs and maintenance to maintain the tolls in their current state. The obligation to repair and maintain the roads built under the Public Private Partnership contract is part of the consideration being paid to occupy the tolls and therefore, as it is a form of rent and relates to the road rather than the toll it should not be allowable as an expense. The road is a public road and there is an obligation on Celtic Roads Group (Waterford) Ltd. to keep it open as such.

Mr. Adamson did not introduce a valuation in accordance with his expert opinion as to what he considered “*allowable expenses*” when using the Receipts and Expenditure method of valuation but nonetheless said that in his expert opinion the net annual value (un-apportioned) of the property concerned was €7,250.

Under cross-examination Mr. Adamson agreed that neither the valuations of €5,100 and €900 nor his expert opinion of how the valuation of the property concerned be determined were in compliance with the findings of the High Court in the **Celtic Roads (Dundalk) Limited** case. Mr. Adamson said that as a general proposition the Valuation Office in making valuations had regard to previous decisions of the Valuation Tribunal or the High Court as appropriate. However in this instance the Commissioner has appealed the decision of the High Court in the **Celtic Roads (Dundalk) Limited** case and in those circumstances it was not improper for the Commissioner or indeed himself as an expert witness to take a view contrary to the High Court in regard to what proportion, if any, of any maintenance and life cycle costs he considered as “*allowable expenses*” when using the Receipts and Expenditure method of valuation.

When asked about bank charges Mr. Adamson said that on reflection he would allow bank charges as an “*allowable expense*”. However in the absence of detailed information as to the circumstances that would give rise to legal costs on an ongoing basis his natural inclination would be to not allow them. In this regard Mr. Adamson accepted that in other instances he may have allowed legal costs so that to that extent he would not consider them to be a matter of any great import.

In response to questions from the Chairperson, Mr. Adamson said that in his opinion there was a distinction to be made between the obligations imposed under the PPP contract and the statutory provisions contained in Section 48 which envisaged a situation where the property concerned was vacant and to let in its existing state. In such a hypothesis the only maintenance and life cycle costs to be allowed would be those incurred in maintaining the tolls and not the roads either in whole or in part. Mr. Adamson said he was aware that the valuations on the list that were the subjects of appeals had been made on the proposition that a proportion i.e. 14% of the maintenance and life cycle costs would be treated as “*allowable expenses*” and acknowledged that this figure had been incorrectly calculated.

6. The Appellant’s Submissions:

Mr. Murray SC, on behalf of the Appellant, submitted that the only issue before the Tribunal was whether the cost of maintenance of the entire roadway or just part of it should be taken into account when calculating the net annual value of the property. Mr. Murray stated that

once it was accepted that some maintenance cost was allowable then the argument that only part of the maintenance cost should be taken into account bore no logical scrutiny. This was because, firstly, maintenance costs were allowed because the contract said that maintenance had to be paid – the contract did not distinguish between that part of the road over which a user had to pay a toll to travel and that part of the road which was untolled. Secondly, it was submitted that the argument that only part of the maintenance costs should be taken into account was based upon a factual assumption which was untenable, viz, that the use of the tolled part of the road is inevitably affected by the quality of the untolled part of the road over which a user traveled. Finally, Mr. Murray submitted that the instant appeal was completely indistinguishable from the circumstances which gave rise to Mr. Justice Charlton’s ruling in *Celtic Roads Group (Dundalk) Limited v. Commissioner of Valuation* [2008] IEHC 255. Mr. Murray pointed out that the judgment of Mr. Justice Charlton in that case made it absolutely clear, as did the decision of the Valuation Tribunal in that case, that it was the cost of maintenance of the entire road which had to be taken into account when arriving at the net annual value of the property as that was the contractual obligation into which the hypothetical tenant would step.

The Respondent’s Submissions:

Mr. Connolly SC acknowledged that the Tribunal had ruled on one leg of the Respondent’s Submissions, namely that no part of the cost of maintenance of the road was allowable because all that was occupied physically by the ratepayer was the toll gate and toll booth. However, Mr. Connolly submitted that the Tribunal still had to consider the provisions of Section 48(3) of the Act of 2001. Mr. Connolly submitted that the actual state of the property in this case was somewhat complicated because the Tribunal was dealing with an incorporeal hereditament. The property involved was a right to collect a toll income and that was the benefit which the hypothetical tenant wanted to acquire in the Receipts and Expenditure method of valuation. Mr. Connolly submitted that the PPP contract was not being valued although it might or might not be part of the factors looked at.

Mr. Connolly referred to the Supreme Court decision in *Dublin County Council v. Westlink Toll Bridge Limited* [1996] 1 IR 487, and in particular page 493 of the report where Mr. Justice O’Flaherty observed: “*We are concerned exclusively with the rateability of the tolls. The rateability of the buildings and other structures is not in issue.*” Mr. Connolly submitted

that the Appellants in the instant case were seeking to step around that finding and argue that the toll is a package and that you cannot have the right to receive the income of the toll without the maintenance of the roadway. However, in Mr. Connolly's submissions that ignored the normal Receipts and Expenditure method whereby items akin to rent and contractual obligations were added back into the equation and not set off as maintenance.

Mr. Connolly referred to Section 63(5) of the Roads Act and observed that while there appeared to be a statutory obligation to comply with the requirements of Section 63, there was no sanction applicable where such a failure arose. The only sanction under the Roads Act was the statutory obligation with sanction for persons who failed to pay the toll after they had gone through the toll gate, etc. There was no consequence for a breach of Section 63(5). This had been confirmed by Mr. Justice Charlton in his decision in the "MI" case. On that basis, the Respondent argued that if the Appellant's obligation to maintain the roadway was not a statutory charge then it was a separate contractual obligation and the Appellant was not permitted to set it off.

In support of this, Mr. Connolly relied upon *R v Rhymney Railway Company* [(1869) LR 4 QB 276] and *Brecon Markets Co. v. St. Mary's, Brecon* [(1877) 36 LT 109]. In the first case the owners of wharves let them to the railway company, but by the agreement certain wharfage dues were made payable to the owners, and were not receivable by the railway company: It was held that the railway company, being the occupiers of the wharves, were rateable for their full value, including the wharfage dues. In the latter case a trading company had, pursuant to a statute, acquired markets formerly vested and managed by the Municipal Corporation. By the terms of the statute the company was required to pay an annual charge to the Corporation to be applied by them in the first instance to pay interest on debts charged on property other than the market tolls. It was held that, in rating the company for their markets, no deduction could be made in respect of the annual payment which was deemed to be in the nature of rent. In both these cases the company in possession of the property being rated paid no rent but as part of the consideration for the acquisition of the property had to pay the charges described above.

In Mr. Connolly's submission these cases were on point with what was currently before the Tribunal. There was no rent payable by the Appellant in the instant case. The quid pro quo

for their right to collect the tolls which was in the nature of rent or akin to rent was the obligation to maintain the road for the NRA.

Mr. Connolly also referred to the case of *Imperial Tobacco Company (of Great Britain and Ireland) Limited v. Pierson* [1961] AC 463. In that case the ratepayer, an advertising company, had a contract whereby it was given the right to occupy a particular space on a wall. The ratepayer did not have physical ownership of the wall, simply the right to advertise on that space. When a sign was erected it was contended that this resulted in the rates increasing because there was now a physical element to the right. The House of Lords held that what was being rated was the original right under the contract and the fact that the ratepayer had availed of the right so that it now had a physical manifestation did not add an extra value to the rates. Mr. Connolly argued that this principle applied to the instant appeal because the Appellant's right was the right to collect the tolls. The Appellant had an accompanying contractual obligation that was akin to rent and that accompanying obligation was to maintain the road but it was a separate contractual obligation and under the receipts and expenditure method it was not allowed to be set off as a maintenance expense. The Respondent submitted that the Appellant was entitled to set off the cost of maintenance of the toll booth but not the maintenance of the roadway. The Appellant did not occupy the roadway, nor, did it exercise complete control over it. The roadway was ancillary to what the Appellant had in the way of a benefit.

In reply, Mr. Murray pointed out that Mr. Connolly had not tried to distinguish Mr. Justice Charlton's judgment, nor, the decision of the Valuation Tribunal in the *MI* case. Mr. Murray submitted that the decision in the *Brecon Markets* case was irrelevant once it was accepted, as the Valuation Office had to accept, that some form of maintenance can be deducted. In addition, the decision in *Brecon Markets* was distinguishable from the circumstances of the instant case as that involved a fixed sum paid to the landlord, non payment of which did not determine the right to collect the toll. In the instant case, the maintenance obligation was uncertain and varied from year to year. It was paid not to the landlord but to a third party. In Mr. Murray's submission the maintenance of the entire roadway was as far removed from rent as could be. The road had to be maintained for people to use it to pay the toll. The ability to collect the toll was dependent upon the road being maintained and there was no reality to saying that one simply ignored that maintenance obligation because it could be

divorced from the right to collect the toll, or, was a separate contractual obligation as had been submitted by the Respondent.

FINDINGS

1. The parties to this appeal were each represented by senior and junior counsel and the Tribunal is indebted to them for the depth and quality of their submissions. These coupled with the extensive range and scope of the authorities introduced was of immense assistance to the Tribunal.
2. The Tribunal received evidence from senior staff members of the appellant company in relation to the PPP contract and the operation of the toll scheme and the financial performance of the enterprise. Their evidence was clear, precise and helpful.
3. The valuers in preparing their respective opinions of net annual value of the property concerned expressed the view that the most appropriate method of valuation having regard to the nature for the property was the Receipts and Expenditure Method. Similarly, they each used as the basis of their respective valuations the financial spreadsheet or model prepared by Ms. Irvine, the Finance Manager of the appellant company. 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 valuation 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 N25 from Grannagh Junction just north of the River Suir in County Kilkenny to the western link junction at the Waterford City Council/Waterford County Council boundary. It is agreed that the length of road that is subject to the payment of the appropriate toll fee is 5.5 kms which includes the new bridge across the River Suir. It is further agreed that the length of road to be maintained by the appellant during the operational period of the PPP contract is 23.1 kms.
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 also agreed that tolls are of their very nature incorporeal property, but nonetheless when they fall to be valued for rating

purposes the valuation of essential corporeal elements necessary 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 (the NRA) for the design, construction, financing, management and maintenance of 38 kms of roads to include a 475 metre cable stayed bridge across the River Suir at a total project cost of €338 million. At the end of the construction period a section of road was handed over to the local authority where the remainder – some 23.1 kms including the new bridge is to be maintained by the appellant in compliance with stringent requirements set down by the NRA during the operational period of the contract at which time the road is to be handed back to the local authority in pristine condition.
7. In return for meeting its obligations under the PPP contract the appellant was granted a concession to collect the tolls during the operational period of the contract with ends on the 20th April, 2036.
8. In many respects the fundamental facts in regard to this appeal are similar to those in the **N6 (Concession) Ltd. v Commissioner of Valuation (VA11/4/019)** and **Celtic Roads (Dundalk) Limited. v Commissioner of Valuation (VA05/3/008 & 009) – [2008] IECH 255** – which is currently the subject of an as yet undetermined Supreme Court appeal – in as much as only a proportion of the road which the operator is obliged to maintain is subject to the payment of a toll fee while the other section is toll free to all users.
9. In the **Celtic Roads** case the Tribunal concluded that the cost of maintaining and operating 54.7 kms of which only 21.7 kms was subject to the payment of an appropriate toll fee as 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 as mentioned above is now the subject of an appeal to the Supreme Court, the outcome of which is awaited. In the **N6 (Concession) Ltd.** appeal the appellant is required to maintain 52.9 kms mainline roads and 3.7 kms of side roads of which only 25.5 kms of mainline road is subject to the payment of the appropriate toll fee. In the **N6** appeal

the Tribunal said it could not disregard the findings of the High Court in the **Celtic Roads** case and concluded that the costs incurred by the appellant in maintaining the total length of road 56.6 kms and not just the 25.5 kms which is subject to the payment of a toll were “*allowable expenses*” when using the Receipts and Expenditure method of valuation. The Tribunal also followed the High Court in **Celtic Roads** in finding that the life cycle costs associated with 56.6 kms of roads were also “*allowable expenses*”.

10. In the Tribunal’s opinion there is a seamless link between the Roads Act, 1993 as amended, the PPP contract and the Toll Bye-Laws for the N25 Waterford Bypass, all of which are a manifestation of Government policy to have the private sector participate in the provision of strategic pieces of public infrastructure. Furthermore there is a causal relationship between the anticipated toll income receivable by the appellant during the period of the contract and the financial responsibilities to be assumed by the appellant. In other words the base tolls were set at levels having regard to the likely capital expenditure and ongoing costs to be incurred by the appellant over the period of the contract in meeting its obligations imposed by the said contract. On the one hand the State obtains at no direct cost an important and costly piece of strategic infrastructure while the appellant obtains the concession to collect and retain the toll revenues during the operational period of the PPP contract which were set at levels deemed sufficient to enable the appellant to recoup all its costs and a return commensurate with its investment and risk.
11. The Tribunal accepts the evidence of Mr. Wood that the actual traffic volumes upon which the PPP contract was predicated are substantially below the anticipated volumes and that this is unlikely to change for some time.
12. The Tribunal also accepts the evidence of Mr. Wood that tolled bypasses are different to tolled motorways in that users of a bypass do so as a matter of choice and that in this instance the level of congestion on the Rice Bridge will be a major factor in that choice which is fundamentally a financial one.
13. Unlike the Commissioner of Valuation and Mr. Adamson the Tribunal finds itself bound by the precedent set by the High Court to the effect that maintenance and life

cycle costs are an “*allowable expenses*” in full and not restricted solely to that proportion of the road which is tolled. Similarly the Tribunal finds that legal costs and bank charges incurred in the normal operation of the enterprise are “*allowable expenses*”.

14. In the circumstances the Tribunal finds the valuations put forward by Mr. Adamson to be 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.

15. Ms. Murphy’s valuation is based on 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.*”

16. 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 €368 (Kilkenny County Council and €182 for Waterford City Council).

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.

In this regard the Tribunal notes that the appellant's financial model indicates that the enterprise from a purely operation point of view is profitable before making allowances for "life cycle" costs.

10. The Tribunal notes that the appellant in its Notices of Appeal dated 22nd December, 2011 stated at Section 6(a)(ii) thereof that the rateable valuation of the property concerned should be €368 (Kilkenny County Council) as against the respondent's valuation of €900 and €182 (Waterford City Council) as against the respondent's valuation of €5,100. No calculations were contained in the Notices of Appeal as to how the appellant arrived at the above figures.

11. Both parties have apportioned their respective opinions of net annual value in the following manner: 83% Waterford City Council and 17% Kilkenny County Council. The Tribunal proposes to do so likewise.

Determination

Having regard to the findings and conclusions set out above, the Tribunal, in accordance with Section 37(1)(b) of the Valuation Act 2001 allows the appeal and determines that the valuation of the property concerned as stated in the Certificates of Valuation issued on 25th November 2011 pursuant to Section 33(2)(b)(i) be reduced as set out below:

Amount available for Rent and Rates		€400,000
Apportioned as per the parties	Waterford City Co.(83%)	Kilkenny Co. Co. (17%)
	€332,000	€68,000
Rate in €for 2010	66.22	52.31
Rates Reduction Factor	1.41718	1.26155
Rent/NAV =	€234,268	€3,902
CPI adjustment		
(Nov '88 to Aug '10)	x .57	x .57
Net Annual Value (11/88)	€133,533	€30,724
Rates Reduction Factor	<u>x 0.0063</u>	<u>x 0.005</u>
Rateable Value	€841	€153
Say	€840	

In arriving at the above determination, the Tribunal has had regard to the fact that the valuations so determined shall remain on the relevant Valuation Lists until such time as they are subject to a revaluation under section 19 or a revision of valuation under section 28 of the Valuation Act, 2001.

And the Tribunal so determines.