

Appeal No. VA11/4/022

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

CRG (Portlaoise) Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Property number 2207750, Toll(s) at Lot No. M7 Toll Road, Clonadacasey, Clonkeen, Abbeyleix, County Laois.

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

By Notice of Appeal received on the 22nd day of December, 2011, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €10,300 on the above described relevant property.

The grounds of appeal are set out in the Notice of Appeal, a copy of which is attached at Appendix 1 to this judgement.

1. 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 (Waterford) Limited (VA11/4/020 and VA11/4/021) 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 genesis of the PPP contract entered into on the 14th June 2007 between the National Roads Authority and Celtic Roads Group (Portlaoise) Limited and the main obligations in relation to the comprehensive maintenance and hand over requirements imposed on the company by the said contract.
 - II. Ms. Louise Irvine, ACIMA, with a degree in Business Studies Accounting is the Finance Manager of Celtic Roads Group (Portlaoise) Limited. In her evidence Ms. Irvine said she prepared the financial spreadsheet showing the actual and projected income and operating costs for the five 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) created a scheme for the construction, operation and maintenance of a road from (i) west of the R435, south of Borris-in-Ossory, eastwards to south of Aghaboe and then north eastwards to the termination of the M7 Portlaoise Bypass at Portlaoise (M7) and (ii) south of Culahill and north eastwards to join the M7 at Ballycuddahy (M8) the M7 and M8 scheme, which scheme was adopted by the NRA on the 12th December, 2006 as “The Toll Scheme”.
- (b) Following a competitive tender process the appellant entered into an NRA PPP contract dated 14th June, 2007 to design, construct, operate, maintain and finance a road scheme known as the M7/M8 Portlaoise Motorway PPP Scheme. The term of the contract to include the construction period is for 30 years from 14th June, 2007.
- (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” dated 20th April, 2010. In the event the toll collection scheme commenced on the 25th May, 2010 and will under the terms and conditions of the NRA contract continue to operate until 13th June, 2037.
- (d) It is agreed that the PPP contract was entered into between informed parties who, at the time the contract was signed, were fully appraised of the likely costs of procurement, maintenance, routine and life cycle, handback obligations and the base toll fees and the provision for their increase from time to time in accordance with the Bye Laws during the operational period of the contract.
- (e) It is agreed that the length of road constructed and to be maintained by the appellant under the NRA contract is 41.5 kms and that only that section from Junction 18 to Junction 21 (M7) or Junction 3 (M8) – circa 34 km is subject to

the payment of the relevant toll fee. The remainder of the road, some 7.5km or 18% of the total being toll free.

- (f) In accordance with the PPP contract the appellant is required to maintain 41.5 kms of road during the period of the contract to very high standards and at the end of the contract period (13th June 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.
- (g) 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.
- (h) It is agreed that the property concerned is the tolls collectable from users of vehicles of all types which traverse that section from Junction 18 to Junction 21 (M7) or Junction 3 (M8). It is further agreed that tolls are relevant property as particularly provided for at Paragraph 1(h) of Schedule 3 of the Valuation Act, 2001.

4. Preliminary Issue

At the outset of the hearing a preliminary question arose. The Certificate 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 Certificate, 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 Certificate 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 Appeal was allowed it would follow that the Tribunal would substitute for the valuation contained in the Valuation Certificate, either the value contended for by the Appellant, or, another figure deemed to be appropriate by the Tribunal, which was less than the figure contained in the Valuation Certificate. However, it was clear from the language of Section 37(1)(a) that if the Tribunal disallowed the Appeal it had to confirm the decision of the Commissioner. There is no statutory power to substitute a figure higher than that contained in the Valuation Certificate.

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

In light of the above, the sole issue now remaining 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 valuation of €10,300 contained in the Valuation Certificate issued by the Commissioner of Valuation in the exercise of his powers under Section 33 of the Act.

6. The Valuation Evidence

Ms. Siobhan Murphy, BSc (Surv), MSCS, MRICS.

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 prepared by Ms. Louise Irvine, the Financial Manager of Celtic Roads (Portlaoise) Limited. Ms. Murphy said that when it came to identifying and quantifying all allowable expenses she had come to the conclusion that it was proper to allow the maintenance costs and lifecycle costs in respect of the entire road i.e. 41.5 kms not just that section – 34 kms which is the subject of the toll. Such a course of action, she said, was supported by the decision of the High Court in **Celtic Roads (Dundalk) Ltd.** A copy of Ms. Murphy's valuation is contained at Appendix 3 attached to the judgment.

In regard to life cycle costs Ms. Murphy said there was a difference in the approach taken by her and Mr. Adamson in relation to the electronic toll installation costs and maintenance of these elements. In her opinion those costs which are in the nature of capital expenditure should be amortised over the operational period of the contract under the heading of life cycle costs. The respondent, on the other hand, treated these costs as "operating costs" incurred on an annual ongoing basis. The consequence of this decision by the respondent, according to Ms Murphy, gave rise to an overstatement of operating costs in Mr. Adamson's valuation in

the order of €258,000 and a corresponding understatement in life cycle costs in the order of €80,000.

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 €12,000, which figure was reduced to €10,300 following an appeal made under Section 30.

Mr. Adamson said that the valuation of €10,800 being put forward by him was solely for the purpose of supporting the valuation of €10,300 contained in the Valuation Certificate issued by the Commissioner of Valuation in the exercise of his powers under Section 33 of the Act. This valuation, Mr. Adamson said, was similar in many respects to that put forward by Ms. Murphy in that it was made using the Receipts and Expenditure method and the financial information supplied by Ms. Irvine. However, the valuation of €10,800 now being put forward by him “*corrects a number of double counting errors in earlier valuations*”. Mr. Adamson also said that in his valuation only 82% of operating costs and life cycle costs were allowable expenses to reflect the fact that only 34 kms of the roads which the appellant was obliged to maintain under the PPP contract was subject to the payment of a toll fee – the remaining 7.5km being toll free.

Mr. Adamson said that in his valuation he had regard to the obligations under the PPP contract that the roads be maintained and that they and all the facilities associated therewith be handed back at the end of the contract period in good repair and condition. The estimated life cycle costs necessary to meet these obligations are estimated to be €72,360,383 and are spread over the years from 2010 to 2036. In accordance with the Guidance Note in relation to the application of the Receipts and Expenditure method of valuation it was proper to treat the annualized cost of this expenditure as an “allowable expense”. Having regard to the fact that only 82% of this expenditure was in respect of the road that was subject to the toll fee the annual fund to meet this expenditure would be €1,565,085. A copy of Mr. Adamson’s valuation is contained in Appendix 4 attached to this judgement.

Mr. Adamson said that under the act the figure to be determined is the net annual value of the “Tolls” i.e. the rent a hypothetical the tenant would pay to occupy the tolls. Section 48(3) of the Valuation Act, 2001 defines net annual value as follows:

“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 reasonable 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.”

In this instance Mr. Adamson said the valuation is the “*net annual value of the Tolls of the M7 Motorway toll road i.e. the rent which a hypothetical tenant would offer to operate the tolls.*” Mr. Adamson said that as an expert witness he considered the valuations of €10,800 and €10,300 to be low because in his opinion they were formulated on an incorrect basis. In his opinion the appellant had agreed as part of the provisions of the PPP contract to design, build, manage and maintain the roads in this scheme as well as meeting the hand back provisions. There are contractual obligations carried out as part of the negotiations between Celtic Roads Group (Portlaoise) 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. Accordingly Mr. Adamson contended that none of the expenditure involved in meeting these obligations should be considered “allowable expenses” when using the Receipts and Expenditure method of valuation. Mr. Adamson went on to say “*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 other 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 (Portlaoise) Ltd. to keep it open as such*”. Mr. Adamson said that on this basis only those costs incurred in collecting, maintaining and operating the tolls were “allowable expenditure” and accordingly the valuation of the property concerned would be €8,600. No calculations were provided to show how this valuation was

determined. Mr. Adamson said that in the recently heard appeal to the Supreme Court in regard to **Celtic Roads (Dundalk) Ltd.** it was argued that only those costs in operating the tolls should be allowable and no allowance should be made for the maintenance of any roads whether or not it is subject to the payment of a toll fee. This argument, he said, was consistent with those put forward by him and which gave rise to his valuation of €18,600. Mr. Adamson acknowledged that in light of the Tribunal's decision in the **N6 (Concession) Ltd.** appeal (**VA11/4/019**) it was not open to the Commissioner to seek to have the Tribunal increase the valuation of the property above the valuation contained in the Certificate issued by him pursuant to Section 33.

Under examination Mr. Adamson reiterated his view that a distinction was made between obligations imposed under the PPP contract and those contained in Section 48. In his opinion the PPP contract is to be disregarded and the situation between the NRA and the appellant looked at from the rating hypothesis point of view. In the first instance there is a toll gate and the collection of the tolls (the property concerned) that is vacant and to let. The question to be answered is what rent would a tenant pay to collect the tolls. The accepted method to determine this rent is that known as the Receipts and Expenditure method whereby the income is the toll receipts to be derived from the occupation of the tolls. The outgoings would be only those relating to the operation of the tolls and referring to Section 48 of the Act which states that *“the outgoings are the average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property, mainly the toll, in that state and that is the state that it is in at the valuation date”*. Mr. Adamson said that the appellant in this instant is obliged under the PPP contract *“to incur costs which would not apply to the hypothetical tenant because it is a separate property”*. In his opinion there are two separate and distinct properties – the tolls and the road which are capable of separate occupation. However, since the road is a public road it is not capable of rateable occupation.

Mr. Adamson drew the Tribunal attention to Section 63 of the Roads Act, 1993 as amended which provides as follows:

“(1) Where a toll scheme is approved by the Minister, a road authority may, with the consent of the Minister, enter into an agreement with another person under which, upon such terms and conditions as may be specified in the agreement (including the payment to, or retention by, the person of all or part of the proceeds of tolls in respect of the toll

road the subject of the scheme), the person agrees to do all or one or more of the following:

- (c) to pay some or all of the cost of the construction of the road,*
- (d) to pay some or all of the cost of the maintenance of the road,*
- (e) to construct or join or assist in the construction of the road for or with the authority,*
- (f) to maintain or join or assist in the maintenance of the road for or with the authority*
- (g) to operate and manage (including provide, supervise and operate a system of tolls in respect of the use of the road) the road for or with the authority,*
- (h) such other things connected with or incidental or ancillary to or consequential upon the foregoing as may be specified in the agreement.*

(2) Without prejudice to the generality of subsection (1), an agreement under this section may—

- (a) provide for the application of the proceeds of tolls, systems of accounting for tolls collected and the methods and times of payment of proceeds of tolls to the persons to whom they are to be paid under the terms of the agreement,*
- (b) specify the period for which the agreement shall have effect and provide for its termination or suspension and for matters connected with or incidental or ancillary to or consequent upon the expiration of the agreement or such termination or suspension, and*
- (c) provide for the giving of such security as may be specified therein—*
 - (i) to the road authority by any other party to the agreement, or*
 - (ii) by the road authority to any other party to the agreement,**in relation to the carrying out and observance by that party or authority of the terms and conditions of the agreement.*

(3) A road authority may, with the consent of the Minister, enter into an agreement with a party with whom it has entered into a previous agreement under this section amending the terms or conditions thereof, adding thereto, or deleting therefrom, terms or conditions or revoking the previous agreement.

(4) Entry into an agreement under this section in relation to a regional road or a local road shall be a reserved function.

(5) The parties to an agreement under this section shall carry out the agreement in accordance with its terms and conditions and a road authority shall have all such powers as may be necessary for that purpose.”

This section, Mr. Adamson said, provides a menu or list of options open to persons wishing to participate in toll road scheme. Some of these options would include obligations to maintain the toll road or part of it. Any such obligation, Mr. Adamson said, in rating valuation terms equated to rent. In essence, he said, there is no statutory obligations under Section 63 to maintain the road as any such obligations arise from the option contained in Section 63 selected by the interested party and any maintenance costs arising from that choice is equivalent to rent and hence not an “*allowable expense*” when using the R&E method of valuation. On the basis outlined by him Mr. Adamson said the valuation of the property concerned should be €18,600. The valuation of €10,300 contained in the Commissioner’s certificate and the valuation of €10,800 he had put forward in support of the Commissioner’s figure had been calculated on the basis that maintenance and life cycle costs were “*allowable expenses*” but only to the extent of 82% being the percentage of costs in respect of that section of the road which is subject to the payment of the toll fee.

Under cross-examination Mr. Adamson intimated that the general policy within the Valuation Office in making valuations was to have regard to relevant decisions of the Valuation Tribunal and/or the High Court. However, when it came to valuing the property concerned at the revision and Section 30 appeal stage the Valuation Office did not feel itself to be bound by the decision of the High Court in the **Celtic Roads (Dundalk) Ltd.** case as it was under appeal to the Supreme Court. At the revision and appeal stages the view within the Valuation Office was that only that portion of the maintenance and life cycle costs in respect of the tolled section of the road, which in this case is 82%, should be treated as “*allowable expenses*”. Since then the position had changed and the argument introduced at the Supreme Court was that no maintenance costs or life cycle costs in relation to the road should be treated as “*allowable expenses*”. The only maintenance costs to be allowed were those incurred in maintaining the toll and structures associated therewith.

When questioned about the PPP contract Mr. Adamson agreed that there was a connection between maintaining the road and collecting the tolls. He also agreed that the PPP contract

was created in accordance with the Roads Act and that failure to maintain the road to proper standards would result in the appellant ceasing to have the right to collect the tolls.

In response to questions about Section 63 of the Roads Act, Mr. Adamson said it offered a range of options and 63(1) for example did not necessarily include operating and managing the road, although it did provide for paying the construction costs or just paying the maintenance costs. In any event, Mr. Adamson said, whatever the nature of the NRA contract he held the view that maintenance costs were the equivalent of rent paid to occupy the toll. Furthermore a tenant under the rating hypothesis would not under any circumstance undertake to maintain a public road which persons could traverse over without paying a toll.

When asked to explain the difference between the life cycle costs in his valuation and that of Ms. Murphy's, Mr. Adamson said that this was due to a difference in opinion as to how to treat those costs relating to the Operation & Maintenance (O & M) contract. These costs, he said, were operating costs and described as such in the accounts and were incurred in respect of maintaining the electronic toll collecting equipment and apparatus and admin systems which arise routinely on a year on year basis and consequently are part of tenant's normal outgoings. That being so it would not be proper to include them under the heading of life cycle costs. In regard to bank charges Mr. Adamson said he would agree that they be treated as an allowable expense. However, in relation to legal costs he would not be of a mind to allow them without detailed information as to what they related to and if they were being incurred on an ongoing basis.

7. 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. Those 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. The evidence presented to the Tribunal was again of assistance to the Tribunal.
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 which traverse that section from Junction 18 to Junction 21 of the M7 or Junction 3 of the M8.
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 further 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 (NRA) for the design, construction, financing, management and maintenance of 41.5 kms of motorway which the use of 34 kms only is subject to the payment of the appropriate toll fee. The PPP contract was entered into following a tender process.

7. In many respects the facts in relation to this appeal are similar to those in appeals numbers **VA11/4/019 - N6 (Concession) Ltd. v Commissioner of Valuation** and **VA05/3/008 & 009 – Celtic Roads (Dundalk) Ltd. v Commissioner of Valuation** in as much as only a proportion of roads which the operator is obliged to maintain is subject to the payment of a toll while the other section is toll free.

8. 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 is now the subject of an appeal to the Supreme Court, the outcome of which is awaited. In the **N6** appeal the appellant is required to maintain 52.9 kms mainline roads and 3.7 kms of side roads 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 56.6 kms of road 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 found that the life cycle costs associated with 56.6 kms of roads were also allowable expenses.

9. In the Tribunal's opinion there is seamless link between the Roads Act, 1993 as amended and the PPP contract between the NRA and the appellant which is representative of the Government's 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 the obligations imposed by the said contract. On the one hand the State obtains an important and costly piece of strategic infrastructure at no direct cost while the appellant is entitled to the toll revenues during the contract period which is

set at levels deemed sufficient to enable the appellant to recoup all its costs and a return commensurate with its investment and risk.

10. In relation to the costs incurred under the heading of “O&M Contract Lifecycle” in Mr. Adamson’s précis there was a difference of opinion as to how they should be treated in the valuation calculated using the Receipts and Expenditure Method. Ms Murphy adduced the argument that they should be included under the general heading of “lifecycle” costs and annualized in the same manner as lifecycle and handback costs in respect of the road and associated structures etc. Mr. Adamson on the other hand contended that since they arise annually on an ongoing basis they should be treated in the same manner as other costs incurred in operating and maintaining the toll. This is the first occasion that “O&M contract” costs have been identified and quantified in the valuation of tolls and indeed Mr. Adamson made no such distinction in the valuation submitted by him in relation to the Waterford toll (**VA11/4/020 & 021 – Celtic Roads Group (Waterford) Ltd.**) which was held concurrently with this appeal. In the circumstances the Tribunal concludes that if only for the sake of consistency it would be better to adopt Ms Murphy’s valuation approach notwithstanding the fact that there is considerable merit in Mr. Adamson’s argument. In any event, if the Tribunal were to accept Mr. Adamson’s view the effect on the valuation would be of no great significance.

Determination

Having regard to all the evidence adduced, submissions made and having considered the various authorities therein referred to the Tribunal determines as follows:

1. That in line with the findings in **VA05/3/008 & 009 - Celtic Roads (Dundalk) Ltd. ([2008] IE HC 55)** and **VA11/4/0419 – N6 (Concession) Ltd.** appeals, the Tribunal finds that the maintenance costs, life cycle costs and other operating costs as set out in the valuation proposed by the appellant’s valuer be considered as allowable expenses in their entirety.
2. That having regard to paragraph 1 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 Certificate of Valuation issued under

Section 33(2)(b)(i) of the Act be reduced to €8,900 based upon an estimated net annual value of €1,780,000 in accordance with Section 49(2) of the Act, as set out below.

3. Valuation as per Ms Murphy:

Average toll income (2011 – 2015) (agreed)	€12,525,657
Less discounts @ 1%	€ 125,257
Net average toll income (agreed)	€12,400,400
Less operating costs (agreed) take @ 100%	<u>€ 3,680,614</u>
	€ 8,719,786
Less lifecycle costs (to include O&M contract costs) @ 100%	<u>€ 2,253,258</u>
Divisible Balance, i.e. amount for Tenant's share, rent & rates	€ 6,466,528
Tenant's share @ 10% of average toll income (agreed)	<u>€ 1,252,566</u>
Amount for rent & rates	€ 5,213,963
NPV of rent/rates amount discounted @ an agreed rate of 3.5%	x <u>0.8725</u>
Adjusted amount for rent & rates	€ 4,535,520
Rate in €= 64.63	
Rates adjustment factor = 1.32315 – reciprocal of	x <u>0.7557722</u>
NAV/rent	€ 3,427,820
CPI adjustment to Nov. 1988 (agreed)	x <u>0.5175</u>
NAV	€ 1,773,897
Rateable valuation @ 0.5%	x <u>.005</u>
Rateable valuation	€ 8,869
Say	<u>€ 8,900</u>

And the Tribunal so determines.