

Appeal No. VA94/2/025 -
VA94/2/033

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 1988
VALUATION ACT, 1988

West Link Toll Bridge Limited and National Toll Roads Plc
and

APPELLANTS

Commissioner of Valuation

and

RESPONDENT

South Dublin County Council and Fingal County Council

NOTICE PARTY

RE: Tolls of Toll Road (Part of) at

- (1) VA94/2/025 - Townland: Palmerstown Upper, E.D. Palmerston West,
R.D. South Dublin. RV - £60.
- (2) VA94/2/026 - Townland: Brooklawn, E.D. Palmerstown West,
R.D. South Dublin. RV - £275.
- (3) VA94/2/027 - Townland: Palmerstown Lower, E.D. Palmerstown West,
R.D. South Dublin. RV - £1,395.
- (4) VA94/2/029 - Townland: Astagob, E.D. Castleknock - Knockmaroon,
R.D. Dublin - Fingal. RV - £325.
- (5) VA94/2/030 - Townland: Castleknock, E.D. Castleknock Park,
R.D. Dublin - Fingal. RV - £1,165.
- (6) VA94/2/031 - Townland: Blanchardstown, E.D. Castleknock - Knockmaroon,
R.D. Dublin - Fingal. RV - £705.
- (7) VA94/2/032 - Townland: Castleknock, E.D. Castleknock - Knockmaroon,
R.D. Dublin - Fingal. RV - £2,755.
- (8) VA94/2/033 - Townland: Diswellstown, E.D. Castleknock - Knockmaroon,
R.D. Dublin - Fingal. RV - £2,820.
- (9) VA94/2/028 - Offices at Map Ref: 12Ca, Townland: Diswellstown, E.D.
Castleknock - Knockmaroon, R.D. Dublin - Fingal. RV - £80. Co. Dublin

Rateable Occupation and quantum
B E F O R E

Paul Butler

S.C. (Acting Chairman)

Mary Devins

Solicitor

Brid Mimmagh

Solicitor

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 4TH DAY OF OCTOBER, 1995

By Notices of Appeal dated the 27th day of July, 1994 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £9,580 in total on the above described hereditaments.

The grounds of appeal as set out in the Notices of Appeal are that:

- "1. The Toll Road is a public road and as such is dedicated to and used exclusively for public purposes and is therefore not a rateable hereditament.
2. The tolls referred to in the Valuation List, being the tolls of a public road are not rateable hereditaments, nor are any structures (including office, car park and stores) erected and maintained for the collection of such tolls or necessary for the operation of the Toll Scheme made by Dublin County Council on the 10th June 1985 and approved by the Minister for the Environment on the 22nd December 1986, rateable hereditaments.
3. The Commissioner of Valuation failed to distinguish the said hereditaments as being of a public nature and occupied for a public purpose or service.
4. The appellants do not derive any private profit or use from the said hereditaments.
5. The appellants are not occupiers of all of the said hereditaments nor any of them.
6. The said valuations have not been made in accordance with Article 37, Paragraph M of the Adaptation of Irish Enactments Order 1899 and are therefore, invalid, void and of no effect.
7. The valuations are excessive and inequitable.
8. The said valuations have been made by the Commissioner of Valuation upon a wrong principle and contrary to law.
9. The valuations were carried out contrary to natural justice and in an arbitrary manner.
10. The appeal to the Commissioner of Valuation (the 'First Appeal') was carried out in a manner contrary to natural justice and arbitrarily in that the Commissioner ignored the repeal of Section 23 of the Valuation (Ireland) Act 1852, and the onus thereby placed upon him of demonstrating the correctness of his valuation to the appellant or his duly authorised Agent.
11. The description of the hereditaments are not reconcilable with the request for review submitted by the Rating Authority."

The Property:

The Toll Road is a four lane carriageway (two each direction), which widens to ten lanes (five each direction) on either side of the Toll Collection buildings. It includes a high level bridge across the River Liffey.

The Toll Road, the source of the 'Tolls of Toll Road' is known as the Western Parkway Toll Facility or 'West Link'. It is located west of Dublin city and extends from the roundabout on the Galway Road (N4) at Palmerstown to the Navan Road (N3) at Castleknock, an approximate length of 3.2km in all. It is proposed to eventually form part of the entire Western Parkway from the Belfast Road, north of Dublin city to the Wexford Road, south of Dublin city.

The Toll Plaza (VA94/2/028) is located on the Toll Road in the townland of Diswellstown, north of the bridge over the River Liffey. The Toll Plaza is a three storey over basement construction with the following accommodation:-

- (a) Basement: Cash Strongroom, Passageway and Employees Canteen
- (b) Ground Floor: Toll Collection Booths, General Office/Control Room and Private Office/Computer Room.
- (c) First Floor: Offices and Toilets
- (d) Second Floor: Reception Area, 2 Private Offices, Boardroom, Staff Canteen and Toilets

The basement, ground floor and all but one office on the first floor are used exclusively for the operation of West Link Toll Bridge Limited. The remainder is occupied by National Toll Roads Plc and is surplus to the requirements of West Link Toll Bridge Limited. Both East Link and West Link Toll Bridge Limited are subsidiaries of National Toll Roads Plc and certain personnel serve one or more firms.

Valuation History:

- March 1990 : Valuation of the hereditaments was requested by Dublin County Council.
- November 1991 : Following inspection of the Works the rateable valuations were fixed and issued to Dublin County Council. The hereditaments were as follows:-
- (a) **District Electoral Division:** Castleknock -

Knockmaroon

Townlands: Astagob, Blanchardstown,
Carpenterstown, Castleknock and
Diswellstown.

Occupier: West Link Toll Bridge Limited

Description: Tolls of Toll Road (Part of)

Rateable Valuation: £5,950

(b) **District Electoral Division:** Castleknock -
Knockmaroon

Townland: Diswellstown

Occupier: West Link Toll Bridge Limited

Description: Offices, Store & Car park

Rateable Valuation: £220

(c) **District Electoral Division:** Castleknock Park

Townland: Castleknock

Occupier: West Link Toll Bridge Limited

Description: Tolls of Toll Road (Part of)

Rateable Valuation: £900

(d) **District Electoral Division:** Palmerstown West

Townlands: Brooklawn, Palmerstown Lower,
Palmerstown Upper

Occupier: West Link Toll Bridge Limited

Description: Tolls of Toll Road (Part of)

Rateable Valuation: £2,650

December 1991 : The appellant was aggrieved by this Revision and appealed to the Commissioner of Valuation.

May 1992 : Valuation Office requested, from appellant's agent, submissions in support of the grounds of appeal.

July 1992 : Submission received from appellant's agent, Gerrard Scallan & O'Brien, Solicitors.

February 1994 : Mr. Aylward deputed to inspect the hereditament and to investigate the grounds of appeal.

June 1994 : At First Appeal the Commissioner of Valuation amended the rateable valuations as follows:-

(a) **District Electoral Division:** Castleknock -

Knockmaroon

Townlands: Astagob
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £325 (VA94/2/029)

- (b) **District Electoral Division:** Castleknock -
Knockmaroon

Townlands: Blanchardstown
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £705 (VA94/2/031)

- (c) **District Electoral Division:** Castleknock -
Knockmaroon

Townlands: Castleknock
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £2,755 (VA94/2/032)

- (d) **District Electoral Division:** Castleknock -
Knockmaroon

Townlands: Diswellstown
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £2,820 (VA94/2/033)

- (e) **District Electoral Division:** Castleknock -
Knockmaroon

Townlands: Diswellstown
Occupier: National Toll Roads Plc
Description: Offices
Rateable Valuation: £80 (VA94/2/028)

- (f) **District Electoral Division:** Castleknock Park

Townlands: Castleknock
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £1,165 (VA94/2/030)

- (g) **District Electoral Division:** Palmerstown West

Townlands: Palmerstown Lower
Occupier: West Link Toll Bridge Limited

Description: Tolls of Toll Road (Part of)
Rateable Valuation: £60 (VA94/2/025)

- (h) **District Electoral Division:** Palmerstown West
Townlands: Brooklawn
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £275 (VA94/2/026)
- (i) **District Electoral Division:** Palmerstown West
Townlands: Palmerstown Upper
Occupier: West Link Toll Bridge Limited
Description: Tolls of Toll Road (Part of)
Rateable Valuation: £1,395 (VA94/2/027)

July 1994 : Appellant lodged an appeal with the Tribunal against the determinations of the Commissioner of Valuation.

Written Submissions:

1. Appellant:

Mr. Bryan J. Strahan of Messrs. Gerrard Scallan & O'Brien acting on behalf of the appellants presented a copy of proposed submissions by Counsel on 28th November 1994. In addition a report entitled "Traffic and Revenue Expectations 1990" was submitted to the Tribunal on 2nd February 1995, together with a map of Westlink Toll Bridge indicating connections to local road network. On 19th April 1995 the Tribunal received further submissions on behalf of Westlink Toll Bridge and a written précis of evidence from Donal O'Buachalla of Donal O'Buachalla & Company Limited.

Closing submissions were handed in at the hearing on 31st July 1995 by Richard Cooke, S.C. on behalf of the appellant.

In the submission dated the 28th November 1994, the appellant submitted that the road, the subject of the present appeal was a public road constructed in pursuance of the said agreement within the meaning of the Local Government (Road & Motorways) Act, 1974 and the Local Government (Toll Roads) Act, 1979.

- (1) The effect of the foregoing legislative and contractual provisions is to establish the roads, bridges and works constructed in pursuance of the said agreement as a public road within the meaning of the Local Government (Roads & Motorways)

Act, 1974, and the Local Government (Toll Roads) Act, 1979.

- (2) That the County Council of Fingal, as universal successor by statute to the Dublin County Council, is the road authority within the meaning of the said Acts with regard to the said road.
- (3) That the tolls payable for the use of the said road, the proceeds of which are devoted exclusively to the provision, maintenance, improvement management and operation of the said road to the intent that the said road shall become toll-free, fall to be distinguished in the Valuation Lists in accordance with the second proviso to Section 63 of the Poor Relief (Ireland) Act, 1838, and Section 2 of the Valuation (Ireland) Amendment Act, 1854.
- (4) That the appellants are not the occupier of the said tolls within the meaning of Section 124 of the Poor Relief (Ireland) Act, 1838.
- (5) The appellants are not and were not at any material time the "occupiers" of the tolls.

"Occupier" is described by Section 124 of the Act of 1838 as including every person in the immediate use and enjoyment of the tolls. The appellants collected the tolls on behalf of the road authority by virtue of the delegation of the collection of the road authority to them and not for themselves; their disposition of the money collected as tolls was not within their discretion since the road authority had prescribed the disposition of the same.

On the question of the quantum of the valuation the appellant submitted that the hereditaments (the subjects of the present appeals) could only be rateable if there was a private profit derived therefrom. It was submitted that there was not at the effective valuation date any private profit, nor could private profit be earned until profits sufficient to offset the losses previously incurred had been achieved. The appellants submitted the case law in support of their submissions as follows:

- (1) *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* [1867] QB283.
- (2) *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* [1868] 2IR CL576.
- (3) *Belfast Harbour Commissioners v. Commissioner of Valuation* [1897] 2IR 516.
- (4) *Commissioner of Valuation v. Sligo Harbour Commissioners* [1899] 2IR 214.
- (5) *The Committee of Management of Barrington's Hospital and City of Limerick Infirmary v. The Commissioner of Valuation* [1957] IR 299.
- (6) *The Clonmel Mental Hospital Board v. The Commissioner of Valuation* [1958]

IR 381.

(7) *Dublin Corporation v. Dublin Cemeteries Committee.*

In a further submission dated the 19th day of April 1995 the appellants further set out their submissions to the Tribunal. In the first place they stated that the tolls are the tolls of a public roads or a road dedicated to public use and not rateable at all. The agreement between Westlink and the County Council delegated the collection of the tolls to that company. The agreement provided that the produce of the tolls was to be used for the erection and maintenance of the bridge, for the repayment of the money borrowed to build the bridge and the approach roads and the remuneration of those employed for the period of years at the end of which the agreement would terminate and the contract embodied therein would come to an end, the bridge would be toll free and presumably would be maintained thereafter by the Local Authority for the time being. It was stated in the written submission that no profit whatsoever was derived by the appellant at any time prior to the beginning of the year 1992, if no profit was derived therefrom there could be no private profit. If there was no profit there was no private profit and therefore no occupier, whatever the nature of the rateable hereditament. In the written submission the appellant referred to the judgment of Mr. Justice Geoghegan in the proceedings between Dublin County Council and Westlink Toll Bridge Limited. It was the contention of the appellant that the decision of Mr. Justice Geoghegan was based upon a misunderstanding of the arguments and of the defence of the appellants in that appeal. In the written submission the appellant gave detailed comments in relation to the Valuation Office report dated 23rd November 1994 and dated the 16th February 1995. The appellant also commented on Fingal County Council's submission dated the 25th November 1994 and on their Counsel's skeletal submission dated the 3rd February 1995.

Submission of Mr. Donal O'Buachalla

In his written submission Mr. Donal O'Buachalla set out an approach to valuation of the subject hereditament as follows:-

Total Expenditure	£27,400,000
Less: Estimated Cost of Offices (Agreed RV £80 Rateable)	<u>£ 150,000</u>
Effective Capital Value (1988 Act. Sect. 4)	£27,250,000
Net Annual Value = £27.25m x 5%	£ 1,362,500

% of NAV adopted by Mr. Aylward 0.5677% (viz. pps 9/10 Supplementary Précis)

Adjustment for rates levels city/county

Reduction of 22.389% $(.5677/1.22389) = .4638\%$

For conformity of assessment as outlined above, allow for:

Risk

Denning Discount

Exclusive Public Nature

(say) 50% = .232%

Thus RV: £1,362,500 x .232%

£3,161 (say) RV: £3,160

RV £80 (Offices) occupied by National Toll Roads, agreed.

2. **Respondent:**

Mr. Shay Aylward, B. Comm, a District Valuer with 20 years experience in the Valuation Office and a graduate of ACCA submitted a précis to the Tribunal on the 24th November 1994. In addition Mr. Aylward presented a supplementary précis on 20th February 1995 and a revised supplementary précis on 3rd July 1995.

In his written submission Mr. Aylward set out the grounds of the appeal and the respondents approach to them. In relation to the valuation of tolls of toll road, Mr.

Aylward said that they had been valued as provided for in the Valuation (Ireland) Act 1852, Section 12 which states as follows:-

- (1) "For the purposes of this Act the following hereditaments shall be deemed to be rateable hereditaments: "... all rights of way and other rights or easements over land the tolls levied in respect of such rights of easements; and all other tolls"
- (2) Valuation (Ireland) Amendment Act 1854, Section 4 provides for the revision of the valuation of hereditaments "the annual Value of which is liable to frequent alteration, such as Tolls of Roads".

In the written submission Mr. Aylward set out a basis for the valuation of the subject hereditaments as follows. He said that in view of the substantial investment in this development it is necessary in the light of the accounts of the scheme to consider what rent the landlord is likely to demand and what rent a hypothetical tenant may be willing to offer for the hereditament. Based on an analysis of the capital cost and financial commitment of the landlord, Mr. Alyward set about deriving a figure which would represent an acceptable

rent receivable in relation to the undertaking. He set out his assessment of the "current position" as follows:-

The total rateable valuation for the "Tolls of Toll Roads" is £9,500. This figure reflects a net annual value of £1,507,936. The total rateable valuation £9,500 has been divided to give a figure for each townland. Each such figure bears the same relationship to the total rateable valuation figure as the length of the Toll Road within each townland bears to the total length of the Toll Road.

The following table sets out the allocation of the net divisible surplus based on the current total rateable valuation figure of £9,500 and the assumption that a tenant is entitled to a generous 20% of the divisible surplus.

	1990	1991	1992	1993
a. Toll income (a)	£1,444,188	£3,199,443	£4,167,161	£4,678,850
b. Operating Exp. (b)	£ 576,992	£ 571,568	£ 796,721	£ 954,438
c. Surplus (a)-(b)	£ 867,196	£ 2,627,875	£ 3,370,440	£ 3,724,412
d. 20% of 'c' tenant's share		£ 525,575	£ 674,088	£ 744,882
e. Rate in the £1		£ 34.84	£ 35.86	£ 37.62
f. Rates @ RV £9,500		£ 330,980	£ 340,670	£ 357,390
g. Available for rent [c-(d+f)]		£ 1,771,320	£ 2,355,682	£ 2,622,140

Given that the rateable valuation is £9,500, the net annual value (rent) is £1,507,936. The resultant rates liability is shown in row "f" above. Therefore, the resultant division of the net available surplus in the payment of rent, rates and the balance available as tenant's share is illustrated in the following charts and table.

Table F

	1991	1992	1993
Rent	£1,507,936	£1,507,936	£1,507,936
Rates	£ 330,980	£ 340,670	£ 357,390

Tenant's share	£ 788,959	£1,521,834	£1,859,086
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Rates:

The proportion of the profits required to pay the rates shows a reduction from 12.6% in 1991 to £10.1% in 1992 and 9.6% in 1993.

Mr. Aylward concluded by saying that the evidence confirmed that a hypothetical tenant could pay rent of £1.7 m for this hereditament while retaining a tenants share of 10% of the gross receipts or 20% of the divisible revenues. Mr. Aylward also set out a valuation on buildings i.e. the Toll Plaza which is separately valued and not directly required for operation of the toll roads i.e. the section currently occupied by National Toll Roads. His valuation on the buildings is as follows:-

Plaza Building:

1st floor office	275 sq.ft
2nd floor office	<u>1,837 sq.ft</u>
Total	2,112 sq.ft. @ £6.00*/sq.ft. = £12,672

* Including car parking facilities.

Take 0.63% = £79.83. Say £80.

In his supplementary precis Mr. Aylward set out additional information concerning anticipated profits calculations. He gave details of the calculation of anticipated profits (a) based on 1990 toll charges and (b) based on August 1991 toll charges. Based on this additional information Mr. Aylward set out a revised calculation of rateable valuation as follows:-

A Rateable valuation based on 1990 Toll Charges

In the years 1991 to 1995, the average amount available to pay the rent is £2,283,633

-

Say £2,275,000.

The resulting rateable valuation = £2,275,000 x 0.63% = £14,332

Adjusting this figure to the 1988 base year = £14,332/1.1097* = £12,915

Allowance for possible shortfall in projected traffic levels 20%^

Allowance for possible misc. items **5% = £3,229**

RV = £9,686

Say = £9,500

B Rateable valuation based on 1991 (August) Toll Charges

In the year 1990 to 1995, the average amount available to pay the rent is £2,670,781

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Say £2,650,000

The resulting rateable valuation is = £2,650,000 x 0.63% = £16,695

Adjusting this figure to the 1988 base year = £16,695/1.1097* = £15,045

Allowance for possible shortfall in projected traffic levels 20%^

Allowance for possible misc. items **5% = £ 1,761**

RV = £11,284

Say = £11,000

(a) *C.P.I. in 1988 365.5
C.P.I. in 1991 405.6
Increase '88 to '91 10.97%

(b) ^ The total traffic level actually achieved for the 3 full years '91 to '93 was 94% of the figures used to calculate the anticipated profits for the period.

This does not take into account the final 25% downward adjustment of the calculated figure.

The traffic figures in the Dublin Ring Road study were based on the completion of the entire Western Parkway at the opening date. However, this objective had not been achieved at the start-up date and the results of this are reflected in the company's accounts for 1990 and 1991.

The hypothetical tenant must therefore refer to the actual trading position to date, as outlined in Section 1(A) ante, so as to determine his anticipated profits based on the actual trading position.

In conclusion Mr. Aylward said that the net annual value of the hereditaments as of November 1991 is more correctly reflected in the latter ordinary figure of £11,000. This implies a net annual value of £1,746,000. A hypothetical tenant could at that date, make a rent offer on the basis of the anticipated profits calculated by using August 1991 toll charges. However, he said as this was a start-up situation with some degree of uncertainty, the rateable valuation figure was not increased.

Mr. Aylward submitted to the Tribunal on the 3rd July 1995 a revised supplementary precis. In this precis Mr. Aylward set out a revised calculation of the rateable valuation taking into account the actual trading position of the Western Parkway in its starting period. He said that the traffic figures in the Dublin Ring Road study were based on the completion of the entire Western Parkway at the opening date. However, as this objective had not been achieved at the start-up date and the results of this are reflected in the company's accounts for 1991 and 1990. He said that the hypothetical tenant must refer to the actual trading position to date, so as to determine his anticipated profits based on the actual trading position. He therefore included an additional assessment of rateable valuation on the basis of accounts for 1990 and 1991 as follows:-

1990 Accounts

The incomplete state of the Western Parkway at its opening date is reflected in the accounts for 1990, particularly the substantial difference between the estimated income

as derived from use of the projected traffic levels and the eventual outcome.

Many of the reasons for this reduced income were easily identifiable;

- (1) The operating period was less than a full year.
- (2) Parts of the Western Parkway were not in use from the opening date;
 - (a) The Galway road to Naas Road section was not opened until May
 - (b) The Naas Road to Tallaght section was only completed in December
 - (c) The proposed interchange at the Navan Road end had not been developed as originally intended.

However, with the completion of the Western Parkway during 1990, average daily traffic levels could be expected to increase significantly during 1991. The facility was still without the proposed interchange at the Navan Road end and traffic levels outlined in the Dublin Ring Road study would be unlikely to be achieved. Average daily traffic levels had increased by 155%, from 3,400 vehicles in April '90 to 8,679 in December '90. The increase in daily traffic levels between June and December was 27%. The average toll charge had reached 70.76p in December '90 reflecting improving volumes of commercial vehicles.

1991 Accounts

The completion of the Western Parkway during 1990 and its use for a full year was reflected in the increased traffic levels in 1991. The average daily traffic level was largely established at 11,500 vehicles approximately, before the end of the year. The eventual figure was 11,527/day. Toll charges for private cars were increased on 1/8/91. Operating costs for the facility were also established approaching the year-end.

Estimation of Net Annual Value

Toll Income	£3,199,443
Operating Expenses	<u>£ 571,568</u>
Surplus	£2,627,875
Deduct tenant's share 10%	<u>£ 319,944</u>
Available for rent and rates	£2,307,931

The amount available to pay rent and rates, having deducted a tenant's share of 10% of gross toll revenue was £2,307,931. A hypothetical tenant, in calculating his own anticipated profits might make adjustments in the overall expected income and/or make allowance for incurring operating costs higher/lower than the actual costs. In this way he could determine the amount available to him for payment of rent and rates in 1991, leaving a certain margin to provide for adjustments. In 1991, it would be reasonable to provide for operating costs somewhat higher than the 1990 figure, although the eventual outcome was a marginal decrease in this item.

Amount available for rent and rates	£2,307,931
Allow for adjustments - say 10%	£ 230,793
Balance available	£2,077,138

Adjust for rates [factor = 1.2195] Available for rent £1,703,270

Adjust to Nov '88 [factor = 1.1097] £1,534,890

Calculation of rateable valuation

Rateable valuation take 0.63% of adjusted NAV = £9,669

Say £9,500.

Mr. Aylward concluded that the eventual trading outcome for 1991 indicated that the hypothetical tenant, on retaining his 10% tenant's share, could make a rent offer of £1.7 m (adjusted). This figure represents the maximum amount available for rent in 1991. The

adjustment of this figure as outlined above is reasonable so as to allow for the hypothetical tenants assessments of anticipated profits. The hypothetical tenant, on the basis of his anticipated profits for 1991 he said had an amount of £1,534,890 (adjusted) available for rent. He said that the anticipated increased in traffic forecast in the Dublin Ring Road study in addition to increased toll charges would increase income in 1992 which he said would be taken into account by the hypothetical tenant. In the start-up situation, he said that the rateable valuation of £9,500 taking all these factors into account was reasonable.

3. Notice Parties:

The Tribunal received a written submission from Mary Crealey, Law Agent, Fingal County Council on behalf of both Notice Parties on the 28th day of November 1994. In the submission she set out details in relation to the revision of the subject hereditaments and provided the Tribunal with copies of all the documentation relating to this revision and First Appeal. This comprised:-

- 1) Correspondence between Donal O'Buachalla as agents for the appellant and Dublin County Council in relation to the Revision.
- (2) Entries in the Valuation Lists in November 1991 in respect of the hereditaments under appeal.
- (3) Correspondence with solicitors on behalf of appellants relating to their rights to appeal.
- (4) Evidence relating to proceedings in the High Court for recovery of rates due by summary summons dated the 29th July 1992.
- (5) The High Court judgment of Mr. Justice Geoghegan delivered on the 20th January 1994 and copy of the Notice of Appeal to the Supreme Court by appellants against the decision.
- (6) Copies of correspondence between solicitors for the appellants and Dublin County Council relating to the determination of the Commissioner at First Appeal.

In addition Ms. Mary Crealey presented a written précis of evidence together with a copy of the Agreement dated 16th October 1987 between Dublin County Council and Westlink Toll Bridge Limited and a list of the legal authorities to be relied upon by Fingal County Council.

On the 21st February 1995 the Tribunal received from Fingal County Council skeletal submissions on behalf of the Local Authority concerned and further legal authorities to be relied upon.

Based on the evidence set out in the written submission Fingal County Council submitted that the valuations had been validly made in accordance with Article 37 Paragraph M of the Adaptation of Irish Enactments Order 1899. In the alternative it was argued that it is within the powers of the Valuation Tribunal to amend any error in the said valuations. It was further submitted that the valuations were not excessive or inequitable and that the Tribunal is bound by the judgment of Mr. Justice Geoghegan in the High Court. In the skeletal submissions to the Tribunal on the 21st February 1995, the Notice Parties dealt with the issue of the jurisdiction of the Tribunal to entertain the signature argument, and whether the provisions of Section 4 of the Valuation (Ireland) Amendment Act 1854 were directory or mandatory. It was argued that the Valuation Tribunal had an established practice whereby it would not allow a Notice of Appeal to be amended or to entertain any grounds of appeal other than specific grounds required for the relevant provisions of the Valuation Act to be stated in the Notice of Appeal. This, it was argued applied with even greater force where those grounds were not relied upon at all at First Appeal. The Counsel argued that the expressed statutory provisions relied upon by Westlink do not require signature for its authenticity. Section 4 of the 1854 Act nor Article 37 (a), (b) and (d) of the 1899 Order mandate such a requirement. It was further argued that the jurisdiction of the Valuation Tribunal may also be founded on the Notice by any person aggrieved by reason of the valuation under Section 19 of the Valuation (Ireland) Act 1852 and not on the original request for revision. The Counsel further argued that the provisions of Section 3 of the 1988 Act lay down a new and more flexible procedure providing for revisions and new valuations. This interpretation, it was argued, was further supported by commentary on the Valuation Act 1988 published in Maxwell's Irish Current Law Statutes Annotated. It was further argued *inter alia* that the provisions of Section 4 of the Valuation (Ireland) Amendment Act 1854 concerning the procedures provided for in respect of the Secretary of a County Council or the Clerk of an Urban District Council have been repealed by implication by Section 3 of the Valuation Act 1988. It was submitted therefore, that the appeal of Westlink should be rejected.

Oral Hearing

The oral hearing commenced on the 12th December 1994 in Dublin and was resumed on the 6th February 1995, 24th July 1995 and 31st July 1995.

Richard N. Cooke S.C. instructed by Messrs. Gerrard Scallan & O'Brien, Solicitors appeared on behalf of the appellant. Aindrias O'Caoimh S.C. instructed by the Chief State Solicitor appeared on behalf of the respondent. James O'Reilly S.C. with James Macken S.C.

instructed by Mary Crealey, Law Agent, appeared on behalf of the Notice Parties, Fingal County Council and South Dublin County Council.

In opening Mr. Cooke raised two preliminary points on behalf of the appellants. First, he submitted, that the Revision carried out by the Commissioner of Valuation was *ultra vires* in that the initiatory document, the list of tenements requiring revision, had not been properly executed by the County Council. He referred to Article 37 of the Adaptation of Irish Enactments Order 1899 and, in particular to paragraphs D and E thereof. He said that it appears that the form in this case was signed by one S. Kearney who, it emerged, is a Principal Officer in the Finance Department. Paragraph E above referred to provides, *inter alia*, that the notice shall be made out and given in the form prescribed by the Commissioner of Valuation. The said form has at its end, provision for a 'signature and designation', and it has a note in brackets reading as follows:-

"this form shall be used for changes of name only and should be signed by the Clerk or Secretary of the Council".

The second preliminary point raised by Mr. Cooke was in relation to the question of notification as required by Section 4(a) Valuation Act 1988.

By way of preliminary ruling the Tribunal found as follows:-

(1) As the first preliminary point went to the jurisdiction of the Tribunal to hear the Appeal, the Tribunal indicated that it was satisfied that the point was validly before it.

It further indicated that, subject to the County Council proving that the Senior Finance Officer, who was accepted as having signed the original list, was duly authorised to sign the document, the Appeal should proceed.

(2) On the question of notification the Tribunal held against the appellant's objection on the basis of a previous decision of the Tribunal in ***VA92/3/017 - Topline Fashions Limited v. Commissioner of Valuation.***

Mr. Cooke read the written submissions. He emphasised that no private profit has yet been made and that the toll office is not in the exclusive use of the appellant.

Mr. Aidan Burke Senior Partner with Arthur Andersen & Company gave evidence in relation to accounts. He said that the same showed for the years 1990 to 1993 as follows:-

1990	-	Loss of £1,035,911
1991	-	Loss of £1,217,410
1992	-	Profit of £628,179
1993	-	Profit of £378,125

He said that there was a charge for rates in 1993. Under cross examination Mr. Burke said that turnover for 1990 was £1,444,188. He agreed that the accounts showed an increase in the volume of traffic and in toll revenue.

Mr. Thomas Roche said that he was a Director of the appellant company and Managing Director of National Toll Roads. He said that his company's only asset is the toll agreement. Part of the land was purchased by agreement and part was compulsorily purchased. The appellant paid for all of the lands and dedicated that which they purchased to the Council. The appellant has spent some £27.4m on an asset that lasts just 30 years.

Mr. Roche said that financing for the venture was arranged in 1987 from:-

1. National Toll Roads - £7.5m of Equity Funds
2. European Investment Bank - £13m (loan)
3. Irish Banks - About £7m (loan)

He said that the East Link Company provided a guarantee.

Under cross examination Mr. Roche agreed that tolls may be increased. He said that the current rate was 70p a car, in 1987 the maximum rate was 60p a car. He said that the increase is not related to traffic volumes.

Under further cross examination at the resumed hearing on the 6th February 1995, Mr. Roche agreed that his company had abandoned its projections prior to the opening of the bridge in 1990. He agreed that they were the basis upon which the project was financed in October 1987 but said that they became so wrong that they had to be abandoned. He emphasised that finance was entirely private, there was no grant aid.

Mr. Ciaran Blair said that he was an Engineer and Director of National Toll Roads. He produced a plan entitled 'West-Link Guide to Dublin Motoring' and explained the map attached thereto. He said that the Western Parkway went to tender before West Link.

Mr. Tom Roche, recalled, gave the following figures for a split up between commercial traffic and cars namely;-

1990	-	Commercial 14%	-	Cars 86%
1991	-	Commercial 15%	-	Cars 85%
1992	-	Commercial 16%	-	Cars 84%
1993	-	Commercial 16%	-	Cars 84%

Mr. Donal O'Buachalla gave evidence entirely in accordance with his written submission above referred to. He emphasised that this is a unique and unprecedented situation. Never has a hypothetical tenant assumed a character of hypothetical landlord. He said that the landlord has provided nothing towards the cost of the hereditament. In England such schemes have always been a joint venture between the Local Authority and the Entrepreneur.

At the resumed hearing on the 24th July 1995 Mr. Shay Aylward gave evidence in accordance with his written submissions. He said that he had no comparisons except a very old case and that he had contacted the valuer, a Mr. Grant in the Valuation Office in Bristol, and was told by Mr. Grant that the basis used in England in such circumstances was the profit basis.

Asked in cross examination whether he agreed that the toll was not rateable until it showed a profit, Mr. Aylward agreed but said that the profit is the operating profit. Asked about his basis of apportionment he agreed that it was the length of the toll road in each townland. Mr. Cooke prepared for the Tribunal a summary of his closing submissions and the same is further annexed hereto. He set out his closing submissions under three headings, namely:-

1. Objections to Jurisdiction
2. Rateable Occupation
3. Objections with regard to Quantum

He said that the substance of his objection on jurisdiction was conveyed to the Valuation Tribunal by letter dated the 7th December 1994 and that the matter was raised during the hearing. He stressed that the evidence (anticipated by the Tribunal) of the authority of the person who signed the initiating document was not forthcoming. He repeated his arguments on notification but the Tribunal pointed out that it had already ruled against him on this.

In relation to rateable occupation, Mr. Cooke said that the judgement of Mr. Justice Geoghegan (later referred to) was the subject matter of appeal and that the appeal was listed for the 23rd November 1995. By reason of findings hereinafter contained the Tribunal does not propose to go further into Mr. Cooke's arguments on rateability.

Mr. O'Reilly in closing said that the facts of the *Londonderry Bridge Case* are totally distinguishable from the facts in this case. He said that even if the jurisdiction argument were to be considered, the provisions of the Statute are directory rather than mandatory and, therefore, failure to comply strictly does not vitiate the revision.

Mr. Macken, on the jurisdiction points said that these were new points raised for the first time on the 7th December 1994. He referred to the *Topline Fashion Case* (above referred to).

Mr. O'Caomh in closing said, *inter alia*, that the appellant had been found to be in rateable occupation in the High Court. On the question of delay, he said, that even if there was delay what would the proper remedy be? In the case of the County Council it would be *mandamus*.

Findings:

- (1) The Tribunal confirms its findings against the appellants on the issue of notification.
- (2) The Tribunal finds Mr. Cooke's argument on the question of signature to be most attractive and did not consider the same until the closing stages of the Appeal because an indication was given that there would be evidence of due authorisation. This evidence was not forthcoming and the County Council now relies on the other arguments outlined above. The Tribunal must, therefore, find as a matter of fact that there was no evidence that the document was signed by the Clerk or Secretary of the Council or a person authorised by the Clerk or Secretary. The appellant's argument is a technical one and no evidence of prejudice has been offered. While the words in paragraph E of Article 37 of the Adaptation of Irish Enactments Order 1899 are

mandatory the same do not deal with the question of signature and, insofar as the form is concerned, they state that "it shall be made out or given in the form prescribed....".

The relevant words in the prescribed form are "...and should be signed by the Clerk or Secretary of the Council". The Tribunal finds that these words are not mandatory and therefore, rules against the appellants on this issue.

(3) **Rateability:**

In the case of *Dublin County Council v. West Link Toll Bridge Limited [1994] ILRM2 page 204* Mr. Justice Geoghegan held, inter alia, that the defendant was in exclusive occupation of the rateable hereditament and was not in occupation of the tolls or ancillary offices merely as agent for the plaintiff, that the effect of the agreement between the parties was to confer a 30 year benefit in the tolls subject to certain obligations on the defendant and that at the very least this amounted to 'paramount occupation' for that period, that the tolls were a specific property right invested for 30 years in the defendant, (appellant in this case), and amounted to a separate privately occupied incorporeal hereditament. Further the corporal hereditament being the toll offices, store and car park were also rateable being ancillary to the tolls rather than to the public road and that a 'private use' was derived by the defendant, from the tolls and toll buildings and, therefore, the proviso contained in Section 63 of the Poor Relief (Ireland) Act 1838 did not apply.

Although under Appeal, this judgement represents the law today and it must be followed in every respect by this Tribunal.

The Tribunal, therefore, holds against the appellants on the rateability issue.

(4) **Quantum:**

The Tribunal is satisfied that Mr. Aylward has put a great deal of work into this case and that he has come to a reasoned belief that the profits method is the best in this case to arrive at a net annual value. The Tribunal accepts, however, the arguments adduced on behalf of the appellant, in particular by Mr. O'Buachalla, and finds that in this particular case, because of the start-up situation and the losses involved, the 'profits method' would be entirely unreliable.

All the Tribunal is left with, therefore, is the capital cost basis described by Mr.

O'Buachalla. In this regard the Tribunal proposes to determine net annual value and rateable valuation on the basis calculated by Mr. O'Buachalla save that it does not find allowances should be made for risk, 'Denning Discount' or exclusive public nature.

The Tribunal, therefore, determines rateable valuation of the entire hereditament as follows:-

	£
Total Expenditure	27,400,000
Less: Estimated Cost of Offices	
Agreed R.V. (£80)	<u>150,000</u>
Effective Capital Value	27,250,000
Net Annual Value	1,362,500

The Tribunal is satisfied that Mr. Aylward's ratio of 0.5677% should be applied but makes an adjustment for rates level/city/county giving a net multiplier of 0.4683% which gives a rateable valuation of £6,380.

In addition to the foregoing the valuation of offices has been agreed at £80 bringing the total rateable valuation to £6,460.

(5) Apportionment:

The Tribunal is satisfied that the question of apportionment is best dealt with by agreement between the valuers on each side and it makes no determination in this regard. Should the valuers fail to reach agreement the matter can be referred back to the Valuation Tribunal for hearing by a Tribunal which need not constitute the same persons as heard this Appeal.