Appeal No. VA96/4/016 &
VA96/4/017 ; VA93/4/015 &
VA93/4/016

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

East Link Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Tolls of Toll Road (pt. of) & Advertising Stations at
VA93/4/015 - York Road, Ward: Pembroke East A,
VA96/4/016 - York Road, Ward: Pembroke East A,

Tolls of Toll Road (pt. of) at
VA93/4/016 - (Easement), Ward: North Dock B,
VA96/4/017 - (Easement), Ward: North Dock B2, County Borough of Dublin
Rateable Occupation and quantum

B E F O R E

Liam McKechnie - Senior Counsel	**Chairman**
Con Guiney - Barrister at Law	**Deputy Chairman**
Barry Smyth - FRICS.FSCS	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 11TH DAY OF MAY, 1998

By Notices of Appeal dated respectively 1st day of November 1993 and the 12th day of August 1996, the Appellant Company appealed against the determinations of the Commissioner of Valuation in fixing the following rateable valuations on the above described hereditaments:-

VA93/4/015 - £4,750

Results of first appeal - 5th day of October 1993

VA93/4/016 - £250

VA96/4/016 - £10,260

Results of first appeal - 29th day of July 1996

VA96/4/017 - £540

Background:-

1. The background setting giving rise to these appeals lies in the enactment of the *Local Government (Toll Roads) Act 1979* the relevant provisions of which, for the purposes of this judgement are, as follows:-

(a) Section 2 of this Act empowers a Road Authority, within its administrative area, to charge and collect tolls in respect of the use of a toll road and to provide and maintain ancillary buildings and structures,

(b) Under Section 3 each such authority has the power to make a scheme for the establishment of a system of tolls in respect of the use of any public road (Toll Scheme). That scheme when made, must be submitted to the Minister for the Environment who may approve of the toll scheme with or without modifications or who may refuse to approve it,

(c) Under Section 5, bye-laws can be made for the purposes of the operational management of any such toll road and,

(d) Under Section 9 where a Toll Scheme has been approved by the Minister, a Road Authority may enter into an agreement with any other person or body for all or any of the purposes as specified in sub-sections 1 and 2 thereof.

These purposes cover the actual provision of toll roads, ancillary structures and the cost thereof, the cost of maintenance and improvement, the making, levying and collection of the tolls and amount thereof and finally the application of the proceeds of such tolls.

It was under and pursuant to the provisions of this Act that the agreement next hereinafter mentioned was entered into and executed by the parties thereto.

2. On 6th day of October 1980, Dublin Corporation, as a Road Authority, made such a Toll Scheme which, having been submitted, was duly approved by the Minister on 13th day of April 1981. In order to implement that scheme the Corporation entered into a Written Agreement dated 16th day of March 1983 with two contracting parties, namely Ringsend Bridge Limited ("The Bridge Company") and Dublin Port & Docks Board ("The Board"). On completion of the roads, bridge, buildings and ancillary works forming the subject matter of the Toll Scheme, that part thereof, defined as "The Works", was to be dedicated to the public as a public road and thereafter its future maintenance to become a matter for Dublin Corporation. Following thisDedication and Acceptance, Article 4 of the Agreement was, to apply and take effect, in the manner following:-

(a) The provisions of the said Article were to remain in force for a period of 25 years from the date on which the final discharge of the building costs had been made or until the 31st December 2015, whichever was the earlier,

(b) The Bridge Company, now East Link Limited was obliged to operate and manage the toll road for the Corporation and as such was obliged to supervise and operate a system of tolls,

(c) Until the full amount of the building costs had been paid the Bridge Company was to apply the proceeds of the tolls, collected in each financial year in the following order of priority:-

(i) the cost and charges of operating, managing and supervising the system including the payment of rates and taxes on the tolls and the toll roads,

(ii) the cost and charges of maintaining the toll road, all ancillary works including the opening span of the toll bridge,

(iii) the cost and charges of maintaining and upkeeping any office or building located on or adjacent to the toll road and used in conjunction therewith,

(iv) the payment to the Corporation for the benefit of public projects of the sum of £50,000 annually with a mechanism for upward review in certain circumstances, and

(v) the balance in payment of the building costs.

(d) On completion of the payment of the building costs the Bridge Company was

to account, for any surplus of tolls collected in each financial year, after payment of specified costs and charges, as to one sixth thereof to the Corporation, one sixth thereof to the Board and two thirds thereof to the Bridge Company, which figures, as varied and expressed in percentage terms are now, as to 16.67% to the Corporation, 25% to the Board and 58.33% to East Link Limited.

The said works were duly erected, constructed and finished and the Toll Scheme became operational in 1985. It continues to function and operate to the date hereof. It is, essentially, the tolls of the toll road which form the rateable hereditaments, the subject matter of these appeals.

3. <u>The Rateable Hereditament/The Agreed Facts:-</u>

<u>Description/Location</u>

The toll road is a two lane carriageway (one in each direction) which widens to six lanes (three in each direction) on either side of the toll collection buildings. It includes a bridge across the River Liffey. This bridge has an opening section which can be raised to allow the passage of ships along the river. At the revision date the toll collection buildings consist of four toll booths and a two storey structure containing a reception area, general office, control room, boardroom, staff/restrooms and toilets. The advertising stations consist of a number of small display units located near the toll collection buildings.

This said toll road is known as the "East Link" bridge and approach roads in the city of Dublin. These extend from the roundabout at North Wall Quay/East Wall Road on the northside of the River Liffey to the roundabout on the south of the river at the junction of the New Pigeon House Road and the South Link Road, Irishtown.

4. <u>Valuation History:-</u>

1985: Valuation of the hereditaments was requested by Dublin Corporation.
Rateable valuations fixed as follows:-

(1)	Pembroke East Ward	£4,790
(2)	North Dock Ward	£ 250

Occr: East Link Limited I.L. Dublin Corporation
Desc: Tolls of toll road (pt. of).

1986: Hereditaments (1) and (2) were listed by Dublin Corporation for revision of

valuation.

Changes made on revision in the case of both hereditaments:

(a) Occupier amended to Dublin Corporation,

(b) Immediate lessor amended to "in fee".

(Both amendments were made at the request of the Local Authority).

1987: Hereditament (1) was again listed for revision.

Changes made on revision:

Description amended to "tolls of toll road (pt. of) and advertising stations".

5. <u>1993 Appeals:-</u> VA93/4/015
VA93/4/016

10/12/91: Hereditaments (1) and (2) listed for revision by Dublin Corporation, in the rather unusual circumstances specified in the written request therefore,

08/05/92: Revision list issued.

Changes made:

(a) Occupier amended to "East Link Limited" with the immediate lessor amended to "Dublin Corporation and Dublin Port & Docks Board".

03/06/92: Notice of appeal by the Appellant Company

05/10/93: First appeal results:

Changes made:

(a) Hereditament (1) reduced to £4,750 caused by the deletion of the rateable valuation of £40 on the buildings included therein,

(b) Hereditament (2) no change.

Description of occupier/immediate lessor: no change.

01/11/93: Appeal by the ratepayer to this Tribunal.

6. <u>The 1996 Appeals: -</u> VA96/4/016
VA96/4/017

08/11/93: Hereditaments (1) and (2) listed for revision by Messrs. Donal O'Buachalla & Company Limited on behalf of East Link Limited.

05/94: VA96/4/016 - Revised list issues

08/94: VA96/4/017 - Revised list issues

Changes made: Hereditament (1) rateable valuation increased to £7,600.

Hereditament (2) rateable valuation increased to £400.

Description of occupier/immediate lessor: no change.

03/06/94: Notice of Appeal to Commissioner (VA96/4/016)

30/08/94: Notice of Appeal to the Commissioner (VA96/4/017)

29/07/96: Results of first appeal

Changes made: Hereditament (1) rateable valuation increased from £7,600 to £10,260.

Hereditament (2) rateable valuation increased from £400 to £540:

Description of occupier/immediate lessor: no change.

12/08/96 Appeals to the Valuation Tribunal.

7. **Grounds of Appeal:-**

To both the Commissioner at first appeal stage and to this Tribunal on the present appeals the Appellant Company raised a number of grounds under the heading of both Rateability and Quantum.

In abbreviated form that Company alleges Firstly, that the toll road is a public road, as such is dedicated to and used for public purposes and accordingly, is not rateable;

Secondly, that the tolls, being tolls of a public road, are likewise not rateable;

Thirdly,that no private profit or use is derived therefrom and accordingly, the proviso contained within *Section 63 of the Poor Relief (Ireland) Act, 1838* applies;

Fourthly,that East Link Ltd., is not in rateable occupation of the hereditaments and

Fifthly, that in any event the amount of rateable value attaching to each hereditament is excessive, inequitable and is in principle and in practice contrary to and incompatible with the decision of this Tribunal in the ***"West Link case (VA94/2/025 - VA94/2/033)"***.

8. These grounds of appeal as applying to the 1992 revision, predated the delivery by Mr. Justice Geoghegan of his judgement in the case of the ***County Council of County Dublin v. West Link Toll Bridge*** **[1994] 1IR 77**. The grounds of appeal however, in relation to the 1994 revision were formulated at a time when the Supreme Court had given its judgement on the defendant's appeal against the decision of the learned trial Judge. That appellate judgement was given by O'Flaherty J. on 13th February 1996 (now reported at 1996 2ILRM 232). From that judgement the following would appear to constitute the major facts of the decision which as given are as follows:-

(a) that the defendant company, "West Link" was not in occupation of the relevant hereditament as agent for Dublin County Council or indeed in any other representative capacity. It was, in its own right, the "occupier" in accordance with the definition of that word as contained in *Section 124 of the 1838 Act*. It was therefore, for the purposes of rating in exclusive beneficial occupation of the relevant hereditament,

(b) that *Section 9 of the 1979 Act* superseded any common law rule to the effect that an incorporeal hereditament (as the collection of tolls is) had to be created by Deed and,

(c) that the defendant company was in fact obtaining a private profit or use directly from the rateable hereditament and accordingly the proviso as contained in *Section 63 of the 1838 Act* could not be availed of.

In view of this decision by the Supreme Court it remains to be seen whether or not there is any practical or useful purpose in the Appellant Company pursuing any of its grounds of appeal relating to the issue of rateability. However, in the instant appeal this is not a matter which is of any direct of immediate concern to us in that, with the agreement of the parties, it was decided to proceed with the issue of quantum only and thus to defer any further consideration of any or all other issues.

9. <u>Basis of Valuation:-</u>

As stated above the hereditaments in this case, which fall to be rated, are "tolls", and not toll roads, toll buildings or other ancillary works or structures. That "tolls", are rateable has been established beyond question and any challenge to this proposition is now well beyond reach. They are referred to *'eo nomine'* in *Section 63 of the 1838 Act*, in *Section 12 of the Valuation (Ireland) Act, 1852* and also in *Section 4 of the Valuation (Ireland) Act 1854*. A question arises however, as to the correct basis upon which these should be valued. *Section 11 of the 1852 Act*, in the first part thereof, specifies a particular basis upon which "land" should be valued and in the latter part thereof specifies quite a different and distinct basis upon which "houses and buildings" should be valued. The former, generally on the basis of the average prices of certain agricultural produce, whereas the latter must be calculated by way of an estimate of the net annual value. Quite clearly in our view, tolls come neither within the definition of "land" or of "houses and buildings". How, therefore, is one to establish the correct basis of valuation. In our opinion the answer is as follows.

10. *Section 63 of the 1838 Act, inter alia,* specifies certain nominated hereditaments, including tolls, which for the purposes of the Valuation Acts must be valued. Section 64 then provides the basis upon which this valuation must be carried out. That Section reads:

> *"Every such rate shall be a poundage rate made upon an estimate of the net annual value of the several hereditaments rated thereunder: that is to say, that the rent of which one year with another the same might in its actual state be reasonably expected to let from year to year, the probable annual average cost of the repairs, insurance and other expenses, if any, necessary to maintain the hereditaments in their actual state and all rates, taxes, and public charges, if any, except tithes, being paid by the tenant".*

If therefore there was no subsequent legislation then the provisions of Section 64 would form the basis for valuing the hereditaments mentioned in Section 63. There is however, such later legislation. It is that which is contained in *Section 11 of the 1852 Act* and in *Section 4 of the 1854 Act.* Section 11, as already stated, applies only to "land" and "houses and buildings". Accordingly, it has no application to the valuation of "tolls". Such hereditaments must , therefore, be governed by the provisions of Section 64.

11. There is also *Section 4 of the 1854 Act* which section, *inter alia* specifies a mechanism by which hereditaments, the annual value of which are liable frequent alteration, can be so valued. This Section, which again specifically mentions "tolls of roads", was considered by the Supreme Court in the case of **Roadstone Limited v. Commissioner of Valuation [1961] IR 239**. In that case, the hereditament in question was a quarry. The issue was whether the same was to be valued as "land" under *Section 11 of the 1852 Act* or in some other way. In the judgment of the Supreme Court Mr. Justice Kingsmill Moore held, firstly, that the true meaning of the word "land" in *Section 11 of the 1852 Act,* was confined to land used for agricultural or pastural purposes and did not include any hereditament, the annual value of which was liable to frequent alteration, examples of which were, land used for business, commercial or manufacturing purposes, secondly, that as a result the correct basis of valuation was not by reference to the average prices of different agricultural produce, but rather was on the same basis as houses and buildings ought to be valued, thirdly that any hereditament falling within Section 4 ought to be

valued on that basis and fourthly, that the correct basis of valuation, of any hereditament not covered by either *Section 11 of the 1852 Act* or by *Section 4 of the 1854 Act* was that as found in *Section 64 of the 1838 Act*. See also in ***International Mushrooms Ltd., v. Commissioner of Valuation [1994] 2 ILRM 121***. Accordingly, we are satisfied that this last mentioned Section is the correct statutory basis upon which the hereditaments in this case must be valued. As this basis is the same as that specified for houses and buildings in Section 11 then identical considerations apply to both.

12. <u>The Method of Valuation:-</u>

The obligation upon this Tribunal is to estimate the net annual value of the hereditaments in question. This is achieved by calculating what rent, taking one year with another, the hereditaments might in their actual state be reasonably expected to let from year to year, with the tenant being liable for the repairs, insurance and other expenses necessary to maintain the hereditament in its actual state and also being liable for the rates, taxes and public charges, if any.

The tenant in question is the hypothetical tenant as is the landlord with the actual lessor/lessee, if any being a stranger to this process, which process is one between the Occupier and the Rating Authority. The hereditament however, is actual and it must be assumed that it is vacant and to let and that it has been provided by the landlord, or perhaps more accurately not by the tenant. It must also be assumed that the landlord is willing to let to a tenant willing to lease, with account being taken of every intrinsic quality of the hereditament, of all relevant existing circumstances and of all relevant anticipated circumstances. Generally, no difficulty arises in the application of these principles. However, one of the most crucial elements in the exercise and application of the statutory formula above mentioned is to identify what is the most appropriate method of determining the net annual value. Such a question of determination is undoubtedly a question of fact and not a question of law. See **Mersey Docks & Harbour Board v. Birkenhead Assessment Committee [1901] Appeal Cases 175 p. 180**. Having accepted this proposition as last stated, Mr. Justice Fitzgibbon, in the **Commissioner of Valuation v. Dundalk Gas Company case [1929] IR 155 p. 167** went on to say:-

> *"It cannot be laid down as a matter of law that the judge in fact is bound to use any particular method, to the exclusion of all others, in performing the duty which is imposed upon him by the Valuation Acts .... Section 11 ...."*

At page 260 of the report in the **Roadstone case** supra, Mr. Justice Kingsmill Moore had this to say:-

> *"It has been repeatedly decided that in arriving at his estimate of the hypothetical rent, the judge is not bound to use any particular method, but may arrive at his determination in whatever way is most suitable to produce the required result ..... The ascertainment of the net annual value as directed by the Section is a question of fact and not a question of law .... and common sense and economic considerations must be the guidelines."*

See also Mr. Justice Barron's decision in the **IMI case reported at 1990 2IR 409 p. 412**

and the Court of Appeal's decision in **Garton v. Hunter [1969] 1A ER 451** where the preferred method was the one resulting in the smallest margin of error.

13. The question, as to what part the profit earning ability of a hereditament plays in its valuation, was directly in issue in the **Rosses Point Hotel v. Commissioner of Valuation case, 1987 ILRM p. 512**. At p.515 of the report, Mr. Justice Barron said:-

> *"What the prospective tenant would be affected by would be his own view of the likely profitability of the premises, having regard to all material factors . The learned Circuit Court Judge has indicated in the case stated that he regarded the Appellant's ground of appeal, profit earning ability, as being a new concept. Having heard legal arguments, he formed the opinion that the Appellants in effect would have had to prove that the business or a specific identifiable part of the business had ceased to be carried on or had ceased almost completely before he could reduce the valuation. In my view he was wrong in both aspects of the matter. Profit earning ability is the basic element in determining the net annual value. It is based not on actual profits, but on what the prospective tenant would anticipate would be his profits...."*

This view of the law is not new and has been well established for more than a century.

Though put slightly differently, **Blackburn (J)** in **R v. London & North Western Railway [1874] LR 9 QB 134 p.144** said:-

"In letting a thing from year to year, the rent would be regulated by two matters, on the one hand by the benefit the tenant would be likely to derive from the occupation: because he would not give more than that; on the other hand, by the nature of the property, such as its location or how many persons there are who could supply him with an equally eligible thing, and be willing to let it to him; for he would not be willing to give more than he expected to make by it, he would not even give that if he could get a similar thing at a lower rent".

14. It appears therefore, from the cases above quoted, that the determination of the net annual value under *Section 11 of the 1852 Act* and/or *Section 64 of the 1838 Act* is a question of fact and not of law, that there is no one way as a matter of law in arriving at this determination, that the applied method should be that particular one which is most suitable to achieve a fair, balanced and equitable result and that the hypothetical tenant's view of the profit earning ability of the hereditament to be valued, is a significant constituent in the calculation of net annual value.

15. **Contractor's Basis v. Profit Method:-**

The major difference, between the parties in this case is on the point of principle as to whether the rateable hereditaments should be valued on the contractor's basis or on the profit basis. It was submitted on behalf of the Appellant company that the decision of this Tribunal in the "West Link" case, created a precedent for this type of hereditament where none existed previously, and accordingly the method preferred in that case, namely the contractor's basis, should also be applied in the instant case. It was further submitted that unless this was so the resulting rateable valuation on a profits basis, would lack uniformity and relativity as between the respective hereditaments. In addition, it was said that as these hereditaments in the present circumstances have been established and exist only in a unique situation given the terms and conditions of the written agreement referred to at paragraph 2 above. Accordingly, it was submitted that an exceptional approach to valuation was justified as it would be with other unique hereditaments like perhaps runways or certain pharmaceutical factories which previously have been valued on a contractor's basis. In addition, it was urged upon us that since certain inconsistencies existed in the Commissioner's approach for example

in leaving the rateable valuation unchanged in the 1992 revision and in his handling of the percentage applicable to tenant's share, the profits method was unsatisfactory and should cede its position to the Contractor's basis.

16. On behalf of the Commissioner it was denied that the decision in the West Link case created any precedent either "per se" or one that should be followed in this case. It was further submitted that given the evidence available, by far the most appropriate method of valuation was the profits method and that it was unnecessary and unjustified to have any resort to the contractor's basis, a basis which previously had both judicially and in the textbooks been described as one of last resort.

17. It is the view of this Tribunal that the decision in the West Link case was not and was not intended to create any precedent for the future valuation of even like or similar hereditaments, it being a decision solely on the facts, evidence and submissions of that case. That this is so is quite clear from the judgement itself. At page 22 under the heading of "Quantum" the Tribunal said:-

> *"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 find in this particular case,* ***because of the start up situation and the losses involved****, the profits method would be entirely unreliable."* (emphasis added).

Even disregarding for a moment the distinguishing features of that case with the present one it is abundantly evident that the Tribunal in West Link had no intention of laying down any rule, guideline or practice of a general nature which was intended to be applied in later cases. Accordingly, we are satisfied that the decision last mentioned did not in fact create any precedent which by virtue of that doctrine ought to be followed in this case.

18. In addition however, there are fundamental differences in the facts of both cases. The "start up situation and the loses involved" referred to in the passage above quoted, relate to the fact that West Link commenced operations in March 1990 with the valuation date being November 1991. The accounts so produced showed

substantial losses for the years 1990 and 1991 with a profit of £628,000 for 1992, reducing downwards for the year 1993 to £378,000. Furthermore, the major costs involved in the project were incurred in the years 1987, 1988, 1989 and the first half of 1990.

Given these facts it was obviously the view of the Tribunal in that case, that in such circumstances the available accounts could not form a reliable basis for determining the net annual value of the tolls in question. This view, is one which we would respectfully agree with.

19. In the instant case the situation is wholly different. The start up date for the East Link was in 1985 with the relevant valuation dates being May 1992 and June/August 1994.

By the latter dates one had, from the available accounts, an operating financial history for nine years and even with the 1992 revision had accounts available for seven years. This situation therefore, is clearly distinguishable from and is quite different and quite unlike the position in West Link: certainly so at the relevant dates for the purposes of the aforesaid judgement. In our opinion therefore in the context of the circumstances above outlined it is necessary for this Tribunal to consider afresh the central issue in this case.

20. The task imposed upon us, as set out at paragraph 11 above is to ascertain the net annual value by reference to the rent which would be payable by the hypothetical tenant in the statutory framework heretofore identified. In considering what rent such a tenant might pay, the nature of that tenant's occupation is of importance. If the purpose of the occupation is to achieve an anticipated profit, then, it logically follows, that his view of the available rent will be based on that profit. He will be unlikely to offer a rent in excess of the amount which he anticipates will be available to him as his operating profit. As "Receipts" and "Expenditures" are core elements in arriving at this operating profit the hypothetical tenant will be directly concerned with these. If that tenant in respect of the hereditament in question has available to him published accounts, the accuracy of which is not disputed, indicating the profits earned and forming the basis for indicating the likely profit earning ability into the future, why would he not so utilise such accounts? Why would he reject such data and prefer some other information more abstract, more indirect, containing assumptions perhaps difficult to justify and above all which is of far less value to him in calculating what rent he might be likely to pay? True, the hypothetical tenant must be careful to evaluate critically the information

available. The greater this information is, the better. He can in such circumstances identify factors, either external or internal, either permanent or seasonal, which might affect the profitability of the enterprise. So, provided the information shows a fair and reasonable picture of that enterprise, it would be our view that no reasonable or informed hypothetical tenant would reject such evidence in favour of something lesser.

21. In the instant appeal there is no doubt in our mind but that East Link Limited is in occupation of the subject hereditaments for the purposes of making or achieving a profit therefrom. It is, in almost an identical position to West Link. It is therefore, apposite to recall the words of O'Flaherty J. at page 240 of the report of that case when he said:-

> *"The defendant, in my judgement, is deriving - and deriving directly – a profit or use from these tolls. The Defendant is obviously in business to make a profit. The Defendant does not seek altruistically the benefit of the public, without expectation of profit, as the Commissioners in the* ***Londonderry Bridge*** *case did ....."*

It must be assumed that a hypothetical tenant would likewise want to occupy these hereditaments for the purposes of making profits. Hence the reliance on the available information. From the accounts as presented in evidence, it is clear that all of the relevant and material information, which might have been looked for at the valuation dates, was available and was so available over periods ranging from seven to nine years. Given the fact that tolls or the proceeds of tolls, are in effect a flow of income and that these are the hereditament to be valued, it is quite clear to us that by far the most appropriate method to be used in this case is one that is based on income and expenditure. Hence our preference for the "Profits Method". In general, whilst respecting that the question is always one of fact, it would be our view that this method may be particularly appropriate to such hereditaments as Caravan Parks,Docks, Harbours, Marinas, Motor Racing Tracks, Railways and Tolls.

22. There is no doubt but that the contractor's method has been used to value a wide variety of different hereditaments such as waterworks, fire stations, college/university buildings, museums, a lighthouse etc. See paragraph 118 of Halsbury 4th Ed. Vol. 39. However, a review of some of the reported cases dealing

with this method indicates that in many instances the presiding Court or Tribunal has issued warnings about its suitability. For example in **Robinson Brothers (Brewers) Limited v. Houghton & Chester - 1e - Street Assessment Committee [1938] 2ER 79**, Scott LJ. said:-

> *"Where better evidence is in the circumstances of a particular hereditament impossible, resort may be had to either capital value or cost of construction.."*

In **Cardiff Rating Authority v. Guest Keen Baldwins Iron and Steel Company Limited [1949] 1 KB 385**, Denning LJ, as he then was, said:-

> *".... even when the contractor's basis is taken, the assessment on that basis is open to great variations up and down as for instance, in assessing the effect of capital value and in deciding what percentage to take from it. Take a furnace.*
>
> *The effective capital value at the beginning of its life of five years would be very different from that at the end of it. What is the figure to be taken? The possible variations may become so great that the contractor's basis ceases to be a significant factor in the assessment ...."*

Admittedly the facts of both of these cases were quite different to the facts of the instant appeals, nevertheless the quotations are but examples of very considerable judicial caution in applying or in placing any substantial reliance on this basis. In using this method one has to establish the estimated capital value, the appropriate decapitalisation rate and interest rates, the identity of the correct index, whether for example the CPI or Building cost Index should be used, and so on. One has to relate the figures back to November 1988 and consider the applicability or otherwise of Denning's discount and if so applicable the appropriate percentage rate. In addition, as was urged in this case the issue of obsolescence may arise. In view of what would be required in order to operate this basis and to produce an appropriate rateable valuation for the subject hereditaments, we are satisfied beyond question that we must apply the profits method and reject the contractor's basis.

23. One of the submitted objections to the use of the profits method was the fear that the resulting rateable valuation would lack uniformity with the existing rateable valuation on West Link. Undoubtedly, the hereditaments, in both West Link and East Link, are

physically and functionally comparable and similar. Therefore, if the relevant circumstances were equally similar one would indeed be concerned with any gross lack of parity. However, as has been pointed out and illustrated in an earlier part of this judgement the material facts of concern to this Tribunal are wholly different to the material facts available to the Tribunal in the West Link case. We are therefore, quite satisfied that even though the end result will show a substantial difference between the respective rateable valuations, nevertheless this is the inevitable consequence of dealing with different situations.

24. **Methodology**:-

As an alternative to his evidence on the contractor's basis, Mr. Killen also gave evidence as to his approach utilising the profits method. What he did was to look at the existing rateable valuation of £6,380 fixed on West Link. He then looked, over the years 1991, 1992 and 1993 at what surplus both West Link and East Link made and he compared one with the other. His resulting average over the period was that East Link made 83.7% of the surplus made by West Link. He then suggested that the appropriate rateable valuation, in this case, on a profits basis, should be that percent of £6,380 which gave a resulting rateable valuation of £5,340. This way of applying the profits method is not in our view correct and accordingly, the suggested rateable valuation of £5,340 is inappropriate.

25. The method involved, in utilising the profits basis, is well established and is set out in Ryde on Rating commencing at E. 666. In general terms it can be said, firstly that the relevant gross income must be ascertained; and secondly that the proper costs of purchases or the expenses of earning the gross income must then be deducted leaving one with an operating surplus or a divisible balance. That balance is then available for the tenant's share, for the payment of rates and for the payment of rent. It is this latter sum adjusted to 1988 values, that becomes the net annual value. See (***Trustees of Fitzgerald Memorial Park v. Commissioner of Valuation VA95/1/001***).

26. We are quite satisfied that Mr. Aylward, the Appeal Valuer in these appeals, has correctly used the appropriate principles when applying this method of valuation. In particular we are satisfied that he was correct:-

(a) In taking into account only the "toll revenue" and to have disregarded the income arising from interest and advertising,

(b) in allowing under the heading of "expenditure", the entirety of the sums

applied to "other operating costs" and "maintenance costs",

(c) in allowing in full monies appropriated to public projects,

(d) in disregarding the interest payments and capital and construction payments on the building costs,

(e) in allowing the rates and in the rates adjustment factor so utilised,

(f) in applying the CPI Index to obtain 1988 values, and of course

(g) in applying the conversion factor of 0.63%.

Indeed subject to the issues next hereafter dealt with it must be said that the Appeal Valuers evidence on these matters was not challenged.

27. In addition to the aforegoing, the evidence showed that in arriving at his rateable valuation, the Commissioner allocated 10% to gross income for the tenant's share. As was pointed out in cross-examination the Commissioner, in the "West Link" case, used 20% of the operating surplus and indeed when dealing with the subject hereditament on previous occasions he used yet a different percentage. Whilst thes points were made as part of the submissions that the Profits Method was unreliable, nevertheless we feel that the question does arise as to whether in this case the appropriate percentage is that as suggested by the Respondent or should the Tribunal apply a different figure?

28. The tenant's share, whatever percentage might be appropriate, is intended to cover interest on tenant's capital, remuneration for his industry and compensation for his risk. Its level must be sufficient to induce the tenant to take the tenancy of the hereditament in the first instance. See **St. James's and Pall Mall Electric Light Company Limited v. Westminster Assessment Committee [1934] Appeal Cases 33** at **42.** The actual amount or percentage of such deduction is entirely a question of fact and will in each case be determined by reference to the circumstances relating to the enterprise carried on at the hereditament in question. See **R.v. Sheffield United Gaslight Co. [1893] 32 LJM C 169**. The calculation of such amount is generally based on a percentage of the tenant's capital, or a percentage of the gross receipts or an apportionment of the divisible balance. The actual rate, in the reported cases, has in general varied between 7-15%, which variations are not altogether surprising given the factual base of the inquiry. At paragraph E. 683 of *Ryde on Rating* it is stated:-

"In the case of Water Undertakings the percentage applied to the gross

receipts was very much more variable. In the case of very large concerns it has been as low as 7% but it was generally acknowledged that the smaller the undertaking the higher the percentage that should be allowed. Probably the commonest percentage was 10%, but whatever the nature of the undertaking, the size of the gross receipts is a relevant factor in determining the percentage."

29. In this case we are quite satisfied that in view of the capital introduced by the tenant it would be inappropriate to calculate the tenant's share as a percentage of this capital.

We are equally satisfied that once the purpose behind this calculation is clearly kept in focus then a percentage of the gross receipts is quite a valid method of calculating the tenant's share. As above stated the Commissioner of Valuation has suggested 10% of the gross income. By taking gross income, and not the divisible balance the tenant's share will not be adversely affected by any increase in expenditure or any downward movement of the Operating Surplus. In this case the risk factors identified were the possibility of Dublin Corporation providing a second bridge, free of charge, which would very much compete with East Link. If this were to happen the Appellant company would have several years notice and could, at any time, list the hereditaments for revision. Taking one year with another we do not feel that, for the present appeals, this is a real or substantial or tangible risk. On the basis of 10% the tenant's share for the year 1989 would have been almost £270,000 rising in 1993 to over £360,000. For the same years, the landlord's rent would have been £1.483 million, rising to over £2 million. Given that all other expenses are also provided for we feel that the tenant's share is reasonable and that a reasonable hypothetical landlord would be satisfied with the residue as available for rent. As no other evidence, of an alternative percentage figure was given, we are satisfied that 10% is both reasonable and appropriate.

30. **<u>The Question of Obsolescence:-</u>**

During the course of this case it was urged upon this Tribunal that, irrespective of the method to be applied, a percentage discount, suggested at 10%, should be allowed in order to cover the physical obsolescence of the roads and structures from which the tolls are derived. There is no doubt but that in accordance with the statutory formula the hypothetical tenant is liable for the "cost of repairs, insurance and other expenses (if any) necessary to maintain the hereditament in its actual state ..." He is not however, responsible for renewal of either the whole of any part of it. It may be however that renewal of part may be necessary in order to properly carry out his

repairing covenant. If so, the cost will be allowed. Each case must be considered on its own merits having regard to the nature of the hereditament. Repairs themselves may also be of a different kind and thus may be treated differently in the accounts. General repairs of a repetitive nature may be dealt with under the straight forward heading of "Repairs" or "Maintenance Costs". On the other hand, it may be that the tenant would wish to make provision for the possibility of having to carry out a major or substantial repair at some unspecified time in the future and he might do so by the establishment of a Reserve or Sinking Fund or the like. In principle, if it was reasonable for the hypothetical tenant to make such provision by this or some other appropriate means then that cost in whole or in part may be allowed, see **St. Alban's C.C. v. St. Alban's Waterworks Co. and Clare [1954] 47 R and IT 191**. The precise calculation of what part of that annual fund will be allowed will be determined by a number of matters including the amount to be provided, the duration of the hypothetical tenancy and the rate of return which should be employed.

31. In this case, under the heading of "Expenditure" in the Accounts there are sums inserted for "Other Operating Costs" and for "Maintenance Costs". As stated above this had been deducted and allowed in full so far as the evidence went, there was no further provision in the accounts for either repair or maintenance or for any physical or functional obsolescence. Since the preferred method of valuation in this case is one based on and derived from the accounts (with appropriate adjustments) it would in our view be quite wrong to allow any deduction under this heading. On principle in any event it is our opinion that it would be quite inappropriate to allow any generalized percentage reduction. Rather, if provision had been made in the accounts, one would have analysed the position in the manner above indicated. If, at some future time, such provision is within the accounts then that matter can be taken into consideration in a further revision but at present no deduction will be allowed.

32. **Occupational Percentages:-**

Under the written agreement dated the 16th day of March 1983 the parties thereto, in certain circumstances, were to share in the distribution of surplus profits in the manner as specified at Article 4.05 thereof. As of the relevant valuation dates the parties apparently were so entitled in the percentage figures referred to at Paragraph 2(d) above. Based on this agreement to so distribute, a submission was made to this Tribunal to the effect that whatever rateable valuation should be fixed on the subject

hereditaments the same should be reduced in order to correspond with the said figures.

Though such a submission was made at both the opening and closing of this case no evidence was led or given in respect of the matter, and no authority either statutory or common law was quoted in support thereof. It is therefore somewhat unclear to us as to what basis in law could be identified so as to sustain this submission or to help us in approaching a consideration thereof. On one view of the point so made, the logical consequences, if accepted, would be that East Link was not "the occupier" of the hereditament in that is occupation could not be said to be exclusive. Furthermore, if any such adjustment was allowed would it not follow at least conceptually that the other contracting parties, would be equally liable for the resulting rate albeit in adjusted proportions. Such situation is one which we think cannot be correct or sound in principle.

Subject to these difficulties it may well be that the answer, as a matter of law, is that the distributive provisions of the written agreement are matters of a purely private nature between the contracting parties and thus, therefore, in the entirety should be disregarded for the purposes of this appeal. If this is so, the law on this point is reasonably clear and certain. The statement by Lord Buckmaster, in the **Port of London Authority v. Orsett Union [1920] A.C. 273** is still considered as the classical authority on this issue. At p. 305 Lord Buckmaster said:-

> *"the actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities, and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."*

Whilst that statement was in relation to the effect of a statutory restriction upon profits, nevertheless it lays down a principle which applies equally to all hereditaments.

At paragraph E. 261 of Ryde on Rating and the Council Tax the author says:-

> *"it follows from the rule that the hereditament is at the date of valuation deemed to be vacant and to let on the statutory terms that restrictive covenants and other private arrangements affecting a hereditament are irrelevant in the ascertainment of its value for rating. On the other hand every potential hypothetical tenant must be affected by statutory powers or*

obligations which are attached to the hereditament in whoever's hands it may be."

See also paragraph 110 of Halsbury's Laws of England 4Ed. where the following is stated:-

"the hereditament must be valued subject to any statutory restrictions in respect of it, other than those limiting the rent obtainable for it. However, restrictive covenants and other private arrangements affecting the hereditaments are irrelevant."

On either basis we would reject this submission.

33. North Kerry Milk Products Case (VA88/205, VA89/0/024 & 25):-

When giving judgement in this case the Tribunal said:-

"The Tribunal accepts the force of this qualification and would expressly wish that valuations now fixed (mostly agreement) should remain in place for an appreciable length of time which it would regard as not less than five years. Of course, if circumstances change - if there are new buildings or installations, for example, the situation would obviously be different."

This observation and view of the Tribunal is one which we would respectfully agree with and indeed repeat and reaffirm. If the same were to be disregarded it could lead to a multitude of unnecessary revisions, first appeals and appeals to this Tribunal. It would cause a great deal of uncertainty and lead to much wasted cost and expenses.

Therefore, we strongly recommend a general observance to this practice.

However, such observations as made have to be read in the light of *Section 3 (1) of the*

Valuation Act, 1988. In any event, we fail to see how this suggested rule of practice could apply, if as in this case, the 1993 revision was requested by the Appellant company itself.

34. Finally, we are also satisfied that the rateable valuation as suggested should apply respectively to both appeals. In order to sustain the Commissioner's valuation for the 1994 revision it is necessary to have, at the valuation date, available as the net annual value figure of £1,741,285 in 1988 terms. It is quite clear from the following appendix that the same was so available in 1993. Eventhough the net annual value is not

tied to the "actual profits", it is clear from a consideration of such profits alone, that in respect of the 1992 revision there is evidently available sufficient net annual value to justify the rateable valuation placed thereon.

35. <u>Conclusion:-</u>

As can be deduced therefore from the aforegoing and as is evident from the appendix to this judgement, this Tribunal, is of the opinion for the reasons stated above that the correct rateable valuation for hereditament number (1) is £10,260 and for hereditament number (2) is £540. Equally so we affirm the Commissioner's rateable valuation in respect of the earlier revisions.