

**Appeal No: VA19/5/0521**

**AN BINSE LUACHÁLA  
VALUATION TRIBUNAL**

**NA hACHTANNA LUACHÁLA, 2001 - 2015  
VALUATION ACTS, 2001 - 2015**

**MONAINCHA WIND FARM LIMITED  
APPELLANT**

**AND**

**COMMISSIONER OF VALUATION  
RESPONDENT**

**In relation to the valuation of**  
Property No. 5005908 Local Map NO/Map Ref: 8A9AD/1 at,  
Monaincha, Roscrea, County Tipperary.

<b>TRIBUNAL</b>	<b>Carol O'Farrell - BL</b>	<b>Chairperson</b>
	<b>Fergus Keogh - MRICS, MSCSI</b>	<b>Member</b>
	<b>Killian O'Higgins - FSCSI, FRICS</b>	<b>Member</b>

**JUDGMENT OF THE VALUATION TRIBUNAL  
ISSUED ON THE 29<sup>TH</sup> DAY OF JUNE 2023**

**1. THE APPEAL**

- 1.1 By Notice of Appeal received on the 14<sup>th</sup> October 2019 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value ('the NAV') of the above relevant Property (hereinafter referred to as "Monaincha") was fixed in the sum of €2,814,000.
- 1.2 Briefly, the grounds of appeal as set out in the Notice of Appeal are:
- (i) The NAV is incorrect as the Respondent's approach to the valuation does not accord with the Valuation Tribunal decisions in VA15/5/067- Hibernian Wind Power Ltd, VA15/5/012 - Limerick West Windfarm Ltd, VA15/5/058 Slievreagh Power Ltd and VA15/5/108 – West Clare Windfarm Ltd.
  - (ii) As regard the six component elements of the R & E valuation, the Respondent diverges from the Tribunal's decisions in every respect save the estimation of revenue.

- (iii) The NAV's of wind farms are substantially higher following REVAL 2019 than the valuations determined in REVAL 2017 despite the fact that there was no change in REFIT reference prices between 2015 and 2017.
  - (iv) The Appellant objects to the adoption of €16 per MWh for operating costs as costs require to be scaled up as the windfarm ages to €20 per MWh.
  - (v) The Respondent has disregarded the Tribunal's decisions by adopting 20 years for the calculation of the sinking fund rather than 15 years and in capping tenant chattels at €100,000 rather than estimating same at the rate of €12,500 per MW.
  - (vi) The Respondent applied a 70:30 percentage split of the divisible balance in disregard of the Tribunal's determinations that a fair percentage split of the divisible balance is 65:35.
  - (vii) Equity and uniformity must be achieved between comparable properties as a large number of windfarms in Tipperary and other rating authority areas are currently under appeal to the Valuation Tribunal.
- 1.3 The amount that the Appellant considered ought to have been determined as being the valuation of Monaincha was revised upwards from the amount of €1,111,000 as stated in the Notice of Appeal to €1,600,000 at the appeal hearing.

## **2. VALUATION HISTORY**

- 2.1 On the 7<sup>th</sup> of June 2019 a proposed valuation certificate was issued to the Appellant in relation to Monaincha indicating a valuation of €3,780,000 and advising that the final date for making representations was the 16<sup>th</sup> of July 2019.
- 2.2 Being dissatisfied with the valuation proposed, written representations were made to the Valuation Manager on the 14<sup>th</sup> of July 2019 seeking a reduction in the proposed valuation to €1,111,300. Following consideration of those representations, the final valuation certificate issued on the 10<sup>th</sup> September 2019 stating a valuation of €2,814,000.
- 2.3 The valuation date for the rating authority area of Tipperary County Council area was the 15<sup>th</sup> September 2017.
- 2.4 The Tribunal delayed the issue of this Judgment to await the decision of the Court of Appeal on the appeal from the Judgment and Order of the High Court in *Commissioner of Valuation v Hibernian Wind Power Limited (2021) IEHC 49 ('Hibernian')*.

### **3. THE HEARING**

- 3.1 The Appeal was heard in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2 on the 17<sup>th</sup> October 2022.
- 3.2 At the hearing the Appellant was represented by Mr David Halpin M.Sc. (Real Estate) Ba. (Mod) of Eamonn Halpin & Co. Ltd. The Respondent was represented by Mr. David Dodd BL instructed by the Chief State Solicitor who called Ms. Aoife McCrystal MSCSI MRICS BSc, Dip. Arbitration to give evidence.
- The rating authority, Tipperary County Council, appeared as an interested party represented by Ms. Rosemary Healy-Rae BL instructed by Binchy Partners LLP and Mr. Brian Bagnall FRICS FSCSI of Bagnall Doyle MacMahon was called to give expert evidence.
- 3.3 The rating authority is, by virtue of section 36(2) (b) of the Valuation Act 2001 ('the Act') entitled to be heard and to adduce evidence at the hearing of an appeal on the grounds that it will be directly affected by the Tribunal's decision on the appeal.
- 3.4 In accordance with the directions of the Tribunal, the parties respective valuers' filed their respective précis of evidence prior to the commencement of the hearing and each witness under oath adopted his or her précis as their evidence-in-chief, subject to some minor amendments in addition to giving oral evidence.

### **4. THE ISSUES**

- 4.1 The issues that fell for determination by the Tribunal concerned the following components of the R & E Valuation. They were:
- (i) Output: whether the generation output should be estimated over the four year period between 2015 and 2018.
  - (ii) Revenue: whether in estimating the revenue figure it was appropriate to take account of prospective inflation.
  - (iii) Operating costs; whether the costs fell to be estimated from the Appellant's accounts or from the accounts of all other windfarms in the rating authority area.
  - (iv) Sinking fund: whether the sinking fund should be calculated over a period of 20 years or over the 15-year period of the Renewable Energy Feed-In Tariff (hereinafter "the REFIT") Scheme
  - (v) Tenant chattels: whether the Respondent had arbitrarily applied a cap on the sum for tenants chattels at €100,000.
  - (vi) Divisible balance: whether the tenant's share of the divisible balance should be apportioned on a 20% basis rather than 35%.

## 5. RELEVANT STATUTORY PROVISIONS

- 5.1 All references hereinafter to a particular section of the Valuation Act 2001 ('the Act') refer to that section as amended, extended, modified or re-enacted by the Valuation (Amendment) Act, 2015.
- 5.2 Section 48 of the Act requires the value of Monaincha to be determined by estimating the net annual value of the property and section 48(3) of the Act sets out the factors to be considered in calculating the 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 reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant."*

- 5.3 Section 19 (5) of the Act provides

*The valuation list as referred to in this section shall be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue of the valuation certificates concerned, and shall achieve both (insofar as is reasonably practicable)—*

- (a) correctness of value, and*
- (b) equity and uniformity of value between properties on that valuation list,*

*and so that (as regards the matters referred to in paragraph (b)) the value of each property on that valuation list is relative to the value of other properties comparable to that property on that valuation list in the rating authority area concerned or, if no such comparable properties exist, is relative to the value of other properties on that valuation list in that rating authority area.*

## 6. UNDISPUTED FACTS

- 6.1 Monaincha is a large scale onshore wind farm situated in the rural townland of Monaincha County Tipperary and which is approximately 6 kilometres southeast of Roscrea in County Tipperary and 5.5 kilometres west of Borris-in-Ossory in County Laois. It is located on the northern side of the M7 motorway and is visible from the motorway midway between junction 21 and junction 22. It was commissioned in March 2014.
- 6.2 The windfarm occupies a low lying position in a cutaway bog at an approximate elevation of 100m above sea level. It is surrounded by Monaincha bog.

- 6.3 Monaincha has a total installed generating capacity (TIGC) of 36 MW. It produces electricity from renewable resources and is connected directly to the electricity network and metered independently of any other electricity generating plant. At the valuation date it had 15 Nordex N117 turbines, each having a capacity of 2.4 MW, a diameter of approximately 117 metres and a tip height of approximately 150 metres.
- 6.4 The Appellant is a generator accepted into the REFIT 2 ('Renewable Energy Feed in Tariff') support scheme. The Appellant entered into a REFIT 2 Participating Power Purchase Agreement ('PPA') with Bord Gais Energy Limited on the 30<sup>th</sup> November 2012 pursuant to which Bord Gais Energy Limited agreed to purchase the Net Electrical Output of Monaincha at a price in Euro per megawatt hour (MWh) of €68.078 per MWh (CPI Indexed) and €5.00 per MWh (not indexed) – total €73.078 per MWh. That Agreement was amended and restated on the 19<sup>th</sup> November 2018 between the Appellant, as the owner of Monaincha, and Bord Gais Energy Limited to accommodate the implementation of the Integrated Single Electricity Market (I-SEM) which replaced the Single Electricity Market ('SEM') on the 1<sup>st</sup> October 2018. I-SEM is a new wholesale electricity market arrangement designed to integrate the all-island electricity market with European electricity markets.
- 6.5 REFIT payments are made to Bord Gais Energy Limited for the duration of the PPA and that company pays the Appellant the price agreed in the PPA. At the valuation date, the PPA price is an amount equal to the REFIT 2 reference Price plus a balancing payment of €5.00 per MWh. Under the amended and restated PPA the PPA price is an amount equal to the REFIT 2 Reference Price €69.99 99 (CPI indexed) plus a balancing payment (not indexed) of €9.90 less €4.35 per MWh for I-SEM balancing and forecasting.
- 6.6 The REFIT 2 reference price is adjusted by way of indexation annually by the annual increase, if any, in the consumer price index (CPI) in Ireland. In 2017 the REFIT 2 reference price for a large scale wind farm in euro per megawatt hour was €69.72 (indexed). The balancing payment per megawatt hour of €9.90 is not subject to CPI.
- 6.7 The parties' respective valuers agreed that the NAV of Monaincha should be estimated by the R & E method of valuation.
- 6.8 The Appellant's financial year end is the 31st of December.

## **7. APPELLANT EVIDENCE**

- 7.1 Reading from his précis Mr. Halpin described the location of the subject wind farm in terms of its proximity to and visibility from the M7 motorway and noted that the uniqueness of Monaincha when compared to other wind farms is its positioning within a valley at 100m above sea level as opposed to a more normal position for a wind farm on a mountain side.
- 7.2 Mr. Halpin confirmed that the subject was commissioned in March 2014 and following clarification confirmed that the wind farm has a capacity of 36.0 MW with 15 no. 2.4 MW Nordex 117 turbines and is subject to the REFIT 2 Scheme. It is also subject to a PPA

agreement for a term of 15 years from the 30<sup>th</sup> November 2012 which was initially priced at 100% of the REFIT 2 reference price of €68.078 per MWh (indexed). This agreement was re-stated in 2018 with a revised reference price of €69.99 per MWh (indexed) and with a balancing payment of €9.90 per MWh (not indexed) and from which €4.35 per MWh is deducted for SEM balancing / forecasting purposes which is indexed at the REFIT 2 equivalent level.

7.3 Mr. Halpin said that the initial PPA agreement was between related parties however the re-stated agreement was not with the revised agreement taking place following the purchase of Monaincha by the Appellant from Bord Gais.

7.3 Mr. Halpin stated that despite the fact that the wind-farm market is approximately 30 years old there continues to be no market evidence of any wind farms being rented on commercial terms. He said that both valuers in the appeal had agreed to adopt the Receipts & Expenditure Method of Valuation (R & E Method) to establish the rent that the hypothetical tenant would pay as defined in the Act, however, the parties differ in the application of the R & E Method and despite the check and balances adopted by valuers using the R & E Method neither party had definitive proof of correctness.

7.4 Mr. Halpin stated that the theory of the R&E method of valuation involved four stages to be considered as follows:

1. Revenue
2. Operating costs
3. Divisible balance and
4. Stand back & Look.

Mr. Halpin considered the theory of each of the above elements and compared his application of the stages to Monaincha to that of the Respondent as follows:

#### **1. Revenue**

Mr. Halpin said that the revenue of a wind farm was based on its ability to generate power to be sold to the national grid. He said that it is not a certainty that the revenue in a set of audited accounts is representative of that which the hypothetical tenant could achieve as the revenue can be manipulated by connected parties. He said that at the time of the valuation date that he was aware of the three PPA agreements. The details of which he set out in Fig. 1 of his Precis which is produced in **Appendix 1 (n/a to public)**

Mr. Halpin said that two large wind farm projects achieved 95% of the balancing payment and 100% of the base reference price. Small wind farms did not have the same negotiating strength in the market prior to I-SEM and were liable to supplier charges and that an appropriate I-SEM deduction was in the region of €3.50 per MWh.

Mr. Halpin said that the Respondent had adopted a revenue figure of €76.62 per MWh as part of Reval 2019 based on the base rate of €69.72 per MWh plus 100% of the

balancing payment less €3.00 per MWh for I-SEM and acknowledged that both the Appellant and the Respondent are closely aligned on the revenue element.

Mr. Halpin analysed four years of generation. That information is set out in Fig. 2 in his Précis which is produced in **Appendix 2 (n/a to public)**

Mr. Halpin said that revenue was suppressed for the majority of the period 2015 to 2017 and that the balancing payment of €5.00 per MWh was lower than that achievable in the market due to the connected parties status.

This, he said, was remedied in the PPA revision exercise in 2018 which resulted in a higher net balance of €75.54 per MWh which he considered to be closer to that in an arms-length transaction. Mr Halpin adopted a revenue figure of €75.27/MWh in his valuation by taking the 2017 reference price of €69.72 per MWh and adding the balancing payment of €9.90 less €4.35.

## **2. Operating Costs**

Mr. Halpin said that the estimating the operating costs in the R&E model allows the inclusion of all legitimate costs incurred in the running of the Monaincha excepting;

- The landlord's cost of capital (loans etc)
- Rent
- Depreciation (other than by way of sinking fund)

Mr. Halpin said that the Respondent's approach to operating costs was to apply a rate of €16 per MWh based on analysed data that had yet to be provided to the Appellant with the adoption of a 20 year term for the sinking fund and with tenants chattels to be capped at €100,000.

Mr. Halpin presented the Appellant's operating costs for the years 2015 to 2018 in Fig. 5 of his Précis which is produced in **Appendix 3 (n/a to public)**. He contended for and adopted average annual operating costs of €20 per MWh based on the fact that by September 2019 costs were contracted to rise by €3.80 per MWh (€24,000 per turbine) and a further €2.53 (€15,000 per turbine) in 2024 and on the basis that the hypothetical tenant is aware in advance that his costs will rise over a 10 year tenancy. He said that the Respondent's approach to operating costs was to apply a rate of €16 per MWh based on analysed data that had yet to be provided to the Appellant.

In relation to depreciation Mr. Halpin said that this is accounted for by way of a sinking fund calculated at €1,000 per MW installed over a 20 year term at the rate of 2.5% noting that the issue concerned whether the duration of the sinking fund term should be 15 or 20 years which is subject to an appeal to the Court of Appeal. In his valuation he assessed the sinking fund over a period of 15 years and the figure for tenant chattels at the rate of €2,500 per MW.

### 3. Divisible Balance

In relation to the divisible balance Mr. Halpin described it as being the available sum to be shared by the tenant and the landlord following the deduction of operating costs from revenue with the proportion of the sharing of the division dictated by;

- The capital required by both parties.
- The risk incurred by both parties.

Mr. Halpin contended that the majority of the risk is carried by the tenant having regard to the market price of power, maintenance costs, planning, storage curtailment and the scale of the relevant project. He considered that the landlord carries the lesser risk based on the receipt of rents and sinking fund.

He said that whilst the Respondent continually contends for a 70:30 division in favour of the landlord precedent decisions have been on a 65:35 percentage basis and he had calculated the tenant's share at 35%.

### 4. Stand Back and Look

Mr. Halpin said that due to the lack of market rental evidence in the wind farm sector and as there are no market rents to consider that it was necessary to undertake a stand back and look exercise and compare a resultant valuation deduced by the R&E method.

He said that principles of correctness, equity and uniformity was written into law in Section 19(5) of the Act as amended and in order to comply with this provision it is necessary to compare values, however it is unclear how to undertake this exercise where no other form of power generation plant exists within a rating authority area or when all wind farms within a rating authority area are subject to appeal. Mr. Halpin said that the eighteen wind farms in Tipperary are under appeal. The list valuation of Monaincha represents 41.82% of the Appellant's turnover as at the valuation date. Referring to Fig. 6 in his Precis he said that he was not aware of any other types of properties that are valued at such a high proportion and said that an appropriate rate of turnover to valuation assessment should not exceed 25%.

Type of Property	% of Turnover
Pubs / Hotels / Guesthouses	Rooms 10%, Drink 7%, Food 5% & Leisure 15%
Nursing Homes	7- 8%
Holiday Parks	20%
M50 Toll	29.72%

Mr. Halpin contended for a NAV of €1,600,000. The R & E calculation is set out in **Appendix 4 (n/a to public)**.



7.5 Mr. Halpin acknowledged that his valuation primarily differed from that of Ms McCrystal due their respective approaches to the apportionment of the tenant's share, the allowance for tenant chattels and the duration of the period for the calculation of the sinking fund. Mr Halpin acknowledged that he had full access to the Appellant's audited accounts and agreed that his calculation of tenants chattels at the rate of €2,500 per MW was not supported by those audited accounts He commented that "*there is no tenant in situ*". Whilst agreeing that the onus was on Appellant to support this contention, r. Halpin accepted that he had not produced any evidence to support the allowance at that rate.

In response to a question regarding the term of the sinking fund Mr. Halpin agreed that he differed with the Respondent by applying a term of 15 years as opposed to that of the Respondent's of 20 years noting that as at the date of the hearing that the appropriate length of the term of the sinking fund was with the Court of Appeal for determination.

In response to a question concerning his adopted hypothetical revenue rate of €75.27 per MWh he said that the deducted amount of €4.35 per MWh was based on a revised 2018 PPA agreement which he acknowledges was not in existence at the valuation date adding that he considered it reasonable to have regard to this deduction rate as no alternative evidence was available to him to consider. He acknowledged that the Respondent had adopted the REFIT reference price plus a balancing payment rate of €6.90 per MWh (as opposed to €9.90 per MW) and then applied a 1% inflation allowance to arrive at a figure of €79.84. He said that he was not informed of the basis for the €3.00 per MWh deduction made by the Respondent. He accepted that his revenue figures differed by a relatively small amount to that of the Respondent's revenue figure and agreed that in material terms the difference was due to the 1% allowance made by the Respondent. Mr. Halpin said that whilst he did not have any difficulty in principle with CPI increases but he had not allowed for any inflationary increase as he was not able to predict future inflation rates.

He acknowledges that the Respondent adopted a balancing payment rate of €6.90 per MWh (as opposed to €9.90 per MW) and said that the Respondent's basis for deducting €3.00 per MWh had not been shared with him.

In relation to operating costs, Mr. Dodd questioned Mr. Halpin as to the basis of his adopted base rate of €20 per MWh. Mr. Halpin said that he took the rate for €15.01 per MWh of allowable operating costs per MWh established from the Appellant's accounts for the year ending December 2018 and then added the known contracted increments for turbine maintenance of €3.80 per MWh arising in 2019 and €2.53 per MWh in 2024 which gave a figure of €21.23 per MWh from which he adopted €20 per MWh. He acknowledged that the average of the allowable operating costs for the years 2015 to 2018 was €14.39 per MWh.

Mr. Halpin said that the starting point was €15.01 per MWh prior to applying the two known up-lifts would determine the end base rate to be adopted. Mr. Dodd asked Mr. Halpin to compare the adopted rate of €15.01 to the rates that he had displayed at items 6-9 in Fig 3. above which indicated rates ranging from €9.68 to €14.82 per MWh for comparable large wind farms. Mr Halpin acknowledged that the four wind farms evidence

a wide range and difference in costs for similar type wind farms and agreed that by taking the lowest provided cost example and adding the two known increments results in a rate approaching €16.00 per MWh, which is similar to that adopted by the Respondent. Mr. Halpin said that there may be site specific reasons as to why Monaincha wind farm was costing €9.60 per MWh to run including operation efficiencies. He said that if he was valuing this particular wind farm he would adopt the same valuation principles which would likely result in a lower rate than €20 per MWh and said that the Tribunal has in judgments to date adopted differing rates for operating costs compared to the Respondent's approach of applying the same rate of €16 per MWh to all wind farms.

Mr. Halpin acknowledged that his analysis of average allowable costs as set out in Fig. 4 above for wind farms that are between 3-8 years old is €15 to €18 per MWh and that the Respondent's adopted figure of €16 per MWh is within this range. He also acknowledged that this analysis was from his wider experience in the sector and was not a result of the further analysis of the Fig. 3 content.

Ms. Rosemary Healy-Rae on behalf of the rating authority asked Mr. Halpin as to why he used the average of four years output figures as opposed to three years as recommended by the Guidelines. He said that he considered four years as being more relevant than three and that evidence post the valuation date is relevant particularly in the case as it is a relatively new wind farm.

Responding to a question regarding tenants chattels Mr. Halpin accepted that the items listed under the heading of *Tenants Chattels* in Mr. Bagnall's précis were examples of such items and he further accepted that in assessing the allowance for tenant chattels he had to do so in the context of a hypothetical tenant. He also accepted that such items may not always be required where there is a maintenance contract in place under which the maintenance contractor would provide the items.

Referring to Mr. Bagnall's précis and the section dealing with *Divisible Balance*, Mr Halpin was asked to comment on Mr. Bagnall's view that the divisible balance should be 80:20 in favour of the landlord. Mr. Halpin said that he considered that the landlord was in a low risk situation and that a 65:35 split was appropriate. He did not accept that the tenant was in a low risk situation.

In response to a question from the Tribunal in relation to the Grounds of Appeal, Mr. Halpin said that he was no longer relying upon items 5, 6, 7 as set out under the *Revenue* heading in the document attached to Grounds of Appeal dealing with curtailment, turbine wasting and efficiency and the application of a 7.5% write down of the average hypothetical MWh generated respectively and item 9 which stated that the average PPA as at the valuation date was achieving 75% of the balancing payment.

In response to a question in relation to the quantum of the balancing payment withheld by licensed suppliers Mr Halpin said that he has seen reductions of between €3 and €4.50 per MWh from balancing payments.

In response to a question from the Tribunal regarding operating costs Mr. Halpin corrected an error in his précis and confirmed that two large wind farms as identified in Fig. 1 were paid 100% of the balancing payment and not 95% as stated together with 100% of the indexed base reference price.

Mr. Halpin confirmed to the Tribunal that the Year 2017 referenced in Fig 3. was an accounting year and was not aware if all the wind farms listed therein had the same financial year end. He also confirmed that the *Costs* as set out in Fig 3. were based on the 2017 costs. He was unable to confirm the number of turbines in each of the large wind farms in Wexford included in Fig. 3 of his Précis.

## **8. RESPONDENT EVIDENCE**

- 8.1 Ms. McCrystal adopted her Précis as her evidence in chief subject to correcting three typographical errors which were noted by the Tribunal.
- 8.2 Mr. Dodd referred Ms. McCrystal to her précis and a report prepared by the Central Bank and titled Quarterly Bulletin - QB3 July 217. Reading from the report Ms. McCrystal said that the Central Bank had predicted that inflation was expected to increase in 2017 by 0.3% and by 1% in 2018. Ms. McCrystal said that she had adopted the revenue figure of €76.62 per MWh determined by the Respondent at representation stage based on a REFIT 2 Reference Price of €69.72 per MWh plus a balancing payment of €6.90 per MWh being €9.90 less €3.00 for SEM balancing / forecasting purposes to which she added a figure to take account of 1% inflation and applied it to her revenue calculations to give an end figure of €79.84 per MWh. The inflation allowance was included in her calculations because CPI increases were guaranteed under the REFIT Scheme.
- 8.3 When referred to a table of operating costs in the appendices to her précis, (n/a to public) Ms. McCrystal said the table represented the analysed section 45 returns of information supplied by 19 no. windfarms across the counties of Tipperary, Wexford, Cavan and Monaghan. The 19 no. windfarms were a broad selection of small and large facilities and their ages ranged from a new recently commissioned facility to one that was eleven years old with the majority participating in the REFIT 2 scheme. Accounts were supplied to the Respondent for the facilities for the years from 2015 to 2018.
- 8.4 Ms. McCrystal said that her analysis of the information supplied by the 19 no. windfarms produced average running costs per MWh of between €7.81 and €24.78 with the majority being in the euro mid-teens range which resulted in her adoption of €16 per MWh. Ms McCrystal said that for the wind farms aged between 6 and 11 years of age the costs ranged from €13.38 to €16.83 per MWh excluding one farm recorded at €24.78 per MWh which Ms. McCrystal considered to be an outlier.
- 8.5 Ms. McCrystal to consider that her analysis of the costs information supplied by the 19 no. windfarms did not support Mr. Halpin's adopted figure of €20 per MWh.

- 8.6 Ms. McCrystal confirmed that she had adopted a term of 20 years in her valuation for the calculation of the sinking having regard to the High Court decision in *Hibernian* and had applied a rate of €12,500 per MWh for tenants chattels capped at €100,000 explaining that economies of scale can be achieved for large wind farms. Ms. McCrystal contended for a NAV of €2,612,000. The R & E calculation is set out in **Appendix 5 (n/a to public)**.
- 8.7 Under cross examination by Mr. Halpin Ms. McCrystal confirmed that she was the sole valuer within the Respondent's office for wind farms following a handover from the previously appointed valuer. She confirmed that she did not have previous valuation experience in the renewable sector prior to July 2022 but had considerable experience in R&E valuations from her time working in private practice.
- 8.8 When asked whether she was aware of the inclusion of an inflation factor in an R&E valuation of a wind farm by any valuer in the Respondent's office, Ms. McCrystal replied that she was not aware and could only speak for her own valuations. She was not aware of the use of an inflation factor in the valuation of other properties by the R&E method and advised that her current experience was limited to tolls and hotels.
- 8.9 Mr. Halpin asked Ms. McCrystal to explain why she had applied an inflation factor to revenue but not to the operating costs in her valuation. Ms. McCrystal replied that the adopted figure of €16 MWh was higher than those in her analysed schedule. She was asked if the adopted rate included an inflation factor and she replied that she had not applied an inflation factor but had made an allowance treating everyone equally.
- 8.10 In response to a question regarding whether she had ever valued a property based on future inflated projections Ms. McCrystal advised that she had not as the *Red Book* does not permit such actions whereas in the current case she was valuing based on a hypothetical scenario.
- 8.11 In replying to a question as to why she had decided to inflate revenues over a 10 year period she replied that she had done so on the basis of a recent Tribunal decision which presumed a hypothetical 10 year lease.
- 8.12 Referring to maintenance costs Mr. Halpin asked Ms. McCrystal if she considered that wind farm maintenance costs increased with age. She replied that her analysis of the 19 no. wind farms did not indicate this saying that there was a range of differing costs but that she did not see a trend and this was the reason that she took an average figure.
- 8.13 Ms. McCrystal confirmed that she did not consider changing the established period of the term for the sinking from 20 years to 15 years as she had adopted as a precedent the recent High Court decision.
- 8.14 Referring to a question regarding the €100,000 cap adopted for the allowance allocated to tenants chattels, Ms. McCrystal said that there was no evidence put forward to indicate that this figure was incorrect and that it was the Respondent's policy to use this allowance.

- 8.15 In relation to the divisible balance Ms. McCrystal said that she had adopted the Tribunal's decision in previous cases and applied the 65:35 percentage split in valuing Monaincha. .
- 8.16 In reply to a question by Ms Healy-Rae, Ms. McCrystal agreed that the items recited in Mr. Bagnall's précis listed under the heading of *Tenants Chattels*, were examples of such items and that she considered that a similar amount of tenants chattels would be required for one turbine as for a number of turbines.
- 8.17 In reply to a question from the Tribunal Ms. McCrystal said that she was unable to provide any background information or insight in relation to the wind farm listed in her schedule of 19 no. comparisons with an advised average cost rate of €24.78 per MWh and which she previously called an outlier. She agreed that such a high number could distort the average rate adopted in her valuation. Ms. McCrystal undertook to provide to the Tribunal additional and background information in relation to this comparison.
- 8.18 In reply to question by the Tribunal as to how Ms. McCrystal arrived at her adopted cost rate of €16 per MWh when the average rate in her schedule of comparisons was €14. 31 per MWh Ms. Mc Crystal said the adopted figure in the 2017 Reval was €15 per MWh which she also took into account before rounding up to €16 per MWh.
- 8.19 Ms. McCrystal was unable to tell the Tribunal as to the number of wind farms in her 19 no. comparisons which had in excess of 15 no. turbines.
- 8.20 In reply to a question by the Tribunal as to the consideration she gave to maintenance costs in her comparisons Ms. McCrystal said that she had reviewed the maintenance contracts available to her and did not have regard to any increase costs that may have been in the contracts for future years.
- 8.21 When asked as to the number of sets of wind farm accounts received by the Respondent Ms. McCrystal said that 31 no. sets of accounts for windfarms across all counties had been received. In relation to the €100,000 cap applied to the tenants chattels allowance, Ms. McCrystal said that she was unable to separate out from the accounts landlords and tenants chattels due to the manner that they were presented and acknowledged that there was no factual basis for the adoption of the €100,000 cap.

## **9. NOTICE PARTY EVIDENCE**

- 9.1 Mr. Bagnall adopted his précis dated 30<sup>th</sup> September 2022 as his evidence in chief.
- 9.2 Mr. Bagnall said that he had reviewed the précis submitted by Mr. Halpin and Ms. Crystal and said that he favoured the approach of Ms. McCrystal in allowing for an inflation factor and agreed with her adopted figure of €79.84 per MWh as the REFIT scheme allowed for such a situation. He considered that a potential tenant would consider that the rate would go up.

- 9.3 In relation to the wind farm output Mr. Bagnall said that in his valuation he took a three year average from the previous year's accounts and said that he considered that it was prudent not to have regard to the 2018 figures as these accounts were not available at the valuation date and he described the difference as not being substantial.
- 9.4 In relation to tenants chattels Mr. Bagnall said that it is important to remember that in relation to the subject wind farm that it is already operating and has chattels some of which belong to the landlord and some of which belong to tenant. He said that the tenant does require chattels however they are limited to items such as phone, preparation of accounts, office facilities and possibly a jeep. He said that he considered that such items would cost €30,000 to €40,000 per annum and the extra €60,000 in his valuation is just for incidentals. He said that what he was considering was the additional cost of chattels not already in-place. Mr. Bagnall said that he considered the €100,000 capped allowance as being more than adequate for the purpose.
- 9.5 Mr. Bagnall said that in relation to the sinking fund term that he accepted the High Court decision of 20 years being appropriate having regard to the fact that some of the older wind farms are now approaching 30 years of age and still producing electricity.
- 9.6 Mr. Bagnall said that in relation to operating expenses that the Respondent had analysed a basket of comparisons with an average rate of €14.31 per MWh. He said that whilst the various rates varied substantially he said that he considered the adopted rate of €16 per MWh as reasonable in the circumstances on the basis that a more efficient or less efficient operator should not be hindered.
- 9.7 In relation to the divisible balance Mr. Bagnall said that he had adopted a different approach to both the Appellant and the Respondent and was in favour of an 80:20 percentage division having cognisance of the fact that a landlord would spend in excess of €60m to develop a wind farm similar to Monaincha and on this basis would require more than two thirds of a share of the profits to undertake the venture and to justify this quantum of investment. He said that he considered that the tenant had a lesser risk and would reflect this in accepting a reduced divisible balance. He said that he did not agree with Mr. Halpin's assertion that a wind farm was a no risk investment to a landlord. He said that there was considerable risk including substantial bank borrowings, potential bad weather damaging the wind farm and the potential risk of a tenant defaulting.
- 9.8 Mr. Bagnall contended for a NAV of €3,000,000. The R & E calculation is set out in **Appendix 6 (n/a to public)**.
- 9.9 Mr. Halpin put to Mr Bagnall that in previous appeals that both he and Mr. Bagnall had participated in, he, Mr Bagnall, had adopted a different approach in valuing other wind farms without adopting an inflationary factor in the revenue figure as he asked what had caused him to change his approach. Mr. Bagnall replied that he was not previously aware of the Central Bank July 2017 Quarterly Bulletin and was now having regard to its findings.

- 9.10 When asked Mr. Bagnall if he had adopted inflationary factors in the appeals of properties such as nursing homes which are also valued by the R & E method, Mr Bagnall said that he did not.
- 9.11 Regarding the proportion of the divisible balance that Mr. Bagnall had adopted in his valuation Mr. Halpin asked Mr. Bagnall whether a landlord would not accept a lesser return from a risk free investment. Mr. Bagnall said that he considered that a wind farm investment was not risk free.
- 9.12 In reply to a question by the Tribunal as to whether the €100,000 capped tenants chattels was sufficient to run the wind farm Mr. Bagnall said that as it was an annual charge he considered it a sufficient sum particularly as he considered that the additional cost to a tenant in operating a wind farm was in respect of chattels that were not already on site and the items were limited with much of the cost already accounted for the operating cost rate of €16 per MWh and were within a maintenance contract.
- 9.13 In reply to a question from the Tribunal as to why he would apply a cap the tenants chattels Mr. Bagnall said that in his calculations that he could not get to a figure in excess €100,000. He said that it was not an exact science and agreed that in the event of a once in a lifetime catastrophic event such as a weather event that substantially damaged a wind farm that the €100,000 may be an insufficient amount, however, insurance cover may cover such events.

## **10. RESPONDENT SUBMISSIONS**

- 10.1 Counsel on behalf of the Respondent adopted his written Submissions. In summary he advanced the following arguments:
- i. The authorities say that we are to project revenues and in this scenario unlike in the example of hotels, nursing homes and tolls the Refit Scheme has inbuilt CPI and it's a fact that wind farm operators will get CPI linked increases. He said that in previous cases CPI has not been an issue due to a long period of zero inflation however that has now changed as confirmed by the Central Bank quarterly bulletin referenced in Ms. McCrystal's précis. At the valuation date the CPI trend was upward and the hypothetical tenant would project and factor in this knowledge.
  - ii. On the cost side of the equation whilst an inflation factor had not been applied the cost were inflated and increased from the average of €14.31 per MWh as calculated from Ms. McCrystal's comparisons to €16 per MWh. He said that no wind farm in the submitted comparison schedule reaches a cost factor of €20 per MWh which the Appellant is seeking, the highest being €16.85 per MWh for an older wind farm. Monaincha is a three old facility. Mr. Halpin in his calculations is adding to the figure of €15.01 per MWh and working off the cost figure in the year immediately prior to the valuation date. The objective is to establish a figure that a reasonably competent operator would pay being neither the most nor least efficient operator.

## **11. NOTICE PARTY SUBMISSIONS**

11.1 Counsel on behalf of the Notice Party adopted her written Submissions and those made on behalf of the Respondent regarding the revenue, operating costs and tenant chattel figures. In summary he advanced the following arguments:

- i. No justification has been provided by the Appellant to support the figure of €450,000 for tenant chattels. The cap of €100,000 adopted by the Respondent is reasonable in circumstances where no evidence has been provided by the Appellant.
- ii. In terms of the divisible balance Ms. Healy-Rae asked that the Tribunal take into account the evidence of Mr. Bagnall of an 80:20 division having regard to the large capital investment in the wind farm and his opinion of the level of low risk that the tenant accepts.
- iii. Ms. Healy-Rae asked that the Tribunal dismiss the appeal and uphold and accept the valuation of €3,000,000 as put forward by Mr. Bagnall.

## **12. APPELLANT'S REPLY**

12.1 Mr Halpin responded as follows:

- i. The Respondent had given evidence that the prevailing view on inflation had changed based on new evidence being available at the valuation date based on the Central Bank 2017 Bulletin. Mr. Halpin said that this information would have been available to Mr. Hazel in 2019 when Monaincha was valued yet no inflation factor was applied and he was not aware of the Respondent making allowance for inflation in the valuation of any other relevant property.
- ii. Mr. Halpin said that if the revenue figures are to be scaled up by inflation that the associated costs must also as a matter of logic be scaled up for inflation whilst adding in known maintenance costs increases and that the Respondent is incorrect in saying that because €16 per MWh is a reasonable figure no additional increment is necessary.
- iii. Mr. Halpin said that on a 'stand back and look' exercise he was not aware of any other business where NAV's were assessed in excess of 40% of the turnover of the business.

## **13. FINDINGS AND DISCUSSION**

13.1 Net annual value as defined in s.48 of the Act is a rental value based upon certain well-established valuation principles which are set out in the Tribunal's decision in *VA15/5/012 Limerick West v Commissioner of Valuation*.



- 13.2 The parties agree that the R & E method is the appropriate method by which to value the Property due to the absence of direct rental evidence or of any rental comparisons. The fundamental principles of the R & E method must be taken into account when considering how the method is to be applied. Those principles as to how this method of valuation should be applied are set out the Guidance Note having regard to rating practice and judicial precedent.
- 13.3 The R & E method involves using the actual occupier's accounts as evidence of what the hypothetical tenant would expect to earn and expend in the year commencing on the valuation date so that a judgment can be made as what proportion of the profits the hypothetical landlord and tenant would agree upon as rent. While what is to be rated is the property and not the income generated at the property, the profits disclosed by the accounts may serve to indicate the rent at which the property might reasonably be expected to let, from year to year. Lord Dunedin in *Port of London Authority v Assessment Committee of Orsett Union (1920) AC 273 at 295* described this method of valuation as a consideration of “...what profit the Hypothetical Tenant could make out of the property not in order to rate that profit, but in order to find out what he was likely to give in order to have the opportunity of making that profit.”
- 13.4 As a general rule an R & E valuation is based upon annual accounts for three years prior to the valuation date, if available, to establish levels or trends (if any), in revenues or costs generated from the trading operations. However, s.19(5) allows data which has become available after the valuation date up until the date of the issue of the valuation certificate to be considered which in this case is the 10<sup>th</sup> September 2019.
- 13.5 As pointed out by the Tribunal in *Limerick West*, the hypothetical landlord and tenant are assumed to base their agreed rent on the income that the hypothetical tenant would be capable of achieving. The revenue achieved by the Appellant is a useful starting point but cannot be adopted uncritically and as necessarily representing the income that the reasonably efficient hypothetical tenant might be expected to achieve. The task is to estimate the revenue potential of the Property not the average revenue earned by the actual occupier. The Appellant has adduced the Appellant's accounts in evidence and the Tribunal accepts the correctness of those accounts, no arguments having been advanced by the Respondent to challenge the basis upon which the Property is operated, or any item of expenditure incurred by the Appellant.
- 13.6 Turning to the issues that fall for determination by the Tribunal as set out in paragraph 4 above:

### **Output**

The accounts furnished disclose the income earned by the Appellant for the years 2015, 2016, 2017 and 2018. The Appellant's financial year end is the 31<sup>st</sup> of December.

Mr. Halpin furnished the Tribunal with a table (Fig. 2) detailing the total generation (MWh) output of Monaincha, the total income earned for the financial years 2015 to 2018 and the average income earned for that period. The table furnished by Mr. Halpin gives an itemized breakdown of the output and income earned under the REFIT 2 Scheme. The initial PPA agreement made between connected parties was for a term of 15 years from the 30<sup>th</sup> of

November 2012 and was restated on the 19<sup>th</sup> of November 2018 between non-connected parties.

In preparing the R&E valuation the first question to be considered is the output of the wind farm. The Appellant and the Respondent are broadly in agreement on the output capacity of the windfarm. Mr. Halpin averaged the years 2015 to 2018 with Ms. Mc Crystal averaging the years 2015 to 2017. The difference is not significant. Mr. Bagnall adopted the Respondents estimate. In the circumstances of this wind farm the Tribunal considers that regard should be had to the available output data for four years prior to the issue of the valuation certificate as the average output between 2015 to 2018 produces a lower average annual output than that which was actually achieved at Monaincha in the years 2015, 2017 and 2018. Accordingly for the purpose of the R & E valuation the Tribunal adopts the average output of 94,700 MWh and an average capacity factor of 30%.

## **Revenue**

The next question is whether the accounts represents the income the efficient hypothetical tenant might expect to achieve at the Property. The Parties differed in the approach to calculating the revenue figure to be used in the R&E valuation model. Mr. Halpin adopted a rate of €75.27 per MWh based on a base rate reference price of €69.72 per MWh with a balancing payment of €9.90 less €4.35 as stated in the restated PPA agreement. He considered that the balancing payment of €5 per MWh in the connected party agreement was less than the market rate being confirmed by the restated agreement in 2018.

Ms. McCrystal adopted a revenue rate of €79.84 per MWh based on adopting the revenue figure of €76.62 per MWh determined by the Respondent at representation stage. This figure was based on a REFIT 2 reference price of €69.72 per MWh plus a balancing payment of €6.90 per MWh being €9.90 less €3.00. She then added an allowance figure to take account of 1% inflation and applied it to her revenue calculations to give the figure of €79.84 per MWh. The inflation allowance was included in her calculations as CPI price increases were guaranteed under the REFIT Scheme. Mr. Bagnall adopted Ms. McCrystal's approach and calculations.

The parties noted at the hearing that their respective revenue figures prior to the application of Ms. McCrystal's inflation allowance were not too dissimilar at €75.27 and €76.62 per MWh. The Tribunal notes that the Respondent did not apply an inflation factor to the revenue figures adopted in the R & E valuations of the wind farms valued Reval 2019. Ms. McCrystal said that the change in approach before the Tribunal was being made on account of new information becoming available however the Tribunal notes that this 'new information' would have been available to the Respondent prior to the issue of the final valuation certificates and was not acted upon. Ms. McCrystal confirmed that inflation factors are not applied by the Respondent in the valuation of other categories of property.

There are several reasons why the Tribunal cannot accept adjusting revenue for inflation. The Respondent is using the Appellant's appeal as a vehicle to introduce an inflation adjustment to the revenue figure in the R & E valuation. No such adjustment was made in the list valuations of any of the wind farms valued under the Reval 2019 programme. It

was also accepted by Ms. McCrystal that inflation has not been factored into the valuation of any other category of property on the valuation list.

If the revenue figure falls to be adjusted for inflation then all other component elements of the R & E valuation would also require similar adjustment, especially operating costs and the tenant chattels and sinking fund allowances. The REFIT 2 reference price is adjusted by way of indexation annually by the annual increase, if any, in the CPI. That adjustment is made on the 1<sup>st</sup> January each year based on any increase in the CPI in the previous year. There was zero inflation in the period 2015 to 2017.

Inflation is a “known unknown”. The inflation estimate of 1% for 2018 in the Central Bank Report relied upon by Ms McCrystal does not inevitably come into play in subsequent years. Ms McCrystal’s approach to estimating revenue is to assume that revenue will increase at 1% every year over a ten year period. In the Tribunal’s view, it is simply too speculative to take inflation into account. It is a crystal ball gazing exercise.

Although CPI increases are provided for in PPA agreements the Tribunal considers, particularly having regard to the low inflation rate at the valuation date and the other variable factors and vagaries inherent in the operation of wind farms, that the hypothetical tenant would adopt a conservative approach and rely on stated contracted revenue rates

What is required by s.48 is the estimation of the open market rent of the property at the valuation date for which the property might in its actual state be reasonably let from one year to another. The hypothetical letting is not made on the terms that one would normally expect in a commercial lease but rather on the limited terms specified by s.48(3) of the Act. The possibility that rents may increase due to inflation after the valuation date is irrelevant. An essential feature of the 2001 Act is that values entered in a valuation list remain fixed for the duration of that list unless during its currency there is a material change of circumstances as defined in section 3 of the Act. Each revaluation resets values to a common base (i.e. the relevant valuation date) which remains constant until the next revaluation. The system of quinquennial to decennial revaluation is based on the principle that properties entered in a particular list at a revaluation will remain at the same value until the next revaluation unless a material change of circumstances occurs in the interim. In reality, the rental values of commercial properties of all kinds fluctuate throughout the period between revaluations.

No case was cited to the Tribunal supporting Ms McCrystal’s approach and the Tribunal did not approve the inflation of revenue in *VA17/5/108 West Clare Windfarm (SER) Ltd* or in *VA15/5/038 Carrons Wind Farm Ltd*. Finally, no other property on the valuation list was valued applying annual inflationary increases and the proposal to value Monaincha in a different manner to every other property on the list runs counter to the provisions of the Valuation Act which are aimed at practical equity and uniformity of valuations.

The average revenue of €72.83 per MWh earned by the wind farm in the period 2015 to 2017 appears to have been limited by the terms of the related party PPA which contained a balancing payment of €5 per MWh, which is confirmed by the revenue earned post the

restating of the PPA in 2018 when the revenue figure was €74.53 per MWh. Having regard to the foregoing the Tribunal finds that the revenue rate as proposed by the Appellant of €75.27 per MWh based on the income earned during the three year period to the 31<sup>st</sup> December 2018 in addition to the balancing payment of €9.90 less €4.35 reflects the appropriate level of revenue to be expected by a reasonably competent operator as opposed to the rate of €79.84 per MWh proposed by the Respondent. The €4.35 per MWh figure is the forecasting and balancing fee retained by the licenced supplier under the Agreement made on the 19<sup>th</sup> November 2018 to amend and restate the PPA dated the 30<sup>th</sup> November 2012 and is a figure to which regard can be made in accordance with s.19(5) of the Act.

### **Operating Costs**

In relation to operating costs, Mr. Halpin based his evidence on the operating costs contained in the wind farm accounts. The accounts furnished disclose the costs incurred by the Appellant for the years 2015, 2016, 2017 and 2018. In his précis Mr. Halpin furnished the Tribunal with a Table (Fig. 5) detailing the total generation (MWh) output of the Property, the total for costs for the 2015 to 2018 period and the average cost per MWh for that period.

The average for the period 2015 to 2017 was €14.18 per MWh. The advised annual figure for year end 31<sup>st</sup> December 2018 was €15.01 per MWh. Mr. Halpin contended that the hypothetical tenant would allow for average figure of €20 per MWh over a ten year period which he rounded down from €21.23 per MWh based on taking the average rate for the four year period 2015 to 2018 of €14.39 per MWh and adding the known contracted increases of €3.80 per MWh in 2019 and €2.53 per MWh in 2024.

In her estimation of costs Ms. McCrystal contended for a figure of €16 per MWh arrived at by averaging the costs contained in her 19 no. comparisons which gave a figure of €14.31 per MWh which she rounded up to €16 per MWh. Mr. Bagnall adopted Ms. McCrystal's approach and calculations.

The Tribunal has been of the consistent view that it is contrary to valuation practice and principle when carrying out an R & E valuation to take the average operational costs per MWh of several other windfarms in substitution for the operational costs figure derived from the appeal Property's accounts. That approach simply cannot be reconciled with the R & E method of valuation as this method consists in ascertaining the average actual profits of the occupier in order to estimate the rent a hypothetical tenant would give for the opportunity of making the ascertained profit in that particular property.

It is worthwhile setting out the Court of Appeal's comments at paragraph 66 of its Judgment in *Hibernian* on the "Standard NAV/MWH" approach adopted by the Commissioner in valuing Grouse Lodge Wind Farm and nine other wind farms in Limerick:

*The "Standard NAV/MW" is simply the product of the mathematical averaging of the various (and varying) values from each windfarm. That exercise does not account for the variables that affect the operation (and therefore the output and*

*cost base) of individual windfarms. That point is made by Owens J at para 39 of his judgment. It has also been made by the Valuation Tribunal in some of the many determinations provided to us: see for instance West Clare Windfarm SER v Commissioner of Valuation at 10.15 (de minimis windfarms will typically have proportionately higher operating costs than large scale windfarms), Reirk Energy Limited v Commissioner of Valuation at 11.7 (energy output of a wind farm is highly dependent upon the weather conditions present at the wind farm site as well as the type, size, and capacity of its wind turbines and in term of estimating energy output, the accounts of other windfarms are not useful unless those wind farms are similarly located on a site of similar terrain and have the same type and height of wind turbine). As it is aptly stated in 'Hibernian's written submissions, "wind farms are neither identical nor "homogeneous" when it comes to their design, manufacture, location, wind capacity factor, operation, maintenance routine or degradation."*

and what Collins J. further stated at para. 67

*"The Commissioner's approach does not, in truth, involve comparison with other operators. Instead, it involves devising an imaginary and notional "average" operator that does not correspond to any actual operator. The price notionally achieved by that notional operator will be higher or lower than that of actual windfarm operators; ditto its notional average operational costs. But that says nothing as to the price that the hypothetical operator of any specific windfarm would achieve or the costs that such an operator would incur. If windfarms were indeed entirely homogenous, there might be some validity in the Commissioner's approach. But they are not. Outputs differ. Costs differ. Those differences do not necessarily indicate any deviation from normally efficient operation and simply averaging the prices and costs of different operators does not establish a benchmark for efficient operation. That is, in my view, a fundamental flaw in the Commissioner's position."*

And later at para. 69

*"There is also a fundamental difficulty in the Commissioner's approach insofar as it relies on confidential financial and commercial information relating to other windfarms that Hibernian is not in a position to access or review. In my view, it is no answer to this point to say, as the Commissioner says, that the hypothetical tenant would have access to such information. The ratepayer has a right to investigate and, if appropriate, to challenge the basis of the Commissioner's valuation. That right is significantly impaired if such valuation depends on information to which the Commissioner, but not the ratepayer, has access."*

The operating costs as disclosed by the accounts were reviewed by the Tribunal and it is satisfied that they are a clear and fair indication of the probable average annual costs, one year with another of Monaincha. For the same reasons given in respect of the estimation of output referenced previously above, the Tribunal considers that the operating costs figure in the R & E valuation of the Property should be adjudged by reference to the

Appellant's accounts for the three years prior to the issue of the valuation certificate. The average costs for that period is €15.19 per MWh. The price under the maintenance contract was set to increase in 2019 by €3.80 per MWh and Tribunal considers that it is appropriate to include this known contract price increase. Accordingly, the Tribunal considers that the figure to be adopted for operating costs is €19.00 per MWh.

### **Sinking Fund**

Mr. Halpin contended for a sinking fund period of 15 years and Ms. McCrystal for a period of 20 years. The Court of Appeal upholding the High Court's decision in *Commissioner of Valuation v. Hibernian Wind Power Limited Ltd [2023] IECA 121* has held that "*the terms of section 48(3) make it clear that the expense of replacing the turbines must be averaged out over the entirety of their 20 year design life.*"

Accordingly, the sinking fund is to be calculated over a period of 20 years.

### **Tenants Chattels**

In relation to tenants chattels Mr. Halpin contended for an uncapped figure of €450,000 based on an allowance of €12,500 per MW of capacity. Ms. McCrystal contended for a capped figure of €100,000. Ms. McCrystal noted that and acknowledged that there is no factual evidential basis for the €100,000 cap as wind farm operators had not provided the Respondent with the necessary information to properly assess an appropriate allowance. Whilst Mr. Bagnall adopted Ms. McCrystal's calculations in his valuations he said that he would struggle to understand how a wind farm operator would require this level of allowance other than in a year where extraordinary expenditure may be required.

It is well established that the hypothetical tenant will invest capital in the business and that on an R & E valuation an allowance for depreciation of the tenant's assets can be made in the context of renewal of those assets. On the 2019 Reval, the Respondent decided to cap the tenant chattels allowance for wind farms at €100,000. The Appellant is not the only appellant that feels aggrieved by this decision. The reason why the Respondent decided to change its approach on this allowance is presumably because its earlier decision was made on a mistaken basis or perhaps the consequences of applying a fixed rate per MW regardless of wind farm size or the extent of the 'tenant assets' was not properly thought through.

The Tribunal is not persuaded by an argument that the Appellant is entitled to have an allowance for €460,000 for tenant chattels simply because the Respondent previously adopted the rate of €12,500 per MW in valuing wind farms in Limerick or in the counties subsequently valued as part of Reval 2017. The Respondent is obliged to value each relevant property separately and both the Respondent, and the Tribunal have, in accordance with section 19(5), a positive statutory obligation to achieve insofar as possible correctness of value, and equity and uniformity of value between properties on the valuation list. If an error was previously made, the Respondent is entitled to revisit the valuation issue where there is good reason to warrant it doing so.

If an Appellant considers that the Respondent has under assessed the amount of depreciation of tenant's assets, the appellant has the right to challenge that under assessment to the Tribunal. Any such ground of appeal would require proof in the first instance of each tenant asset, proof of the market value of each asset at the valuation date and the amount determined for depreciation. The Guidance Note at para. 5.41 provides that

*“(c) depreciation should be based upon the fall in value caused by the reduction in the useful economic life of that asset arising from use, the passing of time or obsolescence through technological or market changes  
(d) any residual value (i.e. the value at the end of the item's useful economic life) should be deducted.*

No such evidence was adduced by the Appellant. The contention that an allowance cap of €100,00 is in appropriate is an matter for another day. It is not one which the Tribunal would be prepared to decide in the absence of any evidence. At all events as far as the Tribunal is presently concerned, the Appellant has not established an entitlement to an allowance for tenant's chattels of €460,000.

### **Divisible Balance**

The parties calculated the tenant's share as a percentage of the divisible balance and the Tribunal considers that to be the appropriate approach to estimating the tenant's share. As to the tenant's share Mr. Halpin and Ms. McCrystal each applied a 35% apportionment in their R & E calculation while Mr. Bagnall adopted 20% having regard to the size and scale of the windfarm and the size of the landlord's investment.

The Guidance Note makes clear that the tenant's share of the divisible balance must be;

*“sufficient to induce a tenant to take a tenancy of the Property and to provide a proper reward to achieve profit, an allowance for risk and a return upon the tenant's capital.*

By whatever method the tenant's share is calculated, it is necessary to “*stand back and look*” at the result to decide whether the outcome of the calculation is reasonable for both parties. There are risks inherent in operating a wind farm and the risks that would be undertaken by the hypothetical tenant should not be underestimated simply because the tenant's capital contribution is low. Any person proposing to operate a wind farm needs to understand the amount of potential revenue the wind farm can generate and have confidence in their ability to generate that revenue in order to be able to cover the operating costs and pay the rent. Operating risks are the risks associated with running the facility and generating revenue from the production of energy. Nobody can predict with 100% certainty the amount of wind that will drive a turbine over any given period of time. No wind or low wind speeds means a loss of revenue. The tenant risks also include site and equipment failure or warranty risks, but even assuming those risks are well managed, the other major risks after a wind farm has been constructed are how much power it will produce year on year and whether there will be a sharp fall in electricity prices.

Mr Bagnall focussed on the level of return on invested capital. The hypothetical tenant would not be concerned about how much the landlord expended on developing the wind farm. He would endeavour to find out how much rent he could afford to pay, after meeting all the operating expenses, and setting aside a sum to compensate him for his own efforts and endeavours and risk (i.e. the tenant's share). He does that by ascertaining the amount of the receipts earned by the operator on an average of years and considering whether he could improve upon that and the amount of expenditure necessary to carry on the operations and to keep the wind farm in substantial repair. The difference between those two amounts will be the sum from which he can pay the rent to the landlord and profits or remuneration to himself. This is the method that is adopted for ascertaining the rent (i.e. net annual value) at which the property could be expected reasonably to let in their actual state, from year to year.

That is not to say that the landlord's capital investment is to be completely disregarded. It is a factor to be taken into account when apportioning the divisible balance. Striking a balance between the landlord and tenant that acknowledges the risks involved in running this particular wind farm as a result of adopting our own figures for the disputed matters in the valuation leads the Tribunal to the conclusion that the tenant's share should be 35% of the divisible balance.

- 13.7 The Tribunal's valuation is set out in **Appendix 7 (n/a to public)** incorporating our conclusions on the issues raised by this appeal.

#### **14. DETERMINATION**

Accordingly, the Tribunal holds that the Property's valuation on the list is incorrect. The appeal is allowed and the Tribunal decreases the net annual value of the Property as stated in the valuation certificate and on the valuation list to €2,207,000.

And the Tribunal so determines.

#### **NOTIFICATION OF RIGHT OF APPEAL**

In accordance with section 39 of the Valuation Act 2001 any party who is dissatisfied with the Tribunal's determination as being erroneous in point of law may declare such dissatisfaction and require the Tribunal to state and sign a case for the opinion of the High Court

This right of appeal may be exercised only if a party makes a declaration of dissatisfaction in writing to the Tribunal so that it is received within 21 days from the date of the Tribunal's Determination and having declared dissatisfaction, by notice in writing addressed to the Chairperson of the Tribunal within 28 days from the date of the said Determination, requires the Tribunal to state and sign a case for the opinion of the High Court thereon within 3 months from the date of receipt of such notice.