Appeal No: VA15/5/013

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

MARCH WIND LIMITED	**<u>APPELLANT</u>**

AND

COMMISSIONER OF VALUATION	**<u>RESPONDENT</u>**

AND

LIMERICK CITY AND COUNTY COUNCIL	**<u>INTERESTED PARTY</u>**

In relation to the valuation of
Property No. 2214318, Utility at Athea 1 Wind Farm Knocknagornagh Athea Co. Limerick

B E F O R E

Carol O'Farrell –	**Barrister-at-Law**	**Chairperson**
Barry Smyth –	**FSCSI, FRICS MCI Arb**	**Deputy Chairperson**
Eoin McDermott –	**FSCSI, FRICS, ACI Arb**	**Deputy Chairperson**

DETERMINATION OF THE VALUATION TRIBUNAL
ISSUED ON THE 26TH DAY OF JULY 2023

THE APPEAL

1. By Notice of Appeal received on the 9th day of September 2015 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 'Athea') was fixed in the sum of €2,431,000.

2. The sole ground of appeal is that the assessment is excessive and bad in law and should be reduced as it did not correctly take account of the issues raised in the representations made by the Appellant under s. 26 of the Valuation Act 2001 ('the Act') and the subsequent first appeal to the Respondent under s. 30 of the Act in respect of, *inter alia*, a reduced load factor, increased percentage of non-rateable items, increased operating costs and

depreciation, adjustments to the sinking fund calculation and an increased proportion of the tenant's share.

3. The amount the Appellant considered ought to have been determined as being the NAV of Athea was revised from €1,444,300 as stated in the Notice of Appeal to €1,850,000 at the appeal hearing

THE HEARING

4. The Appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 8th and 9th October 2019 and on the 8th day of November 2021. At the hearing the Appellant was represented by Mr. Owen Hickey SC instructed by Ms. Emma English Solicitor of SSE and Mr. Keith Norman B.Sc., FRICS of GeraldEve LLP was called to give evidence on behalf of the Appellant. The Respondent was represented by Mr. David Dodd BL instructed by the Chief State Solicitor and Mr. Liam Hazel M.Sc., B.Sc., Dip. Acc & Fin., MSCSI, MRICS, MIPAC (CV), ACIArb of the Valuation Office gave evidence on behalf of the Respondent.

5. The rating authority, Limerick City and County Council, appeared as an interested party represented by Ms. Rosemary Healy-Rae BL instructed by Mr. Gerard Reidy of Leahy Reidy Solicitors LLP and Mr. Brian Bagnall FRICS, FSCSI of Bagnall Doyle MacMahon was called to give expert evidence. The rating authority is by virtue of section 36(2)(b) of the Valuation Act 2001 ('the Act') entitled to be heard and adduce evidence at the hearing of the appeal.

6. In accordance with the Rules of the Tribunal, the parties exchanged their respective précis of evidence (including supplementary précis) prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief (in the case of Mr. Hazel and Mr. Bagnall following some amendments) in addition to giving oral evidence.

7. This appeal was heard at the same time as the appeals in Tournafulla Wind Farm (ROI) Limited v Commissioner of Valuation VA15/5/017 and Knockastanna Wind Farm (ROI) Limited v Commissioner of Valuation VA15/5/015.

8. 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').*

THE ISSUES

9. The Appellant and the Respondent made an agreement that the value of Athea should be amended to €1,850,000 at a time when they were preparing for the hearing of the appeal when it was originally listed for hearing on the 11th April 2019, and were fully conversant with the issues and their own positions concerning those issues. The agreement was notified to the Tribunal on that hearing date, and so there is no dispute as to the fact of that agreement. The parties were aware that the Tribunal's practice is to enquire if the Rating Authority has any objection to an agreement before making a determination in the terms of the agreement notified. Yet, there is nothing to indicate that the parties agreed that the agreement would not take effect until the Rating Authority confirmed to the Tribunal that it had no objection and nor was there any evidence that the agreement was reached on the basis that the parties intended to be bound by the agreement even if the agreement were met with an objection. Equally, there is nothing to signify that the parties intended not to be bound by the agreement if the Rating Authority objected. The Rating Authority did object and following that objection the Respondent resiled from the agreement.

10. The Appellant, quite understandably, complained in their evidence and submissions of the Respondent's decision not to abide by the agreement and so the Tribunal was, in effect, invited to give particular weight to the agreement or, at the very least, if it was accepted that the capacity factor of 29.56% would not had been agreed had Mr. Hazel been given sight of the Technical Analysis PBEPE Report commissioned by SSE in 2017 ('the 2017 Report') before the agreement was reached to revisit that figure only in the R & E valuation.

11. The reasons put forward for the Respondent for not abiding by the agreement were that it was a "*failed agreement*" due to the Rating Authority's objection and because Mr Hazel did not have a copy of the 2017 Report before the agreement was made. The evidence establishes that Mr Hazel was given the 2017 Report in August 2019 after Mr Hazel enquired of Mr Norman as to the basis upon which he had estimated the 29.56% capacity factor.

12. The Tribunal considers the agreement to be part of the evidential matrix and that it may, in its discretion, give such weight to it as it considers appropriate having regard to the evidence in deciding whether or not it would be appropriate to determine the valuation of Athea on the basis of the parties' compromise or any part of it.

13. The other disputed issues concerned the average annual net energy output which the hypothetical landlord and tenant negotiating the rent would assume a reasonably competent operator would be capable of achieving at Athea at the valuation date, the period over which the sinking fund should be applied and how the divisible balance should be apportioned. The Appellant contended for a load (capacity) factor of 29.57%, a sinking fund over 15 years and a 35% tenant's share of the divisible balance. The Respondent contended for a capacity factor of 34.87%, a sinking fund over a 20-year period and a 30% tenant's share of the divisible balance. The Notice Party supported the Respondent's position save that it contended for a tenant's share of 20%.

UNDISPUTED FACTS

14. Athea wind farm is owned by the Appellant which is a wholly owned subsidiary of SSE plc. Athea is located approximately 10 kilometres to the north of Abbeyfeale in County Limerick and 21 kilometres west of Newcastle West.

15. Athea comprises 16 G.E. wind turbines, 9 of which have a capacity of 1.6MW and 7 have a capacity of 2.85 MW. The total installed generating capacity ('TIGC') of Athea is, therefore, 34.35MW. The wind farm stretches across the top of a small hill with gentle slopes. The output from Athea connects into a transmission line which runs from the Tarbert electricity sub-station in north Kerry to the Clashavoon sub-station in County Cork.

16. Prior to the development of Athea, the Applicant made a successful application to participate in the REFIT 1 Competition. A transmission connection agreement was secured with EirGrid in December 2005 for a planned 51MW wind farm (the TIGC was subsequently reduced to 34.35MW).

17. Athea was commissioned in January 2014 and has firm access[1] to the transmission system which means that if Athea's output onto the grid is changed (i.e. constrained on or off), it

[1] Firm access means the quantity of output that a generator unit has firm rights under a Connection Agreement to be able to export onto the system at the point of Connection

may be eligible to receive constraint payments as set out in the Trading and Settlement Code. A constraint payment is calculated as the difference between the total revenues received from the market versus the total cost of purchasing metered energy from the generator, based on the REFIT reference price for the relevant PSO period. Constraint payments are made to intermediary supply companies.

18. EirGrid's original long-term strategy, known as 'GRID25', to develop Ireland's electricity transmission grid was in the public domain by late October 2008. EirGrid, by letter dated the 20th February 2012, advised SSE of the individual associated transmission reinforcements ('ATRs') (i.e. planned upgrades or new infrastructure) for Dromada Wind Farm, which is located beside Athea. The same ATRs affected Athea. The ATRs required to uprate the local transmission network were planned by EirGrid prior to the valuation date (1st March 2012) and EirGrid's plans to uprate the transmission network were known at the valuation date.

19. On the 13th February 2014, an Intermediary REFIT Power Purchase Agreement was made between Airtricity Limited and the Appellant for a term of 15 years. Pursuant to this PPA Airtricity Ltd agreed to take and pay for all electrical output from Athea for a period of 15 years or until the expiry of the REFIT 1 support scheme. The PPA electricity price is fixed at €73 per MWh and clause 5 of the PPA provides that the electricity price is to increase by reference to the annual Irish Consumer Price Index ('CPI') on the 1st January every calendar year commencing on the 1st January 2014. There is no provision in the PPA entitling the Appellant to receive compensation payments for constraint from Airtricity Ltd (now trading as SSE Airtricity).

20. The Valuation Order made by the Respondent for the revaluation of Limerick City and County specified the 1st March 2012 as the valuation date and the 31st December 2014 as the publication date of the valuation list. Athea was an existing relevant property when the Respondent appointed a valuation manager to organise and secure the carrying out of a valuation of all relevant property in the County of Limerick and pursuant to s.19(2) of the Act Athea fell to be valued by the valuation manager.

21. A proposed valuation certificate issued on the 10th day of June 2014 in relation to the Athea indicating a valuation of €2,475,000. Being dissatisfied with the valuation proposed, representations were made to the valuation manager and following consideration of those

representations, the valuation of Athea was increased to €2,860,000. The final valuation certificate issued on the 17th day of December 2014 stating a valuation of €2,860,000.

22. On the 6th February 2015, the Appellant submitted an appeal to the Respondent under s. 30 of the Act against the valuation. On the 6th August 2015, the Respondent allowed the appeal and reduced Athea's valuation to €2,431,000.

23. The key components of Athea's list value are as follows:

Standard Revenue NAV per MWh	€73,000
Standard Capacity Factor	33%
Capacity Factor (Estimated)	32%
Adjustment	0.97
Costs per MWh	€15.00
Sinking Fund (20 years)	
Tenant's Share 30%	
NAV/MW	€70,788
NAV	€2,431,000.

RELEVANT STATUTORY PROVISIONS

24. This appeal falls to be determined under the provisions of the Valuation Act 2001. Section 48 of the Act requires the value of Athea 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 and charges (if any) payable by or under any enactment, are borne by the tenant."*

25. Section 19 in material part provides:

(1) "The Commissioner, after consultation with the Minister for the Environment and Local Government and the rating authority concerned, may make an order (in this Act referred to as a "valuation order") specifying a rating authority area as

being an area in relation to which the Commissioner proposes to appoint an officer of the Commissioner under subsection (2) to organise and secure the carrying out of a valuation of every relevant property situate in that area (other than any property specified in paragraph (a) or (b) of that subsection).

(2) As soon as may be after the making of a valuation order, the Commissioner shall appoint an officer of the Commissioner to organise and secure the carrying out of a valuation of every relevant property situate in the rating authority area specified in the order, other than—

(a) any relevant property the subject of an order under section 5, or

(b) any relevant property specified in Schedule 4.

APPELLANT'S EVIDENCE

26. Mr. Keith Norman, a partner in the firm of Gerald Eve LLP, is a Fellow of the Royal Institution of Chartered Surveyors (FRICS) and has since the 1990s specialised in providing valuation and other advice in respect of oil refineries, chemical works, pipelines and power stations including nuclear, biomass, wind, coal and gas. Mr. Norman has advised the owners and operators of wind farm in England, Scotland, Wales Northern Ireland and Ireland since the mid-1990s as well as trade bodies in the UK such as Energy UK and the Renewable Energy Association. He has specialised since 1995 in the Receipts and Expenditure method of valuation (hereinafter "R & E") of energy industry assets in the UK. He demonstrated a detailed understanding of the valuation issues during the course of his evidence and the Tribunal is satisfied of his relevant expertise and experience.

27. At the outset Mr. Norman confirmed that when this appeal was scheduled to be heard on the 11th April 2019 he had agreed with Mr. Hazel the NAV of Athea in the sum of €1,850,000 based on the following components:

- revenue of €78.29 per MWh
- operating costs of €15.00 per MWh
- capacity factor of 29.565% (rounded to 29.57%)
- sinking fund over a period of 15 years
- a tenant's share of 35% of the divisible balance

This agreement was presented jointly by the parties to the Tribunal on the 11th April 2019 but the Tribunal did not determine the appeal on foot of that agreement because Limerick City and County Council objected to the agreement by letter dated the 24th April 2019.

28. Mr. Norman outlined his valuation methodology which he confirmed was based upon the Appellant's acceptance of the Tribunal's determination in *Limerick West Wind Farm Ltd v Commissioner of Valuation VA15/5/012 ('Limerick West')* which concerned the Rathcahill Wind Farm, that the revenue should be €78.29 per MWh and the acceptance of the variables applied in the valuation of that wind farm as to the sinking fund period, tenant's chattels, and the tenant's share of the divisible balance.

29. Mr. Norman's approach to the assessment of Athea's net energy production differed from that of Mr. Hazel. The basic premise of his valuation approach was that at the valuation date the hypothetical tenant would take a yearly tenancy which had a reasonable prospect of continuance on the assumption, firstly, of an unconstrained capacity factor and, secondly, in the knowledge that significant constraint was going to be imposed for a period of time to facilitate major improvement and upgrade works to the transmission and distribution network into which Athea feeds.

30. Mr. Norman stated that EirGrid launched the GRID25 Strategy Project (inserted in Appendix 6 of his Précis –N/A to public) in 2008 to announce its intention to invest €4 billion in the transmission network. The GRID25 Project outlined the major works required to uprate the transmission network across Ireland to facilitate and support the growth of wind farms and renewables generally. The Project envisaged the installation of 1,150 kilometres of new transmission lines as well as the upgrading and reinforcing of approximately 2.3 kilometres of existing transmission lines. The GRID25 report referred to large parts of the southwest transmission network being upgraded to accommodate the growth of renewable energy and page 19 of the report explained that

> "*upgrading existing lines generally requires taking the lines out of service for lengthy periods of time to make changes to conductors and / or the structures supporting them.*"

31. The electrical output of Athea and two other SSE wind farms, Dromada and Tournafulla, connect into the transmission line from Tarbert sub-station to Clashavoon sub-station in County Cork which did not have sufficient capacity to transfer the volume of generation

produced by these wind farms between 2014 and 2017 (hereinafter the 'constraint years'). As a result, the capacity factor of Athea was reduced during the constraint years while the (ATRs) were being carried out. Neither Rathcahill nor Knockastanna, SSE's two other Limerick wind farms, were affected by network constraint because Rathcahill feeds into the Rathkeale 110KV sub-station and Knockastanna feeds into the Ardnacrusha 110KV sub-station.

32. Mr. Norman stated that at the valuation date the hypothetical tenant taking a tenancy of Athea would have known about the GRID25 Strategy and the ATRs required to be undertaken and so would have reflected constraint in his rental bid. He pointed out that unlike Athea and Tournafulla, Dromada wind farm did not have a firm access certificate because its connection agreement with EirGrid was made in December 2009 by which time the proposed ATRs were known. He produced a letter of the 20th February 2012 from EirGrid to Dromada Wind Farm Limited detailing the ATRs required to be carried on the transmission network before Dromada could be considered for a firm access certificate and pointed out that those ATRs were going to equally impact Athea and Tournafulla. While that letter inferred that the ATRs would be carried out between 2012 and 2015, there was subsequent slippage in the timetable.

33. In carrying out the valuation exercise Mr. Norman said the first problem he had to resolve was Athea's unconstrained output. The problem stemmed from the fact that Athea was not commissioned until January 2014 so there was no evidence of the output achievable by Athea prior to the constraint years. Evidence was available of Athea's actual output during the constraint years and of SSE's forecast assumptions (using SCADA metered output data) as to what Athea's output would be after the constraint years. This data, which Mr. Norman set out in a spreadsheet, showed that Athea's capacity factor was low during each of the constraint years at 25.5% (2014/15), 28.8% (2015/16), and 24.3% (2016/17). The average capacity factor during those three years was 26.22%. SSE's forecast assumption was that Athea could achieve a capacity factor of 31% following the completion of the ATRs.

34. In estimating Athea's unconstrained output, Mr. Norman had regard to the 2017 Report which predicted an anticipated capacity factor of 31.25% on a 50% probability of exceedance basis (P50) and an anticipated capacity factor of 28.5% on a 90% probability of exceedance basis (P90). He confirmed that the 2017 Report (which is appended to his

Précis – N/A to public) was not furnished to the Respondent until after he made the agreement with Mr. Hazel.

35. The 2017 Report identified and summarised the key wind analysis findings in various wind assessment reports that had been compiled between 2007 and 2013 during the planning stage of Athea in respect of different turbine scenarios and wind farm capacities. Two of these reports were prepared close to the valuation date in 2012 based on a turbine scenario which came close to matching the as-built scenario.

36. The report of the 20th February 2012 predicted a P50 capacity factor of 32.87% (96.90 GW hours) and a P90 capacity factor of 28.90% (85.20 GW hours) while the later report dated the 29th February 2012 (the eve of the valuation date) predicted a higher P50 capacity factor of 35.57% (105.00 GW hours) and a higher P90 capacity factor of 31.30% (92.40 GW hours). Mr. Norman queried with SSE the reasons for the variations between the two Reports given the short nine-day interval but was unable to obtain any explanation that could account for them. He adopted an unconstrained output figure of 93,280 per MWh (31% capacity factor assessed as follows: - 34.35MW x 31% x 24hrs x 365 days.)

37. For the purpose of reflecting in his valuation the tenant's knowledge that there would be lower output for a period of 3 years due to network constraint, Mr. Norman assumed a probable hypothetical term of 10 years of which 3 years would be affected by network constraint and 7 years would not. He took Athea's actual output figures for the constraint years which he considered offered the best guide as to impact of network constraint and assessed an average actual output of 78,892MW/h which reflected a capacity factor of 26.22% and, adopting 7 years for unconstrained output based on a capacity factor of 31.00% (rounded from 30.97%), he determined a ten-year average output of 88,964MW/h (giving an average capacity factor of 29.57%) as follows:

Notional Load Factor -Planned		*93,280*	*31.00%*
Restricted Load Factor (constraint years)	*78,892*		*26.22%*

Year	*Output MW/h*	*Year*	*Output MW/h*
1	*93,280*	*6*	*78,892*
2	*93,280*	*7*	*93,280*
3	*93,280*	*8*	*93,280*
4	*78,892*	*9*	*93,280*
5	*78,892*	*10*	*93,280*

38. Mr. Norman next addressed the question whether the hypothetical tenant would disregard network constraint when making his rental bid as Athea has a firm access certificate which can give rise to an entitlement to compensation for loss of income arising from such constraint. He thought he would not for three reasons. Firstly, constraint payments would be a rare occurrence in respect of a REFIT supported wind farm because market revenue plus constraint payments would have to exceed REFIT payments for the compensation to become payable. Secondly Mr. Stephen Gallagher, a director of SSE Airtricity Limited confirmed by letter of the 7th October 2019 that the market revenue plus constraint payments obtained by SSE in the years 2014/15, 2015/16, 2016/17 and 2017/18 did not exceed the REFIT reference price multiplied by actual output so that any constraint payments received did not affect the Appellant's ultimate income. Thirdly, compensation payments are made to the supply company and not to the generating company unless the parties' power purchase agreement (PPA) provides for such payments to be shared between them.

39. From the hypothetical tenant's perspective, he concluded that the potential for compensation would not have been a material issue at the valuation date and he made the additional observation that the deemed PPA price of €78.29/MWh gives the hypothetical tenant not just the REFIT reference price but the whole of the balancing payment so that PPA constraint payments would be a rare occurrence in respect of a REFIT supported wind farm. He did not agree with Mr. Bagnall's view that if compensation is not payable, the constrained output should be assessed over the longer 15-year REFIT period. In his experience he had not seen any assumption being made that the hypothetical term should be considered to be of 15 or 20 years' duration. He was aware that the Land's Tribunal in England had referred to the period being one of '*several years*' and that in practice for the purpose of valuing specialist assets he would generally adopt a period of between 5 and 7 years but in this case he considered it reasonable to assume a term of 10 years.

40. Mr. Norman pointed out that Athea's PPA, despite being made with Airtricity Limited, could not properly be characterised as a non-arm's length agreement as SSE are legally bound to agree PPA prices in accordance with transfer pricing legislation. A letter of the 10th April 2019 addressed to the Valuation Tribunal and signed by Ms. Arlene Bowman, Group Finance Director, was handed in (without objection) to confirm that the Appellant's PPA reflected market terms. Mr. Norman confirmed that the PPA did not contain any provision for the apportionment of constraint payments between the generating company and the supply company. He confirmed that he had analysed Athea's operating costs for

the period 2014/15 to 2016/2017 and though he did not have the precise figure for average annual costs to hand, having agreed €15.00/MWh with Mr. Hazel, he confirmed that to the best of his recollection he had calculated the costs from the Appellant's accounts to be slightly above €15.00/MWh.

41. Mr. Norman disagreed with the Respondent's characterisation of the sinking fund as a payment made by the tenant to the landlord on an annual basis. Relying upon the Tribunal's decisions in *Hibernian* and *Limerick West* he calculated the sinking fund over a 15-year period. He said the tenant has a statutory obligation to set aside monies in a sinking fund to ensure that he is able to replace worn out assets because by virtue of s.48 he takes a tenancy for several years under which he has a contractual obligation to maintain the Property in its actual state. In his view the period for building up the sinking fund is a commercial decision for the hypothetical tenant.

42. In terms of the divisible balance Mr. Norman considered that care had to be taken not to be overly reliant upon the size of the landlord's capital investment when calculating the tenant's share because the annual operating costs the hypothetical tenant would incur upon entering into a tenancy for a period of several years which, in the case of Athea is a sum in excess of €1,000,000 per annum, while assuming the risks of operating the wind farm is a critical factor. In his view significant risk attaches to the hypothetical tenancy by reason of the expenses and risks the tenant undertakes upon assuming occupation of the wind farm. A tenant, he said, would not take on such a major undertaking unless he is sufficiently rewarded for his expertise, working capital, investment, and business risk. The landlord by contrast no longer has any ongoing business connection with the property and receives a fixed income from the letting. The landlord has no construction risk as the wind farm is already built, he has no market risk as the wind farm is let; he does not have to incur the operating costs or assume the risk of turbine breakdown. He observed that a 50% tenant's share had been adopted in the valuation of telecom networks of BT, UPC, Meteor, O2 and Vodafone all of which, as in the case of wind farms assets, involve significant capital investment by the landlord.

43. Under cross examination Mr. Norman did not agree that the estimated P50 output figure in the 29th February 2012 Report was the most probable figure the hypothetical tenant would use to calculate his rental bid. He said a tenant who only has an expert report predicting future output on a P90 and P50 basis is in a far less advantageous position than a tenant negotiating with a landlord in respect of a wind farm with a history of actual

operational data. For that reason, the hypothetical tenant would adopt a more cautious approach and base his rental bid on the estimated P90 output figure. He considered the P50 output figure represented too great a risk for a tenant who would not have available to him any actual operational data. He also rejected the proposition that by reason of EirGrid's investment in the ATRs the risks were significantly reduced as to warrant an adjustment to the apportionment of the divisible balance pointing out that network improvements were primarily designed to facilitate grid access for new windfarms and that curtailment and constraint as identified in the Tribunal's decisions in *Hibernian* and *Limerick West* would continue to be underlying risks. Mr. Norman commented that network constraint requiring a programme of ATRs to be carried out was not a specific issue for the hypothetical tenant of Grouselodge wind farm (*Hibernian*) or Rathcahill wind farm (*Limerick West*) and that network constraint has to be distinguished from the general risks of curtailment which is always present even after ATRs are carried out.

44. When asked whether he should have adopted a longer 15 year or 20 year hypothetical term for a specialist asset, he replied that the hypothetical tenancy is for a term of several years; it is not an indefinite tenancy and nor is it a fixed term tenancy. He referred to the Lands Tribunal decision in *British Gas Trading Ltd v Hardman (VO) [2015] UKUT 53* which viewed the hypothetical term as 7 years and the decision of the Lands Tribunal of Hong Kong in *China Light & Power Company Ltd v Commissioner of Rating and Valuation [1996] RA 475 ('China Light & Power')* which considered that the term would be between 3 to 5 years and settled on 4 years as being the probable duration of the tenancy.

45. Mr. Norman stated he was not aware of any precedent or caselaw which affirmed a hypothetical term that stretched to a period of 15 or 20 years. In his view the hypothetical term should be viewed as a period of between 5 and 7 years which is the period used by valuers for valuing regulated networks in the UK. On this appeal he had adopted a longer hypothetical term of 10 years solely for the purpose of estimating Athea's output. The fact that the turbines have a life of 20 years and the windfarm is supported by REFIT for 15 years does not mean that a hypothetical tenant will have a tenancy for either of those periods as a new tenant could come in at some point in time. The fact that the gas fired power station in the *British Gas Trading* case had a longer life than a wind farm and the electricity distribution network in the *China Light & Power* had an even longer life than the gas fired power station, he said, presses this point home. He accepted the point put to him on behalf of the rating authority that a valuer should consider the nature of the property being valued when considering an appropriate duration but was not prepared to accept

the proposition that the duration of the term should be viewed as commensurate with the duration of the REFIT Scheme or the estimated design life of a wind turbine.

46. As to Mr. Bagnall's suggestion that there should be a sliding scale for the apportionment of the divisible balance to reflect the size of a wind farm, Mr. Norman made three observations. Firstly, he noted that the Tribunal departed in *Slievereagh Power Limited v Commissioner of Valuation VA15/5/058 ('Slievereagh')* from the 35% tenant's share of the divisible balance that was applied in the *Hibernian* and *Limerick West* appeals because of the unique circumstance of a single turbine being connected to a weak 10kV network. Secondly, he saw no justification for a sliding scale for larger turbine sites as he considered the risk of 1 turbine failing on a six-turbine site to be the same as 2 turbines failing on a 12 turbine site. He did not accept the principle of 'economy of scale' because he considered the costs and the risks to be the same. Thirdly, based on his experience of valuing wind farms of varying sizes of up to 50 turbines, no differentiation had ever been made between larger and smaller wind farms with respect to the apportionment of the divisible balance. He considered that the Tribunal's apportionment of the divisible balance on a 65:35 percentage basis in *Hibernian and Limerick West* to be in accordance with the Guidance Note of the Institute of Revenues Rating and Valuation on 'The R&E Method of Valuation for Non-Domestic Rating' ('the Guidance Note') pointing out that there will always be a degree of subjectivity and valuer's judgment in the computation of the tenant's share.

THE RESPONDENT'S EVIDENCE

47. In his Précis submitted to the Tribunal on the 28th March 2019 Mr Hazell requested the Tribunal to affirm the valuation of Athea at €2,003,334 based on the following key components:

capacity factor of 31%
revenue of €78.29 per MWh
operating costs of €15.00 per MWh,
sinking fund over 20 years
divisible balance apportioned 65% landlord and 35% tenant

48. In April 2019, the Respondent consented to the Tribunal approving the valuation of Athea in the amount of €1,890,000 based on the following key components:

capacity factor of 29.56%
revenue of €78.29 per MWh
operating costs of €15.00 per MWh,

sinking fund over 15 years

divisible balance apportioned 65% landlord and 35% tenant.

49. In a Supplementary Précis submitted to the Tribunal on the 11th September 2019 Mr Hazel requested the Tribunal to affirm the list valuation of €2,431,000.

50. He pointed out the Appellant had no financial accounts prior to the valuation date and having regard to paragraph 5.9 and 5.11 of the Guidance Note he considered the use of accounts after the valuation date to be impermissible.

51. He stated it was only on the 16th August 2019 that he was provided with the 2017 Report which referred to the earlier wind assessment reports that had been carried out on the Athea site.

52. While the 2017 Report estimated net energy production of 94.06/GWh, equivalent to 94,060/MWh, on a P50 basis (capacity factor of 31.24%), of the previous wind analysis reports mentioned in the 2017 Report, Mr. Hazel identified the report of the 29th February 2012, the one closest in time to the valuation date, as being key to the negotiations between the hypothetical landlord and tenant. The wind farm capacity envisaged in that report was 33.7MW somewhat lower than the 34.35MW wind farm that was subsequently built. Applying the as-built wind farm capacity of 34.35MW, an output of 105,000MWh produced a capacity factor of 34.87% while the output of 92,400 MWh estimated on a P90 probability of exceedance basis gave a capacity factor of 30.60%. Mr. Hazel stated that in terms of net energy production a P50 calculation of probability of exceedance is an estimated output that will be exceeded 50% of the time and conversely, not exceeded 50% of the time.

53. When commenting on the loss factors and uncertainties identified in the 2017 Report, Mr Hazel clarified that the gross capacity factor and energy loss factors are estimated and the estimated loss factors are then applied to the gross energy production to calculate the net capacity factor. He pointed to the fact that the biggest loss factor identified in the 2017 Report was wind turbine availability which he said could be caused by dispatch down or electrical fault. Comparing the anticipated outputs provided by the Appellant for the four years following the constraint years, to the estimated outputs in the 2017 Report, Mr. Hazel noted that SSE's budgeted capacity factor of 31% was only slightly below the P50 calculation in the 2017 Report of 31.25%.

54. Following receipt of the 2017 Report, he said the P50 capacity factor of 34.87% predicted in the 29 February 2012 report should be adopted. He said that the hypothetical tenant taking a long-term view would estimate Athea's average capacity factor not over a ten year period but over a 20-year period (33.57%) or a 15-year period (33.14%).

55. He said the general risk of dispatch down for network reasons should be accounted for in the tenant's share of the divisible balance. He stated that the Grid25 stratagem would have informed the hypothetical tenant not only that there would be increased disruption to the transmission network for a period of time but also that following completion of the ATRs the network would be more secure and the risk factors would abate as there would be less constraint.

56. Mr. Hazel next addressed the importance of Athea's firm access certificate. He considered that the hypothetical tenant would be aware when negotiating an arm's length PPA that if Athea is dispatched down by the system operator, he would be eligible for compensation payments. He referred to an extract from a PPA made between unrelated parties in respect of a Kilkenny wind farm with a MEC of 4.6MW which provides for the payment by the supply company to the generating company of 85% of net constraint payments received provided the wind farm is continuously constrained down for a period in excess of 14 consecutive days from the dispatch instruction requiring the constraint. He also referred to another PPA between a different generating company and a different supply company of the 23rd February 2009 in respect of a wind farm in Wicklow containing an identical clause in respect of constraint payments. Based on these PPAs, he contended that constraint would not be a relevant consideration in the mind of the hypothetical tenant at the valuation date because he would receive constraint payments on foot of Athea's firm network access as recompense for loss of output.

57. In his Supplemental Précis he stated that the correct approach to the sinking fund is outlined in paragraphs 5.30 and 5.31 of the Guidance Note. The fund should be spread over the life of the asset, which he said in accounting terms is a period of 20 years. He said that the tenant is obliged not to provide the landlord with a better or more advanced item but to maintain the asset in its actual state and would not agree to pay the landlord more than what would be required to be paid on an annual basis. He said that it is a

commercial matter for the tenant to ensure that funds are available for 20 years and that it is not for a tenant to pay a heightened payment plan to the landlord over 15 years in circumstances where the hypothetical tenancy is viewed as continuous. He made provision in his valuation for a sinking fund for the purpose of renewals to effect repairs over the estimated life of the asset.. He referenced the first commercial wind farm in Ireland at Bellacorick in County Mayo which was constructed in 1992. The same turbines are in position, though significant maintenance is required. He also identified another non-REFIT wind farm in County Cavan which was 18 years in operation when the valuation list was published in September 2019 and which produced average revenues over a 3-year period of €67.58 per MWh (and incurred average annual operating costs of €25.21 per MWh). A non-REFIT wind farm in County Roscommon which was 20 years in operation when the valuation list was published produced average revenues over a 3-year period of €66.40 per MWh and incurred average annual operating costs of €23.10. On the basis of these revenues Mr. Hazel contended that wind farms continue to achieve significant revenues after exiting REFIT and so there was no reason why a sinking fund should not be spread over a period of 20 years.

58. On the apportionment of the divisible balance, Mr. Hazel stated that the sliding scale proposed by Mr. Bagnall was reasonable given the greater capital investment in large scale wind farms which carry less risk than smaller wind farms. He said that the key factor is the landlord's capital investment and, in his view, a tenant's share of 20% is more than justified. He said that the evidence did not justify a tenant's share of 35% because the tenant would know that the proposed ATRs will make the transmission network more secure, that revenues are guaranteed and may increase annually by reference to the CPI over a 15-year period and that wind farm energy output has priority dispatch onto the grid.

59. For comparison purposes Mr. Hazel presented in his Supplementary Précis an R & E valuation applying an average annual output figure of 105,000 MWh, an adjusted market revenue of €78.29 per MWh to reflect the REFIT 1 reference price plus the balancing payment in 2012, agreed operating costs of €15.00 per MWh, an agreed figure for tenant's chattels of €12,500 per MW, a 35% tenant's share of the divisible balance which resulted in a valuation of €2,418,000. Doing a similar calculation but applying the Respondent's position on the appeal as to the sinking fund over 20 years and a tenant's share of 30%, he valued Athea at €2,919,000. On that basis, he contended that the list valuation of €2,431,000 is not excessive.

60. Under cross examination Mr. Hazel confirmed that he made an agreement with the Appellant on the day the appeal was first listed for hearing to the effect that the NAV of Athea should be €1,850,000. He said he conducted the negotiations with the benefit of Counsel's advice and that during those negotiations he was in telephone contact with the valuation manager who in turn was in contact with the Commissioner of Valuation. He accepted that the agreement was fair at the time it was made but later he considered it not to be fair in terms of the capacity factor that had been agreed because he was not aware that the 31% relied upon by Mr Norman was based on a 2017 Report.

61. He said the Respondent decided to resile from the agreement when Mr. Norman furnished a copy of the 2017 Report to him on the 16th of August 2019.

62. When challenged in cross examination of taking too narrow an approach to the capacity factor by focussing solely on a single estimated P50 probability of exceedance figure disregarding all other estimates, Mr. Hazell stated that the P50 output estimate in the Report of the 29th February 2012, being closest to the valuation date, was the most relevant estimate. He accepted the distinction between routine and recurring expenditure for repairs and the setting aside of a sinking fund for renewals but refused to accept that the sinking fund should be spread over any period other than the useful life of the asset. He did not agree that there is a recognised valuation practice of assuming 4, 5, 6 or 7 years as being the probable duration of a hypothetical tenancy. When asked if he could cite any authority for the proposition that the term of a hypothetical tenancy could extend beyond 10 years, he was unable to do so. When it was put to him that by estimating average capacity factors over periods of 15 and 20 years, he was conflating the sinking fund period with the duration of the hypothetical term, Mr. Hazel stated that the hypothetical tenancy is a letting from year to year and is of indefinite duration. As to the calculation of the divisible balance he confirmed that the Respondent was not arguing for it to be calculated as a percentage of the tenant's capital. He acknowledged that the hypothetical tenant would know of the pending transmission network constraint at the valuation date and would, as a result, anticipate a fall-off in energy output because of the infrastructural deficits. He did not accept that there was no real prospect of constraint payments arising but instead insisted that constraint would make no difference to the tenant as Athea had the benefit of firm access. When it was pointed out to him that the Lands Tribunal in *China Light & Power Co Ltd* which is cited in the Guidance Note had approved the use of hindsight to achieve greater accuracy without making any reference to the use of hindsight for confirming trends, Mr. Hazel relied on

the Tribunal's decision in *Westclare Wind Farm Ltd v Commissioner of Valuation VA17/5/107.*

THE RATING AUTHORITY'S EVIDENCE

63. Mr. Bagnall, a qualified chartered surveyor with 40 years valuation experience in all areas of property who specialises in rating assessments, made observations on the three disputed issues which he hoped would be of assistance to the Tribunal.

64. Mr Bagnall sought to amend page 4 of his Précis at paragraph 2 under the heading 'Comments' by the deletion of the words "on time" and the capacity factor and NAV figures in his R & E calculation on page 6 to 34.87% and €3,367,947, respectively.

65. Pointing to Mr. Hazel's evidence that a wind farm constructed over 20 years ago is still generating electricity and that the average SMP for the period from January 2008 to December 2014 was €60.02/ MWh, it was his view that it would be imprudent to adopt a 15 year sinking fund as there is still substantial income to be derived when a wind farm exits REFIT. Annual SMP revenue of €60.02 per MWh would produce a surplus of €45/MWh assuming standard operating costs of €15.00/MWh remain stagnant. Whilst the landlord might consider it desirable to recover all his capital expenditure in a 15-year period, Mr. Bagnall did not consider it reasonable for the landlord to have such an expectation in a competitive environment. In his experience and, in particular when valuing quarries, sinking funds were calculated over the life expectancy of the plant. He said that after 20 years the sinking fund would be in place and the extra money would be available for additional turbine maintenance.

66. By way of background to the issue of divisible of balance Mr. Bagnall referred to the economies of scale that can be achieved by wind farms with a greater number of turbines. He considered that smaller wind farms facing higher risk would expect a higher proportion of the divisible balance than the larger wind farms such as Athea and Tournafulla. He posited a sliding scale of divisible balances by reference to either the number of turbines or the total installed generating capacity (TIGC) of a wind farm as follows:

Windfarm		
Turbines	Landlord	Tenant
1-3	60%	40%
4-6	65%	35%
7-10	70%	30%
11-14	75%	25%
>15	80%	20%

Windfarm		
MWH	Landlord	Tenant
0-5	60%	40%
6-15	65%	35%
16-20	70%	30%
21-24	75%	25%
>25	80%	20%

67. Mr. Bagnall was firmly of the view that with the comfort of scale the hypothetical tenant of a large wind farm would accept a lower profit. Though the chance of a turbine failing to operate is slim, an operator is exposed if he has a single turbine whereas the consequences of single turbine failure on a wind farm having a TIGC of between 15 and 20MW is not as serious. He suggested a 60%:40% split of the divisible balance is reasonable for operators of a wind farm having between 1 and 3 turbines because they are exposed to greater risk. He said there has to be some reflection of the lower risk for larger scale windfarms in the divisible balance and suggested that a 20% tenant's share is an acceptable return for the tenant of a windfarm having either a TIGC of 25 MW or more or 15 or more turbines given the substantial income earned at €78.29/MWh to cover the operating expenses.

68. Mr. Bagnall sought to bolster this argument by reference to return on capital. He stated that turbines represent 70% of the capital costs of a wind farm project. In terms of investments costs based on €1,430,000/MW the landlord or developer would expect a percentage rental return on capital of 6.86% which was not significantly greater than the 6% capital return an investor could expect in 2012 from an investment in Grafton Street. In his view SSE would not have developed a large wind farm for a 3.76% return on capital (based on the landlord's share in Mr Norman's valuation) given that they could obtain a double return on the same investment anywhere else in the country. Mr. Bagnall advised that his 6% prime retail rental yield for 2012 (which was the lowest yield for that sector) was obtained from the Bi-monthly CBRE Research Report of September 2012 and that the rental yield for prime offices at that time was 7%. In his view an investor in a wind farm project would expect a minimum return on that investment of between 6% and 8%. He asserted that the tenant's share in the valuation of Athea (on the Appellant's valuation), being almost three times that of the tenant's

share in Knockastanna wind farm, underlines the economy of scale and indicates that a tenant's share of 20% of the divisible balance is appropriate.

69. He said it could be reasonably assumed that the hypothetical tenant, relying upon information available at the valuation date, would adopt the estimated capacity factor of 34.87% as representing the expected long-term mean (at the P50 exceedance level) of net energy output. He observed that the capacity factors of Knockastanna at 38%, Grouselodge at 34% and Limerick West at 39.50% were all higher. He agreed with Mr. Norman that transmission network constraint would have been known to the hypothetical tenant at the valuation date. His initial interpretation of the SSE letter of the 7th October 2019 was that constraint payments were made to SSE under the firm access agreement, but he later clarified that he was satisfied with Mr. Norman's evidence that no payments were made**.** He accepted that Airtricity Limited had not received any constraint payments for the constraint years but he remained of the view that it was reasonable to assess Athea's output figure over the 15-year period of REFIT. In cross-examination Mr. Bagnall accepted that he is not an expert on constraint payments and that his knowledge of such payments is limited. He later confirmed that he did not know if constraint payments were paid or not to SSE, but he was satisfied that a hypothetical tenant would have regard to the impending constraint. He submitted that a fair NAV for Athea is €3,367,947.

70. Mr. Bagnall accepted the proposition put to him that if the REFIT reference prices are increased by reference to CPI, operating costs should follow the inflation trend. He also accepted that it would be prudent and cautious for the tenant to set aside the sinking fund over a shorter period of 15 years but in a real market situation where more than one tenant is bidding for the tenancy and knows based on SMP prices that a windfarm can continue to generate good income during the 5 year gap after exiting REFIT, he believed the period of 15 years would be whittled and moved out to 20 years by stronger rental bids. He was not swayed otherwise when it was put to him that the quarterly SMP figures in the SEM dashboard which fluctuated between a high of €58 (final quarter 2014) and a low of €37 (3rd quarter in 2016) affirmed a prudential approach to the sinking fund period. Mr. Bagnall viewed the operation of a wind farm as a business decision and did not consider that there were unusual risks inherent in that decision. When asked he was unable to point to the application of a sliding scale for the apportionment of the divisible balance depending upon the scale of facilities. In that regard, Mr. Bagnall said he relied upon his own instinct as a valuer. Also, during cross-

examination, he was asked about the appropriateness of using investment yields in both retail and office development to determine how the divisible balance should be apportioned in the valuation of a wind farm. Mr. Bagnall explained that he was not utilising investments yields as a valuation methodology but was trying to show that in the real world a developer of a wind farm would want a better return than that equating to 65% landlord's share of the divisible balance.

LEGAL SUBMISSIONS

71. The Tribunal has read the written submissions filed on behalf of the Applicant, Respondent and the Rating Authority and will refer to the principal submissions and to certain authorities which appear to be of most assistance in resolving the issues in dispute.

The Appellant's Submissions

72. The Tribunal should give weight to the agreement concluded between the Appellant and the Respondent to compromise the appeal at a NAV of €1,850,000. It is entirely unsatisfactory that the Respondent should seek to resile from a solemn and formal settlement made with a ratepayer for the purpose of contending for a higher valuation based on a higher single year output figure estimated using a P50 parameter, which is significantly higher than the estimated P90 parameter as well as the actual output achieved by the wind farm after it was commissioned. A settlement considered and accepted by the Respondent has a gravitas that should not be disturbed except for serious reasons. The Agreement was not made on a "without prejudice" basis but it was understood by the parties that implementation was subject to approval by the Tribunal. If the Tribunal considers that the 29.56% reduced capacity factor agreed between the parties should be altered in light of Mr. Norman's acknowledgement that Mr. Hazel would not have agreed that capacity factor had he had sight of the 2017 Report, then that figure is the only one should be altered; all other variables should be honoured by the Respondent.

73. The Respondent, despite the express terms of the Agreement made in April 2019, persists in urging before the Tribunal that a sinking fund should be spread over 20 years rather than the 15 year period determined by the Tribunal in the *Hibernian* and *Limerick West* decisions.

74. As to the duration of the hypothetical term, Ryde on Rating at para. 158 states that "*The rent to be estimated is such a rent as might reasonably be expected for the hereditament if let from year to year and is therefore not such a rent as might be obtained for it if let for a term of years*. There are authorities all of which accept that the hypothetical term is of indefinite duration. Intuitively valuers take a term of several years, generally in single figures. There is no authority for assuming a hypothetical term of 10 or 15 years. Mr. Norman acknowledged that 10 years is outside the envelope and clarified that he had only adopted that period in the context of negotiating a settlement.

75. Mr. Norman's evidence is that provision is made for constraint payments to licensed supplier companies but by and large such provision makes no difference to revenue unless very peculiar circumstances occur in the market.

76. Athea's average annual capacity factor was estimated on the 20th February 2012 at 28.9% and nine days later at 31.3% at a P90 probability of exceedance. The actual annual average capacity factor output during the constraint years was 26.22% (78,892MWh). It was anticipated that the average annual capacity factor after the constraint years would be 31%. The transmission network constraint was known to the hypothetical tenant at the valuation date. In circumstances where actual operating data is known, equity and fairness requires the capacity factor to be based on that data in estimating the NAV. It would be unconscionable and unlawful to fix the Appellant with a rateable valuation based on a capacity factor far in excess of the actual capacity factor for the years 2014 to 2018. Counsel referred to *Bwllfa and Merthyr Dare Steam Collieries Ltd v Pontypridd Waterworks Co [1903] AC 426* ('*Bwllfa*') were it is stated by Lord Macnaghten

> *"In order to enable the arbitrator to come to a just and true construction it is his duty I think to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark."*

77. Aside from *Bwllfa*, *China Light & Power* is another authority, opened during the cross-examination of Mr. Hazel, which establishes there is no absolute rule against the use of hindsight and there are cases or aspects of cases where hindsight, either affirmatory of

a view apparent at the valuation date or in order to do equity, is used. In *Hibernian,* the Tribunal looked at information that had emerged after the valuation date.

78. Furthermore, in light of the fact that the Respondent agreed a capacity factor of 29.56%, he is estopped from contending for a higher capacity factor.

79. In *Hibernian, Limerick West* and *Knockawarriga*[2] *decisions* the Tribunal apportioned the divisible balance on a 65:35 percentage basis. No adequate or sufficient evidence has been adduced to warrant a different approach on this appeal. *Slieveragh* is to be distinguished from the facts of this appeal. The Tribunal adjusted the tenant's share in that appeal to 40% of the divisible balance because the tenant was entirely dependent upon the availability and operating reliability of a single turbine connected to a local distribution network operating at 10kV. That decision cannot be relied upon as a justification for saying that the divisible balance should be adjusted downwards for wind farms having a greater number of turbines.

<u>The Respondent's Submissions</u>

80. Other than the sinking fund, divisible balance and output figures, all other components of the R & E valuation are agreed between the parties.

81. Given the decisions in *Hibernian* and *Limerick West* the Tribunal is obliged to achieve equity and uniformity in the values fixed for wind farms in the same rating authority area so a ratepayer pays a fair share of the rates burden.

82. In *Hibernian,* the Tribunal clarified that the risks associated with the wind farm business have to be reflected in the tenant's share of the divisible balance. The REFIT scheme has 'derisked' the SEM for renewable electricity generators by providing them with a minimum fixed price for each unit of electricity exported to the grid over a 15 year period and EirGrid is required by the EU Renewable Energy Directive (2009/28/EC) to prioritise renewable energy generation. The only remaining risks are constraint and bad wind years. The purpose of the tenant's share is to reward the tenant for his industry and cover such risks as may happen in the future such as constraint.

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[2] VA15/5/65 of the 6th November 2019

83. The Appellant has adduced good documentary evidence to show that the network constraint was known prior to the valuation date and so it would have been a factor in the mind of the hypothetical tenant when negotiating the rent.

84. The hypothetical tenancy is a tenancy from year to year so is one of indefinite duration. It is not a fixed term of years. Mr. Norman was mistaken in his evidence when he said that it is assumed to be 3 to 5 years or 10 years. He used 10 years to calculate the average output to derive the revenue figure in his R & E valuation.

85. Para. 11.6 of the Tribunal's decision in *Limerick West* confirms that a property must be assumed to be vacant and to let and the Tribunal held in para. 11.13 thereof that it cannot be assumed that the hypothetical landlord and tenant would agree the rent by reference to the Appellant's actual PPA. The Appellant's PPA is personal to the Appellant and does not contain a constraint payment provision. The transmission network constraint would not affect the hypothetical tenant's rental bid because the evidence establishes that an arm's length PPAs contain provisions obliging the supplier to pay 85% of constraint payments to the generator. The hypothetical tenant would not experience loss of revenue because he would negotiate a PPA containing a similar constraint payment provision entitling him to 85% of those payments. Mr. Norman confirmed his awareness of such clauses.

86. Decision Paper CER/08/236 is about the calculation of the R-Factor in determining the PSO levy and does not govern constraint payments. It was published in 2008 and no evidence was adduced confirming that it continued to apply in 2012. It is a summary of a more detailed document which underpins the SEM Settlement and Trading Code. Page 15 of the Decision Paper clarifies that under market arrangements suppliers are compensated when acting as intermediaries for generators for constrained generation and this copper fastens or underpins the evidence which indicates that in arm's length transactions generators will negotiate a compensation clause entitling them to payment of 85% of any constraint payments. The letter of the 7th October 2019 adduced in evidence by Mr. Norman indicates that SSE obtained constraint payments during the constraint years and so the Tribunal should disregard Mr. Bagnall's evidence to the contrary. As Athea has firm access the hypothetical tenant would be eligible to receive constraint payments and the tenant would know that the investment planned to be made under the Grid25 Strategy would make the transmission network into which

Athea connects safe and secure with fewer incidents of constraint and dispatch down after the constraint years and thereby ameliorate the tenant's risks.

87. Mr Norman adopted a P90 capacity factor of 31% and applied it for 7 of the 10-year period in his calculation of the average annual output of Athea. Mr. Hazel adopted the P50 capacity factor of 34.87% prior to the valuation date. The Tribunal could not have a better parameter than P50 to work out what would have been agreed by the hypothetical landlord and tenant. With a P50 probability of capacity exceedance, there is a 50% chance that the estimated annual energy production will be reached or not be reached. There will be years when the output will equal or exceed that exceedance probability and years when it will below that exceedance value. There is no logical basis to hold that a landlord would accept the P90 parameter.

88. In the summary of outputs and load factors in Appendix 8 of Mr. Norman's Précis (N/A to public) SSE budgeted for a capacity factor of 31% (93,500 MWh) from year 2018/19 onwards. The data for the wind analysis Report of the 29 February 2012 would have been collated over the previous 12 months at least. Mr. Hazel's evidence is that only data available prior to the valuation date would be in the mind of the hypothetical tenant. In *Barking Rating Authority v Central Electricity Board [1940] 3 All ER 477* ('*Barking*') the use of post valuation accounts was held to be impermissible and para. 672 of Ryde on Rating states that accounts subsequent to the valuation date should be excluded as irrelevant.

89. The sinking fund ought properly to be applied over the working life of the asset which is 20 years. The proper approach to applying such a fund is set out in paragraphs 5.30 and 5.31 of the Guidance Note. Pursuant to section 48, the tenant's obligation is to repair the property so as to maintain it in its actual state and the spreading of costs over the period of the REFIT scheme is contrary to section 48.

90. The parties have agreed operating cost of €15.00 per MWh. In para. 10.3 of *Declan Rouse t/a Lackan Wind Energy Limited v Commissioner of Valuation VA17/5/786* the Tribunal set out correctly the principle that the hypothetical tenant is assumed to be a reasonably competent or efficient tenant who will expect to achieve a level of income, and to incur a level of expenditure, broadly representative of an average level of performance. The Tribunal is not taking the correct approach to operating costs. The Tribunal, the Respondent and every valuer estimating the reasonable operating costs of the

hypothetical tenant at the valuation date should arrive at the same figure if the exercise is done correctly. The Guidance Note says it is necessary to project receipts and expenditure as the rent is to be determined for the year commencing at the valuation date. The Respondent's approach is consistent with the Guidance Note as it used the data from the accounts of all the wind farms in the rating authority area to come to a reasonable estimate of operating costs.

91. The proper calculation of the divisible balance is described in the Guidance Note at paragraph 5.47. The tenant's share is intended to cover interest on tenant's capital, remuneration for industry and compensation for risk. On the basis that the landlord provides most of the capital and the tenant's capital contribution is virtually negligible, it is the landlord who bears most of the risk. A tenant's share of 10% would be more than justified. A tenant's share of 20% is more than reasonable. A landlord's share of 65% is too low as it imposes an inequitable burden on other rate payers in the rating authority area and is not in accordance with the Guidance Note. REFIT provides price certainty to generators for the very purpose of taking risk out of the market for new entrants and the priority dispatch rule ensures that energy produced from renewable resources achieves priority onto the grid ahead of fossil fuel generators are significant risk abatement factors.

92. The Agreement made with the Appellant is a failed agreement. During the negotiation it was flagged that the Tribunal practice is to notify the rating authority of the agreement before it will approve an agreement. The rating authority objected to the approval of the agreement so the Tribunal must determine the appeal on the evidence. Subsequent to the making of that agreement when asked about the basis for his post constraint years capacity factor of 31% Mr Norman furnished Mr. Hazel with the 2017 Report. Mr. Norman accepted in evidence that it was unlikely that Mr. Hazel would have agreed a capacity factor of 29.56% if he had had possession of that Report. The Tribunal should not place any weight on the agreement.

<u>The Rating Authority's Submissions</u>

93. The Rating Authority supported the Respondent's submissions subject to some additional comments. The settlement agreement was set at naught and no weight should be given to it otherwise the attendance of the Rating Authority for the purpose of being heard would be pointless. The intervention of the Rating Authority is warranted due to delay and the last minute 'drip-feed' of information and calculations by the Appellant. It

is entirely unsatisfactory that all relevant information was not provided to the Respondent at the first appeal stage.

94. The Appellant's valuer used accounts for the years 2015 to 2017 and SSE budget estimates as a basis to calculate an average capacity factor. Athea was a new venture at the valuation date and the Guidance Note provides that in the case of new ventures where previous accounts do not exist the business plan should be reviewed. The Appellant would have had a business plan and it is unsatisfactory that the information envisaged by the Guidance Note was not made available to the Tribunal.

95. In terms of the R & E calculation the revenue figure of €78.29 per MWh is accepted. Though the valuers for the Appellant and Respondent have agreed operating costs of €15.00 per MWh, Mr. Bagnall's evidence is that €15.00 per MWh may not be appropriate in respect of all wind farms due to economies of scale but if economies of scale are factored into the divisible balance on this appeal, the Rating Authority will be satisfied. Costs could be manipulated and so costs should be properly analysed for the purpose of determining the hypothetical rent.

96. It is reasonable to vary the divisible balance based on the size of the wind farms, either by reference to the TIGC or the number of turbines as outlined in Mr. Bagnall's spreadsheet. Economies of scale are relevant to the hypothetical tenant's rental bid. The Tribunal recognized the concept as regards the divisible balance in *Slievereagh*, and as regards operating costs in *West Clare* where at para.10.5 it is stated " … *the application of €15.00/MWh to all wind farms would mean that de minimis windfarms, which in many cases have proportionately larger operating costs, would be subsidizing large scale wind farms which may benefit from economies of scale. The cost advantages that certain enterprises obtain due to their scale of operation should not be disregarded. Each property has to be independently assessed and correctness must not be sacrificed to uniformity*." Obviously, the tenant's capital is very low and, though Mr. Norman has stressed the business risks for the tenant, the level of return the landlord would expect from his significant investment must also be considered. For larger investments, a higher return would be expected. The Tribunal is at large to determine this issue as no decision, as yet, has been issued in respect of the larger wind farms in the rating authority area.

97. As a principle of law, the Appellant's submissions that Athea's actual output after the valuation date should be used for calculating the NAV are incorrect.

98. The onus is on the Appellant to prove that the determination of the Respondent is incorrect. That onus has not been discharged.

99. The NAV has to be assessed by reference to data known at the valuation date. The Rating Authority considers a NAV of €3,367,947 to be fair.

FINDINGS AND CONCLUSIONS

100. In *Hibernian*, the Tribunal rejected the Respondent's approach to the estimation of the NAV of Grouselodge wind farm. The same approach was taken to estimating the NAVs of nine other wind farms in County Limerick, including Athea.

101. On this appeal the task is to estimate the rent which the hypothetical tenant might reasonably be expected to give for Athea at the 1st March 2012 subject to the obligations mentioned in section 48(3) of the Act as a tenant from year to year. This exercise requires the making of assumptions, contrary to the true facts, that Athea was vacant and to let at the valuation date by a willing landlord, and that such a letting would be achieved.

102. It is important to recall that this is the Appellant's appeal and it is brought against the NAV of €2,431,000 as determined by the valuation manager and stated on the valuation certificate. By virtue of s. 36(2)(b) of the Act, the Interested Party as the relevant rating authority, is entitled to be heard and to adduce evidence on the appeal. However, the Tribunal does have jurisdiction to entertain the Interested Party's arguments for a valuation higher than that on the list valuation.

103. It is common case that no market rental evidence is available for wind farms and the parties agree that the appropriate approach to estimating the NAV of Athea is to adopt the R & E method of valuation.

104. There was agreement on certain component elements of the R & E valuation including the revenue figure per MWh. The REFIT 1 reference price in 2012 was €68.078 per MWh and the balancing payment was €10.211 giving a total guaranteed REFIT price of €78.29. The Appellant's income is delimited by their PPA price, but private commercial arrangements made in the real world must be ignored. The hypothetical tenant would seek to negotiate a new PPA in 2012 to secure the best possible PPA price to reflect

market conditions. The Tribunal accepts that the agreed revenue per MWh figure of €78.29 per MWh reflects the potential earnings of Athea.

105. The Tribunal took a point of its own motion about the adoption of operating costs of €15.00 per MWh having raised it with the parties in the early course of the appeal hearing to give them the opportunity to comment upon it. Mr Norman gave evidence that he adopted that figure because he said it had been approved by the Tribunal in *Limerick West*. Mr Hazel adopted it because it was derived from an analysis of the accounts of all the wind farms in Limerick. In *Limerick West,* the Tribunal was informed by Mr. Norman, who was the appellant's expert valuer in that appeal, that the operating costs he assessed from the accounts of Rathcahill wind farm were just above €15.00 per MWh. On this appeal the accounts indicate that the average annual operating costs for the first three years of operations at Athea (i.e. during the constraint years) was €15.59 per MWh. By deducting community fund expenses, such expenditure not being an allowable item of expenditure under s.48(3) of the Act as it is not expenditure incurred to maintain the property in its actual state, the average annual operating costs fall below €15.00 per MWh, For that reason and for no other reason the Tribunal is persuaded by a fine margin that the figure of €15.00 per MWh is tenable by reference to the Appellant's accounts and accordingly approves a projected expenditure figure of €15.00 per MWh.

106. It is not clear what led Mr Hazel to make the incorrect assumption that the Tribunal had approved the Respondent's approach to assessing operating costs based on the average operating costs of ten wind farms. The Tribunal has consistently held that approach to be inconsistent with the Guidance Note and contrary to the R & E method of valuation and in that regard the Tribunal's findings have been affirmed by both the High Court and the Court of Appeal in *Hibernian.*

107. The first disputed issue concerns Athea's capacity factor. Before committing to a tenancy and a particular rent the hypothetical tenant would, in the Tribunal's view, want to be as well-informed as possible about the possible levels of output and the factors affecting it, especially as a generator's income is entirely dependent upon overall output.

108. It is permissible to have regard to post valuation date accounts where a future event likely to impact the rental value of a property was known at the valuation date. The use of such accounts, however, requires evidence not only that the anticipated future event was known at the valuation date but also evidence to quantify or measure the impact of

that event on the rental value of the property. It is common case that the ATRs on the transmission line were anticipated at the valuation date and so would be known to the hypothetical parties.

109. The parties had sharply differing views on the figure to be adopted in the R & E valuation for the annual net energy output of Athea. Mr. Norman took a pragmatic approach which involved consideration of the Appellant's accounts post the valuation date because the impending network constraint would have been in the mind of the hypothetical tenant at the valuation date**.** Mr. Hazel was of the contrary view that anything occurring after the valuation date had to be disregarded relying upon the Guidance Note and the Court of Appeal decision in *Barking*. He also paid no regard to the fact that the output of Athea was constrained for three years because he said Athea has firm access to the grid.

110. Mr Norman favoured a combined approach involving (i) the application of the hindsight principle to ascertain Athea's actual output during the constraint years from the Appellant's trading accounts and (ii) the adoption of the predicted capacity factor of 31% as representing Athea's unconstrained output. Assuming a probable hypothetical term of 10 years, he derived an average output of 88,964MWh (in the manner set out in paragraphs 33 and 34 above) which equates to a capacity factor of 29.57%.

111. In the Tribunal's view Mr Norman was correct to evaluate the impact of the ATRs on Athea's output during the constraint years on a real, as opposed, to a fictional basis. As regards the Respondent's reliance on paragraph 5.11 of the Guidance Note, Athea was not simply a new venture without accounts; it was a new wind farm venture connected to a distribution network that was about to undergo major ATRS which necessitated the taking of transmission lines out of service for lengthy periods of time. While the final sentence of paragraph 5.11 of the Guidance Note acknowledges the use of hindsight "*as a means of confirming trends discernible at the AVD*" the use of hindsight is also permissible to show the working of a factor in the mind of a hypothetical tenant at the valuation date as confirmed in Ryde on Rating at Section E, para. 672:

> *"A proposal to alter the valuation list may give rise to protracted proceedings on appeal and may be made years after the material date for a valuation on tone of the list, and the question arises whether accounts becoming available after the material date but before the hearing can be taken into account. The practice for many years was to base the valuation on the last accounts available, but to admit*

in evidence both before assessment committees and quarter sessions the latest available accounts. Where these accounts merely illustrated the working of factors in existence at the material date, the practice could be supported; but it could not extend to the admission of accounts showing the working of a factor which would not have been in the mind of any reasonable hypothetical tenant at the date of the proposal, or, it is submitted, the date for valuations on tone of the list. It would appear, however, proper to reflect at some point in the valuation factors which either came into existence after the closing of the last account and before the material date or were only partially effective in that account."

112. The Tribunal does not consider the *Barking* decision to be of any assistance because it does not address the issue that is raised in this appeal. The Central Electricity Board was not in the same position as the Appellant as that it did not seek to admit into evidence any accounts after the valuation date and furthermore, the right to have regard to post valuation date accounts to illustrate the financial effect of an event anticipated at the valuation date on the value of a property was not in issue in that case.

113. Indeed, in the Tribunal's view, the application of the hindsight principle to show the financial effect of an anticipated future event would have justified the assessment of the unconstrained output of Athea based on the Appellant's accounts after the ATRs were completed. The actual output figure of Athea at the Appellant's financial year end for 2018/19 was 73,800MWh (capacity factor 29%) below the 31% capacity factor projected in the 2017 Report. No output figures were produced in evidence for the following financial year.

114. The fixing of a relevant period for calculating loss of output (and consequentially lost revenue) is not an exercise which can be done with any great mathematical precision. The Tribunal is satisfied that Mr. Norman approached the assessment of output, as outlined above in paragraphs 33 and 34, in a reasonable and equitable manner. In calculating the constrained output of Athea he used output figures that are entirely objective and based on empirical evidence in order to estimate an annually representative output figure. As to the unconstrained output, he adopted a capacity factor of 31%. It is a reasonably conservative best estimate in that it avoids overstatement.

115. The Tribunal does not accept that by calculating Athea's output over a 10 year period, Mr Norman was contending for a hypothetical term of 10 years. The common position of all the parties is that the hypothetical tenancy is one of indefinite duration. It could be terminated on giving six months' notice to quit but it has a reasonable prospect of continuance.[3] Mr Norman could have taken 5, 6, 7, 8 or 9 years but, if he had done so, the resulting output figure would have been less than 88,964MWhs which in his view and, indeed the Tribunal's, would not have produced an annually representative output figure. For the sole purpose of estimating the annual output figure Mr Norman adopted a probable period of 10 years. He considered there to be no justification or authority for assuming a hypothetical tenancy of 15 or 20 years' duration. Mr Norman's methodology seems to the Tribunal be a reasonable exercise of expert judgment which cannot be condemned as unreasonable. The Tribunal considers a one year tenancy of a wind farm to be unrealistic and a period in excess of 10 years too long given that the Act envisages the Respondent exercising his powers under Part 5 of the Act "*not less than 5 years and not more than 10 years*" after a valuation list is published and before the next subsequent valuation list is published in a rating authority area.

116. The actual annual average output of the first three years of Athea's operations was 78,892MWh; over the first four years it was 77,625 MWhs. Mr Hazel stated that he adopted an output figure of 105,000MWh. It is worth pointing out at this stage that all of the evidence given by Mr Hazel in respect of this output figure was irrelevant to the valuation of Athea because he relied upon the list value of Athea which was calculated by reference to the projected capacity factor of 32% as confirmed in Appendix 7 of his first Précis (N/A to the public). While Mr Hazel appended four valuations to his Supplemental Précis, two of which were based on a capacity factor of 34.87% (105,000MWh) the Tribunal was not asked to value Athea on the basis of any of those valuations.

117. The output figure of 105,000MWh was extracted from the summary Table in section 9 of the 2017 Report relating to EPE methodology, specifically, EPE v18 of 29 February 2012 which was not based on the as built turbine scenario (a fact which Mr Hazel acknowledged). Mr Hazel stated that this EPE v18 would have been available on the valuation date and would have informed and been critical to the hypothetical negotiations. Without knowing the precise methodology used, the data relied upon, the

[3] see *Reg. v South Staffordshire Waterworks Co. (1885) 16 QBD 359*

assumptions made or the basic analyses which formed part of the reasoning which lead to the conclusion that the long term P50 probability of exceedance energy yield would be 105,000 MWh, Mr Hazel said he was "*adopting*" a capacity factor of 34.87% which was the last P50 estimated output before the valuation date.

118. There was no explanation forthcoming for the difference between that P50 figure and the lower P50 of 96,900MWh estimated by the earlier EPE v16 v 8 of the 20th February 2012 and the Tribunal considers that this difference should, at the very least, have given Mr Hazel pause for thought. Based on Mr Hazel's projected output figure 105,000MWh the Appellant's turnover for the first four years of operation would have been on average €2 million higher than it actually was for each of those four years.

119. When cross-examining, Mr Hickey criticised Mr Hazel for relying upon this single P50 estimate. As the list valuation in not in fact based on a 34.87% capacity factor not much needs to be said about it but had it been used in valuing Athea the Tribunal would have determined that it is unsafe to place conclusive weight on this evidence one way or another. It is limited evidence. The EPEv18 wind analysis report was not put in evidence and no contemporary evidence was produced to the Tribunal as to what information lead to the significantly improved P50 output figure of 105,000MWh from the 96,990MWh P50 figure assessed in EPE v16 v 8 only nine days earlier. The evidence given by Mr Hazel was plainly not in the form of admissible expert evidence and there were limitations on its usefulness given that neither the EPE v18 Report or the earlier EPE v16v8 report were adduced in evidence.

120. The Tribunal is also cognisant of the fact that the 2017 Report was undertaken for the purpose of investigating the EPE methodology to reconcile the difference between the higher 110,100 MWh P50 figure ultimately assessed for the Athea project in the EPE v19 (dated 25 October 2013) and that assessed in the context of the 2017 Report which was 94,100 MWh. The Report concluded in para. 9.1 that the EPE deviated from current best practices for wind modelling and that "*Inaccuracies in forestry modelling are also likely to have made a significant contribution to the difference in energy*." It was also pointed out in para. 9.1 that EPE v19 was an update of an earlier GH EPE which made use of the wind analysis from GH EPE. Presumably all the EPEs in between GH EPE and EPEv19 (including EPEv18 of 29 February 2012) made use of the same wind analysis. The 2017 Report therefore calls into question the reliability of the P90 and P50 probability of exceedance figures in the updates subsequent to the GH EPE report.

121. The next point that the Respondent sought to make was that the hypothetical tenant would disregard network constraint because Athea has firm access. Firm access rights to the transmission network are essentially financial rights, giving a licensed supplier the right to receive financial compensation where a wind farm's output onto the grid is changed by the Transmission Operator due to a network transmission constraint. The Respondent pointed out that constraint payments are governed by the Single Market Electricity Trading and Settlement Code. The Code was not adduced in evidence. This Code was established pursuant to section 9BA(1) of the Electricity Regulation Act 1999 as amended and designated pursuant to the Electricity Regulation Act 1999 (Single Electricity Market) Regulations, 2007 (SI 406/2007). Before the establishment of the Integrated Single Electricity Market (I-SEM) in 2018, the Code set out the detailed rules and procedures for participating in the Single Market Electricity and such rules and procedure apply to "*the collection and distribution of payments for the compensation of a generator where one or more of its generators are subject to a transmission system constraint*"[4].

122. The Appellant argued that constraint payments are rare in respect of REFIT supported wind farms because market revenue plus constraint payments have to exceed REFIT payments for compensation to become payable. Mr. Stephen Gallagher, a director of SSE Airtricity Limited confirmed by letter of the 7th October 2019 that in PSO Years 2014/15, 15/16, 16/17 and 17/18 "*market revenue together with any constraint payments obtained by SSE in respect of Athea …. did not exceed the REFIT reference price multiplied by actual output. Therefore, any constraint payments obtained by SSE in respect of Athea ….. did not affect the ultimate income obtained by SSE Airtricity Ltd following end* of year reconciliation *by the market regulator."* The Respondent interprets this letter to mean that constraint payments were actually made. The Tribunal does not accept this submission. In the event constraints payments are payable, they are treated as market revenue and deducted from REFIT payments calculated by reference to Athea's actual output. Properly understood, if, unhappily expressed, Mr Gallagher's letter confirms that no constraint payments were actually made and Athea's income for those four years was based solely on the actual output of Athea. It is clear from that letter and, indeed Mr Norman's evidence, that the market regulator reconciles REFIT payments made to SSE in respect of Athea's actual output with market revenue for that same output plus constraint payments. If the reconciliation exercise confirms that the REFIT revenue

[4] S.1.406/2007 Electricity Regulation Act 1999 (Single Electricity Market) Regulations 2007, Regulation 4

exceeds market revenue plus constraint payments in the relevant PSO Year, then SSE does not receive constraint payments. So, when Mr Gallagher in his letter referred to "*constraint payments obtained*" what he was actually describing were notional constraint payments that did not become actual receipts of the business once the reconciliation exercise was completed.

123. The Tribunal, accordingly, accepting the evidence of Mr Norman and Mr Bagnall, is satisfied that the transmission network constraint would affect the hypothetical tenant's rental bid in respect of a REFIT supported wind farm and is further of the view that the position would be the same regardless of whether the PPA has a clause entitling the generator to receive 85% of any constraint payments made to the licensed supplier.

124. As to the duration of the sinking fund, the Court of Appeal in *Commissioner of Valuation v. Hibernian Wind Power Limited Ltd [2023] IECA 121* upheld the decision of the High Court 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.

125. There was disagreement between the valuers as to the tenant's share to be deducted from the divisible balance as to establish the landlord's share (i.e. the rent). Mr Norman applied a 35% tenant's share relying on the Tribunal's decisions in *Hibernian*, *Limerick West* and *Knockawarriga*. Mr Hazel relied on the tenant's share of 30% saying that it is the landlord who bears the greater risk as the tenant's capital contribution for operating the wind farm is low. Mr Bagnall used a tenant's share of 20% as he considered the divisible balance should be weighted towards the landlord who, he said, would want to maximise the return on his significant investment.

126. The Guidance Note says at para. 5.46

> "*The tenant's share may be regarded as the first call upon the divisible balance. This share has to 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*."

and at 5.47

> *".. Although the tenant's share may be regarded as a first charge on the divisible balance, the valuation must properly reflect the strengths and weaknesses of the hypothetical landlord and tenant, given their assumed willingness to reach agreement."*

127. In *Railway Assessment Authority v Southern Rail Company [1936] 1 All ER 266* Lord Hailsham, L.C. described the hypothetical tenant as follows:

> *"He is a person embarking upon a commercial undertaking in which he is to sink his capital, in which he takes all the risks of success or failure, and in which he has not merely to be compensated by receiving a reasonable interest upon the capital invested, but also to receive such a profit upon his venture as reasonably to compensate him for the risk which it involves and to induce him to embark upon its prosecution. How much that percentage ought to be is a question of fact which is for the Authority and not for your Lordship's House."*

128. Mr Bagnall's proposed a sliding scale for the apportionment of the divisible balance based on the number of turbines or the TIGC of a wind farm. The Tribunal does not consider it necessary to differentiate between wind farms according to size in order to apportion the divisible balance.

129. There are risks inherent in operating and maintaining a wind farm. Those risks 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 operate and manage the wind farm to generate that revenue in order to be able to cover the operating costs, the sinking fund and pay the rent. 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 risk for a REFIT wind farm is how much curtailment and constraint it will experience apart from other potential sources of energy loss.

130. 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. The valuers calculated the tenant's share as a percentage of the divisible balance and the Tribunal considers that to be the correct approach to estimating the tenant's share. How much the percentage ought to be is a question of fact to be decided by the Tribunal. The key issue is whether the tenant's share should be higher than the 20% proposed by the

Rating Authority or the 30% adopted by the Respondent to reflect the risks associated with the wind energy business

131. Mr Bagnall's apportionment of the divisible balance is not justified mathematically when the agreed revenue and operating costs figures per MWh are applied to the output to be adopted for Athea as determined by the Tribunal and the sinking fund and tenant chattels allowances, which produces a divisible balance of €3,336,032**.** If a tenant's share of 20% were subtracted from the divisible balance of €3,336,032 a return to the tenant of €667,206.40 would not provide a reasonable return that reflects risk, reward and remuneration. If a tenant's share of 30% were subtracted from the divisible balance the return to the tenant of €1,000,809.60 would seem too modest a level of return having regard to the risk factors and the responsibility assumed for the operation, management and administration of a 16 turbine wind farm.

132. The effort expended by the tenant in operating the wind farm and the risks associated with that business need to be reflected in a reasonable annual profit. The REFIT 1 Scheme undoubtedly helps the hypothetical tenant to manage the risks. In *Hibernian* and *Limerick West*, the Tribunal determined that the divisible balance should be apportioned as to tenant's share 35% and landlord's share 65%. The Tribunal is not persuaded to adjust the apportionment of the divisible balance away from the 35% as to the tenant's share and in the Tribunal's judgment, the tenant's share in the circumstances of this appeal should be 35% of the divisible balance**.**

133. The Tribunal turns finally to the agreement made between the Appellant and the Respondent to make some final observations. Parties are encouraged to compromise appeals wherever possible with a view to saving not only their own time and resources but also those of the Tribunal. A compromise reached on an appeal is considered by the Tribunal to be binding on the parties who made the agreement. The agreement made by the Appellant and the Respondent was not the product of any mistake. There was no suggestion that the Respondent was misled by the Appellant. There was no suggestion at all that the Appellant or its representatives had acted otherwise than in good faith. There was nothing in the agreement that the Respondent did not at the time intend to include and nothing was excluded from the agreement that the Respondent had at the time intended to include. But for the fact, that the Rating Authority notified the Tribunal that it wished to object to the agreement, the Tribunal would have determined the appeal in a manner that gave effect to the agreement.

134. The fact that the Rating Authority indicated that it wished to object to the agreement did not make the agreement a "*failed agreement*." It would have been wrong simply to have ignored the Rating Authority's objections and determined the appeal on foot of the parties' agreement without first hearing the Rating Authority's objections. In the Tribunal's view, what should have happened is that the Rating Authority should have filed a précis of evidence setting out their position in relation to the appeal and detailing their objections to the order that the Tribunal proposed to make on foot of the parties' agreement and then for the parties to respond to those objections.

135. The Tribunal does not attach any weight to the argument that the Respondent was entitled to resile from the agreement because Mr Hazel would not have agreed a "*29.56% reduced capacity factor*" had he had possession of the 2017 Report. The Respondent agreed that capacity factor without asking how it had been determined. When asked by Mr Hickey S.C., Mr Hazel readily confirmed that the agreement was fair. Furthermore, Mr Hazel did not in fact rely on any of the capacity factors stated in the Table on page 9 of the 2017 Report because he sought on behalf of the Respondent to have the list valuation affirmed by the Tribunal. The list value of €2,431,000 was determined by the Respondent on the 6th August 2015 and as previously mentioned, that valuation was based on a capacity factor of 32%.

136. The Tribunal's findings in respect of the component elements of Athea's R & E valuation endorse the R & E components that were agreed by the Appellant and Respondent in April 2019 save for that relating to the sinking fund. The Court of Appeal's decision in *Hibernian*, which is binding on the Tribunal, confirms that the sinking fund is to be estimated over a period of 20 years. But for that fact, the Tribunal would have upheld parties' agreement in its entirety as the Tribunal was not persuaded by the Rating Authority's argument regarding the apportionment of the divisible balance or that there is any lawful basis upon which it could increase the valuation of Athea to €3,367,947.

137. The Tribunal's valuation is set out on the attached Appendix (N/A to public) incorporating our conclusions on the issues raised by this appeal.

DETERMINATION

138. 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 €2,168,000.

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.