VA17/5/150

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

AN tACHTANNA LUACHÁLA, 2001
VALUATION ACT, 2001

GREENOGE WINDFARM LIMITED **APPELLANT**

AND

COMMISSIONER OF VALUATION **RESPONDENT**

In relation to the valuation of

Property No. 2180055, Windfarm, Kilbrannish Hill, Kilbrannish North Cranemore, Carlow, County Carlow.

B E F O R E

Carol O'Farrell - BL	**Chairperson**
Barry Smyth - FRICS, FSCSI, MCI Arb	**Deputy Chairperson**
Fergus Keogh MRICS MSCSI	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL ISSUED
ON THE 19th DAY OF JUNE 2023

1. THE APPEAL

1.1 By Notice of Appeal received on the 4th of October 2017 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV') of the above relevant Property was fixed in the sum of €414,000.

1.2 The Notice of Appeal contends that the valuation of the Property is excessive and inequitable. Briefly, the appeal raises issues on the Receipts and Expenditure valuation relating to the Property's capacity factor (which was not pursued), the apportionment of the divisible balance, the sinking fund calculation, the estimation of operating costs and whether wind

farms and conventional generating stations should be fairly weighed against each other to arrive at an appropriate value for the Property as they all feed into the Single Electricity Market (SEM). The point that the valuation of a sector of the power generation market in isolation could amount to a subsidy which would be contrary to Article 13 of the Renewables Directive was also abandoned at the hearing. The final ground of appeal contends that the schematic applied to valuation of wind farms should use an 'economy to scale model' as smaller wind farms tend to have higher fixed costs than larger ones.

1.3 At the appeal hearing the amount the Appellant considered ought to have been determined as being the valuation of the Property was revised upwards from the amount of €68,000 stated in the Notice of Appeal to €161,200.

2. THE HEARING

2.1 The Appeal proceeded by way of an oral hearing before the Valuation Tribunal sitting at the Morrison Hotel, Ormond Quay Lower, Dublin 1 on the 17th of November 2021. The Appellant was represented by Mr. David Halpin M.Sc. (Real Estate) BA. (Mod) of Eamonn Halpin & Co. Ltd. Mr. David Dodd BL instructed by the Chief State Solicitor represented the Respondent, and Mr. Adrian Power-Kelly FRICS FSCSI, ACI Arb, RICS Reg Val was called to give valuation evidence on behalf of the Respondent.

2.2 In accordance with the Rules of the Tribunal, the witnesses exchanged their respective précis of evidence in advance of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, following some minor amendments, adopted his Précis as his evidence-in-chief in addition to giving oral evidence.

2.3 The Tribunal delayed the issue of this Judgment to await the decision of the Court of Appeal on the appeal from the Judgment and Order of the High Court in *Commissioner of Valuation v Hibernian Wind Power Limited (2021) IEHC 49 ('Hibernian').*

3. THE PROPERTY AND ITS REVALUATION HISTORY

3.1 At the valuation date, the Property comprised 4 Nordex N60 turbines each having a capacity of 1.300kW. The wind farm is situated on Kilbrannish Hill in the townland of Kilbrannish

North in County Carlow. It lies approximately seven kilometres west of Bunclody in County Wexford.

3.2 The Property was re-valued as part of the revaluation of the Carlow County Council rating authority area. The valuation date is the 30th of October 2015.

3.3 On the 22nd of June 2017 a proposed valuation certificate issued to the Appellant under s. 24 of the Valuation Act 2001 (hereinafter "the 2001 Act") specifying a valuation of €414,000.

3.4 Following representations to the valuation manager seeking a reduction in the proposed valuation, the valuation of the Property remained unchanged, and a final valuation certificate issued on the 7th of September 2017.

3.5 The publication date for the valuation list was the 15th of September 2017.

4. THE RELEVANT LEGISLATIVE PROVISION

4.1 The Valuation Act 2001 was amended by the Valuation (Amendment) Act 2015. The amendment of any provisions of the 2001 Act relevant to the determination of this appeal came into effect on the 8th June 2015. All references hereinafter to a particular section of the Valuation Act 2001 ('the Act') refer to that section as amended, extended, modified or reenacted by the Valuation (Amendment) Act, 2015.

4.2 The net annual value of the Property is determined in accordance with the provisions of s. 48(1) of the Act which provides as follows:

> *The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.*

S.48(3) of the Act sets out the factors to be considered in calculating net annual value:

> "*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 be expected to let from year to year, on the assumption that the probable annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant."

4.3 Section 19 (5) of the Act provides

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

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

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

5. THE ISSUES

5.1 The disputed figures in the parties respective Receipts & Expenditure ('R & E') valuations concern:

i) The Income: whether the revenue figure of €57.39/MWh represents the income the hypothetical tenant would be capable of achieving at the Property.

ii) The Operating Costs: whether a hypothetical tenant would estimate operating costs of €18.50 per MWh based on the Appellant's actual accounts.

iii) The Sinking Fund: whether the sinking fund should be spread over 15 years or over the estimated useful life of the turbines i.e., 20 years.

iv) The Divisible Balance: whether the divisible balance should be apportioned on a 55:45 percentage basis or on a 65:35 percentage basis as to the landlord's and tenant's share, respectively.

6. UNDISPUTED FACTS

6.1 The Property is a windfarm situated on a remote hilltop location in the townland of Kilbranish North, County Carlow close to the Wexford border. It comprises four N60 Nordex turbines each having a rated capacity of 1.3MW and a hub height of 60 metres. The total installed generating capacity (TIGC) is 5.2 MW. The Property is the only wind farm on the rating list for the rating authority area of County Carlow.

6.2 The Property was commissioned in April 2005 and is not and never has been in receipt of the guaranteed minimum REFIT payments under a REFIT 15-year power purchase agreement ('PPA').

6.3 The Property was valued in the sum of €414,000 by the Respondent on the mistaken assumption that the Property was in receipt of REFIT support.

6.4 The Property participated in a state supported AER V1 project which sanctioned the construction of wind farms to the 31st of December 2005. The AER VI 2.55 PPA ('AER PPA') made with the Electricity Supply Board was restricted to half of the TIGC of the Property, that is 2.6 MW. That PPA expired by September 2013.

6.5 The Appellant entered into a separate PPA in respect of net electrical output of the remaining generation capacity of 2.6 MW with Airtricity Energy Supply Limited on the 11th of December 2003 for a term not exceeding 15 years. A fixed rate of €50.90 per MWh was payable for the electricity purchased under the Airtricity PPA.

6.6 The Appellant entered another PPA Agreement with VAYU Limited on the 21st of August 2013 for a period of 36 months commencing from the termination date of the AER PPA. Under the Vayu PPA the Appellant is entitled to receive payment of the floor price (i.e., 0.05 cent per KWh/€50 per MWh) indexed annually in accordance with any increase in the Consumer Price Index for generated electricity). In the event the actual seller market price revenue in respect

of a billing period is higher than the floor price in respect of the same billing period, the Appellant is entitled to invoice Vayu for the actual seller market price revenue (i.e., 75% of the difference between market payments and the floor price).

6.7 At the valuation date the wholesale Single Electricity Market (SEM) was in place. The new wholesale electricity market for Ireland and Northern Ireland known as the Integrated Single Electricity Market (I-SEM) did not replace the SEM until the 1st of October 2018. However, its establishment for the purpose of integrating with European electricity markets was well flagged by the regulatory authorities from 2014.

6.8 On the 29th of May 2015 the Appellant entered a Maintenance and Service Agreement with Nordex Energy Ireland Limited to provide and perform service, maintenance and repair works in respect of the four turbines for an annual minimum fee per turbine subject to annual review for a period of 5 years.

6.9 The parties agreed that the NAV of the Property should be determined by the R & E method of valuation.

7. APPELLANT'S CASE

7.1 At the outset, Mr Halpin identified the issues arising on the appeal as concerning the figures to be adopted in the R & E valuation for revenue per megawatt hour, operating cost per MWh, the period of the sinking fund and in terms of the divisible balance whether the additional risk faced by an operator of an unsupported wind farm should be reflected in a higher percentage than the 35% applied by the Tribunal in the valuation of large-scale wind farms in the REFIT 1 scheme. Mr Halpin acknowledged that the gap between the parties in terms of the figures on those particular issues was not significant. He considered that the main issue concerned how the requirements s.19(5) of the Act were to be achieved so as to ensure that the Property is valued relative to the value of properties on the valuation list there being no other wind farm on the list. He pointed out that Mr Power-Kelly had not identified any property within the rating area to which the value of the Property as determined by the Respondent could be compared to satisfy the requirements of equity and uniformity.

7.2 Mr. Halpin considered that regard should be had to other types of power generating properties participating in the SEM such as hydro, distillate & oil, coal, peat, pumped storage, and gas power plants because the hypothetical tenant would know the benefits these other power plants enjoy in terms of profit margin, flexibility, ease of operation and management. There was no justification, he said, for not comparing a wind farm to a hydro station as both plants collect cost free energy from renewable resources. Essentially, Mr. Halpin argued that the cumulative effect of these factors would materially influence the hypothetical tenant to make a lower rental bid. The only other electricity generating property on the valuation list is Property No. 1207724. It is a single hydro turbine dating from the 1990's within a mill building dating from circa 1775 situated on the banks of the River Barrow at Clockristrick, Nurney in County Carlow. By letter of the 17th of November 2020 the Appellant's agents were advised that the valuation of Property No. 1207724 "*had regard to the comparative basis*" and that Property No. 1742140 Lot 16E Bellmount, Birr, Co. Offaly, valued at €25,000 per MW, was identified as the relevant comparator. Mr Halpin referred the Tribunal to an unsupported wind farm with an equivalent TIGC of 5.2 MW at Kilronan in County Roscommon which had been valued at €36,000 per MW.

7.3 Mr Halpin analysed the Appellant's accounts for the four-year period between the 1st of June 2013 and the 31st of May 2017. In terms of revenue, he disregarded the accounts from 1st of May 2012 to 30th of April 2013 as the wind farm was in receipt of income support under the AER PPA. Between October 2013 and October 2015, the Appellant derived revenue from the Airtricity PPA and the Vayu PPA. The price paid under the Airtricity PPA is fixed at €50.90 per MWh and under the Vayu PPA the price is €50 per MWh (the floor price) plus 75% of the difference between actual market payments and the floor price in any billing period. Mr Halpin pointed out that between 2014 and 2017 the floor price payable under the Vayu PPA did not exceed €60 per MWh.

7.4 The Property's capacity factor for the year ending 31st May 2014 was 37.65%, 38.37% for year ending 31st May 2015, 41.37% for year ending 31st May 2016 and 38.1% for year ending 31st May 2017, which gave a four-year average capacity factor of 38.89%. The breakdown of the Appellant's annual output and revenue figures under the Airtricity PPA and the Vayu PPA over that four year period were handed in during the course of the hearing without objection. For the purpose of his valuation, Mr Halpin adopted the four year (2014-2017) average net energy output of 17,730 MW (38.89%) and for the same period average revenue of €57.39 per MWh.

7.5 As to operating costs, Mr. Halpin observed that the Respondent's approach to operating costs was to adopt a figure of €15 per MWh regardless of the wind farm's actual operating costs as disclosed by the Appellant's accounts. Based on his analysis of those accounts for 2014 to 2017 the operating costs fell within a range of €17.16 to €20.29 per MWh. He derived an average of €18.50 per MWh pointing out that at the valuation date the wind farm had been operational for 10 years. He said that estimated operating costs would need to reflect the declining functionality of the turbines.

7.6 As to the sinking fund allowance, Mr. Halpin did not accept that the sum of €1,000,000 per MW should be spread over 20 years. He was aware of the High Court's decision in *Hibernian Power Limited* (*Hibernia*') but as that decision was under appeal to the Court of Appeal, he was contending for the shorter period of 15 years as had been determined by the Tribunal in several appeals.

7.7 Mr. Halpin considered that the 65:35 percentage split of divisible balance applied by the Tribunal in the valuation of windfarms in the Renewable Energy Feed In Tariff scheme (REFIT') and adopted by the Respondent would represent an unattractive level of return as the hypothetical tenant would undertake a greater risk operating an unsupported wind farm. He identified those risks as the vagaries of wind power, fluctuating market prices, age and size of turbines, increased maintenance costs and the fact that the Property feeds into a 20 KV distribution line rather than the standard distribution network of 110KV. He apportioned the divisible balance on a 55:45 percentage basis to reflect the differences between the appeal Property and REFIT supported wind farms. He pointed out that the divisible balance was apportioned by the Tribunal on a 60:40 percentage basis in respect of a single turbine project in REFIT and in his view the operator of that single turbine would face substantially less risk than the operator of four older turbines with no REFIT support.

7.8 Mr Halpin observed that even though the Respondent had valued a significant number of 'out of support' wind farms in other counties and had devised a valuation scheme applying certain standard figures for revenue, operating costs, sinking fund, divisible balance, those figures were unknown and not disclosed by the Respondent.

7.9 Under cross-examination Mr. Halpin accepted that as the Property is presumed to be vacant and to let it would be necessary to estimate a PPA price that would be agreed between the hypothetical landlord and tenant at the valuation date and he further accepted that some weight could be attached to Vayu PPA price. While he agreed that the average income earned under the Vayu PPA in 2014 (€66.62 per MWh) and in 2015 (€68.54 per MWh) was higher than the revenue figure of €63 adopted by Mr Power-Kelly, he disagreed with Mr Power-Kelly's approach to the estimation of revenue because it was based on the average annual income of four non-REFIT wind farms reduced by 10% in circumstances where not only were the dates of those PPAs unknown save in respect of one wind farm, the terms of the those PPAs in respect of all four wind farms were not even known to the Respondent. In the absence of that critical information, he said it was impossible to make any valid assumptions concerning the revenues of those other wind farms.

7.10 When questioned about PN 1207724, Mr Halpin refused to accept that the value of a wind farm property could not be compared with that of a water turbine in circumstances where there is no other wind farm on the valuation list. He was particularly critical of the fact that the Respondent had applied the exact same rate per megawatt to PN 1207724 as was applied to PN 1742140 in County Offaly and queried why other generating stations are valued purely on a gross megawatt basis without any apparent regard to the capacity factor of other types of power generation plants in Carlow or the operating costs, sinking fund provision and other matters considered in the valuation of wind farm properties.

8. RESPONDENTS CASE

8.1 Mr. Power-Kelly adopted his Précis of evidence and clarified that the Property's valuation of €414,000 had been calculated erroneously on the assumption that it was a REFIT supported wind farm.

8.2 He adopted a capacity factor of 39.29% based on the average capacity factor of the Property over the three-year period from 2013 to 2015.

8.3 He estimated the average revenue of the Property from both the Airtricity and Vayu PPAs over the 3-year period to year ending the 31st of March 2015 to be €63.05 per MWh. In 2015 the

average revenue was €59.88 per MWh. He decided to concentrate on the income derived from the Vayu PPA as he considered the hypothetical tenant would disregard the fixed price Airtricity PPA as it had been negotiated in 2003. He explained that the differences between his revenue and output figures for the financial years ending May 2014 and 2015 as presented in tabular format on page 34 of his Précis and those set out in the Table handed into the Tribunal by Mr. Halpin at the hearing were due to the fact that Mr Halpin had more accurate information relating to the net electrical output under the Airtricity PPA.

8.4 He estimated the average revenue under the Vayu PPA on an annual output of 9250 MWh for the financial year end in May 2015 at €69.95 and over the three-year period from 2013 to 2015 the average revenue was €75.63 per MWh. Based on the specific output figures provided by Mr Halpin at the hearing for 2014 (8733 MWh) and 2015 (8899 MWh) he said the average revenue under the Vayu PPA for those two years was €67.58 per MWh while the three-year average revenue under the Vayu PPA increased from €67.58 per MWh to €74.63 per MWh.

8.5. He said the mean system margin prices (SMP) for 2013 to 2015 reported in the SEM Committee Monitoring Report Q4 2015 showed a downward trend in prices by 13.65% in 2014 and by 10.09% in 2015 which he presumed would be known to the hypothetical tenant. Those prices were as follows:

2013	2014	2015
€65.63	€56.67	€50.95

8.6 He gave evidence of revenue figures from the accounts of four out of support wind farms as follows:

A. The accounts of a windfarm in Roscommon with a three-year PPA from December 2013 to December 2016 disclosed revenue figures per MWh as follows

2014	2015	2-year average
€73.64	€66.33	€69.98

The PPA price was the aggregate of three items being 100% of the system marginal price times generation in the trading period, 100% of the capacity payments demand charge times generation in the trading period and 25% of the imperfection charges applied in respect of each supplier unit in the trading period. The PPA stipulated that the wind farm operator should receive 100% of the SMP for each year. When asked Mr Power Kelly could not say whether this windfarm is a large scale or small-scale windfarm.

B The accounts of a large-scale windfarm in Roscommon disclosed revenue figures per MWh as follows:

2013	2014	2015	3-year average
€81.54	€79.49	€74.32	€78.45

C. The accounts of a small-scale windfarm in Leitrim disclosed the following revenue figures per MWh:

2013	2014	2015	3-year average
€81.25	€79.44	€73.24	€77.98

D The accounts of another small -scale windfarm in Leitrim disclosed the following revenue figures per MWh:

2013	2014	2015	3-year average
€68.05	€82.88	€64.49	€71.80

8.7 Mr Power Kelly confirmed that the Respondent had not been furnished with the PPAs of three of these out of support windfarms. Their revenues in 2015 ranged between €64.49 and €74.32. He considered €70 per MWh (being approximately the average 2015 revenue) would be a *'more than reasonable'* PPA price to adopt for the appeal Property but because of the drop in the SMP he discounted that figure by 10% to arrive at a revenue figure of €63 per MWh. In response to a question from the Tribunal Mr Power Kelly accepted that the revenue earned by the Appellant in 2013 and for 4 to 5 months in 2014 was not attributable to the Vayu PPA. He was unable to provide any information as to the TIGC of the four unsupported windfarms.

8.8 Mr Power-Kelly confirmed that he had valued PN 1207724 on behalf of the Respondent. The original hydro dated from the 1800's but was recommissioned in 1990. For approximately 30 years this property consisted of part of the ground floor of the original mill building dating back to the 1700's. It has a maximum output capacity of between 0.2 to 0.25 of a megawatt. He was informed by the occupier that 1,000 kilowatt hours of output was achieved in only one year which is equivalent to 0.1 of a megawatt and that in another year the hydro station had been shut down for six months because of breakdowns and flooding issues. Taking those factors into account the property was valued on the comparative basis at €850 per megawatt by reference to the 0.4 of a megawatt hydro generating station at Bellmount in Offaly. He did not accept that a hydro generating station could be compared to a wind farm due to their very different physical characteristics, and in the case of PN 1207724 its generating capacity was limited by the flow in the River Barrow. When the river flow is low the property cannot produce anything and when the flow is high, the property becomes flooded.

8.9 Mr Power-Kelly agreed that the Appellant's accounts disclosed operating costs of €17.12 in 2013, €18.30 in 2014 and €20.29 in 2015 giving an average of €18.57 per MWh. He said a figure of €15.00 per MWh had been agreed in the valuation of four windfarms but that the Tribunal had cautioned against using that figure in respect of all windfarms. He said that the average operating costs per MWh in four of the decided windfarm appeals valued as part of the 2017 Revaluation Programme ranged between €12.27 (Dunneill Wind Farm in Sligo) and €18.23 (Seltenaveeny Wind Farm in Roscommon) and that the average operating costs of those four wind farms was €14.28. In his Précis of evidence Mr Power-Kelly stated that the Respondent reserved its position on the costs. He compared the age of certain wind farms (Lackan, Dunneill and Knockawarriga) with the appeal Property which was 10 years in operation at the valuation date. He said Lacken Windfarm was the longest in operation at the publication date having been commissioned in 2007 and that the Tribunal had allowed operating costs of €12.92 per MWh and that the NAV had been determined at €61,391 per MWh. He also referred to the operating costs allowed by the Tribunal in respect of Knockawarriga, Seltenaveeny, and Dunneill wind farms. Confirming that the Appellant's accounts indicated operating costs of between €17.12 and €20.29 he said in his Précis that this "*reflects the particular aspect of the maintenance and service costs*". At the hearing he was uncertain as to how much of the costs were attributable to "*repairs or other factors*" and pointed to unexplained fluctuations in travel and electricity expenses.

8.10 On the issue of the apportionment of the divisible balance Mr Power Kelly confirmed that having regard to previous decisions of the Tribunal he had adopted a divisible balance of 65% 35% which he considered fair and reasonable as the nature of the tenant's risk was not as substantial given the capital investment made by the landlord and, whilst acknowledging that the hypothetical tenant assumes some risk in taking the letting, he considered the 10% allowance applied to reflect the downturn in the SMP removed an element of that risk.

8.11 Mr. Power-Kelly was critical of Mr. Halpin's approach to the sinking fund as it was his view that a sinking fund should be depreciated over the lifetime of the asset, which is 20 years.

8.12 When asked by Mr Halpin why he had not compared the subject property with other out of support wind farms in other counties, Mr Power-Kelly stated that he had estimated the revenue and costs from accounts available in respect of other wind farms. He accepted there was only one wind farm on the valuation list for County Carlow but that he nonetheless believed that he had achieved a correct valuation without the aid of any comparable property in the rating authority area having the benefit of numerous Tribunal decisions, which he subsequently agreed were concerned with REFIT supported windfarms.

8.13 In response to a question from the Tribunal as to what information would have been available to the hypothetical tenant in terms of operating costs at the valuation date, he said that the tenant would look at any accounts that might be available from the previous running of the actual operation of the subject and also at whatever information was available in respect of other wind farms, just as he had done. On further questioning he said that he could not be certain that the hypothetical tenant would have access to documents other than the accounts of the Property but that in his view it had to be assumed that the hypothetical tenant would be knowledgeable, would take advice, including professional advice, and in looking at the Property's accounts would consider whether he could be more efficient in terms of operating costs. He did not accept that wind farm costs increase as a wind farm ages pointing out that costs had been estimated at €12.29 for Lackan wind farm and €12.27 for Dunneill wind farm.

9. SUBMISSIONS

9.1 In summary Counsel on behalf of the Respondent advanced the following arguments:

i) The Tribunal had to be satisfied that the revenue figure of €63 per MWh adopted by Mr Power-Kelly is incorrect. Given that the Appellant's revenue in 2015 accounts was higher at €69, the revenue figure of €63 per MWH adopted by Mr Power-Kelly is a reasonable estimate.

ii) The Property is assumed vacant and to let and so any private agreement made by the Appellant such as a PPA is irrelevant when determining its value. The relevant valuation principles are set out in the Tribunal's decision in *Limerick West v Commissioner of Valuation.*

iii) S.19(5) of the Act as amended makes clear that information to which regard must be had is relevant market data and other relevant data available on or before the date of issue of the valuation certificate which in this instance was on the 7th of September 2017. Other relevant data could include data from the energy market such as SMPs, operating costs in the energy market and industry reports. Relevant means relevant to the valuation date. No financial accounts can be considered after the valuation date and this point was fully dealt with in the Tribunal's decision in *Coillte v Commissioner of Valuation*.

iv) Valuers have to assess what revenue and costs are likely to be in order to estimate the rent that would be agreed for the Property. The Respondent says these estimates must come from other accounts. These other accounts should not be excluded just because the hypothetical tenant would not have access to the confidential accounts of other windfarms. Rather, the valuers are entitled to look at the evidence available and form a view of what figures are reasonable.

v) S.19(5) requires the Respondent and the Tribunal to achieve correctness and equity and uniformity with regard to comparable properties in the rating authority area. Wind farms are to be compared with wind farms, but the subject is the only wind farm on the valuation list, and it is not comparable with the Milford water mill. Mr PowerKelly had regard to the previous decisions of the Tribunal so as to ensure the equitable distribution of the rates burden. Notwithstanding that the valuations determined by the Tribunal are not values on the list it would not be right to disregard

those decisions. Lackan is the most comparable windfarm because it is closest in age to the subject at the publication date. The operating costs of that wind farm were increased by the Tribunal from €10.80 to €12.92 per MWh. The operating costs in the accounts of Seltanaveeny Wind Farm, a 6-year-old windfarm, were higher than €10.80 per MWh. The adoption of operating costs of €15 per MWh is reasonable.

vi) The sinking fund ought properly to be applied over the working life of the asset which is 20 years and the proper approach to applying such a fund is set out in paragraphs 5.30 and 5.31 of 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').

vii) The proper calculation of the percentage of divisible balance is described in the Guidance Note. On the basis that the landlord provides most of the capital and the tenant's capital contribution is virtually negligible, the landlord bears the most risk. The apportionment of the divisible balance on a 80:20 percentage split would be justified so a 65:35 percentage split in favour of the landlord is more than reasonable. A 55:45 percentage split is not appropriate.

9.2 In his concluding remarks, Mr. Halpin conceded that PN 1207724 is an imperfect comparison, but it was the only power generating property on the list and as such the Tribunal should have regard to it as required by s.19 (5)(b) of the Act given that the Respondent did not identify any other possible comparable but instead sought to rely on wind farms in other rating authority areas which is otherwise than in accordance with the requirements of s. 19.

10. FINDINGS AND DISCUSSION

10.1. Normally the burden of proving that the valuation amount entered on the list is incorrect lies upon the appellant ratepayer. The valuation entered on the list for the Property is €414,000. However, on this appeal, the Respondent conceded that the Property was valued on the erroneous basis that it is a REFIT supported wind farm and proposed a revised NAV of €329,240. The onus of proof is therefore, on the Respondent to establish the correctness of this new determination.

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

10.3 The parties agree that the R & E method is the appropriate method by which to value the Property due to the absence of direct rental evidence or of any rental comparisons. The fundamental principles of the R & E method must be taken into account when considering how the method is to be applied. Those principles as to how this method of valuation should be applied are set out the Guidance Note having regard to rating practice and judicial precedent.

10.4 The R & E method involves using the actual occupier's accounts as evidence of what the hypothetical tenant would expect to earn and expend in the year commencing on the valuation date so that a judgment can be made as what proportion of the profits the hypothetical landlord and tenant would agree upon as rent. While what is to be rated is the property and not the income generated at the property, the profits disclosed by the accounts may serve to indicate the rent at which the property might reasonably be expected to let, from year to year. Lord Dunedin in *Port of London Authority v Assessment Committee of Orsett Union (1920) AC 273 at 295* described this method of valuation as a consideration of *"…what profit the Hypothetical Tenant could make out of the property not in order to rate that profit, but in order to find out what he was likely to give in order to have the opportunity of making that profit."*

10.5 As a general rule an R & E valuation is based upon annual accounts for three years prior to the valuation date, if available, to establish levels or trends (if any), in revenues or costs generated from the trading operating. However, s.19(5) allows data which has become available after the valuation date up until the date of the issue of the valuation certificate to be considered which in this case is the 7th September 2017.

10.6 As pointed out by the Tribunal in *Limerick West*, the hypothetical landlord and tenant are assumed to base their agreed rent on the income that the hypothetical tenant would be capable of achieving. The revenue achieved by the Appellant is a useful starting point but cannot be adopted uncritically as necessarily representing the income that the reasonably

efficient hypothetical tenant might be expected to achieve. The task is to estimate the revenue potential of the Property not the average revenue earned by the actual occupier. The Appellant has adduced the Appellant's accounts in evidence and the Tribunal accepts the correctness of those accounts no arguments having been advanced by the Respondent to challenge the basis upon which the Property is operated, or any item of expenditure incurred by the Appellant.

10.7 The accounts furnished disclose the income earned by the Appellant for the years 2012, 2013, 2014, 2015, 2016 and 2017. The Appellant's financial year end is the 31st of May. Mr. Halpin furnished the Tribunal with a Table detailing the total generation (MWh) output of the Property and total income earned for the 2014 to 2017 period. The Table furnished by Mr. Halpin gives an itemized breakdown of the output and income earned under the Airtricity PPA and the Vayu PPA. Mr. Halpin also furnished a Table showing the market prices of electricity between January 2012 and September 2019.

10.8 Logically, the first question to consider is the output. The Tribunal considers that a consistent and principled approach to the R & E valuation requires consideration of the available data for the three years prior to the issue of the valuation certificate and accordingly for the purpose of the R & E valuation adopts the average output of 17,918 MWh (average capacity factor of 39.30%).

10.9 The next question is whether the accounts represents the income the efficient hypothetical tenant might expect to achieve at the Property. Electricity prices can fluctuate greatly and frequently. The average SMP for the years 2012 to 2015 were €63, €66, €55 and €51 respectively. The Table on page 13 of Mr. Halpin's Précis shows that the average SMP fell as low as €43 in 2016 and that in the nine year period between 2012 and 2019 the highest average SMP of €66 occurred in 2013. Based on these SMP figures Mr Halpin contended that the hypothetical tenant would consider a figure between €50 and €60 per MWh depending on his risk appetite.

10.10 Mr Halpin adopted a figure of €57.39 per MWh based on the average revenue earned under the Airtricity and the Vayu PPAs between 2014 and 2017 while Mr Power Kelly adopted a higher figure of €63 per MWh based on the average revenues of four out of support wind farms reduced by 10%. The Tribunal does not accept the Appellant's revenue figure as representing

the income that the hypothetical tenant would expect to achieve at the Property for two reasons. A significant part of the income earned during that period is based on a price agreed in 2003 under the Airtricity PPA. As the Property is presumed to be vacant and to let at the valuation date a new PPA price would be negotiated and presumably on better terms This is borne out by the price agreed in August 2013 under the Vayu PPA which, as disclosed by the evidence, resulted in higher revenue being earned per MWh between 2014 and 2017 in respect of the net electrical output covered by that PPA. No evidence was adduced by the Appellant of any PPA negotiated between 2013 and 2015 other than the Vayu PPA. The best available evidence of what price might be agreed at the valuation date is the price payable under the Vayu PPA of August 2013.

10.11 In his analysis of revenue, Mr Power Kelly referred to one PPA for an out of support wind farm, the accounts of two small scale unsupported windfarm in Leitrim and two large scale unsupported wind farms in Roscommon but neither the PPA nor the accounts were made available to the Appellant or adduced in evidence before the Tribunal to support the figures he used. If PPAs or accounts are relied upon to justify the adoption of a particular revenue figure it is incumbent on the Respondent to put that information before the Tribunal.

10.12 Furthermore, in the Tribunal's view Mr Power-Kelly adopted an incorrect approach to the estimation of the revenue which is inconsistent with the R & E method of valuation. The High Court observed in *Commissioner of Valuation Hibernian Wind Power Limited* [2021] IEHC 49:

> *"The R & E method does not allow an averaging exercise of receipts and expenses of the sort carried out here, either by reference to accounts of wind farms in County Limerick or elsewhere."*

The High Court also pointed out that the hypothetical potential tenant would not have access to the confidential accounts of other wind farm operators and so would be "*unable to formulate a rental bid based on averages of receipts and expenditures of similar undertakings".* The High Court's decision that the Tribunal was correct in law in determining the NAV by reference to *Hibernian's* actual accounts was upheld by the Court of Appeal in its Judgment delivered on the 22nd May 2023[1].

[1] **[2023] IECA 121**

10.13 Information about historical fluctuations in the SMP is useful. The hypothetical tenant would know SMP fluctuations are inevitable. He would know that between 2013 and 2015 there was a 30% price increase from the SMP low point of €51 and a 23% price decline from its high point of €66 in 2013. The revenue disclosed by the Appellant's accounts are a useful benchmark and the Tribunal considers that the revenue figure for the R & E valuation of the Property should be estimated by reference to the actual income earned under the Vayu PPA. For the three year period prior to the 31st May 2017 the average income earned under the VAYU PPA was €62.68 per MWh. The SMP changes during that period clearly impacted the revenues earned by the Appellant and the taking of that three year average has the effect of smoothing out not only any fluctuations in energy production caused by weather but also price fluctuations caused by the SEM. The Tribunal considers it appropriate to have regard to the revenues and trends in the period up to May 2017 as the hypothetical tenant would have been aware at the valuation date of the downward trend in the SMP since 2013. Accordingly, the Tribunal finds that the average income earned during the three year period prior to the 31st May 2017 under the VAYU PPA of €62.68 per MWh reflects the appropriate level of receipts to be expected from a reasonably competent operator.

10.14 As to the second issue concerning the operating costs, Mr. Power-Kelly did not interrogate or challenge Mr. Halpin on his evidence regarding the costs disclosed in the Appellant's accounts. His only observation was that travel and electricity costs fluctuated. Mr. Power Kelly adopted a figure of €15.00 per MWh, the same figure applied in the valuation of ten Limerick wind farms, which is lower than the average annual costs in the Appellant's accounts for the threeyear period prior to the 31st of May 2017. He also sought to justify the figure of €15.00 per MWh on the basis that valuers in other appeals had agreed €15 per MWh and the operating costs determined by the Tribunal in other four wind farms appeals averaged at €14.28 per MWh. The Tribunal has been consistently of the view that it is contrary to valuation practice and principle when carrying out an R & E valuation to take the average operational costs per

MWh of several other windfarms in substitution for the operational costs figure derived from the appeal Property's accounts. That approach simply cannot be reconciled with the R & E method of valuation as this method consists in ascertaining the average actual profits of the occupier and the actual expenditure incurred to earn those profits in order to estimate the

rent a hypothetical tenant would give for the opportunity of making the ascertained profit in that particular property.

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

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

and what Collins J. further stated at para. 67

> *The Commissioner's approach does not, in truth, involve comparison with other operators. Instead, it involves devising an imaginary and notional "average" operator that does not correspond to any actual operator. The price notionally achieved by that notional operator will be higher or lower than that of actual windfarm operators; ditto its notional average operational costs. But that says nothing as to the price that the hypothetical operator of any specific windfarm would achieve or the costs that such an operator would incur. If windfarms were indeed entirely homogenous, there might be some validity in the Commissioner's approach. But they are not. Outputs differ. Costs*

differ. Those differences do not necessarily indicate any deviation from normally efficient operation and simply averaging the prices and costs of different operators does not establish a benchmark for efficient operation. That is, in my view, a fundamental flaw in the Commissioner's position

And later at para. 69

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

10.16 Mr. Halpin relied upon the operating costs in the Appellant's accounts (deducting for rating valuation purposes, directors' salary, rent, rates, finances charges and depreciation) as being indicative of what outgoings were necessary to operate the wind farm. Based on the average operating costs for the four-year period prior to the 31st of May 2016 he adopted €18.50 per MWh. The operating costs as disclosed by the accounts were reviewed by the Tribunal, and it is satisfied that they are a clear and fair indication of what is likely would be the probable average annual costs, one year with another, of the Property. For the same reasons given in respect of the estimation of output in paragraph 10.8 above, the Tribunal considers that the operating costs figure in the R & E valuation of the Property should be adjudged by reference to the Appellant's account for the three years prior to the issue of the valuation certificate. The average costs for that period is €18.58 per MWh which is marginally higher than the €18.50 figure proposed by Mr Halpin.

10.17 The reason for the adoption of a 15 year sinking fund period in *Hibernian* v *Commissioner of Valuation* does not apply on the facts of this appeal. Accordingly, the sinking fund is to be calculated over a period of 20 years. In any event, the Court of Appeal upholding the High Court's decision in *Commissioner of Valuation v. Hibernian Wind Power Limited Ltd [2023]*

IECA 121 has held that " *the terms of section 48(3) make it clear that the expense of replacing the turbines must be averaged out over the entirety of their 20 year design life*."

10.18 Both parties calculated the tenant's share as a percentage of the divisible balance and the Tribunal considers that to be the appropriate approach to estimating the tenant's share. As to the tenant's share Mr Halpin applied a 45% apportionment in his R & E calculation while Mr Power-Kelly adopted 35%. The Guidance Note makes clear that the tenant's share of the divisible balance must be

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

By whatever method the tenant's share is calculated, it is necessary to "*stand back and look*" at the result to decide whether the outcome of the calculation is reasonable for both parties.

10.19 Mr. Halpin argued for the allocation of 45% of the divisible balance as to the tenant's share on the basis that a 35% allocation is too low in view of the higher risks involved in operating a small ten year old out of support wind farm on a 20kV power distribution line. The Tribunal rejects the argument for the following reasons. There is no doubt that a 20kV power distribution line is inferior to that of a 110kV power distribution line. However, no evidence was adduced of a need to increase the reliability of the 20kV distribution system to which the Property is connected and nor was there any evidence of the number of disruptions or duration of outages (if any) experienced at the Property to suggest that it faces a greater risk of curtailment. While acknowledging that there are risks inherent in operating a wind farm the Tribunal considers that the allocation of 35% of the divisible balance as to the tenant's share is reasonable and finds that Mr Halpin has not established that the operation of a small scale 10 year old out of support wind farm carries more risk than a small or large scale REFIT supported windfarm. The apportionment of the tenant's share depends very much on the negotiating strength of the parties, and the risk to, and quantum of, the tenant's capital. The landlord is unlikely to agree a lower rent with the hypothetical tenant taking a sizeable proportion of the divisible balance in circumstances where the landlord has invested a substantial sum of money in the Property. In the Tribunal's view it would not be appropriate to make an upward adjustment to the tenant's share for the reasons advanced on behalf of

the Appellant. The tenant's share in the circumstances of this appeal should be 35% of the divisible balance.

10.20 Finally, Mr. Halpin suggested that the valuation produced under the R & E method should be considered at the '*stand back and look stage'* against the background of valuations relating to comparable properties on the valuation list. As there is no other wind farm on the list, he pointed to Property No. 1207724 as being the only other property generating electricity from natural resources. It is plainly open to a ratepayer to object that the valuation of his property is incorrect or unfair for being excessive because certain other properties which are similar to his property are assessed at a different rate. For comparator letting values comparables have to be true comparables as like must be compared with like. It is simply not possible to compare a single water mill turbine with a four turbine wind farm. They are so different in character and operation that they afford no reasonable basis for comparison. The only common feature is that both properties generate electricity. The essence of valuation by reference to settled valuations is that comparison is made with similar properties. The greater the similarity between properties in terms of nature, type, size, age, design and use the better the evidence. Property No. 1207724 is wholly dissimilar to a wind farm. The essential ingredients of comparability are simply absent. On that basis, the Tribunal does not consider Mr. Halpin's approach to be a useful valuation check and gives it no weight.

10.21 Mr Halpin is of course correct that good practice requires a valuer to stand back and look at the final figure to consider whether it correctly represents the annual rent for which the Property might year on year reasonably be expected to let at the valuation date on the assumption that the hypothetical tenant would be responsible for maintaining it in that state. It is difficult to achieve the important aim of maintaining relativity of value when no other wind farm property is on the list. The primary purpose of s.19(5) is to enshrine the principle that the valuation list should be correct insofar as is reasonably practicable. The Tribunal notes that as a result of its determination the NAV/MWh of the Property is €55,886 which falls within the range of NAV/MW values between €48,000 to €61,000 for wind farms having a

TIGC of between 4.6MW and 6.9MW which the Tribunal considers acceptable for wind farm properties.

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

11. DETERMINATION

Accordingly, the Tribunal holds that the Property's valuation on the list is incorrect. The appeal is allowed in part. The Tribunal decreases the net annual value of the Property as stated in the valuation certificate and on the valuation list to €290,500.

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.