VA17/5/932

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

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

BORD NA MÓNA RESOURCE RECOVERY LIMITED **APPELLANT**

AND

COMMISSIONER OF VALUATION **RESPONDENT**

In relation to the valuation of
Property No. 5005279, Mount Lucas Windfarm, 13A 36AB 57 69/2 Clonarrow or Riverlyons, Daingean, County Offaly.

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 3rd DAY OF JULY 2023

1. THE APPEAL

1.1 By Notice of Appeal received on the 12th 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 (hereinafter 'Mount Lucas') was fixed in the sum of €6,691,000.

1.2 The Notice of Appeal contends that the valuation of Mount Lucas is excessive.

1.3 The amount the Appellant considered ought to have been determined as being the valuation of Mount Lucas was revised upwards from the amount of €1,500,000 stated in the Notice of Appeal to €4,600,000 at the appeal hearing.

2. THE HEARING

2.1 The Appeal proceeded by way of an oral hearing before the Valuation Tribunal sitting at the Dublin Dispute Resolution Centre., Law library Building, Church Street Dublin 7 on the 26th of January 2022 and the 21st of February 2022. At the hearing the Appellant was represented by Mr. Owen Hickey SC instructed by Ms. Ariana Marano, inhouse Commercial Solicitor and Mr. Martin O'Donnell BA (Econ) FRICS FSCSI of CBRE was called to give valuation evidence on behalf of the Appellant. Mr. David Dodd BL (instructed by the Chief State Solicitor) represented the Respondent, and Mr. Liam Hazel MSCSI, MRICS,

MIPAV (CV) ACIArb. MSc, BSc, Dip. Acc & Fin 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.

2.3 At the request of the Tribunal on the 26th January 2022 the Appellant furnished an extract of the Appellant's Business Plan, an extract from the Maintenance Contract and information on the Appellant's Community Gain Scheme and the Respondent provided a copy of the Valuation Order in respect of the Offaly County Council Rating Authority Area together with some additional and updated tables in respect of projected revenue figures and operating costs.

3. THE PROPERTY AND ITS REVALUATION HISTORY

3.1 Mount Lucas is situated on 1,100 hectares (2,718 acres) of cutaway peatlands off the R400 Portarlington to Rochfortbridge Road approximately four kilometres southeast of Daingean and ten kilometres from Tullamore in County Offaly. The site is relatively flat with site elevation ranging between 76m and 80m above sea level. At the valuation date, Mount Lucas comprised 28 Siemens SWT-3.0-101 turbines each having a capacity of 3.00 MegaWatts (MW).

3.2 Mount Lucas was valued as part of the revaluation of the Offaly County Council rating authority area. The valuation date is the 30th of October 2015.

3.3 On the 3rd of March 2017 a valuation certificate was issued to the Appellant indicating a valuation at €6,691,000. Following representations in April 2017 seeking a reduction in the proposed valuation, the valuation remained unchanged, and a final valuation certificate issued on the 7th of September 2017 in the sum of €6,691,000.

3.4 The valuation list for the rating authority area of Offaly County Council was published on the 15th of September 2017 and the valuation became effective for rates purposes on the 31st October 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 re-enacted 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) 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) 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 expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant."*

4.3 S.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 Tribunal was informed that the disputed figures in the parties respective Receipts & Expenditure ('R & E') valuations concern:

i) Capacity Factor: the MWh Output to be adopted in respect of the Property for valuation purposes.
ii) Income: whether a revenue figure of €79.62MWh represents the income the hypothetical tenant would be capable of achieving at the Property.
iii) Sinking Fund: whether this fund should be spread over 15 years or over the estimated useful operational life of the turbines i.e., 20 years.

6. UNDISPUTED FACTS

6.1 Mount Lucas comprises 28 Siemens SWT-3.0-101 turbines with a hub height of 99.50 metres and has a total installed generating capacity (TIGC) of 84 MW.

6.2 The Property was commissioned on the 16th of August 2014. It produces electricity from renewable resources. It is a large scale onshore wind project connected directly to the electricity network and metered independently of any other electricity generating plant.

6.3 The Appellant is a generator accepted into the REFIT ('Renewable Energy Feed in Tariff') 2 support scheme

6.4 In 2013 a Single Electricity Market Power Purchase Agreement Participating Generator REFIT 2 ('PPA') was made between Mount Lucas Windfarm Limited and Mount Lucas Supply Company Limited. REFIT payments are made to Mount Lucas Supply Company Limited for the net electrical output of Mount Lucas purchased pursuant to the PPA, and that company pays the Appellant the contract price agreed in the PPA. The supplier is not entitled to a REFIT payment where the market payment is equal to or greater than the sum of the REFIT reference price plus balancing payment.

6.5 A PPA price must be at least equal to the REFIT 2 reference price for onshore wind. The REFIT reference price is adjusted by way of indexation annually by the annual increase, if any, in the consumer price index (CPI) in Ireland. A balancing payment of €9.90 MWh may be payable to a supplier in respect of eligible electricity exported to the grid. This payment is not subject to any increases in CPI. The full €9.90MWh is payable where the market payment is equal to or less than the REFIT 2 reference price. Where the market payment exceeds the reference price but is less than the total of the reference price plus €9.90, the balancing payment is €9.90 less the amount by which the market payment exceeds the REFIT 2 reference price.

6.6 Under Schedule B of the PPA the contract price is the sum of the REFIT 2 reference price of €66.35 (indexed annually in accordance with CPI) and the REFIT 2 Balancing Payment of €9.90 per MWh minus €5.00 MWh and the difference between 100% of the Trading Payments and Capacity payments and the REFIT 2 Reference Price plus the REFIT 2 Balancing or zero where such difference is less than zero. In 2015 the REFIT 2 reference price for a large scale wind farm was €69.72 per MWh.

6.7 Thirty two months of output data was available in respect of the wind farm operations prior to the issue of the valuation certificate on the 7th of September 2017. The Appellant's financial year end is the 31st of March.

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

7. APPELLANT'S CASE

7.1 Mr Martin O'Donnell is a Chartered Surveyor and a Fellow of the Royal Institution for Chartered Surveyors. He is the Head of Business Rates and Compulsory Purchase at CBRE and he specialises in rating valuations. He has given expert evidence to the Valuation Tribunal over many years.

7.2 Mr O'Donnell adopted his Précis of Evidence as his evidence in chief. He corrected a typographical error on page 5 thereof under the heading 'Hypothetical Tenant' so that the first sentence would read *"As I understand it there is no rental market for wind farms in Ireland"* and on page 8 under the heading 'Capacity Factor' he amended the figure of 239,277 in the capacity factor calculation to 239,377. On the second day of the hearing, he amended certain references to "P90 data" on page 7 of his Précis to read "P75 data" as he had been mistakenly misinformed that the P90 probability of exceedance had been adopted by the Appellant to deciding on their investment in Mount Lucas whereas in fact in terms of output the probability of exceedance of P75 was adopted for the business case.

7.3 He considered it reasonable to adopt 214,000 per MWh as the annual export power output in valuing Mount Lucas. He said the hypothetical tenant would have the monthly electrical generation figures for the period August 2014 to October 2015 and the Wind Resource Assessment Report of 1st October 2012 ('the Assessment Report') which assessed the wind energy yield potential of the site. The output for the 12-month period prior to the valuation date was 214,782 per MWh. He was of the view that the hypothetical tenant would also consider the findings in the Assessment Report which looked at seven different wind turbine generator scenarios. In terms of Layout A (the scenario ultimately adopted when Mount Lucas was developed) the actual output of 214,782 per MWh was in line with the P90 five-year energy yield of 214,000.

7.4 Mr O'Donnell also analysed the actual output achieved at the Property over the first six years of its commercial operations to demonstrate that the actual annual export output figures were not in line with P50 probability of exceedance output figures and were lower than 214,000 per MWh in each year other than at financial year end 31st of March 2016 when the output achieved was 239,257 per MWh. Based on the actual output figures, the capacity factor of Mount Lucas ranged between 26.24% and 32.15% over those first six years of operation. He said that the energy yield data from November 2015 to March 2021 post the valuation date supported a trend. He stressed that his opinion on the capacity factor was primarily based on the actual power output of Mount Lucas prior to the valuation date which he said is supported by post valuation date output data and assists the process of estimating a fair and correct valuation.

7.5 On the first day of the hearing his evidence was that P90 data was used by Bord na Móna, the New Economy and Recovery Authority (NewERA), and the Department of Public Expenditure and Reform for approving wind farm developments as well as by financial institutions who finance such developments. At the resumed hearing, he amended certain references to "P90 data" on page 7 of his Précis to read "P75 data" as he had been mistakenly misinformed that the P90 probability of exceedance had been adopted by the Appellant when deciding on their investment in Mount Lucas whereas in fact in terms of output the probability of exceedance of P75 was adopted for the business case. He re-iterated that his evidence that financial institutions base their decisions on wind farm investments on P90 probability of exceedance remained unchanged and that the amendments advised did not alter his opinion that the hypothetical tenant (as distinct from the Appellant) and the hypothetical landlord would agree to a tenancy based on the P90 exceedance probability. He further re-iterated that his opinion was informed by the precedent wind farm determinations of the Valuation Tribunal and the primary evidence

available to the hypothetical tenant of the actual power output generated up to the 31st of October 2015.

7.6 As to the revenue figure, Mr O'Donnell said that in 2015 the reference price under the Renewable Energy Feed-In-Tariff (REFIT 2) Scheme was €69.72 for large scale wind farms and the Balancing Payment was €9.90 MWh. On that basis he considered that the hypothetical landlord and tenant would negotiate a PPA price of €79.62 MWh. He said the revenue figure adopted in his valuation was close to one of the two revenue figures propounded by Mr Hazel (i.e., €80.42 per MWh which on the second day of the hearing was amended to €80.07 per MWh) and he also stated that €79.62 per MWh was applied by the Tribunal in estimating the NAV of the Sliabh Bawn wind farm in County Roscommon [*VA17/5/1008 Coillte Teoranta v Commissioner of Valuation ('Coillte'*)].

7.7 Under a scheme of valuation for two wind farms in County Offaly (Mount Lucas and Leabeg), both of which had been appealed to the Valuation Tribunal, operating costs of €15.00 per MWh has been applied by the Respondent. For that reason Mr O'Donnell accepted that figure on the basis that it was reasonable to apply the same level of costs to both wind farms. He pointed out €15.00 per MWh was applied by the Valuation Tribunal in *Coillte* and that the operating costs applied by the Valuation Tribunal in the valuation of ten wind farms averaged at €14.88 per MWh.

7.8 For the purpose of his valuation Mr O'Donnell estimated the sinking fund figure over a period of 15 years and adopted the divisible balance at 65% as to landlord's share and 35% as to tenant's share in the same manner as the Valuation Tribunal had done in the majority of the decided wind farm appeals. Based on a power output of 214,000 per MWh, a PPA price of €79.62 per MWH, operating costs of €15 per MWh, a sinking fund over 15 years and a tenants share of 35% of the divisible balance, he proposed a NAV of €4,600,000.

7.9 Under cross-examination Mr O'Donnell accepted that in assessing the wind farm's output at 214,000MWh, he had omitted the output for the months of August, September and October in 2014. He explained that he had taken the 12-month period immediately prior to the valuation date because the wind farm was producing output at a constant level during that period whereas the output over the first 12-month period of operations would be lower due to the very low output generated in September 2014. He accepted that the PPA and REFIT 2 allows for CPI inflation indexation and that an inflation rate of 2% had been built into the Appellant's Financial Model over years one to fifteen. In terms of the Financial Model, he accepted that if output was assessed on a P50 probability of exceedance basis over a ten-year period the average operating costs per MWh would be €11.17 over 10 years, €12.23 over 15 years and €12.75 over 20 years whereas if output was assessed on his P90 output figure of 214,000 per MWH average operating costs per MWh for those same periods would be €12.84, €14.03 and €14.68 respectively. He accepted that not all licensed suppliers who receive REFIT 2 payments under the terms of their PPAs pay generators 100% of the balancing payment and that the apportionment of the balancing payment by the Respondent at 72.08% rather than 77% would benefit the Appellant in terms of valuation for rating purposes. While confirming that the grant of planning permission does not include a condition requiring community fund payments

and that a wind farm can be operated without any such payments being made, he said the Appellant had represented on the planning application that such payments would be made and he considered that any hypothetical tenant would be well aware that wind farm developments are usually required to make community fund payments on an annual basis and would factor in such payments into the operating costs.

7.10 In response to questions from the Tribunal Mr O'Donnell confirmed that Bord na Móna had put in place a 15 year 'Supplier Light'[1] arrangement for the operation and management of Mount Lucas and he accepted that a percentage of the balancing payment would normally be retained by the supplier. He said that he had overlooked to take that factor into account in estimating his revenue figure of €79.62. When asked if he had valued Mount Lucas on an R & E basis, he said he used his shortened method which is in line with how he understood wind farms had been assessed by the Respondent. He said he was aware that the Joint Rating Forum Guidance Note – The Receipt and Expenditure Method of Valuation for Non-Domestic Rating ('the Guidance Note) requires a valuer to interrogate the accounts of the particular property to form a view as to what the operating costs should be. He confirmed that the Appellant's accounts to the 31st of March 2016 disclose operating costs of €15.25 per MWh and were €14.93 per MWh in 2017 and €14.09 per MWh in 2018 exceeding those projected in the Financial Model. He pointed out that the figure projected for rates in that Model was €7,000 per turbine whereas the reality is that they are being assessed at €20,000 per turbine. He accepted that maintenance contract wind farm costs generally escalate after a certain period of years, but he was not in a position to give evidence of the actual maintenance costs for Mount Lucas other than to say that he understood the maintenance costs to be on price a per turbine basis and though one might expect there to be economies of scale savings he said the Appellant had additional costs by virtue of being a big operator who experienced the same difficulties as everybody else in the wind energy market, if not more, by virtue of being a semi-state body. He re-iterated that he adopted €15.00 per MWh because that figure was applied by the Respondent in the valuation to Leabeg wind farm and when questioned about Leabeg he accepted that he knew nothing about the accounts of that wind farm and was unaware that it is a small scale (*de minimis*) 4.6 MW wind farm with only two wind turbines.

8. RESPONDENT'S CASE

8.1 Mr Hazell adopted his Précis of Evidence as his evidence in chief. He did not break down the calculation of the Property's valuation of €6,691,000 as stated in the valuation certificate. He clarified that due to the absence of any trading information concerning the Mount Lucas wind farm prior to the issue of the final valuation certificate on the 17th September 2017, the capacity factor had been estimated at 38.00%.

[1] A Supplier-lite arrangement essentially involves a developer setting up a special purpose supply company and a separate renewable energy generation company. A REFIT PPA is then put in place between supply company and a separate renewable energy generation company.

8.2 On the 26th January 2022 the Appellant provided information to the Respondent which *inter alia* consisted of the Appellant's audited accounts for 2016 to 2018, the audited accounts of the supply company for the same period, output information for 2015 to 2021, an Energy Production Assessment Report and a Financial Model prepared on the 4th October 2012.

8.3 In his Précis he stated that the information available to the hypothetical tenant would comprise output data from the commissioning date (16th August 2014) to the valuation date (30th October 2015), the Assessment Report and the Financial Model of 4th October 2012 in which the P50 probability of exceedance capacity factor of 34.18% was adopted as a key project assumption. Following the provision of output and other relevant information by the Appellant he noted that the actual capacity factor of Mount Lucas on the 31st of March 2015 (0.62% of a year) was 33.20% and was lower in the following financial year at 32.49%. The capacity factor assessed from the commissioning date to the valuation date was 28.57% whereas the five year and ten year P50 probability of exceedance capacity factor was estimated in the Assessment Report at 34.60%. For valuation purposes on the appeal, he adopted the Financial Model capacity factor of 34.18% because he said it took account not only of the losses considered in the Assessment Report but also a 98.4% transmission loss adjustment factor (energy lost as electricity is transmitted across the transmission or distribution network).

8.4 Mr. Hazel stressed that probability of exceedance as a measure of occurrence is important. He accepted that P90 exceedance probability energy yield predictions were relied upon by banks in assessing the financial risk of investing in wind farm projects, but he did not consider that to be at all appropriate for the purpose of valuing the estimated annual production of a wind farm in accordance with s.48 of the Act. In his view, the P50 exceedance probability figure is more appropriate because it is at the centre of the bell curve and has the highest probability of occurrence. In his view the hypothetical landlord would not accept a rental bid from a tenant based on energy yields predicted on a P90 probability of exceedance value because over a 10-year period, the capacity factor would exceed the P90 value in nine of those 10 years whereas taking the P50 value over 10 years, the capacity factor would be exceeded in five years and would not be exceeded in the other 5 years.

8.5 Mr Hazel gave evidence that the REFIT 2 scheme opened in March 2012 and under the terms of that scheme licensed suppliers in 2015 were guaranteed payment of a reference price at €69.72 per MWh together with a balancing payment in the fixed sum of €9.90 for large scale wind farms. He characterised the Appellant's PPA as a related party transaction. He initially adopted a revenue figure of €80.40 per MWh which was amended on the second hearing day to €80.07 as it represents the 2015 REFIT reference price of €69.72 plus 72% of the balancing payment (i.e., €7.13) increased by 1% for a period of 10 years to take account of inflation. He said he reduced the projected annual inflation of 2% envisaged in the Financial Model over the first 15 year period by 50% because the Central Bank of Ireland had forecast 0.3% inflation in 2015 and the hypothetical tenant would know an annual inflation rate of 2% inflation to be incorrect. He said contract prices agreed under PPAs negotiated for the REFIT 2 scheme generally comprised the relevant REFIT 2 reference price plus 72% or thereabouts of the balancing payment. Mr

Hazel furnished an amended Table (to replace the Table on page 33 of his Précis) detailing the 1% inflation adjustments to 2015 REFIT reference price prior to the addition of the balancing payment of €7.13 per MWh. The recalculation reduced his average revenue figure over 10 years from €80.40 to €80.073 per MWh and lowered the NAV contended for by the Respondent from €6,894,000 to €6,847,000.

8.6 He said he analysed and adjusted the operating costs inputted into the Financial Model based on a P50 capacity factor of 34.18% (output of 251,707.20 MWh) for rating purposes (e.g., by excluding non-deductible expenses such as rates and depreciation). Those projected costs, appropriately adjusted, start at €5.61 per MWh in year 1, increase to €10.32 in year 2 and thereafter increase marginally year on year up to €15 per MWh in year 15. He accepted such increases would be mainly attributable to maintenance contract price increases. These adjusted costs which include an inflation rate of 2% are shown tabulated on page 13 of his Précis. They average at €11.17 per MWh over the first 10 years, at €12.23 per MWh over 15 years and at €12.75 per MWh over 20 years.

8.7 On the second hearing date Mr Hazel furnished Additional & Updated Tables. One Table contained details of his analysis of what projected operating costs would be from years 1 to 20 if output were assessed at the P90 value of 214,000 MWh as proposed by Mr O'Donnell. Another Table showed the average 10 years costs if the P75 output of 231,830.40 MWh were adopted. These average costs are set out in the Table below.

Exceedance Probability	Projected Output MWh	10 year Average per €/MWh	15 year Average per €/MWh	20 year Average per €/MWh
P90	214,000	12.84	14.07	14.68
P75	231,830.40	11.86	12.99	13.55
P50	251,707.20	11.17	12.23	12.75

8.8 Mr Hazel confirmed that from the commissioning date up to the 2015 financial year end he estimated the operating costs per MWh at €9.16 exclusive of depreciation, rates, land lease and some group management costs to avoid double counting as payroll had already been factored in and for the following financial year end he estimated costs of €10.76 per MWh. He included the community gain costs even though strictly speaking he said they are not operating costs.

8.9 Mr. Hazel gave little weight to the financial and output information furnished by the Appellant that post-dated the valuation date because he said it would not be available to the hypothetical tenant and he considered that to value Mount Lucas by reference to such data would be contrary to s.19 of the Act, paragraphs 5.6 and 5.11 of the Guidance Note and the Tribunal's decisions in *Coillte* and *VA15/5/063 Reirk Energy Limited v Commissioner of Valuation ('Reirk).* He adopted a 65%:35% divisible balance split and estimated the sinking fund allowance over the 20 year lifetime of the asset.

8.10 When asked under cross-examination why a landlord would accept a tenant who might not make the rent payment half of the time in the years where the energy output falls below the P50 level, he replied "… *like any business, he will be exceeding the rent* [in other

years] *so … it will level out over time".* He said the P50 probability of exceedance was the fairest variable to apply as a prudent landlord would not let a wind farm to a tenant on the basis that nine out of ten years the estimated energy output would be exceeded. When asked to explain the difficulty he had with Mr O'Donnell looking at accounts before the valuation date and accounts thereafter which were not only consistent with but confirmed the earlier accounts, Mr Hazel said that he considered it appropriate to have regard only to the accounts prior to the valuation date in conjunction with the Assessment Report and the Financial Model. When queried as to what was wrong with Mr O'Donnell's approach of adopting an output based on the P90 long term value in the Assessment Report which was close to the actual achieved prior to the valuation and carrying out a "reality check" by reference to the post valuation accounts to verify the figure he had adopted, he replied that "*the evidence of output for a hypothetical tenant can't turn on the post valuation data*". When asked why an inflationary factor had not previously being applied to revenue when valuing wind farms, Mr Hazel said inflation had been contended for in appeals VA15/5/065 *West Clare (SER) Ltd v Commissioner of Valuation and VA15/5/038 Carrons Wind Farm Limited v Commissioner of Valuation* ('Carrons') but accepted inflation had not been applied in any other wind farm appeal. When probed further in relation to why inflation had not been added to revenue in previous appeals, he said it was due to lack of evidence but later accepted it was always known that REFIT prices were subject to CPI.

8.11 In response to questions from the Tribunal Mr Hazel confirmed that an inflationary rate was not applied to the income of Leabeg Wind Farm as that wind farm was valued on the original schematic developed by the Respondent to value the wind farms in Limerick and windfarms valued under the Revaluation 2017 programme which applied a standard €73,000 per MWh for revenue and a standard capacity factor of 33%. When queried as to how he arrived at the balancing payment figure of €7.13, he said that the balancing payment made to generators of the six REFIT 2 wind farms averaged at 72.08%. Mr Hazel was unable to offer any explanation as to why in terms of the Wexford wind farm (entry no. 3) and the Leitrim wind farm (entry no. 40) that 90% and 92% of the balancing payment was paid by the supplier to the generator. He pointed out that Mr Drinan of Brookfield Renewable Energy Group Limited gave evidence in *VA15/5/065 Knockawarriga Wind Farm Limited v Commissioner of Valuation ('Knockawarriga') t*hat approximately €3 per megawatt hour of the balancing payment would be retained by the supplier. He said that the Roscommon wind farm generator (entry no 6 on the Table on page 31 of his Précis) was paid 71.72% of the balancing payment which was similar to what he had adopted. When asked in his review of REFIT 2 PPA agreements if he had identified any trend such as particular suppliers seeking a higher retention of the balancing payment than other suppliers, he confirmed that he had not undertaken that analysis. He also readily acknowledged that he had incorrectly applied 1% inflation to the €76.85 MWh revenue figure (inclusive of €7.13 MWh balancing payment) and offered to redo the calculation and provide a corrected Table to replace that on page 33 of his Précis.

9. SUBMISSIONS

9.1 In summary Senior Counsel on behalf of the Appellant advanced the following arguments in his written and oral submissions:

(i) The energy output should be assessed at P90 probability of exceedance. notwithstanding the clarification that the Business Case Model for Mount Lucas was presented on the basis that a wind capacity factor of 32% was built into the Model at a wind factor of P75.

(ii) The use of post-valuation date information is valid and lawful in the determination of net annual value. The 'stand back and look' stage in the R & E valuation has to involve a reality check. In *Bwllfa and Merthyr Dare Steam Collieries Ltd v Pontypridd Waterworks Co [1903] AC 426* hindsight was permitted and the Court of Appeal in *China Light and Power Co Ltd v Commissioner of Rating and Valuation (No 1) [1997] 4 HKC 461* applied the principles of hindsight as expounded in Bwffla to rating and valuation law.

(iii) S.19(5) of the Act requires the valuation list to 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 certificate. This has the effect that data available on the valuation date in the manner approved in *Barking Borough Rating Authority v Central Electricity Board [1940] 2 KB 493* ('Barking') is available to the Tribunal for the purpose of making a determination when property is being valued under the R & E approach.

(iv) Mr. O'Donnell's figures for actual costs based on the first full year of accounts to year end 31st March 2016 are €15.25 per MWh and in the following two years are respectively €14.93 per MWh and €14.09 per MWh. In light of the actual costs incurred between 2016 and 2018 that this might be a case where a pragmatic view could be taken that €15 per MWh should be adopted for the purpose of the valuation.

(v) In terms of community gain expenses, as the subject property is a 28 turbine wind farm, the hypothetical tenant would be a tenant of substance rather than a small operator and would have regard to what is required to ameliorate the concerns of the community for a 28 turbine wind farm. The community gain expense, albeit not one relating to technical operations, is an expense which a hypothetical tenant would expect to incur over the period of the tenancy.

(vi) On the issue of the sinking fund period, it was submitted that in *Hibernian Wind Power Ltd v Commissioner of Valuation (VA 15/5/067)* the existence of the REFIT scheme was held to be a significant factor and that the Tribunal's approach on the basis of the evidence before it that a prudent hypothetical landlord and a prudent hypothetical tenant would agree that the sinking fund would be built up over 15 years was correct. That determination was deemed to be erroneous in law by the High Court and the judgment of the Court of Appeal is awaited on the appeal from the High Court's decision.

(vii) Mr Hazel has produced two valuations - €6,386,000 on the basis of a revenue figure of €76.85 per MWh and €6,847,000 on the basis of a revenue figure of

€80.07 per MWh, the latter being in excess of the valuation entered in valuation list. The Tribunal has no jurisdiction to increase a valuation on a ratepayer's appeal. From the point of view of statutory interpretation, the provisions of s.37 cannot be construed as allowing an appeal from a rate payer who thinks that a valuation is too high and then for that valuation to increase on appeal. This jurisdictional point has been raised on an appeal by way of case stated in *Powercon Wind Energy Ltd T/A Carrowleagh Wind Farm*.

9.2 Counsel on behalf of the Respondent adopted his written submissions and those made in previous appeals relating to the sinking fund to avoid the repeating of arguments with which the Tribunal is well familiar. In brief, the following arguments were advanced:

i) The onus is on Appellant to show that the valuation as determined by the Commissioner is excessive.

ii) The Tribunal is obliged not only to achieve a correct estimate of value but also equity and uniformity of value between comparable properties on the valuation list. Fairness dictates that wind farms have equivalent valuations making appropriate allowances for any difference in size or capacity factor.

iii) The property must be assumed to be vacant and available to let and that in an R & E valuation the trade or profits to be considered are those of the hypothetical tenant rather than those of the actual occupier.

iv) The issues on this appeal are similar to the issues raised in *Coillte*, *West Clare* and *Carrons*. The P90 is a figure that in effect removes all risk from the hypothetical tenant's perspective but the hypothetical tenant does not dictate terms in the negotiation. The Tribunal has already built in a generous allowance for risk by allowing a 65:35 percentage split of the divisible balance. The Appellant's Business case was predicated on a capacity factor of 32% on a wind factor of P75 probability of exceedance.

v) The use of post valuation date accounts to estimate the NAV of the property at the valuation date rather than by reference to information contained in the Assessment Report and the Financial Model which was available at the valuation date would be impermissible and contrary to section 19 of the Act and the Guidance Note.

vi) S.19 (5) requires the valuation list to be drawn up by reference to relevant market data and other relevant data available on or before the date of issue of the final valuation certificate. While data or reports may become available after the issue of the final certificate, they are relevant if they contain information concerning matters prior to the valuation date. The Appellant's trading accounts or any relevant information available on or before the issue of the final valuation certificate are relevant only if they contain data pertaining to the wind farm prior

to the valuation date, otherwise same are irrelevant as they would simply would not have been available to the hypothetical tenant.

vii) In *Barking* the Court of Appeal stated:

> *".... it is settled by the two cases, the Kingston case and the southern Ry. Co. case, to which we have already referred, that the profits basis has to be calculated not on what may happen in the future, but on the profit ascertained down to the last period before the date of the rate, or, in this case the preparation of the valuation list, and therefore quarter sessions were right in excluding evidence as to events subsequent to 1934 as being irrelevant. "*

The ratepayer in this case sought to rely on accounts for a ten year period after the 1st of April 1934. The relevant section of the Rating and Valuation Act 1925 provided that the list will be made or published every year. In 1929, the list was made on the 1st April 1929 and every 12 months thereafter a new rate or a new valuation list was made. The Court held that accounts up to the date at which the property had to be valued (i.e., 1 April 1934) were relevant and any account subsequent to that date were irrelevant. The practice of valuing property to an antecedent valuation date meaning a date fixed prior to list being published was not in force at that time. The 1st April 1934 was both the valuation date and the publication date.

viii) Community fund costs are not operating costs and are not costs which are to be borne by the tenant under s.48 of the Act.

ix) 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.

x) S.37 requires the Tribunal when determining a valuation to do so in accordance with that required to be achieved by s.19(5) which is both correctness of value, and equity and uniformity of value between properties on that valuation list. S.37(2)(b) enables the Tribunal to do something that it could not previously do, that is increase a valuation if a valuation determined by the Respondent is incorrect or is inequitable or is not uniform. This amendment to s.37 introduces an element of risk for appellants. The power to increase a valuation is not confined to an appeal by a rating authority or by another ratepayer; it applies to all appeals relating to the value of the property concerned. There is nothing unfair in conferring such a power on the Tribunal as it in the interest of all ratepayers that s.19(5) is applies to the valuation of a property.

10. FINDINGS

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

€6,691,000. However, on this appeal, the Respondent proposed a revised higher NAV of €6,8,847,000. The onus of proof is therefore, on the Respondent to establish the correctness of this new determination.

10.2 The estimation of the NAV of a relevant property is a statutory exercise to be conducted in accordance with s.48 of the 2001 Act as amended having regard to the requirements of s.19(5). The Tribunal's task is to estimate the rent which the hypothetical tenant might reasonably be expected to pay for Mount Lucas on the 30th of October 2015 subject to the obligations mentioned in s. 48 as a tenant from year to year. This exercise requires the making of assumptions, contrary to the true facts, that the Property was vacant and to let at the valuation date by a willing landlord, and that such a letting would be achieved.

10.3 It is common case that no market rental evidence is available for wind farms and that the appropriate approach to estimating the NAV of the property is to adopt the R & E method of valuation. An R & E is a valuation method that focuses on the accounts of the owner and occupier of the property being valued. There are five steps involved in assessing the profit net of expenses which the hypothetical tenant on the terms of the hypothetical tenancy would expect to make in the year of the hypothetical tenancy (i.e., the "divisible balance"), and then deducting the amount which the tenant would require to earn to justify taking the tenancy (i.e., "the tenant's share"). The remainder is assumed to be available to pay rent.

10.4 There is agreement between the parties on certain component elements of the R & E valuation. The disputed issues concern the estimation of the capacity factor, the revenue per MWh, and the duration of the sinking fund.

10.5 The first issue concerns the energy output of Mount Lucas. Mr O'Donnell adduced evidence of historical export data. He considered that the total output for the twelve month period to the 31st October 2015 and the predicted long-term (five year) annual mean, at P90 probability of exceedance level, supported his adoption of 214,000 MWh. Mr Hazell adopted the P50 probability of exceedance kwh/annual output of 251,682. The Property must be valued in its actual state. The Property was commissioned in August 2014 and s.19 of the Act requires the valuation list to 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 certificate. The Appellant's year end is the 31st March. It is improbable that a hypothetical tenant would base his rental bid for a wind farm solely on information derived from the first full year of the wind farm operations. Taking the average of three years is more reasonable if that information is available. If not, taking the average of two years is considered preferable to relying on the results of a single year.

10.6 The average output of Mount Lucas for the 24 month period from the 1 April 2015 to the 31 March 2017 was 219,984 MWh. That average output divided by the TIGC gives a capacity factor of 29.87%. This irrefutable empirical evidence of the wind farm's performance carries far greater weight than the P90 or P50 probability of exceedance kwh/annual output figures. The Tribunal omitted the output figures for the period from August 2014 to 31 March 2015, though available, as wind is usually stronger through the autumn and winter months and those outputs would potentially have a skewing effect if

output data for 32 months were averaged rather than just 24 months. Mr O'Donnell gave evidence that the wind farm's capacity factor ranged between 26.24% and 32.15% over its first six years of operation. The median between 26.4 and 32.15% is 29.275%. Mr O'Donnell pointed to the fact that the 2016 year end output was much higher than the previous and subsequent years. Wind is unpredictable and whilst averaging may not always be an appropriate approach to solving valuation problems, it smooths out variations in figures to produce a compromise position such as might be expected to be arrived at by two parties negotiating a rent for a wind farm.

10.7 As pointed out by the Tribunal in *VA 15/5/012 Limerick West v Commissioner of Valuation*, 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 actually 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 occupier. It is common case that the revenue derived from the Appellant's PPA is not representative of that to be expected from a reasonably competent operator. Mr O'Donnell considered, based on the 2015 REFIT reference price plus balancing payment, that a PPA price negotiated at the valuation date would be €79.62 MWh. In proposing that figure he overlooked the fact that licensed suppliers retain part of the balancing payment which is evidenced by the Appellant's own PPA. Mr Hazel adopting a figure of €80.07 MWh which reflected a reduction in the balancing payment and the application of annual inflationary increases calculated over a ten year period.

10.8 There are several reasons why the Tribunal cannot accept adjusting revenue for inflation. The Respondent is using the Appellant's appeal as a vehicle to introduce an inflation adjustment to the revenue figure in the R & E valuation. No such adjustment was made in the list valuations of any of the wind farms valued under the Reval 2019 programme. It was also accepted by Mr Hazel that inflation has not been factored into the valuation of any other category of property on the valuation list.

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

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

Although CPI increases are provided for in PPA agreements the Tribunal considers, particularly having regard to the low inflation rate at the valuation date and the other

variable factors and vagaries inherent in the operation of wind farms, that the hypothetical tenant would adopt a conservative approach and rely on stated contracted revenue rates.

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

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

10.9 At the hearing the parties' valuers agreed that licensed suppliers retain part of the balancing payment when negotiating PPAs with generators participating in REFIT 2, a fact borne out by para. 1.2 in Schedule B of the Appellant's PPA. As noted by Mr Hazel in his Précis in *VA15/5/065 Knockawarriga Wind Farm Ltd v Commissioner of Valuation* the Tribunal heard and accepted evidence from Mr Tony Drinan, Head of Training and Data Analytics at Brookfield Renewable Energy Group Ireland who had managed and negotiated new PPAs between June 2013 and 2017, that a fee of approximately €3.00 per MWh was quoted by suppliers not just for the provision of services but also market driven costs and risks that arise upon a licensed supplier entering into a PPA. Mr Hazel gave evidence that a contract price under a PPA Agreement dated 31st October 2013 was the REFIT reference Price plus 69.70% of the balancing payment. This represents a sum withheld by the supplier of €3.00 per MWh. Mr Hazel also gave evidence in respect of two other PPA agreements negotiated in 2012 for large REFIT 2 windfarms where the sums retained by the suppliers exceeded €4.00 per MWh. The averaging exercise carried out by Mr Hazel to estimate that 72.08% of the balancing payment would be retained is flawed and unreliable. The Tribunal considers that at a minimum a licenced supplier would retain €3.00 per MWh and accordingly, the hypothetical tenant would expect to achieve revenue of €76.62 per MWh, calculated as follows: 2015 REFIT 1 reference price of €69.72 plus €6.90 (balancing payment €9.90 less €3.00).

10.10 The issue concerning the duration of the sinking fund was decided by the Court of Appeal in *Commissioner of Valuation v. Hibernian Wind Power Limited Ltd [2023] IECA 12.* That Court upheld the High Court's decision 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".*

Operating Costs

10.11 The Tribunal raised with the parties in the early course of the appeal the propriety of adopting operating costs of €15.00 per MWh in the valuation of Mount Lucas so as to give them the opportunity to comment upon it. The Tribunal's reasons for not approving the Respondent's operating costs of €15 per MWh for every wind farm regardless of the valuation date, the size of the wind farm or the actual costs in the wind farm operator's accounts were well known to the parties as they are set out in previous determinations

10.12 Mr. Hazel said that adopted costs of €15.00 per MWh was utilised in the valuation having regard to the fact that the same figure was applied in the valuation of ten Limerick wind farms, that a Business Plan in respect of a Limerick wind farm projected costs of €15.31 per MWh over a period of 17 years, and that valuers had agreed to adopt costs of €15.00 per in other wind farm appeals. The Tribunal has consistently stated that it is contrary to valuation practice and principle when carrying out an R & E valuation to take the average operating costs per MWh of several other windfarms in substitution for the operational costs figure derived from the appeal Property's accounts.

10.13 It is worthwhile setting out the comments of Collins J. in the course of delivering the Judgment of the Court of Appeal at paragraph 66 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."*

10.14 Mr. O'Donnell's gave evidence that the actual costs based on the first full year of accounts to year end 31st March 2016 were €15.25 per MWh and in the following financial year were €14.93 per MWh, giving an annual average of €15.09 per MWh.

10.15 The operating costs as disclosed by the accounts were reviewed by the Tribunal, and it is satisfied, subject to a minor adjustment to exclude community gain expenditure, that they are a clear and fair indication of what is likely would be the probable average annual costs, one year with another, of Mount Lucas. For the same reasons given in respect of the estimation of output in paragraph 10.5 and 10.6 above, the Tribunal considers that the operating costs figure in the R & E valuation should be adjudged by reference to the Appellant's accounts for the two full financial years prior to the issue of the valuation certificate.

10.16 The Tribunal cannot accept the argument put forward on behalf of the Appellant for the inclusion of community gain expenditure as an allowable item of expenditure. S.48(3) requires "the value of a relevant property be determined by estimating the net annual value of the property. The net annual value is defined in s.48(3) as:

> "…, *in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other*

expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant."

The hypothetical tenant bidding to occupy the property is only concerned with the "*probable average annual cost of the…expenses (if any) that would be necessary to maintain the property*" in its actual state. Community gain expenditure is not an expense falling into that category. Commercial considerations which might motivate a landlord to set up a voluntary payment scheme to support local projects on an annual basis are not relevant to the estimation of the NAV of Mount Lucas.

10.17 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.

11. DETERMINATION

Accordingly, the Tribunal holds that the Property's valuation on the list is incorrect. The appeal is allowed and the Tribunal decreases the net annual value of the Property as stated in the valuation certificate and on the valuation list to €5,279,000.

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.