Appeal No: VA19/5/0663

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

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

LISHEEN WIND FARM LIMITED T/A LISHEEN WIND FARM **APPELLANT**

AND

COMMISSIONER OF VALUATION **RESPONDENT**

In relation to the valuation of
Property No. 2203954 Local Map No./Map Ref: 1AABC.1C.1H.1J.4.25.28.32B at Killoran, Moyne, Thurles, County Tipperary.

B E F O R E

Carol O'Farrell - BL	**Chairperson**
Donal Madigan - MRICS, MSCSI	**Deputy Chair**
Killian O'Higgins - FSCSI, FRICS	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 21ST DAY OF NOVEMBER 2023

1. THE APPEAL

1.1 By Notice of Appeal received on the 14th October 2019 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV') of the above relevant Property (hereinafter referred to as "Lisheen 1") was fixed in the sum of €2,966,000.

1.2 The grounds of appeal as set out in the Notice of Appeal are:

(a) the valuation is excessive and does not accord with section 19(5) of the Valuation Act 2001 as amended as it does not achieve both correctness of value and equity and uniformity of value between comparable properties on the list.

(b) it does not achieve correctness of value, more particularly, based on the Receipts

and Expenditure ('R & E') approach and calculation provided by the Appellant to the Respondent at the Representations Stage, a lower valuation is more representative of a reasonable valuation in accordance with section 48 of the Act.

(c) The Respondent has not given any or any sufficient weight to the factors set out in the representations made or in the R & E valuation provided therewith. The Respondent failed to give any weight or sufficient weight to:

(i) the generator losing the REFIT (Renewable Energy Feed-In Tariff) subsidy in 2024

(ii) increasing I-SEM (Integrated Single Electricity Market) competition and cross border interconnection;

(iii) balancing markets risks;

(iv) loss of wind efficiency due to adjoining forestry and general degradation of turbines;

(v) Repair and maintenance costs

(vi) exceptional capital costs;

(vii) community fund;

(viii) curtailment and constraints.

(d) The NAV of €2,966,000 is incorrect as it does not accord with the Valuation Tribunal's decisions *in VA15/5/067 Hibernian Wind Power Ltd* and *VA15/5/012 Limerick West Windfarm Ltd*. More specifically,

(i) the Respondent has applied a capacity factor of 31.45% despite the average capacity factor equating to 30.44%.

(ii) the Respondent did not deduct an amount equal to €3 which would be the average amount per MWh retained by the licenced supplier. Such deductions have been applied to generators in receipt of REFIT 2 support creating an unfair inequity.

(iii) the Respondent adopted 20 years for the calculation of the sinking fund despite the Tribunal determining that a prudent hypothetical tenant would spread the cost of a sinking fund over the life of the REFIT support, being 15 years;

(iv) The Respondent had adopted a 70:30 percentage split of the divisible balance despite the Tribunal determining that a fair percentage split of the divisible balance is 65:35. On this appeal a

fair percentage split would be 55:45 to reflect the fact that the windfarm will cease to have REFIT support in 2023. A hypothetical tenant could reasonably consider this a less secure investment compared with a wind farm in support for a longer period. The Respondent has applied allowances to wind farms out of REFIT by adjusting revenue by 20%.

(v) By imposing an arbitrary cap of €100,000 for the tenant chattels allowance the Respondent violated the principles of equity and uniformity required by section 19(5) of the Act.

(e) It does not appear that equity and uniformity has been achieved between comparable properties as a large number of windfarms in Tipperary and other rating authority areas are currently under appeal to the Valuation Tribunal.

1.3 The amount that the Appellant considered ought to have been determined as being the valuation of Lisheen was revised upwards from the amount of €1,680,000 as stated in the Notice of Appeal to €2,035,000 at the appeal hearing.

2. VALUATION HISTORY

2.1 On the 7th of June 2019 a proposed valuation certificate was issued to the Appellant in relation to Lisheen indicating a valuation of €3,780,000 indicating that the final date for making representations was the 16th of July 2019.

2.2 Being dissatisfied with the valuation proposed, written representations were made to the Valuation Manager on the 16th of July 2019 seeking a reduction in the proposed valuation to €1,731,000. Following consideration of those representations, the valuation of Lisheen 1 was reduced to €2,966,000 and the final valuation certificate issued on the 10th of September 2019.

2.3 The valuation date for the rating authority area of Tipperary County Council area is the 15th September 2017. The valuation list was published on the 17th September 2019.

3. THE HEARING

3.1 The Appeal was heard in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2 on the 21st of June 2022.

3.2 At the hearing the Appellant was represented by Mr. Proinsias Ó Maolchalain BL instructed by PJ O'Driscoll & Sons LLP and attended by Ms Valerie O'Driscoll. Mr John Algar BSc (Surv), MRICS MSCSI of Avison Young was called to give expert evidence on behalf of the Appellant. The Respondent was represented by Mr. David Dodd BL instructed by the Chief State Solicitor.

3.3 The rating authority, Tipperary County Council, appeared as an interested party represented by Ms. Rosemary Healy-Rae BL instructed by Binchy Partners LLP and attended by Mr. Finbarr Tobin. Mr. Brian Bagnall FRICS, FSCSI of Bagnall Doyle MacMahon was called to give expert evidence.

3.4 The rating authority is, by virtue of section 36(2)(b) of the Valuation Act 2001 ('the Act') entitled to be heard, and to adduce evidence at the hearing of an appeal on the grounds that it will be directly affected by the Tribunal's decision on the appeal.

3.5 In accordance with the directions of the Tribunal, the Appellant and Notice Party filed their respective précis of evidence prior to the commencement of the hearing. No précis of evidence was received from the Respondent The Appellant furnished a Reply to the Notice Party's précis.

3.6 The Tribunal delayed the issue of the Judgment herein to await the decision of the Court of Appeal on the appeal from the Judgment and Order of the High Court in *Commissioner of Valuation v Hibernian Wind Power Limited (2021) IEHC 49 ('Hibernian').* The Court of Appeals decision was delivered on the 22nd of May 2023[1].

4. ISSUES

4.1 The parties' valuers were agreed on a number of matters and consequently only three issues fell for determination by the Tribunal. They were whether the valuation of Lisheen was excessive by reason that the Respondent

(i) incorrectly applied a 20-year period in respect of the sinking fund rather than a 15-year period being the duration of the REFIT as determined (by the Tribunal) in the Hibernian Wind Power Ltd appeal[2].

(ii) wrongly applied a cap on tenant's chattels at €100,000 MW

(iii) incorrectly apportioned the tenant's share of divisible balance on a 30% basis.

[1] [2023] IECA 121

[2] VA15/5/067 issued on the 6th February 2018

5. RELEVANT STATUTORY PROVISIONS

5.1 All references hereinafter to a particular section of the Valuation Act 2001 ('the Act') refer to that section as amended, extended, modified or re-enacted by the Valuation (Amendment) Act, 2015.

5.2 Section 48 of the Act requires the value of Lisheen 1 to be determined by estimating the net annual value of the property and section 48(3) of the Act sets out the factors to be considered in calculating the net annual value as follows:

> *"Subject to Section 50, for the purposes of this Act, "net annual value" means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes* in respect of the property, *are borne by the tenant*."

5.3 Section 19 (5) of the Act provides

> *"The valuation list as referred to in this section shall be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue of the valuation certificates concerned, and shall achieve both (insofar as is reasonably practicable)—*
>
> *(a) correctness of value, and*
> *(b) equity and uniformity of value between properties on that valuation list,*
>
> *and so that (as regards the matters referred to in paragraph (b)) the value of each property on that valuation list is relative to the value of other properties comparable to that property on that valuation list in the rating authority area concerned or, if no such comparable properties exist, is relative to the value of other properties on that valuation list in that rating authority area."*

6. UNDISPUTED FACTS

6.1 Lisheen 1 is a large-scale onshore wind farm situated in a rural area approximately 10 kilometres northwest of Urlingford and 14 kilometres east of Templemore on the former site of the Lisheen Mine close to the boundary between County Tipperary and County Kilkenny.

6.2 Lisheen 1 was constructed in 2007. The grid connection was completed on the 9th of June 2008 and the wind farm was commissioned on the 1st September 2009.

6.3 Lisheen 1 is occupied by the Appellant, which is a wholly owned subsidiary of the Electricity Supply Board ('ESB'). The Appellant received a letter of offer on the 3rd of June 2008 from the Department of Energy, Communications, and Natural Resources confirming that Lisheen 1 had been accepted into REFIT.

6.4 At the valuation date Lisheen 1 comprised 18 Vesta V90-2 MW low speed turbines with a total installed generating capacity (TIGC) of 36 MW and a maximum export capacity to the grid of 36 MW. It produces electricity from renewable resources and is connected directly to the electricity network and metered independently of any other electricity generating plant.

6.5 The Appellant entered into a REFIT Participating Power Purchase Agreement ('PPA') with BRI Green Energy Limited ('BGEL') on the 15th of December 2008 in respect of the electrical output of Lisheen 1 for a term of 15 years. That Agreement was subsequently amended and restated on the 15th January 2016. REFIT payments are made to BGEL for the duration of the PPA and that company pays the Appellant the price agreed in the PPA.

6.6 Under clause 4.1.2 the Appellant is responsible for 50% of the pass-through costs and those costs are set off against the contract price payable under clause 4.2 of the amended and restated PPA. Pass through costs are defined in that PPA as meaning "*all costs which are levied by the Market Operator on (or incurred by) the Purchaser in its role as intermediary including but not limited to the costs , as set out in Schedule 5*."

6.7 The REFIT 1 reference price is adjusted by way of indexation annually by the annual increase, if any, in the consumer price index (CPI) in Ireland. In 2017 the REFIT 1 reference price for a large-scale wind farm in euro per megawatt hour was €69.72 (indexed) and the balancing payment (also adjusted by CPI) was €10.46 per MWh. The parties' respective valuers agreed that the NAV of Lisheen 1 should be estimated by the R & E method of valuation.

6.8 The Appellant's financial year end is the 31st of December. The reliability of the Appellant's 2015, 2016 and 2017 financial statements and the figure extracted therefrom in respect of generation output, revenue, and expenditure attributable to the operation of Lisheen 1 were not challenged by the Respondent or by the Notice Party.

7. APPELLANT EVIDENCE

7.1 Mr. Algar adopted his Précis of evidence as his evidence in chief.

7.2 Mr Algar outlined the valuation considerations in his approach, being, namely:

(i) the variability of future revenue streams anticipated by the hypothetical tenant

(ii) the limited pool of hypothetical tenants with expertise required to operate the property

(iii) the volatility of wind as a source of generation

(iv) the wasting nature of the underlying property and anticipated future physical, functional and technological obsolescence

(v) the obligation of the tenant to ensure the property is maintained in such a state to command the rent for the hypothetical term

(vi) the risk factors affecting the wind industry including but not exclusively changes in TUoS charges, compliance costs, community fund costs, REFIT scheme and issues of curtailment.

7.3 He confirmed that he valued Lisheen 1 on an R & E basis and, in doing so, had regard to the Joint Rating Forum Guidance Note – The Receipt and Expenditure Method of Valuation for Non-Domestic Rating ('the Guidance Note') issued in the UK dated July 1997, set out in the Appendix to his Précis (n/a to public) and to nine of the Tribunal decisions in respect of wind farms.

7.4 **Revenue**. Mr. Algar next explained his approach to each of the inputs to his R & E valuation, starting with the revenue. He stated that as Lisheen 1 has REFIT scheme support, in reliance upon the Tribunal's decisions in the *Tullynahaw Power Ltd*[3] and *Hibernian Windpower Ltd t/a Garvagh Glebe Wind Farm* appeals[4], he adopted the revenue figure calculated as follows:

[3] VA17/5/1071 issued on the 30th April 2021
[4] VA17/5/1073 issued on the 25th May 2021

REFIT 1 Reference price 2017		€69.72
	Balancing payment	€10.46
Less	Charge retained by licensed supplier	- €2.56
		€77.62 per MWh

He considered the supplier charge of €2.56 to be reasonable pointing out that the market operator charge imposed by BGEL on the Appellant under the provisions of the amended and restated PPA in 2017 was €2.57 per MWh. When it was put to him under cross-examination that 100% of the balancing payment had been included in the revenue figures adopted in the appeal by Declan Rouse t/a Lackan Wind Energy Limited v Commissioner of Valuation[5] and Powercon Wind Energy Ltd T/A Carrowleagh Wind Farm[6], both REFIT 1 supported windfarms, and valued by reference to the 30th of October 2015, Mr Algar pointed out that the appropriateness of that approach was raised in a subsequent appeal by Knockawarriga Wind Farm Limited *VA15/5/065*[7] *(Knockawarriga)* and the Tribunal was satisfied that a licensed supplier would retain a proportion of the balancing payment. Accepting that the REFIT 1 reference prices and balancing payments are subject to CPI indexation, he pointed out that at the valuation date REFIT prices had not been inflated over the previous two years. Under cross-examination he Algar accepted that the owner and operator of Lisheen 1 were related parties

7.5 **Output.** Mr Algar adopted the three-year average generation output figure of 97,305MWh analysed from the Appellant's accounts for the financial years 2015 to 2017 inclusive. Mr Algar confirmed in response to a question from the Tribunal that in calculating the capacity factor, he used 365 days as opposed to 365.25 days.

7.6 **Operating Expenses**. Mr Algar estimated operating costs by taking the average expenses disclosed by the Appellant's financial accounts for 2015 to 2017 which he said equated to €16.16 per MWh.

7.7 **Sinking Fund**. Mr. Algar accepted that the life of a turbine is 20 years but he nonetheless calculated the sinking fund over a period of 15 years acknowledging that he was aware that the High Court's had held in *Hibernian* that the sinking fund should be estimated over

[5] VA17/5/786 issued 20th June 2019
[6] VA17/5/787 issued 10th June 2020
[7] VA15/5/065 issued 6th November 2019

a period of 20 years. He said he did so subject to the Court of Appeal's decision on the appeal from the High Court's determination.

7.8 **Tenant Chattels**. As tenant chattels had previously been assessed at €12,500 per MW installed, Mr Algar contended for a figure of €450,000 based on an allowance of €12,500 per MW. In response to Mr Bagnall's Précis of evidence Mr Algar said he was unable to comment on the revised position adopted by the Respondent to cap the tenant chattels at €100,000 and said that Mr Bagnall has not provided any evidence to show that a cap on the allowance is warranted. He commented that it is difficult to quantify this allowance as wind farms are not generally let. Under cross-examination he said he did not think there was any justification for deviating from the rate of €12,500 per MW. He accepted that he had not identified any tenant chattels or provided any detail of tenant chattel costs. Mr Algar agreed with Ms. Haely Rae that the description of tenant chattels outlined on page 3 of Mr. Bagnall's précis was an accurate description. Responding to Ms. Healy Rae's assertion that no effort had been made by the Appellant to identify any tenant chattels, Mr. Algar said he was relying on a long-standing precedent of €12,500 per MW with no cap. Mr Algar accepted that he was put on notice at the Representation Stage on the 16 August 2019 that the Commissioner of Valuation intended to cap tenant chattels. He declined to accept that any double counting would arise if a tenant chattels allowance of €450,000 was applied given the significant expenditure incurred in respect of operating and maintenance costs.

7.9 Mr Algar was of the view that any deviation from the established rate of €12,500 per MW would have a significant effect on the NAV as it would divert €350,000 back into the divisible balance and out of the pocket of the hypothetical tenant. In response to a question from the Tribunal Mr Algar was unable to say precisely what tenant chattels would be required to operate Lisheen 1 but he considered that in general terms vehicles, computer software and maintenance equipment would be required. He considered that some items would need to be replaced every three to four years whereas a vehicle would possibly require replacement after 6 years. He said he could not justify the amount of €450,000 allowance other than through precedent. He was not in a position to provide any insight as to why the specific figure of €12,500 per MW had been adopted by parties appearing before the Tribunal in the past. He acknowledged that he did not enquire into or seek a list of equipment from his client to determine the nature or extent of tenant chattels that would be required for the operation of a windfarm.

7.10 **Divisible Balance**. As regards the divisible balance his view was that in line with the previous decisions of the Tribunal, the divisible balance percentage split should remain apportioned as to a tenant's share 35% and a landlord's share 65%. He pointed out that the imminent change in market rules from SEM (Single Electricity Market) to I-SEM required generators to provide accurate information on their expected generation output and that failure to deliver power as instructed by the market operator based on the forecasts provided would expose generators to potential financial penalties. For the hypothetical tenant, the operational changes due to take place when I-SEM replaced the SEM were an additional risk.

7.11 In response to Mr Bagnall's position that the tenant's share of the divisible balance should be apportioned at 20%, Mr Algar stated that no new information had been provided to justify a departure from the established divisible balance split. He accepted that yields on the property market rarely fell below 4% and that the landlord undertook the vast majority of capital investment. However, he considered Mr Bagnall's analysis flawed because the landlord, on the letting of the property, is no longer the wind farm operator and has no responsibility under the PPA, for maintenance, insurance or for securing a sinking fund to replace the turbines. Mr Algar said that the capping of the tenant chattels allowance was the only issue that could possibly impact on the apportionment of the divisible balance. On his analysis, this allowance equates to approximately 5.96% of gross revenue and 7.52% of net revenue. The capping of the allowance would alter the position for both parties and impact the Tribunal's established approach in apportioning the divisible balance.

7.12 Mr Algar made the additional point that Lisheen 1 exits REFIT in 2023 and that at the valuation date, the hypothetical tenant would identify the loss of REFIT support as another risk factor when considering his rental bid for the tenancy.

7.13 **Valuation.** On the basis of the above approach to the various inputs, it was Mr Algar's opinion that Lisheen 1 should be valued at €2,035,000.

8. NOTICE PARTY EVIDENCE

8.1 Mr. Bagnall is a Fellow of the Royal Institution of Chartered Surveyors and a Fellow of the Society of Chartered Surveyors in Ireland. He has over 40 years valuation experience in all areas of property and has specialised in valuations for rating purposes over the course of his career which included five years in the Valuation Division of Tailte Éireann

(formerly known as the Valuation Office). He adopted his Précis of evidence as his evidence in chief after amending the figure of €82 million on page 4 of his Précis to €58.8 million.

8.2 Mr Bagnall agreed that the R & E method of valuation is the correct basis for estimating the NAV of Lisheen 1. He confirmed his estimation was based on the information contained in Mr Algar's Précis and appendices (n/a to public)

8.3 **Revenue.** He concurred with Mr Algar's revenue figure of €77.62 per MWh.

8.4 **Output**. Mr Bagnall also accepted the three-year average generation output figure of 97,305 MWh.

8.5 **Operating Costs**. Mr. Bagnall adopted €16.16 per MWh in line with the Appellant as that figure appeared reasonable.

8.6 **Tenant's Chattels**. He accepted that prior to REVAL 2019, the Respondent in valuing wind farms had applied an allowance figure of €12,500 per MW without capping. He did not believe that a rate per MW of €12,500 that generated an allowance figure of €450,000 could be justified. He said asset renewals do not occur every year. In his view, capping the allowance at €100,000 is more than reasonable because otherwise there would be double counting as many tenant items would be included in the operating and maintenance costs. He pointed out the figure of €16.16 per MWh for operating costs included a figure of approximately €1,115,000 for operations and maintenance services. He said tenants chattels include a vehicle and equipment to facilitate inspection and maintenance of the turbines and, said that, within reason what is required for one turbine is sufficient for up to 16 turbines. Under cross-examination Mr Bagnall accepted that the Respondent had not produced a list of tenant chattels. He said that the uncapped allowance at a rate per MW of €12,500 becomes substantial with the construction of larger wind farms and in his view, it was a mistake for the Respondent in the first instance to have adopted that rate on an unlimited basis.

8.7 **Sinking Fund**. Mr. Bagnall remained steadfast in his opinion that the appropriate period for calculating the sinking fund is 20 years and noted that the High Court had confirmed that period in *Hibernian.* He pointed out that some of the original turbines are operating

now for almost 30 years and hence spreading the sinking fund over the estimated life of the turbine is much more reasonable, as opposed to over the REFIT period of 15 years.

8.8 **Divisible Balance**. Mr. Bagnall stated that, although he is aware of the Tribunal's decisions on this issue, he considered that the landlord's share of the divisible balance should be higher at 80%. He considered it important when approaching the divisible balance to realise that the landlord has prepared:

(i) a full business plan with bank funding and technical analysis/Energy Production Assessment
(ii) a contract with a Government agency to supply electricity with a fixed floor price index linked but with the option to achieve more
(iii) a full maintenance contract on the wind farm
(iv) a sinking fund allowance to recover the entire cost of the project over a 20-year period
(v) insurance
(vi) warranties on wind turbines

He stressed that the capital input of the hypothetical tenant would be negligible compared to that of the landlord. Referring to clause 5.47 of the Gudance Note he pointed out that one method of calculating the tenant's share is "*a percentage of the tenant's capital*". He pointed out that if the tenant's share is calculated as a percentage of the divisible balance, para.5.56 of the Guidance Note states:-

"The percentage to adopt will depend on the negotiating strengths of the parties and the risk to the tenant in the form of the amount of capital required to be invested. Where the operation requires little capital, the tenant may be prepared to accept a lower proportion of the divisible balance and bid a higher percentage as rent".

8.9 Mr Bagnall posed himself two questions: whether the potential tenant anticipating a total surplus of €3.8 million per annum, and not being the only person bidding, would be happy with a profit of almost €900,000 per annum for very little capital outlay; leaving that question unanswered, he then posed the question whether the landlord, having potential to earn a similar profit, would make a letting at an annual rent of €900,000. Answering the latter question, he said that such a return would be unacceptable for the landlord due to the risks involved and, on a "stand back" basis, a return at that level was in his opinion too low given that prime yields on property in Ireland, which are regarded as far less risky

investments than a wind farm, rarely drop below 4%. He considered that the hypothetical landlord would respect a return on his investment of at least 5%. Taking these factors into account, and to reflect a balance between risk and reward he adopted a split of 80:20 for the divisible balance. In his opinion the annual return on a notional tenancy, having regard to the extent of the landlord's investment, had to be greater than the €2 million advanced by the Appellant. He considered that what is required to be considered when apportioning the divisible balance are the expectations of both the landlord and the tenant. The tenant is going into the venture with relatively small capital investment but with potential to make a substantial return, albeit with some risk, whereas the landlord is going into the venture with a high capital investment for which he will require a commensurate return and that it would not have been fair to the hypothetical landlord to apportion the divisible balance equally considering his significant capital investment.

8.10 When cross examined Mr Bagnall acknowledged that the divisible balance was apportioned equally in the valuation of hotels on the R & E basis but said the REFIT scheme was an important consideration in the Tribunal's decision in *Hibernian* as it would represent a significant inducement to the hypothetical tenant that would reduce the business risk. In his opinion, a tenant's share of €900,000 for a large 18 turbine wind farm was sufficient because as the scale of a wind farm increases the risk proportionately decreases. He did not accept that on taking the tenancy the tenant assumes all of the risk. He said that the landlord still has to pay off the investment debt.

8.11 **Valuation**. On the basis of his inputs Mr Bagnall submitted an R & E valuation of €3,000,000 for consideration by the Tribunal.

9. APPELLANT SUBMISSIONS

9.1 In summary Counsel on behalf of the Appellant advanced the following arguments

(i) The adoption by the Respondent of 100% of the balancing payment in estimating the revenue figure represents a logically inconsistent approach given that the Respondent has in other appeals adduced evidence of PPAs showing that generators secure less than 100% of the balancing payment. It is also inconsistent with the Tribunal's decisions in *Hibernian Windpower Ltd t/a Garvagh Glebe* ('Garvagh Glebe')[8] and *Tullynahaw Power Ltd* ('Tullynahaw') appeals[9]. The Appellant contends for a modest deduction of €2.56 per MWh relying on those decisions and the actual market

[8] VA17/5/1073 issued on the 25th May 2021
[9] VA17/5/1071 issued on the 30th April 2021

operator charge payable under the Appellant's PPA which in 2017 was €2.57 per MWhr. Any criticism that the Appellant did not adduce evidence of any PPAs agreed in 2017 is unwarranted as the REFIT 1 scheme closed in 2010.

(ii) The revenue that would be achieved at Lisheen 1 is subject to the vagaries created by I-SEM. The fact that I-SEM was due to go live on the 1st October 2018 would have been known to the hypothetical tenant.

(iii) In the real world the operator's account do not differentiate tenant chattels. The tenant chattels allowance is shaped by the overall determination on valuation Heretofore, the adoption of a tenant allowance at a rate of €12,500 per MW was agreed and applied by the Respondent and the Tribunal on numerous appeals. The unilateral change introduced by the Respondent is a surprising departure from the principle of equity and uniformity. In the *Hibernian* appeal[10] the Tribunal apportioned the divisible balance as to a tenant's share of 35% and the landlords share 65% and this was the only aspect of the decision not challenged in the case stated. The application of a cap of €100,000 on tenant's chattels substantially impacts the valuation of Lisheen 1. If it is deemed appropriate to alter the approach to the tenant chattels allowance, an upward adjustment to the tenant's share of 35% is required, to ensure that the hypothetical tenant is appropriately rewarded for effort and expertise to operate the wind farm. The tenant's share of 30% adopted by the Respondent is not a sufficiently attractive level of return for the hypothetical tenant based on Mr Algar's valuation inputs.

(iv) Both valuers calculate the tenant's share as a percentage of the divisible balance. The Appellant relies on the Tribunal's decision in the Hibernian appeal[11]. In *Railway Assessment Authority v. Southern Railway Co*. [12] it was held that the tenant's share must be such as to afford a profit to the tenant commensurate with the risk involved and to induce him to embark on the undertaking. Lord Hailsham observed at p. 39 that:

> *"A tenant is not to be regarded as merely an investor in railway shares and to be treated as reasonably compensated by the ordinary rate of interest which can be obtained by such an investment. He is a person embarking*

[10] VA15/5/067 issued on the 6th February 2018
[11] Ibid.
[12] [1936] 1 All ER 26

upon a commercial undertaking in which he is to sink his capital, in which he takes all the risks of success or failure, and in which he has not merely to be compensated by receiving a reasonable rate of interest upon the capital invested, but also to receive such a profit upon his venture as reasonably to compensate him for the risk which it involves, and to induce him to embark on its prosecution.

(v) In the *Slievereagh Power Ltd* appeal[13], the Tribunal, though reluctant to adjust the apportionment of the divisible balance away from the 35% as to the tenant's share, determined that the tenant's share should be 40% of the divisible balance as the property at the valuation date comprised a single turbine connected to a local distribution network operating at 10Kv. On the hypothetical letting the tenant assumes all the risks. The investment has already been made and the landlord is entitled to the rental payments. He has the assurance of the tenant establishing a sinking fund to replace the turbines after 20 years, which is not something that would arise in the context of hotel properties.

(vi) The Rating Authority is a notice party on this appeal, not an appellant. The Tribunal does not have jurisdiction to increase the valuation of Lisheen 1 on the Appellant's appeal.

(vii) The Tribunal must have regard to the requirements of equity and uniformity.

10. RESPONDENT SUBMISSIONS

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

(i) In terms of calculating the revenue figure the Appellant has not adduced evidence to establish that there should be a reduction of the balancing payment.

(ii) The Appellant's PPA does not provide for the reduction of the PPA price.

(iii) The Appellant has not adduced any evidence of tenant chattels or any evidence to support an allowance of €450,00 for tenant chattels.

[13] VA15/5/058 issued on the 23rd May 2019

(iv) The Tribunal has jurisdiction under section 37(2)(b)(ii) of the Act to increase the valuation of Lisheen 1.

11. NOTICE PARTY SUBMISSIONS

11.1 In summary Counsel on behalf of the Notice Party advanced the following arguments:-

(i) The High Court has determined that the period for calculating the sinking fund is 20 years and since the High Court's judgment was delivered the Tribunal has applied the 20-year period.

(ii) There is no evidential basis to support a tenant chattels allowance of €450,000. The Appellant has had ample time since becoming aware in August 2019 that the Respondent imposed a cap on the tenant chattels allowance to collate evidence to justify an allowance of €450,000. The onus of proof is on the Appellant, and it has not been discharged. Mr Bagnall's evidence is that some of this allowance is subsumed in the operating and maintenance expenditure. The Guidance Note cautions valuers to take care to ensure that there is no double counting.

(iii) The landlord's capital contribution is clearly significant. While the extent of the capital sunk by the hypothetical tenant is also a relevant a factor, the tenant does not bear all of the risk. The Tribunal's apportionment of the divisible balance on a 65:35 percentage basis in other appeals is not set in stone. It can be revisited in the valuation of larger wind farms.

(iv) The Tribunal has jurisdiction under section 37 of the Valuation At 2001 to increase the valuation and the power to increase valuation accords with section 19(5) of the Act.

12. REPLY

12.1 In a brief reply Counsel for the Appellant pointed out that both valuers had agreed in evidence the revenue of €77.62 per MWhr and that there was no other evidence of any other figure before the Tribunal. S.48 of the Act requires an 'estimate' of the NAV; there is no mathematical formula.

13. **DETERMINATION**

13.1 The NAV of Lisheen I falls to be estimated in accordance with s.48 of the Act having regard to the requirements of s.19(5). The task is to estimate the rent which the hypothetical tenant might reasonably be expected to pay for Lisheen 1 on the 15th of September 2017 subject to the obligations mentioned in s. 48(3) as a tenant from year to year having regard to the well-established valuation principles which are set out in the Tribunal's decision in *Limerick West v Commissioner of Valuation*[14].

13.2 There is agreement between the valuers for the Applicant and the Notice Party on certain component elements to be adopted for the purpose of the R & E valuation: the wind farm output, the revenue figure, and the operating costs. The disputed issues concern the duration of the sinking fund, the capping of the tenant chattels allowance and the apportionment of the divisible balance.

13.3. The parties agree that the R & E method is the appropriate method by which to value Lisheen 1 for the purposes of rating due to the lack 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 are set out in the Guidance Note which is agreed by the valuers to be relevant.

13.4 As a general rule an R & E valuation is based upon annual accounts for three years prior to the valuation date, if available, to establish levels or trends (if any), in revenues or operating costs generated from trading operating at the property. Section 19(5) of the Act 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 10th September 2019. On this appeal, the Appellant relied on the accounts for the three-year period ending on the 31st December 2017.

13.5 **Output**. The Tribunal agrees with the parties' valuers that the generation output figure of 97,305MWh is broadly representative of the performance of Lisheen 1 over the three-year period to the 31st December 2017 given that the wind farm's output will inevitably fluctuate from year to year.

[14] VA15/5/012 issued on the 17th December 2018

13.6 **Revenue**. It was common case that the Appellant's accounts do not represent the income the efficient hypothetical tenant would expect to achieve at the Property as a new PPA would be agreed in 2017. The parties valuers adopted a revenue figure of €77.62 per MWh based on the REFIT 1 reference price in 2017 of €69.72 per MWh with a balancing payment of €10.46 less €2.56 per MWh.

Mr Algar adduced in evidence the 'Consideration of Representation' report signed by Mr Liam Hazell of the Valuation Office (now Tailte Éireann) on the 16th August 2019 prior to the issue of the valuation certificate. This report confirms that the Respondent adopted a revenue per MWH figure of €80.18 which was calculated as the 2017 REFIT reference price plus balancing payment (€69.72 + €10.46). Mr Algar gave sworn evidence that the Appellant paid to BGEL a market operation charge of €2.57 in 2017. A point was raised by Counsel for Respondent that this charge was not evident in the Appellant's PPA. The Appellant's PPA at clause 4.2 confirms the agreed Contract Energy price at €71.00 per MWh adjusted annually by any increase in CPI. Under clause 4.1.2 the Appellant is liable for 50% of the 'Pass Through Costs' incurred by the licensed supplier which costs are set off against the sum due to the Appellant under clause 4.2. 'Pass Through Costs' as defined in the PPA covers all costs levied by the Market Operator on BGEL in its role as intermediary. Market operator charges are applied to generators and suppliers for the operation of wholesale markets. It has been accepted by the Respondent in a number of appeals[15] that licenced suppliers retain up to €3.00 MWh from the balancing payment. The Tribunal therefore prefers the logical and reasonable approach adopted by both Mr Algar and Mr Bagnall and adopt their figure of €77.62 per MWh for receipts.

13.7 **Operating costs**. Mr Algar adopted a figure of €16.16 per MWh as representing the average actual costs of Lisheen 1 for the three-year period prior to the valuation date. He did not adjust the figure for inflation or for any anticipated increase in maintenance costs. Mr Bagnall likewise adopted this figure, and the Tribunal considers it to be reasonable as it was derived from an analysis of the Appellant's accounts.

13.8 **Sinking Fund**. The Court of Appeal upholding the High Court's decision in *Hibernian* held that "*the terms of section 48(3) make it clear that the expense of replacing the turbines must*

[15] VA17/5/932 Bord na Mona Resource Recovery Ltd ; VA19/5/0521 Monaincha Wind Farm Ltd and VA/19/5/0684 Cappawhite Wind Limited

be averaged out over the entirety of their 20-year design life." Accordingly, the sinking fund is to be calculated over a period of 20 years.

13.9 **Tenant Chattels**. In relation to tenants chattels Mr. Algar contended for an uncapped figure of €450,000 based on an allowance of €12,500 per MW of capacity. Mr. Bagnall contended for a capped figure of €100,000 as applied by the Respondent.

13.10 The hypothetical tenant would invest capital in the business and on an R & E valuation an allowance for depreciation of the tenant's assets can be made in the context of the renewal of those assets. The Appellant is not the only appellant that feels aggrieved by the Respondent's decision on REVAL 2019 to cap the tenant chattels allowance for wind farms at €100,000. The Tribunal did not hear any evidence on behalf of the Respondent so the reason why the Respondent decided to change its approach on this allowance is not known. The reasonable presumption is that the consequences of applying a fixed rate per MW regardless of wind farm size or the extent of the 'tenant assets' was not properly thought through.

13.11 The Tribunal is not persuaded by an argument that the Appellant is entitled to have an allowance for €450,000 for tenant chattels simply because the Respondent previously adopted the rate of €12,500 per MW in valuing wind farms in Limerick or in the counties subsequently valued as part of Reval 2017. The Respondent is obliged to value each relevant property separately and both the Respondent, and the Tribunal have, in accordance with section 19(5), a positive statutory obligation to achieve insofar as possible correctness of value, and equity and uniformity of value between properties on the valuation list. If an error was previously made, the Respondent is entitled to revisit the valuation issue where there is good reason to warrant it doing so.

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

> "(c) *depreciation should be based upon the fall in value caused by the reduction in the useful economic life of that asset arising from use, the passing or time or obsolescence through technological or market changes*

(d) any residual value (i.e., the value at the end of the item's useful economic life) should be deducted.

No such evidence was adduced by the Appellant. The contention that an allowance cap of €100,000 is inappropriate is a matter for another day. It is not one which the Tribunal would be prepared to decide in the absence of any evidence. At all events as far as the Tribunal is presently concerned, the Appellant has not established an entitlement to an allowance for tenant's chattels of €450,000.

13.13 **Divisible Balance**. The parties calculated the tenant's share as a percentage of the divisible balance and the Tribunal considers that to be the appropriate approach to estimating the tenant's share. As to the tenant's share in his valuation Mr. Algar applied 35%, when the NAV was determined the Respondent applied 30% and Mr. Bagnall argued for 20%.

13.14 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.*

13.15 By whatever method the tenant's share is calculated, it is necessary to "*stand back and look*" at the result to decide whether the outcome of the calculation is reasonable for both parties. There are risks inherent in operating a wind farm and the risks that would be undertaken by the hypothetical tenant should not be underestimated simply because the tenant's capital contribution is low. Any person proposing to operate a wind farm needs to understand the amount of potential revenue the wind farm can generate and have confidence in their ability to generate that revenue in order to be able to cover the operating costs and pay the rent. Operating risks are the risks associated with running the facility and generating revenue from the production of energy. The tenant risks include site and equipment failure or warranty risks, but even assuming those risks are well managed, the other major risk after a wind farm has been constructed is how much power it will produce year on year. Nobody can predict with 100% certainty the amount of wind that will drive a turbine over any given period of time. No wind or low wind speeds means a loss of revenue. An additional risk would have been foreseen by the hypothetical tenant due to the SEM being replaced by the I-SEM in 2018. There are several key differences

between the SEM and I-SEM market in that I-SEM generators and suppliers have to match their actual with their traded generation and usage. If their generation or usage differs, they are liable for costs in the balancing market.

13.16 Mr Bagnall focussed mainly on the level of return-on-investment capital. The hypothetical tenant would not be concerned about how much the landlord expended on developing the wind farm. He would endeavour to find out how much rent he could afford to pay, after meeting all the operating expenses, and setting aside a sum to compensate him for his own efforts and risks (i.e., the tenant's share). He does that by estimating the revenue he could potentially earn from operating the wind farm, the expenditure that would be necessary to carry on those operations and to keep the wind farm in substantially good repair. The difference between those two amounts will be the sum from which he can pay the rent to the landlord and profits or remuneration to himself. This is the method that is adopted for ascertaining the rent (i.e., NAV) at which the property could be expected reasonably to let in their actual state, from year to year. That is not to say that the landlord's capital investment is to be completely disregarded. It is a factor to be taken into account when apportioning the divisible balance. Striking a balance between the landlord and tenant that acknowledges the risks involved in running Lisheen 1 and inputting the agreed figures and our own figures on the disputed matters in the valuation, the Tribunal considers that that the tenant's share should be 35% of the divisible balance.

13.17 The Tribunal is satisfied that the Appellant has established that the valuation of the Lisheen I is excessive. 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.

14. DETERMINATION

Accordingly, the appeal is allowed, and the Tribunal decreases the net annual value of the Property as stated in the valuation certificate and on the valuation list to €2,583,000.