VA19/5/0602

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

AN tACHTANNA LUACHÁLA, 2001
VALUATION ACTS 2001 to 2015

GLENOUGH WIND FARM LIMITED **APPELLANT**

AND

COMMISSIONER OF VALUATION **RESPONDENT**

AND

TIPPERARY COUNTY COUNCIL **NOTICE PARTY**

In relation to the valuation of
Property No. 2213475 Glenough Wind Farm, Local No/Map Ref. 5E7BC8AB12B13B14C/2, Turaheen Upper, Clogher, Cashel, County Tipperary

B E F O R E

Carol O'Farrell - BL	**Chairperson**
Barry Smyth - FRICS, FSCSI, MCI Arb	**Deputy Chairperson**
Killian O'Higgins FRICS FSCSI	**Member**

Representation:
For the Appellant : Mr. Proinsias O'Maolchalain BL instructed by Beauchamps LLP
For the Respondent : Mr. David Dodd BL instructed by the Chief State Solicitor
For the Rating Authority : Ms. Rosemary Healy-Rae BL instructed by Binchy Law LLP

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 18th DAY OF DECEMBER 2023

1. THE APPEAL

1.1 This is an appeal by the ratepayer against the decision of the Respondent pursuant to which the net annual value '(the NAV') of the above relevant property (hereinafter 'Glenough') was determined at €3,008,000.

1.2 The Notice of Appeal received on the 14th October 2019 contends that the valuation of Glenough is incorrect. The Appellant advanced 36 grounds of appeal, some overlapping. Put quite shortly the grounds of appeal summarised are:

(I) The Respondent's approach to the valuation was at odds with the Tribunal's decisions in every respect save as to the estimation of revenue.

(II) REFIT supported wind farms valued as part of REVAL 2019 were valued at levels higher than those valued as part of the REVAL 2017 despite there being no change in REFIT reference prices.

(III) A Receipts and Expenditure ('R & E') valuation of a wind farm should have regard to :

(i) the fact that by 2017 curtailment had become a serious issue,
(ii) the wasting nature of the plant,
(iii) the decline in turbine efficiency at a rate of approximately 0.75% per annum,
(iv) that REFIT projects achieve approximately ± 5% of reference prices,
(v) that under power purchase agreements generators are paid 75% of the balancing payment and
(vi) the effect iSEM has had on the balancing payment
(vii) a 7.5% adjustment of the REFIT reference price is necessary.

(IV) The adoption of operating costs of €16.00 per MWh is not sufficient.

(V) Tenant chattels should be assessed at €12,500 per MW.

(VI) The sinking fund should be assessed over a period of 15 years.

(VII) The divisible balance requires adjustment in respect of older wind farms.

(VIII) At the 'stand back and look' stage the valuation of a wind farm should be considered in the context of the value of alternative generating properties and further adjustments should be made if considered appropriate.

1.3 The amount the Appellant considered ought to have been determined as being the valuation of Glenough was revised upwards from the amount of €1,227,000 as stated in the Notice of Appeal to €1,900,000 at the appeal hearing.

2. THE HEARING

2.1 The Appeal proceeded by way of an oral hearing before the Tribunal sitting at Holbrook House, Holles Street on the 30th of May 2022. Mr David Halpin M.Sc. (Real Estate) BA. (Mod) of Eamonn Halpin & Company was called to give expert evidence on behalf of the Appellant. Mr. Brian Bagnall FRICS, FSCSI of Bagnall Doyle MacMahon was called to give expert evidence on behalf of the Notice Party who 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 the appeal.

2.2 In accordance with the directions of the Tribunal, the Appellant and the Notice Party filed and delivered their respective Précis of evidence prior to the commencement of the hearing. Legal Submissions were also filed by the Notice Party. As the Respondent did not file a Précis of evidence, no valuer gave evidence on behalf of the Respondent. At the oral hearing, Mr Halpin and Mr Bagnall having taken the oath, adopted their respective Précis as their evidence-in-chief after making some minor amendments.

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

3. THE PROPERTY AND ITS REVALUATION HISTORY

3.1 Glenough is an onshore wind farm situated in a rural townland of Turraheen Upper, 20 kilometres west of Thurles in County Tipperary. The wind farm site is approximately 400 metres above sea level and at the valuation date comprised ten Nordex N90 HS turbines and four Nordex N80 turbines each having a capacity of 2.5 MegaWatts (MW). Glenough comprised 13 commissioned turbines between the 26th August and the 26th October 2011. Turbine 14 was commissioned in December 2012.

3.2 Glenough was valued as part of the revaluation of the rating authority area of Tipperary County Council. The Respondent signed the Tipperary County Council Valuation Order 2017 on the 6th of October 2017 to secure the valuation of all relevant commercial and industrial properties situate in that rating authority area. The Order specified the 15th of September 2017 as the valuation date. On foot of that Order the valuation list was published on the 10th of September 2019 and the effective date for the valuation list was the 31st October 2019.

3.3 On the 7th of June 2019 a proposed valuation certificate was issued to the Appellant proposing a valuation of €2,924,000. Following representations made on behalf of the Appellant in July 2019 seeking a reduction in the proposed valuation to €1,227,000, the Respondent issued a final valuation certificate on the 10th of September 2019 specifying a higher valuation at €3,008,000.

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 section 48(1) of the Valuation Act, 2001 Act as amended (the Act) which provides as follows:

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

Section 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 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.

4.4 Section 37 of the Act, in material part, provides:

(1) The Tribunal shall consider an appeal made to it under section 34; in considering the appeal, unless the issues in the appeal do not relate to the value of property, the Tribunal shall achieve a determination of the value of the property concerned that accords—

(a) with that required to be achieved by section 19(5), or

(b) in the case of an appeal from a valuation made under section 28, with that required to be achieved by section 49.

(2) Having considered the appeal, the Tribunal may, as it thinks appropriate—

(a) disallow the appeal and, accordingly, confirm the decision of the Commissioner, valuation manager or revision manager, as appropriate, or

(b) allow the appeal and, accordingly, do whichever of the following is appropriate—

(i) decide that the circumstances referred to in section 28(4) existed for the exercise of the powers under that section,

(ii) in accordance with the matters set out in section 19(5) or 49, as appropriate, increase or decrease the valuation as stated in the valuation certificate,

5. QUANTUM ISSUES

5.1 A number of aspects pertaining to quantum arose from the 'R & E' valuations put forward by the Appellant and the Notice Party

i) Income: whether a revenue figure of €76.47 or €76.62 per MWh represents the income the hypothetical tenant would be capable of achieving at the Property.

ii) Operating Costs: whether a hypothetical tenant would estimate operating costs of €20.00 or €16.00 per MWh based on the Appellant's accounts.

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.

iv) Tenant Chattels: whether tenant chattels should be assessed at €437,500 or capped at €100,000.

v) Divisible Balance: whether the tenant's share of the divisible balance should be apportioned at 35% or 20%.

6. UNDISPUTED FACTS

6.1 The facts set out hereunder in relation to Glenough and its valuation history were not in dispute. They are as follows:

6.1.1 Glenough produces electricity from renewable resources. It has a total installed generating capacity (TIGC) of 35MW and a maximum export capacity of 33MW. It is a large scale onshore wind project as it has a maximum export capacity greater than 5MW which is connected directly to the electricity network and metered independently of any other electricity generating plant.

6.1.2 The Appellant is a generator accepted into the REFIT ('Renewable Energy Feed in Tariff') 1 support scheme.

6.1.3 The thirteen turbines owned by the Appellant were commissioned in 2011. Turbine 14, commissioned in December 2012, is owned by Glenough Windfarm 14 Limited and is located on lands leased by that company but is controlled and operated by the Appellant pursuant to a Turbine Development and Use Agreement made between the Appellant and Glenough Windfarm 14 Limited. The Appellant is entitled to the entire electrical output and renewable benefits associated with Turbine 14.

6.1.4 The Appellant entered into a REFIT 2006 Power Purchase Agreement ('PPA') with Viridian Energy Limited dated the 1st of July 2008 as amended and restated on the 10th July 2009 in respect of 13 turbines and further amended and restated by Agreement dated the 24th June 2013 to include Turbine 14 for the sale and purchase of the net electrical output of Glenough. REFIT payments are made to Viridian Energy Limited for the duration of the PPA and that company pays the Appellant the contract price agreed in the PPA. Essentially the PPA price euro per megawatt hour is 5.9 eurocents per kWh as adjusted from time to time in accordance with clause 2.3 of Schedule 2 of the PPA.

6.1.5 REFIT 1 reference prices are 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 and the balancing payment per megawatt hour was €10.458.

6.1.6 The Appellant entered into a second Maintenance and Service/Warranty Agreement (hereinafter 'MSA') on the 7th August 2015 with Nordex Energy Limited in respect of 13 turbines for a minimum annual fee over a period of thirteen years and a supplementary fee in the event actual production exceeded a stated output level. Under the terms of this MSA there are incremental increases in the minimum annual fees payable over the term. This MSA confirms an intention to enter a separate agreement for the maintenance and service of Turbine 14. Under that separate Maintenance and Service/Warranty Agreement, the same minimum annual fee per turbine is payable for the maintenance and service of T14 and that annual fee is subject to the same incremental increases.

6.1.7 The Appellant's financial year end is the 31st of December.

7. APPELLANT CASE

7.1 Mr Halpin adopted under oath his Précis as his evidence in chief after making three amendments as follows:

Page 20 - to clarify that 13 turbines were commissioned between 26 August and 26 October 2011 and that Turbine 14 was commissioned on 30th December 2012.

Page 24 - to clarify that the two large wind projects achieved 100%, not 95% of the balancing payment.

Page 24 - under the heading '*The Commissioner's Approach'* to delete the figure of €3.55 per MWh and substitute therefor, €3.00 per MWh.

Page 29 - under the heading 'Practice' - to delete 2014 and substitute therefore 2011.

7.2 Mr Halpin described Glenough and its location as depicted in the photographs on pages 15 to 19 of his Précis. He referred to the (PPA) made by the Appellant with Viridian Energy Limited on the 1st July 2008 as amended and re-stated on the 10 July 2009 and to the further Agreement made on the 24th June 2013 to amend and re-state the PPA of the 10th July 2009 to *inter alia* reflect the fact that Turbine 14 was to be installed. He accepted that the PPA contract price is not the best evidence of the revenue that the hypothetical tenant

would achieve when negotiating a new PPA at the valuation date. He pointed out that the Appellant's income is subject to an imbalance agreement (contract for difference) that was made in September 2018 providing for the payment to the licensed supplier of a standard charge of €3.15 per MWh.

7.3 Mr Halpin said that there is no rental market for wind farms in Ireland and, to the best of his knowledge, there are no wind farm lettings in Western Europe and so it was common ground that Glenough should be valued by the Receipts and Expenditure (R&E) method.

7.4 **Revenue**. Mr Halpin stated that the Respondent adopted a revenue figure of €76.62 per MWh on the valuation of wind farms under Reval 2019. He interpreted this figure to represent a base rate of €69.72 per MWh plus the balancing payment (€9.90) less €3.00 for I-SEM. The hypothetical tenant, he said, would be aware in 2017 that the Single Electricity Market was to be replaced by the Integrated Single Electricity Market ('I-SEM) the following year and as a consequence licensed suppliers would deduct a minimum charge of €3.00 from the balancing payment. He provided evidence of PPA agreements in respect of three wind farms (one small, two large scale), the details of which he set out in a table on page 26 of his Précis**.** The larger wind farms, REFIT 2 participants, received under their respective PPAs 100% of the base price and 100% of the balancing payment, which was €9.90, non-indexed. He considered that the hypothetical tenant taking account of I-SEM would reasonably expect a supplier to pay 100% of the base price and the balancing payment reduced by a minimum of €3.00. The Appellant' licensed supplier withheld €3.15 per MWh to cover imbalance charges pursuant to an Imbalance Agreement made in September 2018 but Mr. Halpin stated that he was aware of charges up to €3.50 per MWh. He contended for a revenue figure of €76.47per MWh calculated as the 2017 REFIT Reference Price of €69.72 plus the 2017 balancing payment of €9.90 reduced by €3.15 per MWh in respect of the licensed supplier charge.

7.5 **Output**. Mr Halpin analysed the Appellant's accounts for the financial years 2015 to 2018 inclusive and gave evidence that Glenough's average annual output for that four-year period was 100,798 MWh. He adopted that output figure for the purpose of estimating the NAV of Glenough. The output and revenue data are set out on page 25 of his Précis.

7.6 **Operational costs**. Mr. Halpin stated that all legitimate costs incurred in operating Glenough should be allowable with the exception of the landlord's cost of capital (loans or equity), rent (as the method is designed to calculate rent), and depreciation (other than

the sinking fund allowance). He presented the Appellant's operating costs for the financial years 2015 to 2018 inclusive in a table out on page 27 of his Précis. Mr. Halpin said the Respondent adopted a flat €16.00 per MWh regardless of the age or size of the wind farm based on an analysis of other wind farm accounts that were not made available to the Appellant. He understood that the costs analysed ranged between €9.68 and €37.32 per MWh. He presented a table of representative operating costs focussing on the operational age of wind farm turbines. He said the hypothetical tenant would know that Glenough's maintenance costs increase as the turbines age and that the maintenance contract price would increase by 26% in year 11. He said the Appellant entered into a first MSA with Nordex Energy Ireland Limited ('Nordex') on the 21st June 2012 for a term of five years. On the 7th August 2015 a new MSA was made with Nordex in respect of 13 turbines for a further period of 13 years to commence upon the expiry of the first MSA. Mr Halpin said the wind farm was six years old at the valuation date and he pointed to the incremental increases in the annual maintenance fees payable over the 13-year period of the second MSA. He adopted an operating costs figure of €20.00 per MWh to reflect those anticipated increases.

7.7 **Sinking Fund**. Mr. Halpin stated that the sinking fund provision established by the Respondent is €1,000,000 per MW installed at 2.5% over 20 years. The issue whether the duration of the sinking fund term should be 15 or 20 years is subject to an appeal in *Hibernian* to the Court of Appeal. In his valuation, he assessed the sinking fund over a period of 15 years.

7.8 **Tenant Chattels**. In REVAL 19, the Respondent capped the tenant's chattels allowance at €100,000 regardless of the TIGC of the wind farm. Mr. Halpin interpreted the Respondent's position to be that, without such cap, an allowance of €12,500 per MW becomes excessive in the case of larger wind farms. Mr. Halpin considered there to be no justifiable reason to deviate from the uncapped allowance of €12,500 per MW which had been applied in all previous wind farm appeal decisions. In the case of Glenough the application of the cap gave rise to a difference of €337,500. Though accepting under cross examination that the onus is on the Appellant to prove in evidence that the tenant chattels allowance of €100,000 is insufficient, he considered the Tribunal's previous decisions provided the best empirical evidence that the allowance fell to be assessed uncapped at €12,500 per MW. He agreed that items such as jeeps, specialist tools, laptops, monitoring equipment and a portacabin would qualify as tenant chattels but he was unable to quantify a figure for such items from the Appellant's accounts. He contended

for an uncapped figure of €437,500 based on an allowance of €12,500 per MW of capacity and observed that, if the allowance is to be capped at €100,000, further consideration would have to be given to as to the apportionment of divisible balance.

7.9 **Divisible Balance**. Mr. Halpin did not seek to gainsay the fact that the tenant has little capital exposure given that the landlord has constructed the wind farm at great expense. He acknowledged that the larger the wind farm the more capital expended by the landlord. He did, however, reference the Tribunal's determination on the issue of the divisible balance in *Slievereagh Power Ltd v Commissioner of Valuation VA15/5/058 '(Slievereagh')* which was an appeal concerning a single turbine where a tenant's share of 40% of the divisible balance was applied and to that fact that in all the other wind farm appeals the Tribunal applied a tenant's share of 35%.

7.10 Mr Halpin considered the risk to be substantially with the tenant given that the landlord receives the rent and the sinking fund replaces the turbines. If the wind fails to blow, the tenant has nonetheless to pay the rent. In addition, Mr. Halpin referenced other risks on the tenant's side:

i. Market Price of Power. He said I-SEM 2018 is curtailing revenue by 4.5% across the industry.
ii. Maintenance Costs. Older wind farms are more expensive to maintain.
iii. Planning. Wind farms experience opposition from local residents. The duration of a planning permission is limited to 20 years. Applications for retention permissions are required.
iv. Curtailment. Too much wind power in the national grid leads to 5% to 10% losses so some generation does not yield revenue. This is compounded by lower capacity distribution (10-30Kv as opposed to standard 110Kv).
v. Small scale wind farms carry greater risks than larger scale projects.

He was of the view that wind farms valued under REVAL 2019 can be differentiated from wind farms valued under the earlier REVAL 17 and REVAL 2015 programmes because I-SEM puts them at greater risk of curtailment and revenue loss. He contended for a divisible balance percentage split of 65:35 in favour of the landlord.

7.11 On a 'stand back and look 'basis Mr. Halpin maintained that there are no market rents to provide a benchmark. He referred to the requirements of s. 19(5) of the Act mentioning

that the valuation list has to be compiled by reference to relevant market data and that the statutory objectives of correctness of value and equity and uniformity of value relative to other comparable properties on the list has to be achieved. As all the wind farms in County Tipperary had been appealed to the Tribunal, and there being no other power generating properties on the list, Glenough, he said, had to be compared with some other category of property, but he was unclear as to what category of property should be used for comparison.

7.12 According to Mr Halpin the list valuation of Glenough had been assessed at 41.82% of its 2017 turnover which was, he said, considerably out of line with that of other relevant properties. He provided the table below to illustrate his point.

Type of Property	% **of Turnover**
Pubs/Hotels/Guesthouses	Rooms 10%, Drink 7-8%, Food 5%, Leisure 15%
Nursing Homes	7- 8%
Holiday Parks	20%
M50 Toll (VAI 7/5/523)	28.72%

It was the Appellant's position that an appropriate liability for rates would be unlikely to exceed 25% of turnover.

7.13 Under cross examination Mr Halpin did not accept that he was precluded from considering Glenough's output in 2018. He did not agree that the valuation had to be based on the Appellant's accounts prior to the valuation date. He accepted that he had not inflated the revenue figure saying that there were too many practical difficulties in doing so. He agreed that the accounts showed that average annual operating costs for the three years prior to the valuation date were €13.27 per MWh. With reference to the table of representative operating costs on page 26 of his Précis he accepted that the €16.00 per MWh costs figure adopted by the Respondent fell within the €15 to €18 per MWh range for wind farms and was reasonable given that large scale wind farms in Wexford had costs ranging between €9.68 and €14.82 per MWh. When it was put to him that there was a big difference between his estimated operating costs figure of €20.00 per MWh and the average €13.64 per MWh costs incurred by the five large wind farms in the table, Mr Halpin replied that the hypothetical tenant would know that the operating costs would not go down because turbines are wasting assets and that, even though operating costs may plateau for a period of years, they will increase as the turbines age. For that reason, he said the hypothetical tenant would take a different view from the average costs

incurred during the period between 2015 to 2017 when estimating the costs that he would be likely incur. He confirmed that the costs shown in the table on page 27 of his Précis exclude depreciation, lands rent and rates.

8. NOTICE PARTY CONTENTIONS

8.1 Mr. Bagnall is a qualified chartered surveyor with 40 years valuation experience in all areas of property and also specialises in rating assessments. He made observations on the three disputed issues which he hoped would be of assistance to the Tribunal. He adopted his Précis of evidence as his evidence in chief after correcting errors on pages 1 concerning the generation price achievable per MWh; the figure he said should be €76.62, not €76.72. He also corrected the €35m figure on page 4 concerning the landlord's expenditure and substituted therefore the figure of €80m.

8.2 He accepted Mr Halpin's description of Glenough and its location as confirmed by the map and photographs contained in Mr Halpin's Précis. He confirmed his agreement to the valuation of Glenough by the R & E method of valuation. He stated that he relied upon the information provided by the Appellant in forming a view as to how the NAV of Glenough should be estimated given that the Respondent had not filed a Précis of evidence.

8.3 He noted that the revenue figure relied upon by the Appellant was only marginally lower (by 15 cent) than the revenue figure of €76.62 applied by the Respondent. He considered that Mr Halpin had unreasonably sought to justify this reduction on the basis that curtailment compensation might not be available to the hypothetical tenant. He did, however, agree with Mr Halpin that the average annual output of Glenough should be assessed over the four-year period ending the 31st December 2018.

8.4 Mr. Bagnall stated that he considered the €16.00 per MWh figure adopted by the Respondent for operating expenses to be fair. He said maintenance costs are already included in the Appellant's operating costs and pointed out that Nordex had warranted in the second MSA that the average technical availability of the wind farm would not be less than 97% through years 1 to 7 and 96% through years 8 to13. Mr. Bagnall said that the evidence offered in Mr. Halpin's Précis at page 26 demonstrated a level of operating costs ranging between €15.00 and €18.00/MWh for wind that were operating for three to eight years. In the circumstances, Mr. Bagnall believed the costs figure of €16.00/MWh to be fair and reasonable.

8.5 Mr Bagnall was of the opinion that making an allowance for tenant's chattels of €437,500 would be unreasonable. He supported the €100,000 allowance cap introduced by the Respondent as the Appellant has a MSA in place. He stated that, within reason, the items required to operate, manage and maintain one turbine would be the same for the operation, management and maintenance of 14 turbines.

8.6 In terms of the sinking fund period, Mr Bagnall's said that there was evidence from Bellacorick Wind Farm (Co. Mayo) of turbines continuing to operate almost 30 years after commissioning. In those circumstances a sinking fund period of 20 years was very reasonable and he noted that the High Court decision in *Hibernian,* albeit appealed, was that the correct period is 20 and not 15 years.

8.7 Mr. Bagnall advocated a NAV of €3,114,000 which he said represented 4.4% of the landlord's investment in contrast to Mr Halpin's NAV figure which, he stated, offered a mere 2.4% return on investment. He said that the purpose of wind farm investment is to make money, not to provide electricity. The tenant's risk is low in terms of capital commitment and he would be well and fairly recompensed with a 20% tenant's share of the divisible balance. His valuation approach, he said, represented an absolute minimum return at 4.4% as landlords would require at a minimum a return that equates to 80% of the divisible balance.

8.8 In response to a question from Mr. Halpin, Mr. Bagnall agreed that the sinking fund issue was still before the courts, but whatever the outcome, it would not change his professional opinion that 20 years was the appropriate period for the sinking fund.

8.9 In terms of the tenant chattels allowance, when asked if the thought that the Respondent and, subsequently the Tribunal, had been incorrect to approve the allowance based on €12,500/MW, Mr Bagnall said he believed that the issue had not been looked at closely enough. Whilst 'chattels' was a very broad word, on a 'stand back and look' basis he was of the opinion that €100,000 per annum was more than adequate for a wind farm that has a MSA in place. Mr. Halpin asked Mr. Bagnall whether it was his view that an allowance of €281,250 was grossly excessive for a 35MW windfarm. Mr. Bagnall said it was excessive.

8.10 When questioned about the apportionment of the divisible balance, Mr. Bagnall confirmed that he had proposed on a number of appeals relating to Limerick wind farms that the

divisible balance be apportioned as to a landlord's share of 80% and said that those appeals had not yet been determined.

8.11 When asked by Mr. Halpin if knew of any other types of property in which return on investment would be used to drive the estimate of NAV, Mr. Bagnall replied that the matters were intrinsically linked and to say that investment would drive the NAV was a misnomer. Every office building built in Dublin was assessed based on risk and return to the investor.

8.12 In response to a question concerning a 9% return and a figure of €35m mentioned on page 4 of his Précis, Mr. Bagnall said that the return should be corrected to 2.4% and the expenditure figure should be corrected to €80m as he had inadvertently included the written down value (from the Appellant's accounts) of the wind farm in his Précis.

8.13 Mr. Bagnall stated that the only other wind farm accounts he had examined were those in the aforementioned Limerick appeals and that the earlier Kill Hill appeal was his first experience of dealing with a wind farm valued under Reval 19.

8.14 In re-examination, Mr Bagnall confirmed that his comments on return on investment were solely in the context of assessing the divisible balance.

9. SUBMISSIONS

9.1 What follows is a summary of the positions, limited to the contentious issues concerning revenue, operating costs, sinking fund, tenant chattels and divisible balance.

Appellant Submissions

9.2 The Tribunal has confirmed in its previous decisions that the occupier's accounts must be the starting point for estimating operating costs and in the *Declan Rouse t/a Lackan Wind Energy Limited Lackan VA/17/5/786, Slievereagh and West Clare Windfarm (SER*) *Limited VA17/5/108* appeals the Tribunal uplifted the operating costs to include wages. Glenough is a slightly older wind farm and the incremental increases in the contract price per turbine under the second Maintenance and Service Agreement are significant from €42,000 to €60,000 and then to €65,000. Though the tenancy is a tenancy from year to year and of indefinite duration, the Tribunal in *Dromada Windfarm (ROI) Limited v Commissioner of Valuation VA15/5/016* implicitly approved a term of 10 years.

9.3 The allowance for tenant chattels should be treated in the same manner The imposition of a €100,000 cap on the allowance is arbitrary and unfair. The rationale for the cap is unknown. It is not appropriate for the Respondent to move away from the previous consistent position of assessing tenant's chattels at €12,500 per MW.

9.4 It is fundamentally incorrect to apportion the tenant's share of the divisible balance by reference to returns on investment. Glenough is to be valued in its actual state at the valuation date. The wind farm is already in existence and in the words of Lord Hailsham in *Railway Assessment Authority v Southern Rail Company*[1] the hypothetical tenant is

> "*to be compensated by receiving a reasonable interest upon the capital invested, but also to receive such a profit upon his venture as reasonably to compensate him for the risk which it involves and to induce him to embark upon its prosecution".*

A significant sum is put aside for the sinking fund. The Tribunal has apportioned the tenant's share in valuing other properties on a 50:50 percentage basis. Lord Hailsham pointed out in *Railway Assessment Authority* that the apportionment of the divisible balance is not a question of law. The Tribunal ought to apportion the divisible balance on a 65:35 percentage basis.

9.5 On a ratepayer's appeal the Tribunal does not have jurisdiction to increase the valuation of the appeal property. In *Hibernian Windpower Ltd t/a Garvagh Glebe Windfarm VA17/5/1073* the Tribunal perversely held that it had such a jurisdiction under section 37(2) of the Act. The point may be academic on the facts of this appeal but, if not, the Tribunal should not increase the valuation.

Respondent Submissions

9.6 The onus is on the Appellant to demonstrate the NAV is incorrect. The Appellant contends that the tenant chattels allowance of €100,000 is insufficient and that €437,500 should be allowed. Tenant chattels are non-rateable items required to operate the business. No evidence was adduced by the Appellant as to the nature of the tenant chattels that would be required to operate Glenough or of their value. It would also be necessary for the Appellant to establish that there has been no double counting as there is a MSA Agreement in place.

[1] *[1936] 1 All ER 266*

9.7 The allowance cap has been applied to all the wind farms valued in County Tipperary so the requirements imposed by section 19(5) of the Act of equity and uniformity are satisfied. The allowance was not previously disputed and, previously, was never an issue that the Tribunal was required to consider.

9.8 It is ironic that the Appellant has adopted a figure of €20.00 per MWh for operating costs based on data from a basket of wind farm costs which is how the Respondent has traditionally approached the estimation of costs. In doing so, the Appellant is not following the Tribunal's decisions. The Respondent's figure of €16.00 per MWh is reasonable.

9.9 On the question of the Tribunal's jurisdiction to increase a property's valuation, the Appellant's submissions ignore the intent of the Act. The Tribunal should adopt the same position as it did in *Powercon Wind Energy Limited T/A Carrowleagh Wind Farm VA17/5/787.*

Interested Party Submissions

9.10 The Tribunal generally calculates the projected revenue as being the REFIT reference price together with an adjustment for the balancing payment. Whilst there is a is relatively minimal difference between the Appellant figure of €76.47 per MWh and the €76.72 per MWh figure used by the Respondent, the Appellant's argument that curtailment compensation may not be available to the hypothetical tenant is not valid and Mr. Bagnall's figure of €76.62 per MWh should be upheld.

9.11 The Appellant's figure of €20.00 per MWh for operating costs is well in excess of the operating costs determined by the Tribunal in other wind farm appeals and there appears to be no apparent justification for this figure. The figure of €16.00 per MWh used by the Respondent and supported by Mr Bagnall, should be applied. The Rating Authority supports the capping of the tenant's chattel allowance at €100,000.

9.12 The tenant's share represents the sum available to provide a return on any capital invested by the tenant and a reward to the tenant for his venture reflecting the extent of the risk and the need for profit. The question is what rent the hypothetical tenant would be likely to bid for the wind farm for the right to receive a reasonable profit and to protect against uncertainty. The quantification of the tenant's share must also take into account

the rating hypothesis that the tenant is assuming responsibility for the "*probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property*" in its actual state at the relevant valuation date. Regard must be had to the fact that the landlord put in place a full business plan with bank funding, obtained a technical analysis/Energy Production Assessment Report, a contract with a Government agency to supply electricity for 15 years with a fixed floor price that is index linked but with the option to achieve more, a maintenance and service contract incorporating warranties on the wind turbines, a sinking fund to recover the entire cost of the project over a 20 year period and insurance cover. The risks in operating the wind farm are minimal given the continued growth in demand for wind energy and the priority dispatch rule and the existence of the REFIT scheme provide price certainty. There is no reason why the Tribunal cannot vary the tenant's share of 35% to reflect the reduced risks associated with the Appellant's larger wind farm. The divisible balance should be split on an 80% : 20% basis.

9.13 In *Hibernian*, the High Court held that the appropriate period over which to calculate the sinking fund is a period of 20 years and the High Court's decision has accepted by the Tribunal in *Tullynahaw Power Ltd VA17/5/1071*; *Hibernian Windpower Ltd t/a Garvagh Glebe Windfarm VA17/5/1073* and *Reirk Energy Limited VA15/5/063.*

10. FINDINGS AND DISCUSSION

10.1 The valuation entered on the list for Glenough is €3,008,000. The Appellant bears the onus of proving that the list valuation is excessive and that the Glenough ought to have been valued at €1,900,000, a difference of €1,108,000 The Rating Authority estimated a higher NAV figure of €3,114,000 which is an increase of €106,000 on the list value and €1,214,000 higher than the Appellant's figure.

10.2 It is common case that no market rental evidence is available in respect of wind farms and that the appropriate approach to estimating the NAV of Glenough is by the R & E method of valuation which focuses primarily on the accounts of actual occupier of the property being valued.

10.3 The estimation of the NAV of a relevant property is a statutory exercise to be conducted 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 Glenough on the 15th September 2017 subject to the obligations mentioned in s. 48(3) as a tenant from year to year. This exercise requires the making of assumptions, contrary to the true facts, that it was vacant and to let at the valuation date by a willing landlord, and that such a letting would be achieved.

10.4 Under the PPA made in July 2008 the contract price payable to the licenced supplier is less than the price that would be achieved under a PPA agreed in September 2017. The REFIT 1 reference price in 2017 for a large-scale wind project was €69.72 per MWh and the balancing payment €10.458 which gave the licensed supplier a guaranteed total REFIT payment of €80.17 per MWh.

10.5 It is important to recall that this is the Appellant's appeal. The Interested Party, as the relevant rating authority, is a specified person within the meaning of s.34(4) of the Act as amended and so has a statutory right of appeal but chose not to exercise that right, opting instead to be heard on the Appellant's appeal as an interested party. In those circumstances, the Rating Authority cannot contend for a NAV higher than that stated on the valuation list.

10.6 The Tribunal was called upon to determine whether appropriate figures for projected revenue, projected operating costs and the tenant chattels allowance had been adopted in the valuation of Glenough and to resolve issues concerning the duration of the sinking fund and the apportionment of the divisible balance.

10.7 Relying upon the Appellant's accounts for the four-year period from 1st January 2015 to 31st December 2018, Mr. Halpin adopted an averaged output figure per MWh of 100,798 in his R & E valuation. Mr Bagnall did likewise. The Tribunal is satisfied that the average output of Glenough for the four-year period to the 31st December 2018, equating to a capacity factor of 32.85%, is broadly indicative of the output that would be achieved by the hypothetical tenant.

10.8 The relevant principles of valuation are set out in the Tribunal's decision in *Limerick West*. The hypothetical landlord and tenant are assumed to base their agreed rent on the income that the hypothetical tenant would be capable of achieving as it is the profit potential of the Property that must be ascertained, not the profit of the actual occupier. The year in respect of which the rent of Glenough is to be agreed lies ahead and so the rent must reflect the profits expected to be earned by the hypothetical tenant in the years ahead.

10.9 **Revenue.** Mr. Halpin adopted an average revenue figure of €76.47 per MWh which he based on the 2017 REFIT reference price of plus the balancing payment less €3.15 per MWh (€69.72 + €9.90 – €3.15). However, in his calculation he used the REFIT 2 balancing payment of €9.90 whereas in fact Glenough is a REFIT 1 participant and the REFIT 1 balancing payment in 2017 was €10.458. Mr Bagnall's adopted a revenue figure of €76.62 per MWh (€69.72 + €9.90) also incorrectly based on the REFIT 2 balancing payment of €9.90 and he made no adjustment for the widely accepted practice of licensed suppliers to retain a portion of the balancing payment as a charge or fee for their services.

10.10 The projected revenue should be based on a new PPA negotiated in 2017 with a base price that reflects the REFIT 1 reference price for that year plus the REFIT 1 balancing payment for that year less the fee that would be retained by the licensed supplier. The Tribunal has heard evidence that the fee retained by a licensed supplier can be €3.00 or €3.15 or €3.50 per MWh. As the Tribunal has previously accepted that licensed suppliers would retain a minimum of €3.00 per MWh in other wind farm appeals, the Tribunal considers that a revenue figure of €77.18 per MWh (€69.72 + €10.458 – €3.00) would reflect the income potential of Glenough at the valuation date.

10.11 **Operating costs**. Mr. Halpin adopted a figure to €20.00 per MWh while Mr Bagnall relied upon the €16.00 per MWh figure used by the Respondent in determining the NAV of Glenough. It is contrary to valuation practice and principle when carrying out an R & E valuation to take the average operational costs per MWh of several wind farms in substitution for the operational costs derived from the appeal property's accounts, adjusted as appropriate. The Court of Appeal, affirming the High Court, in *Hibernian*[2] has held that the R & E method does not permit an averaging exercise of receipts or expenses by reference to accounts of other wind farms.

10.12 On the figures furnished by Mr Halpin, which he sourced from the Appellant's financial statements, an average annual expenditure of €14.00 per MWh was incurred over the four-year period ending the 31st of December 2018. The operating costs incurred in 2018 were higher than the three previous years due to the payment of litigation costs. Such costs would not arise on a year-to-year basis and to include them would skew the valuation exercise. They are properly excluded not just because it is atypical expenditure but more

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importantly because it not expenditure that contributes to maintaining the wind farm in its actual state. It was also noted that significant legal expenditure was incurred in 2015. The Tribunal considers it appropriate to reduce legal costs incurred in 2018 by €100,000 to €15.14 [€1,527,476 less €100,000 divided by 2018 output of 94,304MWh] and to assess actual past operating expenditure based on the financial accounts for the years 2016, 2017 and 2018 as it provides a more reliable measure for valuation purposes. This in effect provides a three-year average annual expenditure of €14.26 per MWh [€12.53 (2016)+€15.12(2017) +€15.14 (2018) divided by 3]. The question whether this annual average figure should be adjusted to reflect the level of expenses that the reasonably competent hypothetical tenant would expect to incur under the MSA is considered below.

10.13 The operations and maintenance of a wind farm constitutes a considerable source of expenditure. At the valuation date these 13 turbines were operating for a period of 6 years. Mr. Halpin adduced in evidence the MSA of the 7th August 2015 to prove the minimum annual fees for 13 turbines (a separate contract was made in respect of Turbine 14) over the thirteen-year term of the Agreement. The first incremental increase from €42,000 to €60,000 per turbine took effect in 2017, the second such increase from €60,000 to €65,000 per turbine would occur in 2020 and the final increase from €65,000 to €76,000 per turbine is scheduled for 2025 and covers the final three years of the term. These annual fees are subject to annual review under clause 8.2 and may be adjusted to reflect any increase or decrease in the nominated price indices of the German Federal Statistics Offices and the Central Statistics Office. On the basis that maintenance and service costs would rise incrementally, Mr Halpin uplifted his estimated operating costs by €6.00 per MWh to €20.00/MWh.

10.14 Operating and maintenance costs are far from uniform across wind farms and such costs are not evenly distributed over time. Overall, they tend to increase with the passage of time as evidenced by Glenough's MSA.

10.15 The hypothetical tenant would know that Glenough's operating costs would rise over the duration of the tenancy. The Tribunal is satisfied that the starting point should be the average of the operating costs incurred in 2016, 2017 and 2018 (as adjusted by the Tribunal), namely €14.26 per MWh. This figure incorporates the contractual minimum annual maintenance fee increase that took effect in August 2017.

10.16 The Tribunal considers that this annual average figure of €14.26 per MWh should be uplifted to reflect the €5,000 per turbine incremental increase in the maintenance fee due to take effect in August 2020 for a five-year period [and the €11,000 per turbine incremental increase due to take effect in August 2025. Over a period of eight years additional MSA costs of €812,000 would be incurred under the MSA which would equate to additional yearly expenditure of €101,500 thus giving rise to additional expenditure of €1.00 per MWh. On that basis, the Tribunal estimates that the hypothetical tenant would reasonably expect to incur operating costs of €15.26 per MWh (rounded) in operating Glenough. [Calculated as follows : €5000 x 5 (years) x 14 turbines [years 2020 to 2024]; €11,000 x 3 years x 14 turbines [years 2025 to 2027] = €812,000 divided by 8 provides an annual average additional costs of €101,500 which when divided by the average agreed output of 100,798 MWh = €1.00 per MWh]

10.17 In *Hibernian*[3] the Court of Appeal 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".* Accordingly, the sinking fund is to be calculated over a period of 20 years.

10.18 **Tenant Chattels**. It is well established that the hypothetical tenant will invest capital in the business. On an R & E valuation it is appropriate to make an allowance for depreciation of tenant's chattels. On the 2019 Reval, this allowance was capped for wind farms at €100,000. The Appellant is not the only appellant aggrieved by this decision to come before the Tribunal. The reason the Respondent decided to change its approach on this allowance is presumably because its earlier decision was made on a mistaken basis or not properly thought through.

10.19 In the Appellant's view the Tribunal endorsed the calculation of the tenant chattel's allowance at the rate of €12,500 per MWh. The tenant's chattels allowance was not examined in any previous appeal as it was not raised as an issue. The Tribunal determines disputed issues and then only on such evidence as is available. This leaves the way open to the possibility of evidence being called by appellants on other appeals directly on this issue. The rate per MW adopted by the Respondent (applying the cap) would no doubt be the starting point but as matters stand the Respondent's decision on the allowance remains valid until successfully challenged. The estimate of tenant's chattels at €12,500

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per MW carries no implied representation about how it was determined in the first instance or on what information it was based. The allowance, whether capped or not, needs to be considered in relation to the facts of each individual wind farm. It is possible to envisage evidence being called to cast doubt on the allowance applied by the Respondent. That would be a matter for those advising future appellants, and for the Tribunal to consider, when the issue arises.

10.20 The Tribunal is not persuaded by the argument that the Appellant is entitled to have an allowance of €437,500 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) of the Act 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 in assessing the allowance, the Respondent is entitled to revisit the issue where there is good reason for doing so. The desirability of ensuring that this allowance is kept within reasonable bounds is a good reason in the Tribunal's view.

10.21 If an appellant considers that the Respondent has under assessed the amount of depreciation, 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 item asset, proof of the market value of each asset at the valuation date and the amount determined for depreciation. The Guidance Note of the Institute of Revenues Rating and Valuation on 'The R&E Method of Valuation for Non-Domestic Rating' ('the Guidance Note') provides at para. 5.41 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*.

10.22 If, on this appeal, the Appellant was prepared to stand over their figure of €437,500 then it had more than a sufficient opportunity to make their case but elected not to adduce any evidence as to the nature, the extent of, or the value at the valuation date of what would

notionally be the chattels required by the hypothetical tenant to operate the wind farm. That is, of course, entirely their prerogative.

10.23 The contention that capping the allowance at €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. As far as the Tribunal is presently concerned, the Appellant has not established an entitlement to an allowance for tenant's chattels of €437,500.

10.24 **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 that share Mr Halpin applied a 35% apportionment in his R & E calculation in line with the previous decisions of the Tribunal. Mr. Bagnall allocated 20% to the tenant and 80% to the landlord to reflect the size and scale of the windfarm and the size of the landlord's investment, thereby significantly increasing the amount available for rent and his assessment of the NAV.

10.25 The Guidance Note says at para. 5.46

> "*The tenant's share may be regarded as the first call upon the divisible balance. This share has to be sufficient to induce a tenant to take a tenancy of the Property and to provide a proper reward to achieve profit, an allowance for risk and a return upon the tenant's capital*."

and at para. 5.47

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

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

> *"He is a person embarking upon a commercial undertaking in which he is to sink his capital, in which he takes all the risks of success or failure, and in which he has not merely to be compensated by receiving a reasonable interest*

upon the capital invested, but also to receive such a profit upon his venture as reasonably to compensate him for the risk which it involves and to induce him to embark upon its prosecution. How much that percentage ought to be is a question of fact which is for the Authority and not for your Lordship's House."

10.27 The valuers calculated the tenant's share as a percentage of the divisible balance and the Tribunal considers that to be the correct approach to estimating the tenant's share. How much the percentage ought to be is a question of fact to be decided by the Tribunal. The key issue is whether, on the Rating Authority's argument, the tenant's share should be lower than the 30% used by the Respondent or, on the Appellant's argument, higher at the 35%.

10.28 There are risks inherent in operating a wind farm and those risks should not be underestimated simply because the tenant's capital contribution is low. Any person proposing to operate a wind farm needs to understand the amount of potential revenue the wind farm can generate and have confidence in their ability to generate that revenue in order to be able to cover the operating costs, set aside monies for the sinking fund and to pay the rent. Operating risks are the risks associated with running the facility and generating revenue from the production of energy. Nobody can predict with 100% certainty the amount of wind that will drive a turbine over any given period of time. No wind means a loss of revenue. The tenant risks also include site and equipment failure or warranty risks, but even assuming those risks are well managed, the other major risks for a REFIT supported wind farm is how much curtailment and constraint it will experience apart from the other potential sources of energy loss.

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

10.30 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. The REFIT Scheme undoubtedly helps the hypothetical tenant to manage the risks. On all previous appeals made in respect of large scale REFIT supported wind farms the Tribunal has determined that the divisible balance should be apportioned as to tenant's share 35% and landlord's share 65%. The Tribunal is not persuaded to adjust the apportionment of the divisible balance away from the 35% as to the tenant's share.

10.31 The Tribunal's valuation is set out on the attached Appendix 1 to this judgment (N/A to public) and incorporates the conclusions reached on the issues raised on this appeal.

11. DETERMINATION

Accordingly, for the above reasons the Tribunal allows the appeal in part as the Respondent's determination of value does not accord with the requirements of section 19(5) of the Act. In accordance with its powers under section 37(2)(b) of the Act the Tribunal allows the appeal and decreases the valuation of the Property as stated in the valuation certificate to €2,757,000.

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.