**Appeal No: VA19/5/0684**

**AN BINSE LUACHÁLA**
**VALUATION TRIBUNAL**

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

**CAPPAWHITE WIND LIMITED** **APPELLANT**

**AND**

**COMMISSIONER OF VALUATION** **RESPONDENT**

**In relation to the valuation of**
Property No. 5015112, at Kilmore, Cappawhite, 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 30th DAY OF JUNE 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 "Cappawhite") was fixed in the sum of €5,033,000.

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 as set out is more representative of a reasonable NAV 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) increasing I-SEM competition and cross border interconnection;
(ii) balancing markets risks;
(iii) loss of wind efficiency due to adjoining forestry and general degradation of turbines;
(iv) exceptional capital costs;
(v) community fund;
(vi) curtailment and constraints.

(d) The NAV of €5,033,000 is incorrect as it does not accord with the Valuation Tribunal decisions in VA15/5/067 Hibernian Wind Power Ltd and VA15/5/012 Limerick West Windfarm Ltd. More specifically:

(i) It is unclear what capacity factor was applied by the Respondent in arriving at the NAV. The accepted REFIT capacity as per Statutory Instrument No 459 of 2017 is 52MW;
(ii) 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;
(iii) 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;
(iv) By imposing an arbitrary cap of €100,000 per project for tenant's chattels the Respondent has failed to apply a consistent approach and therefore violated the principle of equity and uniformity required by section 19(5) of the Act.
(v) The Respondent is in possession of significant more data and documentation than individual occupiers.
(vi) 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.
(vii) The Tribunal has been requested to state cases for the opinion of the High Court following determinations of several wind farm appeals. A determination of any one of those cases by the Courts is likely to have a significant bearing on the correct approach to determining the value of wind farms

1.3 The amount that the Appellant considered ought to have been determined as being the valuation of Cappawhite was revised downwards from the amount of €3,450,000 as stated in the Notice of Appeal to €2,896,000 at the appeal hearing.

1.4 It emerged during the hearing that an incorrect Notice of Appeal was in the papers and at a break in proceedings the correct Notice, as detailed above was verified and circulated.

## 2. VALUATION HISTORY

2.1 On the 7th of June 2019 a proposed valuation certificate was issued in relation to Cappawhite to the Appellant indicating a valuation of €5,460,000 indicating that the final date for making representations was the 16th 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 €2,818,000. Following consideration of those representations, the valuation of Cappawhite was reduced to €5,033,000.

2.3 A final valuation certificate issued on the 10th of September 2019 stating a valuation of €5,033,000.

2.4 The valuation date for the rating authority area of Tipperary County Council is the 15th September 2017 and the publication date is 17th September 2019.

## 3. THE HEARING

3.1 The Appeal proceeded by way of a remote hearing held on the 22nd of June 2022. At the hearing, the Appellant was represented by Mr. Proinsias Ó Maolchalain BL instructed by Ms Avril Keogh, Solicitor. 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. The rating authority, Tipperary County Council, appeared as an interested party represented by Ms. Rosemary Healy-Rae BL instructed by Binchy Partners LLP and Mr. Brian Bagnall FRICS, FSCSI of Bagnall Doyle MacMahon was called to give expert evidence. The rating authority is, by virtue of section 36(2)(b) of the Valuation Act 2001 ('the Act') entitled to be heard, and 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. Other representatives were in attendance but did not take part in the proceedings.

3.2 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. At the oral hearing, Mr Algar and Mr Bagnall, having affirmed under oath their evidence, adopted their précis as evidence-in-chief in addition to giving oral evidence.

3.3 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').*

## 4. ISSUES

4.1 The parties' valuers were agreed on a number of matters and consequently only four issues fell for determination by the Tribunal. They were:

Whether the valuation as determined by the Respondent was excessive by reason that the Respondent

(i) overstated the estimated wind capacity factor at the valuation date by not adopting the output assessed by Natural Power Consultants on the P90

(ii) incorrectly applied a 20 year period in respect of the sinking fund rather than a 15-year period being the duration of the Renewable Energy Feed-In Tariff (hereinafter "the REFIT") Scheme as determined in Hibernian Wind Power Ltd

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

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

4.2 An application was made during the hearing to amend the Notice of Appeal to contend that the annual energy output applied in the valuation of Cappawhite was excessive and ought to have been assessed at the P90 probability of exceedance value predicted in the Natural Power Wind Assessment Report. In response to the application Counsel for the Respondent, while pointing out that the application should have been made at the start of the hearing, indicated that the Respondent remained neutral. The Notice Party objected on the grounds that no good reason had been adduced to explain why that ground had not been advanced in the Notice of Appeal. Counsel for the Appellant pointed out that it was not known when the appeal was lodged that the Tribunal would hold the use of hindsight figures (i.e., energy output data post the valuation date) inappropriate as the decision in *Coillte Teoranta v Commissioner of Valuation ('Coillte')* did not issue until February 2020. He also pointed out the absence of any prejudice to the Respondent and the Notice Party who were on notice that the Appellant was contending for the wind farm output to be estimated by reference to the P90 parameter since the Appellant's Précis was delivered in April 2022.

4.3 The Tribunal, in its approach to amendment applications, is guided by the jurisprudence of the Superior Courts that permits amendments where it is in the interests of justice to do so and where it is clear that an amendment is necessary to allow the true issues between the parties to be determined, provided no prejudice is caused to the other party which is not capable of being substantially met by appropriate orders or directions in the proceedings. While the application was made very late, the Tribunal was satisfied that no prejudice would arise in permitting the amendment sought and that the justice of the case required that the Appellant, accordingly, be given permission to rely on the new ground.

## 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 Cappawhite to be determined by estimating Its NAV and section 48(3) of the Act sets out the basis to be adopted in calculating the

NAV 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. APPELLANT EVIDENCE

6.1 Mr. Algar confirmed that he had prepared a précis and supplemental précis which he adopted as his evidence in chief. He outlined that Cappawhite is located approximately 3 kms north of Cappawhite village; 14 kms from Tipperary town and 37.5 kms east of Limerick City in a mainly agricultural and forested area. Cappawhite comprises 17 turbines with a total installed generating capacity (TIGC) of 56.85 MW and a maximum export capacity to the grid of 52 MW. The turbines are all Vestas type V-112 with 12 rated at 3.3 MW and 5 rated at 3.45 MW.

6.2 He confirmed that construction of Cappawhite commenced in January 2016 and was completed on the 10th of August 2017 and the facility was commissioned on 1st December of 2017. He also confirmed that there was a Power Purchase Agreement (PPA) entered into for the windfarm by related parties on 1st April 2016 as set out in his report. 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 issue of curtailment.

6.3 He confirmed that he had regard to the that 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 and to thirteen Tribunal decisions on wind farm appeals.

6.4 Mr. Algar then explained his approach to each of the inputs to the valuation, starting with the revenue where he stated that this wind farm is supported in the REFIT 2 scheme and that, having regard to the Tribunal decisions in *VA17/5/1071 Tullynahaw Power Ltd* and *VA17/5/1073 Hibernian Windpower Ltd t/a Garvagh Glebe Wind Farm*, he had adopted the revenue figure used by the Respondent € 76.62 per MW hour as being reasonable. This is calculated by reference to the following:

| | |
|---|---|
| REFIT 2 Reference price 2017 | € 69.72 |
| REFIT 2 balancing payment | € 9.90 |
| Less supplier retention | ( € 3.00 ) |
| | € 76.62 |

He considered that the sum of € 3.00 deducted by the Respondent from the balancing payment was reasonable.

6.5 Regarding **Output**, he referred to the Tribunal decision in *Coillte* and stated that, as the wind farm was not in operation at the valuation date he considered what information would be available to the hypothetical tenant and had sought energy yield assessment reports which were prepared by independent experts in this specialised field. He consulted two reports which were prepared by Natural Power Consultants ('Natural Power') in 2014 and updated in 2015, to guide him. These set out energy yield estimates for output by reference to probability metrics for the provision of the most appropriate turbine and the number of turbines and layout to best suit the characteristics of the site. He explained that the reports used two main metrics of probability to predict the output expressed in terms of exceedance of output over a period of ten years, namely P50 and P90, with the P50 providing output based on this being achieved (exceeded) 50% of the time and the P90 providing a corresponding figure for output based on it being achieved (exceeded) 90% of the time.

6.6 Mr Algar adopted the output based on the P90 estimate which is in line with the decision of the Tribunal in *Coillte* which gives an estimated output of 146,700 MW hours. He justified this stance by saying that a prudent hypothetical tenant would adopt this figure, being the more conservative measure for a wind farm with no track record and to reflect

dispatch down factors which were increasing at the valuation date. The two dispatch down factors arise from the fact that although renewable energy generators receive priority in the central control of the power system, there will be occasions when it is not possible to accommodate dispatch supply for reasons of safety. The first of these is constraint which refers to the restriction of the local network where there is too much wind generation to be taken by the system i.e. during periods of high winds. The second of these is curtailment which refers to dispatch down for system wide reasons such as frequency control, voltage requirements and operating reserve requirements. His understanding was that the energy reports did not take account of these grid connection issues.

6.7 On the subject of **Operating Costs**, Mr. Algar submitted that, as the wind farm was not operational at the valuation date, and though he had accounts for 2018, these were post the valuation date and would not have been available to the hypothetical tenant and following consultation with the Appellant he adopted the Respondent's figure of € 16.00 per MWhr. He explained that the ESB, which was the wind farm owner, has a substantial wind farm portfolio of 26 windfarms with some 380 turbines spread across Ireland, Northern Ireland and Britain encompassing 6 different turbine suppliers and 12 different turbine types and the size of the operation achieves efficiencies, evident from the accounts, but are not reflective of the additional operational expenses that the hypothetical tenant of a standalone wind farm would face.

6.8 **Sinking Fund**. Mr. Algar confirmed that he had allowed a sinking fund over 15 years in line with the Tribunal's approach in the *Hibernian Wind Power* appeal but acknowledged that the High Court's decision, which had found that decision to be incorrect, was under appeal to the Court of Appeal.

6.9 **Tenant's Chattels**. Mr. Algar confirmed that he had adopted a sum of € 12,500 per MW for tenant's chattels in line with prevailing Tribunal decisions. He explained that he has not provided a list of these items stating that it would be difficult to provide this in the industry as the concept does not arise in the real world because wind farms are not rented. He did not agree with the Respondent's approach to cap the tenant chattel allowance at € 100,000.. He has tried to ascertain the basis for the € 12,500 per MW but was advised that this goes back many years to the Limerick Revaluation in 2013 where, as far as he can say, one approach was to look at taking a percentage of the total depreciation. Mr. Algar confirmed that the figure for depreciation in the 2018 accounts was € 4,005,000 and stated that part of this figure would be captured by the sinking fund.

6.10 **Divisible Balance**. Mr. Algar defined his approach here by reference to the Tribunal's previous decisions (bar one – *Slieveragh* ) where the 65:35 (Landlord/Tenant) split had been determined as being appropriate for supported windfarms under REFIT 1 & 2. In his view, though the divisible balance was split 65:35 split in valuing the Garvagh Glebe and Tullynahaw wind farms where the valuation date was 30th October 2015, he saw no reason to deviate from that in valuing Cappawhite at the later valuation date of the 15th September 2017 as the only change that occurred was the emergence of the integrated single energy market which presented more risk for the tenant. His understanding was that the Respondent had adopted the split of 65:35 in other cases.

6.11 **Valuation**. Mr. Algar, taking the above inputs, submitted a valuation of € 2,896,000.

6.12 Under cross examination Mr. Algar confirmed that the probability factors of P50 and P90 refer to the probability of exceedance in each case, over the chosen period of the Report which was ten years. He also clarified that some of the results were for different scenarios in terms of types of turbine, but that the preferred guide was from the " as built" scenario in Appendix 11 of his précis, (notwithstanding that nothing was built by 2015 but considered to be closest to an "as built" scenario) being what he understood to be an update of the detailed Report prepared by NPC in Appendix 10 of his précis. It was put to him that, looking at that update page with the output figure of 174.9 Gigawatts per year (174,900 MWhrs), was to calculate the P50 figure as this is shown in blue coloured type but Mr. Algar did not agree that it suggested a preference for P50 but agreed that the resultant net capacity factor shown at the bottom of the table of values of 35.1% is a reference to the P50 output expressed in percentage terms. Mr. Algar, in a further response to Mr. Dodd on the subject of curtailments and constraints did not agree that these were covered in the table in Appendix 11, despite being referenced therein, as his understanding from other cases was that these are not encompassed in energy reports.

6.13 Under cross examination Mr. Algar clarified that he had not adjusted his valuation for inflation as his understanding had been that that practice had not been adopted to date by the Valuation Tribunal and the inflation was nil or nominal for the relevant years. He confirmed that he had not provided any evidence with regard to tenant's chattels in terms of itemising or quantifying them.

6.14 In answer to questions from Ms. Rosemary Healy-Rae, for Tipperary County Council, Mr. Algar confirmed that although Mr. Bagnall had taken a mean figure for output between the P50 and P90 figures to derive an output of 160,800 MWhrs, it was his view that the Respondent had, in fact, taken an output of 173,000 MWhrs, as far as could be reasonably established. He disagreed that his approach in taking a P90 figure was the worst case scenario but more the better or "more likely" chance, following the *Coillte* decision. He disagreed with Mr. Bagnall's view of having regard to the 2018 accounts as he felt only information available at the valuation date should be considered. When asked to point to any reference in the Energy Report to show that curtailment and constraints had been excluded. Mr Algar responded that he could not do so. He further clarified that he had not seen the Business Plan for this venture.

6.15 Mr Algar agreed that the allowance claimed by the Appellant for tenant's chattels is large but reflects a large wind farm and, although he could not provide further detail on these he considered that Mr. Bagnall had not proved a case for the cap to apply to Cappawhite. He did not accept that there was an element of double counting by reason that some tenant items would be included in the costs figure of € 16.00 per MWhr. He accepted that the landlord's investment is significant but cautioned that the exercise is concerned with determining the rent not the investment alone. The Tenant has to sign up to a large rent and a large sinking fund. When asked about Mr. Bagnall's reference to prime yields being of the order of 4% he said that might well be true but that Mr Bagnall did not include wind farms in the bracket of analysis. When asked about the reason for the change in his

valuation from € 3,665,000 in the Notice of Appeal to the figure put forward in his précis of € 2,896,000 he explained that this was due mainly to the adoption of the P90 figure and also to Tribunal decisions after the appeal was lodged.

6.16 On re-examination, Mr. Algar stated that with regard to constraints and curtailments it was his understanding that energy reports did not take account of those outside the remit of the wind farm site and pointed to the reference in the NPC report on page 3 (2014) which stated:

> " A*lthough grid curtailment has been modelled previously for certain turbine scenarios run for this site, Natural Power have not been instructed to include curtailment for grid export limits in this instance*. "

He also clarified that he had not allowed for inflation on the costs of € 16.00 per MWhr.

6.17 In response to Tribunal questions, Mr Algar confirmed that he had no precise information on the reason for the decrease in the valuation from € 5,460,000 to € 5,033.000 in the final valuation certificate. He further explained that he had not seen a business plan but thought this would be more like a "rolling document" than one single document. He was not able to explain the derivation of the amount of € 12,500 per MW for chattels but said he believed this rate had been adopted by the Respondent for the Limerick wind farms valuation scheme and accordingly used by parties in valuing wind farms. He did not consider that the capacity factor resulting from the adoption of the P90 figure at 29.43% was unduly low. He clarified for the Tribunal that, although the Power Purchase Agreement allowed for a retention of € 4.00 and whilst acknowledging that the default position is € 1.50, he had, after consultation with the Appellant agreed to the figure of € 3.00 as used by the Respondent.

## 7. NOTICE PARTY EVIDENCE

7.1 Mr. Bagnall referred to the précis he had prepared on the 9th June 2022 which he adopted as his evidence in chief.

7.2 He confirmed that in regard to **Revenue** he has adopted € 76.62 as the appropriate price which he said is in agreement with both the Appellant and the Respondent.

7.3 He confirmed that with regard to **Output** he has taken a mean of the P50 and P90 figures which he considers reasonable in the circumstances . Referring to the 2018 accounts he mentioned that the actual output at that stage was ahead of his adopted level. Furthermore, he stated that on the exercise of revision powers in respect Cappawhite (before the onset of the revaluation) the parties (Mr. Algar and the Valuation Office in 2018) had actually taken that approach too. He referred to a Valuation Report (internal Valuation Office document supplied to him) contained in Appendix II of his précis which showed the calculation of the earlier revision figure in addition to the revaluation figure. Aside from this, he considered that by taking P50 in itself a "mean", reflected the possibility of the output being 50% above or below but felt that, taking the mean between the P50 and P90 figures (i.e. 160,800 MWhs) would be the more conservative approach

for the hypothetical tenant point of view. He confirmed that the actual output in 2018 was 164,082 MWhrs.

7.4 **Operating Costs**. Mr. Bagnall adopted € 16.00 per MW hour in line with both the Appellant and the Respondent, a figure which he considered reasonable despite an earlier analysis at reps stage by the Appellant to indicate € 15.04 per MWhr. He said that the adopted level of € 16.00 per MWhr includes a substantial amount of chattels listed by the ESB as set out in the Appendix to Mr. Algar's précis.

7.5 **Tenant's Chattels**. He confirmed that up until 2019 it had been the Respondent's practice to adopt an allowance a figure of €12,500 per MW with no cap but that, following a review of that approach, the Respondent considers it more appropriate to cap the allowance at € 100,000. He did not believe that a rate per MW that generated figure of € 710,625 could be justified. In his view, a cap of € 100,000 is more than adequate because there could be double counting if a cap is not applied as many tenant items are included in the operating costs figure of € 16.00 per MWhr. Furthermore, he considered that stance to be justified because there is a maintenance contract as well as a guarantee in place and as the tenant is presumed to be reasonably knowledgeable, to add a further € 710,625 would not be correct. He cited examples of items that would come into the reckoning as chattels in his précis. He clarified that he was not involved in any capacity in the discussions on how the original allowance was assessed back in 2013.

7.6 **Sinking Fund**. Mr. Bagnall stated that he had adopted a period of 20 years following the High Court's decision in *Hibernian* and, indeed, because turbines can operate beyond 20 years and hence spreading the sinking fund over the life of the turbine is much more reasonable, as opposed to over the REFIT period of 15 years.

7.7 **Divisible Balance**. Mr. Bagnall stated that, although he is aware of the Tribunal decisions on this issue, he had submitted an extract from the 2018 accounts in his précis which showed a significant debt representing the enormous investment in the wind farm which be considered would require a reasonable return, not just on the capital but to service any debt payments. He outlined that the hypothetical tenant would conduct a due diligence assessment on the wind farm, and have regard to the REFIT Scheme terms, the maintenance contract, the sinking fund allowance; the insurance and the warranties. 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 as being more reasonable. He stated that this apportionment is especially justified if one considers that the tenant's investment is less than 1% of that of the landlord. He said the risk to the tenant is that the wind might not blow but that does not happen as it might dip on occasions but is always present. The return for the landlord on his/her investment has to be more than the € 2.9m advanced by the Appellant. He considered that what is required when apportioning the divisible balance is to look at 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, with some risk, granted, whereas the landlord is going into the venture with a high capital investment for which he will require a commensurate return and on that basis a percentage split of 80:20 split to be fair.

7.8 **Valuation**. On the basis of the above approach to the various inputs he submitted an R & E valuation of € 4,980,000 for consideration by the Tribunal.

7.9 In cross examination Mr. Bagnall accepted the output figure from the 2018 accounts was not his primary evidence as hindsight figures cannot be relied upon. He also accepted that banks might want to see P90 figures as they are conservative in their approach and P90 had been adopted by the Tribunal in *Coillte* and *Reirk*. He further accepted that the amount shown in the Appellant's accounts for depreciation may include an element for depreciation in respect of tenant's chattels but he felt that this would be small. He acknowledged that he had given evidence in the *March Winds*, *Knockstanna* and *Tournafulla* appeals where he had accepted the amount for tenant's chattels at € 12,500 per MW. On reflection, he considered this an oversight as the allowance was too generous because he considered some items would be covered in the operating costs of € 16.00 per MWhr and so to add a further € 710,625 would, in his opinion, amount to double counting. He accepted that paring back this amount to € 100,000 does affect the overall negotiation between the landlord and tenant.

7.10 In response to a question from the Tribunal Mr. Bagnall explained that a high yield property investment would yield between 8 and 10% and the range overall is between 4 and 10% but considered that for a wind farm type investment an investor would seek a yield of 5, 6 or 7% return. He agreed that with the level of return would be impacted as more wind farms coming on stream every year but said there is more knowledge now within the industry to create certainty.

## 8. APPELLANT SUBMISSIONS

8.1.1 Counsel on behalf of the Appellant adopted his written Submissions in addition to making brief oral submission. In summary he presented the following arguments:

8.1.2

(i) **Output.** The Appellant has adopted the P90 estimate which provides for an output **o**f 146,700 MWhrs reflecting a net capacity factor of 29.457% in reliance on the Tribunal's decisions in *Coillte and Reirk Energy Limited v Commissioner of Valuation (VA.15.5.063)('Reirk')* quoting in particular from paragraphs 10.7 and 10.11 of *Coillte* and having regard to the fact that the energy report for Cappawhite states that it did not account for constraints and curtailments. There are more wind farms entering the market creating more competition and increasing the likelihood of an excess of electricity being produced. These risk factors do not appear to be reflected in the estimates of P90 or P50.

(ii) **Revenue and Operating Costs**. There is agreement between the parties on the revenue price and costs. The question of inflation would have to be a subject for another day. In any event, if the revenue figure required to be indexed then the same would have to be equally applied to the costs and the sinking fund figures.

(iii) **Tenant' Chattels**. In the real world wind farms are owner occupied. Under the rating hypothesis the approach adopted in numerous cases to date of applying € 12,500 per MW as being appropriate should be continued. Any major change to

this allowance would affect other component elements of the R & E valuation such as the sinking fund and the divisible balance.

(iv) **Sinking Fund.** The sinking fund should be calculated over a period of 15 years in accordance with the determination in *Hibernian* subject to decision of the Court of Appeal following the High Court case [2021] IEHC 49, and also having regard to the principles of uniformity and equity enshrined in s.19(5) of the Act.

(v) **Divisible Balance.** There are no circumstances to warrant a move away from the 65:35 percentage split adopted in the various wind farm appeals to date. A balance must be struck between the aspirations of both the hypothetical landlord and tenant. It is not correct to focus on the capital investment by the landlord to the exclusion of the tenant as it is the latter who has to pay rent and contribute to the sinking fund which gives rise to a significant obligation and who takes on the operational risks. Reference was made to a passage in the UK House of Lords decision in *Railway Assessment Authority v Southern Railway Company [1936] 1 All ER 26* which said that the hypothetical tenant must be seen as not a mere investor in shares and, therefore, content to receive only an ordinary rate of interest, but is to be perceived as a person embarking on a venture in which he sinks all his capital and must receive, in addition to a return on capital, an amount of profit to compensate him for the risk involved and induce him into the venture.

## 9. RESPONDENT SUBMISSIONS

9.1 Counsel on behalf of the Respondent, adopted the submissions from the appeal heard the day before in *VA.19/5/0663 Lisheen Wind farm*. In summary, he submitted that while the energy report of 2014 (page 3) does not take account of grid curtailment, the update report of 2015 does in fact do so. Page 4 of the 2014 energy report refers to P50 probability of exceedance output figure, and it is on this figure that the parties negotiating the rent of the hypothetical tenancy would settle.

## 10. NOTICE PARTY SUBMISSIONS

10.1 Counsel for the Notice Party adopted her written Submissions from the earlier appeal of *VA.19.5.0663 Lisheen Wind farm* in addition to the submissions made on behalf of the Respondent on this appeal save in respect of Cappawhite's output. In summary, she made the following points:

(i) **Output**. Notwithstanding the decisions in *Coillte* and *Reirk* Mr Bagnall's approach is to take a mean between the P50 and P90 probability of exceedance figures which is reasonable, and though after the valuation date, regard should be had to the actual 2018 output.

(ii) **Sinking Fund**. This should be calculated over 20 years.

(iii) **Tenant's Chattels**. No evidence has been presented by the Appellant in relation to the sum claimed of € 710,625 despite the onus of proof being with the Appellant. Mr Bagnall's view is that this sum is covered in the figure adopted for

operating costs. Caution needs to be exercised to avoid double counting as referenced in 5.3.6 of the Guidance Note. As far back as the representations stage the Appellant was advised that the amount for chattels would be capped and yet no effort has been made by the Appellant to satisfy the Tribunal on the correctness of this figure. Any knock on effect on the divisible balance by altering this figure as suggested by Counsel for the Appellant cannot be sustained without attempting to quantify the basis for that assertion.

(iv) **Divisible Balance**. The significant investment by the landlord and the minimal investment by the tenant are factors to be taken into account together with the significant increase in demand for wind energy reflecting an industry that continues to grow assisted by Government policy. The tenant is not taking all the risk and thus the Tribunal should not feel that it must strictly adhere to the former position of a 65:35 split, especially taking account of the size of Cappawhite.

## 11. FINDINGS OF FACT

From the evidence adduced by the parties, the Tribunal finds the following facts:

11.1 Cappawhite is a large scale wind farm situated approximately 3 kilometres (km) north of Cappawhite village and 14km north of Tipperary town.

11.2 Cappawhite comprises 17 Vesta wind turbine generators (WTGs) with a total installed generating capacity ('TIGC') of 56.85MW. It has twelve Vestas V112 3.3MW WTGs and 5 V112 3.45MW WTGs. It has a maximum export capacity (MEC) of 52MW. It is occupied by the Appellant, which is a wholly owned subsidiary of the Electricity Supply Board ('ESB'). Cappawhite was commissioned in December 2017, some three months after the valuation date.

11.3 The Appellant made a successful application to participate in the Renewable Energy Feed in Tariff 2012 ('REFIT 2) competition. On the 1st April 2016, the Appellant entered into a power purchase agreement ('PPA') with the ESB for a term of 15 years pursuant to which the ESB agreed to purchase the Net Tradeable Quantity of electricity exported from Cappawhite and to share Renewable Benefits on the terms and subject to the conditions of the PPA.

11.4 Prior to making the PPA, the Appellant had been issued a letter of offer by the Department of Communications, Marine and Natural Resources on foot of a successful application to participate in the REFIT 2 competition which had been launched in 2012.

11.5 In or about 2014 ESB Wind Development Ltd instructed The Natural Power Consultants Limited ('Natural Power') to update previous energy yield analysis work for the 2015 forestry scenario carried out on the Cappawhite Wind Farm site for the purpose of predicting the long-term (10 year) average of the annual energy production for new turbine scenarios. Natural Power provided a Report dated the 18th November 2014 which calculated in respect of the twelve Vestas V112-3.3 WTGs a 10-year average annual P50 energy yield of 189,900MWhrs and a 10-year P90 average annual energy yield of 159,600

MWhrs. For the five Vestas V112-3.45 WTGs, a 10-year average annual P50 energy yield of 189,700 MWhrs and a 10-year P90 average annual energy yield of 158,700 MWhrs was calculated.

11.6 The Appellant provided a single sheet update entitled "Cappawhite" -Energy Loss factors for 2015 forestry scenario (calculated by NPC) in respect of Scenario No. B. which identified 17 turbines for a wind farm with a TIGC of 56.85MW. This update calculated the average annual Net Energy Output P50 at 174,900 MWhrs and the average annual Net Energy Output P90 at 146,700 MWhrs.

11.7 The valuers for the Appellant and the Notice Party agreed that the NAV of Cappawhite should be estimated by the R & E method of valuation.

11.8 The REFIT reference price in 2017 was € 69.72 per MWhr and the balancing payment was €9.90. The parties' valuers agreed that the amount to be retained by the supplier is € 3.00. This yields a net revenue price of € 76.62 per MWhr.

11.9 The valuers for the Appellant and the Notice Party agreed that the operating costs are € 16.00 per MWhr.

11.10 The valuers for the Appellant and the Notice Party adopted a replacement cost in the sinking fund calculation of € 1m per MW for the turbines and used an interest rate (accumulative rate) of 2.5%.

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

## 12. DISCUSSION AND FINDINGS

12.1 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 Tribunal's task is to estimate the rent which the hypothetical tenant might reasonably be expected to pay for Cappawhite on the15th 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 Cappawhite was vacant and to let at the valuation date by a willing landlord, and that such a letting would be achieved.

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

12.3 There is agreement between the Applicant and the Notice Party on certain component elements of the R & E valuation. The disputed issues concern the estimation of the capacity factor, the duration of the sinking fund, the duration of the sinking fund and the capping of the tenant chattels allowance.

12.4 **Output**: The first issue concerns the energy output of Cappawhite. The approach of the Appellant was to adopt the long-term (ten year) P90 probability of exceedance energy output figure of 146,700 MWhrs whereas Mr Bagnall took the mean between the P50 and P90 predictors to yield an output of 160,800 MWhrs. Mr. Algar gave evidence of the output actually achieved in 2018 which was 164,082 MWH. The Property was commissioned in December 2017 and s.19 of the Act requires the valuation list to be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue of the valuation certificate as confirmed by the High Court in *Coillte Teoranta trading as Sliabh Bawn Wind Farm v Commissioner of Valuation [2022] IEHC 588.* The Appellant's year end is the 31st December 2018. The output for that year was 164,082. That annual output divided by the TIGC gives a capacity factor of 30.34% which exceeds the predicted output figures proposed both by Mr Algar and Mr Bagnall. It is not optimal to base a rental bid solely on information derived from the first full year of the wind farm operations but the 2019 output figures were not available to the Tribunal and the 2018 output figure trumps the 10 year energy P90 and P50 figures and anything in between and constitutes empirical evidence of the wind farm's performance, it carries more weight than the figures utilised by either valuer. Given that the actual output achieved in 2018 was 164,082 MWhrs which is confirmed by the accounts for the year ended 31st December 2018, approved on 6th June 2019, and that the final valuation certificate was issued on 10th September 2019 the Tribunal considers that the figure of 164,082 MWhrs should be adopted for output.

12.5 **Operating Costs**. The Tribunal's reasons for not approving the Respondent's operating costs of €15 per MWh in the case of wind farms valued before 2019 and €16 per MWh for wind farms valued during Reval 2019, regardless of the valuation date have been set out in previous determinations and relate to the size of the wind farm or the actual costs in the wind farm operator's accounts. The Tribunal has consistently stated that it is contrary to valuation practice and principle when carrying out an R & E valuation to take the average operating costs per MWh of several other windfarms in substitution for the operational costs figure derived from the appeal property's accounts

The Court of Appeal in its Judgment in *Hibernian* commented as follows on the "Standard NAV/MWH" approach adopted by the Respondent in valuing Grouse Lodge Wind Farm and nine other wind farms in Limerick:

> *The "Standard NAV/MW" is simply the product of the mathematical averaging of the various (and varying) values from each windfarm. That exercise does not account for the variables that affect the operation (and therefore the output and cost base) of individual windfarms. That point is made by Owens J at para 39 of his judgment. It has also been made by the Valuation Tribunal in some of the many determinations provided to us: see for instance West Clare Windfarm SER v Commissioner of Valuation at 10.15 (de minimis windfarms will typically have proportionately higher operating costs than large scale windfarms), Reirk Energy*

*Limited v Commissioner of Valuation at 11.7 (energy output of a wind farm is highly dependent upon the weather conditions present at the wind farm site as well as the type, size, and capacity of its wind turbines and in term of estimating energy output, the accounts of other windfarms are not useful unless those wind farms are similarly located on a site of similar terrain and have the same type and height of wind turbine). As it is aptly stated in 'Hibernian's written submissions, "wind farms are neither identical nor "homogeneous" when it comes to their design, manufacture, location, wind capacity factor, operation, maintenance routine or degradation."*

and at para. 67

*The Commissioner's approach does not, in truth, involve comparison with other operators. Instead, it involves devising an imaginary and notional "average" operator that does not correspond to any actual operator. The price notionally achieved by that notional operator will be higher or lower than that of actual windfarm operators; ditto its notional average operational costs. But that says nothing as to the price that the hypothetical operator of any specific windfarm would achieve or the costs that such an operator would incur. If windfarms were indeed entirely homogenous, there might be some validity in the Commissioner's approach. But they are not. Outputs differ. Costs differ. Those differences do not necessarily indicate any deviation from normally efficient operation and simply averaging the prices and costs of different operators does not establish a benchmark for efficient operation. That is, in my view, a fundamental flaw in the Commissioner's position*

Mr. Algar appended to his précis a breakdown of Cappawhite's operating costs for 2018. The costs per MWh was €15.04. The Tribunal considers that the operating costs figure in the R & E valuation should be adjudged by reference to the Appellant's accounts for the period prior to the issue of the valuation certificate. The operating costs as disclosed in respect of 2018 were reviewed by the Tribunal, and it is satisfied, subject to a minor adjustment to exclude community fund expenditure, that they give a fair indication of what is likely would be the probable average annual costs, one year with another, of Cappawhite. The reason for the omission of community fund expenditure is that hypothetical tenant bidding to occupy the property is only concerned with the "*probable average annual cost of the…expenses (if any) that would be necessary to maintain the property*" in its actual state. Community fund expenditure is not an expense falling into that category and is not relevant to the estimation of the NAV of Cappawhite. The omission of the community fund expenditure reduced the cost per MWh to €14.30.

12.6 **Sinking Fund**. The Appellant sought a period of 15 years over which to accumulate the sinking fund which contrasted with the approach Notice Party to adopt a period of 20 years. Since the hearing of this appeal, the Judgment of the Court of Appeal has issued in *Hibernian* which upheld the earlier decision of the High Court that " *the terms of section 48 (3) make it clear that the expense of replacing the turbines must be averaged out over the entirety of their 20 year design life".* Accordingly, the Tribunal inputs a period of 20 years for the sinking fund into the valuation.

12.7 **Tenant Chattels**. The Appellant applied an allowance rate of € 12,500 per MW in respect of tenant chattels based on the allowance previously applied by the Respondent to other wind farm cases valued prior to 2019. This produced a total for this component of € 710,625 (€ 12,500 X 56.85 MWs).

It is well established that the hypothetical tenant will invest capital in the business and that on an R & E valuation an allowance for depreciation of the tenant's assets can be made in the context of renewal of those assets. On the 2019 Reval, the Respondent decided to cap the tenant chattels allowance for wind farms at €100,000. The Appellant is not the only appellant that feels aggrieved by this decision. The reason why 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. The Tribunal is not persuaded by an argument that the Appellant is entitled to have an allowance for €710,625 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 has an obligation 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.

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 by appealing 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.

12.8 **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 Mr. Algar applied 35%, the Respondent applied 30% when the NAV was determined and Mr. Bagnall applied 20%.

The Guidance Note makes clear that the tenant's share of the divisible balance must be:

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

By whatever method the tenant's share is calculated, it is necessary to "*stand back and look*" at the result to decide whether the outcome of the calculation is reasonable for both parties. 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. Nobody can predict with 100% certainty the amount of wind that will drive a turbine over any given period of time. No wind or low wind speeds means a loss of revenue. The tenant risks also include site and equipment failure or warranty risks, but even assuming those risks are well are managed, the other major risks after a wind farm has been constructed are how much power it will produce year on year and whether there will be a sharp fall in electricity prices.

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 earned by the operator on an average of years and considering whether he could improve upon that and the amount of expenditure 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.

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 Cappawhite as a result of adopting our own figures on the disputed matters in the valuation leads the Tribunal to the conclusion that the tenant's share should be 35% of the divisible balance.

12.9 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.

## 13. DETERMINATION

Accordingly, the Tribunal holds that the Property's valuation on the list is incorrect. The appeal is allowed and the Tribunal decreases the net annual value of the Property as stated in the valuation certificate and on the valuation list to €4,565,000.

And the Tribunal so determines.

### NOTIFICATION OF RIGHT OF APPEAL

In accordance with section 39 of the Valuation Act 2001 any party who is dissatisfied with the Tribunal's determination as being erroneous in point of law may declare such dissatisfaction and require the Tribunal to state and sign a case for the opinion of the High Court

This right of appeal may be exercised only if a party makes a declaration of dissatisfaction in writing to the Tribunal so that it is received within 21 days from the date of the Tribunal's Determination and having declared dissatisfaction, by notice in writing addressed to the Chairperson of the Tribunal within 28 days from the date of the said Determination, requires the Tribunal to state and sign a case for the opinion of the High Court thereon within 3 months from the date of receipt of such notice.