THE COURT OF APPEAL

UNAPPROVED

Record Number: 2021/98

High Court Record Number: 2020/943SS

Barniville P. **Neutral Citation Number [2023] IECA 54**

Collins J.

Haughton J.

BETWEEN/

EUROLINK MOTORWAY OPERATION LIMITED

APPELLANT

-AND-

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Haughton delivered electronically on 10th day of March, 2023

Introduction

1. The appellant ("**Eurolink**") is the occupier of two toll franchises on the M4 motorway under and pursuant to contract with the National Roads Authority ("**NRA**"), now Transport Infrastructure Ireland ("**TII**"), made on 24 March 2003 ("**the PPP Agreement**").

2. It is of significance that it is not contested that the toll franchises are rateable property and that that rateable property is '*occupied*' by Eurolink for the purposes of the Valuation Act 2001, as amended ("**the 2001 Act**").

3. Under the PPP Agreement there are detailed provisions for calculating what is known as "*the Revenue Share*" ("**the Revenue Share**") which Eurolink must pay to TII. The nature of this "Revenue Share" and the manner in which it falls to be calculated is explained in detail below.

4. This appeal arises out of the judgment of the High Court (Owens J.) delivered on 8 February 2021 and the perfected order of 24 March 2021, dismissing Eurolink's appeal by way of Case Stated pursuant to s. 39 of the 2001 Act in respect of two judgments of the Valuation Tribunal. The question of law posed in the Case Stated for the opinion of the High Court was: -

> "… Whether on the basis of the facts agreed or proved, the evidence and submissions of the parties, the Valuation Tribunal was correct in determining that the Revenue Share handed over by the appellant to TII is not deductible when valuing the subject property in accordance with section 48 of the Valuation Act, 2001 (as amended)."

5. The two issues argued by the appellant in the High Court and in this court may be summarised as follows: -

(a) Whether a proper application of the receipts and expenditure method of valuation (the "**R & E Method**") requires the deduction of the Revenue Share from Eurolink's gross receipts because it is not "*within the grasp of Eurolink*"; and/or

(b) Whether Eurolink's obligation to hand over the Revenue Share is a statutory obligation and/or a restriction on the monies that it can derive from the collection of tolls from the public and, thus, a limitation on the profit making ability of the right to collect the toll as property.

6. Eurolink, therefore, contends that the Revenue Share should be deducted from gross receipts when calculating the "*Net Annual Value*" ("**NAV**") for the purposes of s. 48(3) of the 2001 Act. Both these arguments were rejected by the Valuation Tribunal, and by the High Court.

Relevant statutory provisions

7. It is convenient to set out the relevant statutory provisions at this point in order to better understand the arguments and the decision of the High Court.

8. Section 3 of the 2001 Act has the following definition: -

> "'Relevant property' shall be construed in accordance with Schedule 3."

Schedule 3 of the 2001 Act, as amended by the Valuation (Amendment) Act 2015 sets out "*relevant property*" and states: –

> "Property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in paragraph 2 of this Schedule shall be relevant property for the purposes of this Act:
>
> (a) …
>
> (b) Tolls, …"

Paragraph 2 provides: –

> "The condition mentioned in *paragraph 1* of this Schedule is that the property concerned –
>
> (a) is occupied and the nature of that occupation is such as to constitute rateable occupation of the property, that is to say, occupation of the nature which, under the enactments in force immediately before the commencement of this Act (whether repealed enactments or not), was a prerequisite for the making of a rate in respect of occupied property, or
>
> (b) is unoccupied but capable of being the subject of rateable valuation by the owner of the property."

9. Other relevant definitions in s. 3 of the 2001 Act are: -

> "'Occupier' means, in relation to property (whether corporeal or incorporeal), every person in the immediate use or enjoyment of the property;"

Section 13 of the 2001 Act provides that the Commissioner of Valuation ("**the Commissioner**") "*shall provide for the determination of the value of all relevant properties (other than relevant properties specified in Schedule 4) in accordance with the provisions of this Act*."

10. Section 48(1) of the 2001 Act provides: –

> "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."

I shall refer to the 'net annual value' as "NAV".

11. Critical to the issues raised in this appeal is s. 48(3) of the 2001 Act, as amended by the Valuation (Amendment) Act 2015, which provides: -

> "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."

This definition of NAV is often referred to as '*the statutory construct*'. It is based on the hypothetical rent that a tenant/occupier "*might*" pay, on certain "*assumptions*" as to "*probable*" expenditure "*necessary to maintain the property in that state*", and on the assumption that the tenant will bear the rates.

12. It should be noted, because it is relevant to a decision of the Supreme Court relied upon by Eurolink[1], that prior to amendment in 2015 s. 48(3) included, after the words "*and all rates and other taxes*", the additional words "*and charges (if any) payable by or under any enactment*".

13. The Roads Act 1993 (as amended ("the 1993 Act"), governs road tolls. Section 57(1) provides that a road authority "*may prepare a scheme for the establishment of a system of tolls in respect of the use of a public road*". Section 58 sets out the statutory procedure under which public consultation takes place and in due course a draft toll scheme may be adopted by a road authority. NRA (now TII) was at all material times a road authority for the purposes of the motorway and the tolls at issue.

14. Section 59 of the 1993 Act establishes the power to charge tolls: -

> "59. - (1) Subject to the provisions of this Part, a road authority may charge and collect tolls of such amounts as may be prescribed for the time being in bye-laws made by it under section 61 in respect of the use of a toll road.
>
> (2) A road authority may provide and maintain such buildings, structures, works and apparatus as it considers necessary or expedient for or in connection with the charging and collection of tolls and the operation of toll roads.
>
> (3) Where an agreement under section 63 provides for the collection of tolls by a person specified in the agreement, that person and his servants and agents may collect the tolls to which this agreement relates."

Section 59(1) of the Roads Act 1993 replaced s. 2(1) of the Local Government (Toll) Roads Act 1979, which was in similar terms.

15. Section 61(1) of the 1993 Act as amended provides: –

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[1] *Westlink Toll Bridge Limited v. Commissioner of Valuation and Fingal County Council; Celtic Road Group (Dundalk) Limited v. Commissioner of Valuation and Louth County Council* [2013] IESC 42. Referred to in the Case Stated, and later in this judgment, as "*Westlink (No.2*").

"61. - (1) A road authority may, after consultation with the Commissioner, make such bye-laws as it considers expedient for the purposes of the operation and management of a toll road."

The Commissioner referred to is the Commissioner of An Garda Síochána.

Section 61(3) specifies, so far as relevant: -

"(3) Without prejudice to the generality of subsection (1), bye-laws under this section may—

(a) specify the amounts of the tolls that shall be charged, or the scales and other provisions by reference to which they shall be charged, in respect of the use of a toll road by vehicles and road users of each class specified in the bye-laws and may specify different such amounts by reference to such circumstances or combinations of circumstances (whether relating to classes of vehicles or road users, seasons of the year, days of the week, times of the day or otherwise) as the road authority may consider appropriate,

(e) specify the powers of the road authority and of any person authorised by it to operate and manage the toll road concerned in relation to users of a toll road and vehicles and the persons in charge of them."

Subsection (6) provides for local newspaper publication of proposed bye-laws, and under ss. (7) any objection or representation made to it must be considered by the road authority. Under ss. (8) the bye-laws must specify the date on which they become effective, and under ss. (9) the bye-laws as adopted must be published in *Iris Oifigiúil* ¬ and local newspapers. Subsection (10) makes it an offence to contravene a bye-law.

16. The "*Bye-Laws for the M4 Kinnegad/Enfield/Kilcock Motorway made under the Roads Act 1993 as amended*" ("**the Bye-Laws**") are dated November 2005 and came into effect on 12 December 2005, and will be referred to in more detail later in this judgment.

17. A key provision is s. 63 of the 1993 Act as amended, as it sets out the statutory basis for the PPP Agreement:

> "63.—(1) Where a toll scheme is adopted by a road authority, the road authority may enter into an agreement with another person under which, upon such terms and conditions as may be specified in the agreement (including payment to, or retention by, the person of all or part of the proceeds of tolls in respect of the toll road the subject of the scheme), the person agrees to do all or one or more of the following:
>
> (a) to pay some or all of the cost of the construction of the road,
>
> (b) to pay some or all of the cost of the maintenance of the road,
>
> (c) to construct or join or assist in the construction of the road for or with the authority,
>
> (d) to maintain or join or assist in the maintenance of the road for or with the authority,
>
> (e) to operate and manage (including provide, supervise and operate a system of tolls and their collection in respect of the use of the road) the road for or with the authority,
>
> (f) such other things connected with or incidental to ancillary to or consequential upon the foregoing as may be specified in the agreement.
>
> (1A) A road authority may enter into different agreements with different persons in respect of anything referred to in subsection (1).
>
> (2) Without prejudice to the generality of subsection (1), an agreement under this section may -
>
> (a) provide for the application of the proceeds of tolls, systems of accounting for tolls collected and the methods and times of payment of proceeds of tolls to the persons to whom they are to be paid under the terms of the agreement,
>
> (b) specify the period for which the agreement shall have effect and provide for its termination or suspension and for matters connected with or incidental or ancillary to

or consequent upon the expiration of the agreement or such termination or suspension, and

(c) provide for the giving of such security as may be specified therein—

i. to the road authority by any other party to the agreement, or

ii. by the road authority to any other party to the agreement,

in relation to the carrying out and observance by that party or authority of the terms and conditions of the agreement.

(3) A road authority may enter into an agreement with a party with whom it has entered into a previous agreement under this section amending the terms or conditions thereof, adding thereto, or deleting therefrom, terms or conditions or revoking the previous agreement.

(4) Entry into an agreement under this section in relation to a regional road or a local road shall be a reserved function.

(5) The parties to an agreement under this section shall carry out the agreement in accordance with its terms and conditions and a road authority shall have all such powers as may be necessary for that purpose."

18. Section 64(1) of the 1993 Act, as amended provides for "*a default toll, in accordance with the bye-laws*" that "*may be charged and payable in respect of the vehicle*", and for recovery of tolls, and offences, and further sub-sections provide for additional powers and offences in relation to non-payment of tolls. Section 64(A) allows a road undertaking (such as Eurolink) access to and inspection rights in respect of licensing records "*for the purposes of charging and collecting payment of tolls*". It is an offence (under s. 64A(9)) for a person on a toll road to refuse to obey a lawful instruction of a person authorised by a "*road undertaking*" to provide, operate or manage a toll road or collect or charge tolls on the road.

19. Section 65 of the 1993 Act, as amended, provides: -

"65. —The Minister may make regulations—

(a) for the purposes of this Part and for enabling this Part and any toll scheme under section 58, or agreement under section 63, to have full effect, and

(b) providing for the application of any moneys accruing to a road authority from the exercise of its functions under this Part."

The Case Stated

20. Section 39 of the 2001 Act provides for appeals from the Valuation Tribunal ("**the Tribunal**") to the High Court by way of case stated. Section 39(1) provides that after the determination by the Tribunal, any party to the appeal "*if dissatisfied with the determination as being erroneous in point of law*" may so declare to the Tribunal within 21 days of its determination, and under ss. (2) that party has 28 days in which to require the Tribunal to state and sign a case for the opinion of the High Court. Subsection 3 provides –

"(3) The case shall set forth the facts and the determination of the Tribunal and the party requiring it shall transmit the case, when stated and signed by the chairperson of the Tribunal, to the High Court within 7 days from the date of receiving it."

21. The jurisdiction of the High Court is stated as follows: -

"(5) The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit."

Under subsection 6 the High Court can cause the case to be sent back for amendment, and deliver judgment on it as amended. Under ss. 7 an appeal lies from the decision of the High Court to this court.

22. It is important to note that it is for the Tribunal to make and set forth relevant findings of fact, and the jurisdiction of the High Court, and this court, extends only to determining disputed questions of law arising on the case.

The findings of the Valuation Tribunal

23. In light of the foregoing it is important for the High Court and this court to abide by the findings of fact and the determinations of the Tribunal which form the basis of the Case Stated.

24. The appeals before the Tribunal related to rateable valuations by the Commissioner of €6,365,000 (Kildare VA17/5/1091) and €2,145,000 (Westmeath VA17/5/1092) ascribed to tolls pertaining to the M4 Motorway. Proposed Valuation Certificates were issued in respect of the subject properties on 12 January 2017 (Westmeath) and 10 March 2017 (Kildare). Notwithstanding representations by Eurolink, the Valuation Manager did not consider it appropriate to provide for lower valuations, such that Final Valuation Certificates were issued on 7 September 2017 affirming these two valuations. A Notice of Appeal was received by the Tribunal on 12 October 2017. An oral hearing was held in the offices of the Tribunal over five days in early 2019, with evidence taken from the CEO of Eurolink and three experts on its behalf, and from two experts on behalf of the Commissioner. The Tribunal disallowed the appeals and confirmed the decisions of the Commissioner. Eurolink requested the Tribunal to state a case for the opinion of the High Court which the Tribunal agreed to do.

25. The Case Stated at para. 3 sets out the following as "*Facts Agreed or Found*": -

> "3.1 The subject property is the tolls collectable from users of vehicles of all types which traverse the M4 motorway. The motorway comprises 37.05 kilometres of motorway and includes bridges, a tunnel, and associated structures. It passes through three separate local authority areas, County Kildare, County Meath and County Westmeath. 18.993km (51.26% by distance) is in the County Kildare

Local Authority area; 11.65km (31.44% by distance) in county Meath and 6.41km (17.3% by distance) in County Westmeath.

3.2 The subject property is “relevant property” within the meaning of the Act.

3.3 The M4 toll road scheme was designed to link the N4 and N6 National Primary Routes west of Kinnegad to the existing M4 motorway at Kilcock. The Appellant entered into a contract (“the PPP Agreement”) with the NRA (now Transport Infrastructure Ireland (“TII”)) on 24th March 2003 pursuant to section 63 of the Roads Act 1993, whereby the Appellant agreed to design, construct, operate and maintain and finance a road scheme to be known as the M4/M6 Kinnegad – Kilcock Motorway. Users of the motorway pay a toll to the Appellant at the point of passing through the toll plaza. The PPP Agreement is of 30 years duration and includes the period during which the motorway was under construction.

3.4 Under the PPP Agreement, TII is entitled to receive a Revenue Share which is defined in the Agreement as “*the rights and entitlement of the Authority to receive certain amounts from the PPP Co. pursuant to Part 4 of Schedule 15 (Payments), as adjusted from time to time in accordance with Schedule 12 (variations)”.*

3.5 The purpose of the Revenue Share is so as to enable TII to participate in the revenue being generated by the subject property.

3.6 The Bye-Laws applicable to the motorway were adopted on 8th November 2005, pursuant to section 61 of the Roads Act and came into effect on 12th December 2005, being the date, the motorway opened (the “Bye-Laws”). Regulation 14 of the Bye-Laws provides for the maximum amount that can be charged for the various tolls in one year.

3.7 The Joint Professional Institute and Rating Valuation Form has provided a detailed written Guidance Note to be used in the valuation of properties by the receipts and expenditure method of valuation. Both parties accepted that the receipts and expenditure method ("R&E") is the appropriate valuation method to ascertain the net annual value of the subject property and relied on the application of the Guidance Note. Tolls are specifically referred to in paragraph 3.7 of the Guidance Note.

3.8 The subject property was the tolls."

26. Before the Tribunal the issues were twofold – firstly whether or not the Revenue Share was to be included in the gross receipts when valuing the subject properties in accordance with s. 48 of the 2001 Act, and secondly "*What the appropriate Tenant's Share should be*". The Case Stated only concerns the first of these questions.

27. The Case Stated in para. 6 summarises the submissions of Eurolink and of TII, and then summarises the "*Determination of the Tribunal*" in paragraph 7.1 –: -

"7.1 Revenue Share

(a) The Tribunal stated that the categorisation of the Revenue Share as rent or akin to rent was not key to enable it to make its determination. In the Tribunal's view, the two matters it needed to consider were a) the Appellant's submission that Revenue Share is not within the grasp of the Appellant and b) the Appellant's argument that the Revenue Share is a statutory restriction on the profit making capacity of the Appellant which has to be taken into account.

(b) The Tribunal did not accept the Appellant's submission that the legal regime under which the requirement to transmit the Revenue Share is imposed is predicated on

the assumption that the Revenue Share is never received. It found that the fact that the PPP Agreement made provision for retention of all or part of the proceeds of the tolls by the operator does not mean that the Revenue Share is never received by the hypothetical tenant operator of the toll road. The question is not what income is "*within the grasp*" of the Appellant, but rather the Tribunal must determine what income the hypothetical tenant could reasonably derive from occupation of the subject property. Under the rating construct the hypothetical tenant includes the landlord and if rateable, the landlord would have to pay rates on the entirety of the tolls collected. The Tribunal concluded that in valuing the subject property, the income reasonably able to be derived from the subject property is the income from all the tolls collected.

(c) With regards to the Appellant's secondary argument that the Revenue Share represents a statutory restriction on the profit-making capacity of the Appellant which has to be taken into account, the Tribunal noted that the facts in this appeal were different to those in the case of *The Mayor, Aldermen and Citizens of the City of Worcester*[2], in which the Assessment Committee of the Droitwich Poor Law Union was a public body which was unequivocally directly restricted by statute from charging more than what was required to defray its costs and expenses.

(d) The Tribunal noted that MacMenamin J in *Westlink 2* said obiter that it was arguable that the provisions in relation to the revenue share did fall within the definition of a limitation of profits clause. However the Tribunal further noted that the passage from Ryde quote by MacMenamin J makes it clear that the

[2] (1876), Vol.1, 1 Exchequer Division.

restriction on the profit making capacity must amount to "*a limitation of the charges which the trading occupier can make as between him and the public*".

(e) The Tribunal found that, while there is no doubt that there is a restriction in the Bye-Laws as regards the maximum tolls which the Appellant can charge, the Appellant did not show the connection between that restriction and the Revenue Share payable to TII which is based on traffic volume. Therefore, the Tribunal found that the Revenue Share is not deductible when valuing the subject property"

28. The full "*question of law for the opinion of the High Court*" is set forth in para. 8, as follows: -

"*The question of law for the opinion of the High Court is whether, on the basis of the facts agreed or proved, the evidence and the submissions of the parties, the Valuation Tribunal was correct in determining that the Revenue Share handed over by the Appellant to TII is not deductible when valuing the subject property in accordance with s. 48 of the Valuation Act 2001 (as amended*)."

The "R & E" method and the Guidance Note

29. The Guidance Note referred to in the Case Stated is headed "*The Receipts and Expenditure Method of Valuation for Non-Domestic Rating*", and has been approved by the Joint Professional Institutions Rating Valuation Forum. Paragraph 3.7 of the Guidance Note notes that the R&E method "*may be the preferred method of valuation to be applied to, inter alia… tolls (where they are rateable)*." The Outline of Methodology is set out in para. 4.1 and 4.2 as follows: -

"4.1 An explanation of the R&E method as applied by valuers can be found in the case of *Kingston Union AC v Metropolitan Water Board* (1926);

'*From the gross receipts of the undertakers or the preceding year they deducted working expenses, an allowance for tenant's profit and the cost of repairs and other*

statutable deductions and treated the balance remaining (which should presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern.'

4.2 It is necessary to look at this explanation in the light of modern practice and development of the R & E method through caselaw. The methodology is based upon the approach set out below:

(a) *Gross Receipts should be determined by taking into account all income reasonably able to be derived from occupation of the property.*

(b) The proper Cost of Purchases made in order to produce those receipts should be deducted to determine the Gross Profit.

(c) From the Gross Profit the Working Expenses should be deducted to determine the Divisible Balance.

(d) The Divisible Balance is the sum available to be shared between the landlord and the tenant. It comprises two main elements:

(i) the Tenant's Share – to provide a return on any tenant's capital employed and a reward to the tenant for his venture reflecting the extent of the risk and the need for profit. This is deducted from the Divisible Balance to leave:

(ii) The Landlord's Share, i.e. the rent payable (which becomes the rateable value)."

The words in italics in clause 4.2(a) have particular importance to the present appeal.

30. In paragraph 5.1 it is stated: -

"Under the requirements of a valuation for rating it has to be assumed that the property is vacant and to let and that the occupation is that of a hypothetical tenant who is generally assumed to occupy the property for the purpose for which it is actually used. …"

In relation to "*Receipts*", the Guidance states: -

"5.12 In general, receipts should include all income directly and indirectly derived from occupation of the property …"

Under "*Valuation*" at para. 5.58 it is stated: –

"Having determined the Tenant's Share and deducted this from the Divisible Balance, the resulting figure represents the amount available for payment of rent."

The PPP Agreement

31. Certain provisions of the PPP Agreement between Eurolink and the NRA relevant to the collection of tolls and the payment of the Revenue Share now need to be set out. Within the Definitions in para. 1.1 "*Revenue Share*" is defined to mean: –

"The rights and entitlement of the Authority [TII] to receive certain amounts from the PPP Co. pursuant to Part 4 of Schedule 15 (Payments), as adjusted from time to time in accordance with Schedule 12 (Variations)."

The payment obligation is set out in para. 32.2, which provides: -

"If applicable, the PPP Co. shall pay to the Authority the amount or amounts specified in accordance with Part 4 and Part 5 of Schedule 15 (Payments) which shall be payable in accordance with Clause 34 (Payments)."

Paragraph 33 sets out detailed provisions in relation to Payment Requests. In brief, there is provision for a monthly payment based on monthly reports and payment requests, with an annual reconciliation and a further payment or a refund as the case may be. Clause 34 deals

with payments, with provision for interest on late payments (Clause 34.4), and the NRA/TII has the right under Clause 34.6 at its own expense and on reasonable notice to examine the books and records of Eurolink.

32. In paragraph 39 headed "*Rates*" the basic provision is that –

> "Any rates arising or payable in connection with the use of any property under this Agreement or in connection with compliance with any obligations under this Agreement are payable by the PPP Co. …"

There is a proviso under which, if the Tenant's Share as determined by the Valuations Office decreases to below 7% or increases above 10% then NRA/TII agree to compensate Eurolink for the increase in the amount of rates payable, with adjustment in the other direction if the rates decrease.

33. Schedule 15 of the PPP Agreement in Part 3 deals with "*Tolling*" and provides: -

> "1.1 With effect from the permit to USC Date, the PPP Co. shall collect from each User (other than exempt Users) a toll in respect of its use of the Project Road in accordance with the Toll Scheme and this Part 3 of Schedule 15.
>
> 1.2 If there is an inconsistency between the terms of this Part 3 of Schedule 15 and the Toll Scheme, the requirements of the Toll Scheme shall prevail."

Part 3 then requires Eurolink to produce a Toll Operating Plan, which is considered by the NRA and approved, or approved as modified. Annex 1 to Part 3 sets out the "*Base Toll in accordance with the Toll Scheme*" as of August 2000 and prices and excluding VAT in respect of different classes of vehicle e.g. motorcycle 90 Cent, motor car €1.75, and the heaviest goods vehicles €4.30, are set out.

34. Part 4 of Schedule 15 is headed "*Revenue Sharing*". Clause 1.1 provides –

"It is agreed and acknowledged that the PPP Co. shall pay to the Authority the amounts determined in accordance with this Part 4 of Schedule 15 *so as to enable the Authority to participate in the revenue being generated by the Project Road*. The Authority's rights and entitlements under this Part 4 of Schedule 15 shall commence on the Permit to Use Date."

The words in italics are emphasised as they reflect the findings of fact made by the Tribunal in para.3.5 of the Case Stated.

35. Paragraph 2 then sets out the manner in which the amount to be paid by Eurolink to TII in each contract month is to be calculated. It is based on the Average Daily Traffic (ADT) for each class of vehicles. There is a "*Band Floor*" in respect of each class of vehicles, and if the ADT falls below that in a given month then that class is excluded from the calculation for that month. There is also a "*Band Ceiling*" in respect of each class, and if the ADT exceeds the Band Ceiling there is a method of calculation set out in para. 2.2.1 for a sum that is added to the sum for Revenue Share in respect of ADT falling between the Band Floor and the Band Ceiling. Annex 1 to Part 4 sets out the Bands and applicable percentages in respect of the different classes of vehicle for the contract years 2006 – 2033. While this is complicated, the essence of the band system is that if the daily traffic in a particular class of vehicle is unexpectedly low, then there will be little or no Revenue Share; if it is substantial the Revenue Share will increase significantly; if it exceeds the Band Ceiling the percentage that becomes a Revenue Share thereafter decreases initially, but then increases.

36. The court was informed that in 2017 the Band Ceiling was not exceeded, and only once in that year was there a high ADT such that TII became entitled to 90% of the toll charged in respect of motor cars. The percentages above the Band Ceiling while initially favouring the operator, e.g., only 15% to TII, with the balance being retained by Eurolink, then tip back in favour of TII in the event that there is extraordinary volume over and above the Band Ceiling. It was

agreed between the parties that the Band Floor and Band Ceiling and the percentages set out in the table in Annex 1 to Part 4 are not statutory limits.

37. Clause 3 of Part 4 provides that: –

> "3.1 Any payment due under this Part 4 of this Schedule 15 shall be made in accordance with Clause 34 (Payments)."

The Bye-Laws

38. As indicated earlier the Bye-Laws for the M4 Kinnegad-Enfield-Kilcock Motorway were promulgated under the Roads Act 1993 as amended in November 2005 and came into operation on 12 December 2005. A number of definitions should be noted: -

> "'the Toll Company' means at any time, such person as is party to an agreement with the NRA at such time in relation to, among other things, the collection of tolls on the Toll Road and the application of the proceeds of such tolls being, as of the date of these Bye-Laws, Eurolink Motorway Operation Limited."

> "'Toll Collector' means a person appointed and authorised by the Toll Company to record and/or collect tolls on the Toll Road and to issue and inspect receipts and do ancillary works in connection with the running of the Toll Road and shall include any authorised official of the Toll Company."

The 'Toll Road' is defined to mean the relevant sections of the N4 National Road extending from Kilcock to Kinnegad at the interface with the N6, and a section of the N6 from its junction with the N4 to its junction with county road L8021-1 in Kinnegad.

> "'Toll Scheme' means the Toll Scheme for the M4 Kinnegad – Enfield – Kilcock Motorway as adopted by the NRA on 5th November 2001."

39. Bye-Law 3 headed "*Right to Demand Tolls*" states: –

> "3. The Toll Company may demand, charge, collect and recover tolls as set out herein."

Bye-Law 14 establishes the amount of tolls: –

> "The tolls set out in the First Schedule hereto are the base tolls calculated as of August 2000 at which date the Consumer Price Index as published by the Central Statistics Office was equal to 111.7 on a November 1996 base of 100 (hereinafter referred to as the "Opening Index")."

Bye-Law 15 provides that Maximum Toll for each Toll Year is the aggregate of the Base Toll multiplied by the CPI for August the previous year, divided by the Opening Index, plus VAT at the prevailing rate. It goes on to provide: -

> "The Appropriate Tolls are the tolls chargeable by the Toll Company as agreed with the NRA (inclusive of indexation, VAT and rounding) provided that such Appropriate Tolls shall not exceed the Maximum Tolls."

The Base Tolls for each class of vehicle are then set out in the First Schedule. Based on that Schedule and adjustment in accordance with the Consumer Price Index, the operator can then charge "*Appropriate Tolls*" which are the tolls chargeable as agreed with the NRA, provided they don't exceed the Maximum Tolls.

High Court Judgment

40. The judgment of the High Court was delivered on 8 February 2021. At the outset Owens J. made general observations in relation to ascertaining the NAV under s. 48(3) of the 2001 Act, which, as he pointed out, is "*almost identical to valuation provisions in rating legislation in the State and in the United Kingdom going back to the early 19th Century*" (para. 1). He regarded the substance of the question asked in the case stated to be whether the Revenue Share should be disregarded in determining the NAV. He regarded it as "*necessary to identify the property*

which is to be let to the hypothetical tenant for the purposes of the valuation construct set out in s. 48(3) of the 2001 Act" and proceeded, at para.5: –

> "Rating involves valuation of the occupation right of 'property' at 'net annual value' without regard to any arrangements under which that property is in fact occupied. Physical or legal advantages or disadvantages of property which affect it in the hands of any occupier are matters which the potential hypothetical tenant may take into account as relevant in a bid for the tenancy. An example of a legal disadvantage of a property would be a freehold restrictive covenant which restricts uses of a building. An example of a legal advantage of property is that the occupier of the tolls of the Kinnegad Bypass has the benefit of statutory rights which enable it to enforce payment of toll charges."

41. The trial judge next set out the principle that if the property being valued is currently occupied in return for rent/payment, the annualised value of the amount payable is usually only relevant as evidence of a possible comparator with rent which a hypothetical tenant from year to year might pay, and not as a deduction in fixing rent. He proceeded, in para.8 –

> "For this reason, in general, the annualised amount payable by a grantee in occupation of rateable property as consideration for the occupation right is excluded as an expense when the property is being valued using the R & E method. The purpose of the valuation is to arrive at the annualised amount payable by the hypothetical tenant under the rating valuation construct. To introduce this actual rent as a deduction would involve an element of double count, even though it would be included as an 'expense' in the accounts of the actual occupier."

Developing this principle he observed that where property is let, the terms of the letting dealing with covenants for repair and renewal are irrelevant – the only relevant matter being the assumption under s. 48(3) that the hypothetical tenant will carry the burden of expense

necessary to maintain the property in a state which will command the hypothetical annual rent. He then stated –

> "10. If it is an inherent feature of a property that, irrespective of who occupies it under the hypothetical letting, its income earning capacity is restricted, then that feature can be taken into account. If this restriction flows only from the terms in which a particular person is in occupation of the property, then it will be disregarded. The same result flows if the actual occupier is restricted in some way in the application of an income stream derived from the property, whether as a result of statute or otherwise.
>
> 11.This distinction between disadvantages which are inherent in the property and disadvantages which flow form the terms on which a particular person is in occupation of the property is central to the resolution of the issue in this case."

This led the trial judge to state: –

> "13. The primary issue which I have to determine is whether, because the rights of Eurolink to the tolls of the Kinnegad Bypass are derived from the PPP agreement which was made under authority of the 1993 Act and contains public law rights and obligations, the 'Revenue Share' must be treated as what I would describe as a statutory 'working expense' of the tolls in the R & E method of valuation.
>
> 14. Another issue was raised by Eurolink. This issue is whether the cost of performing payment obligations relating to the 'Revenue Share' can be deducted as an 'expense … necessary to maintain the property' 'in its actual state'. This is resolved by analysing whether these outlays are required to maintain the property in a state fit to command the rent and whether the statutory hypothesis permits in this context consideration of the terms relating to enforcement of payment in the agreement under which the actual occupier holds the property.

15. My answer to the question raised in the case stated is that the Tribunal did not err in law in concluding that an annual estimate of the 'Revenue Share' is not deductible in calculating the NAV of the tolls using the R & E valuation method. The 'Revenue Share' is a grantee obligation under the PPP agreement. It is not such an intrinsic feature of the tolls as requires that it be deducted. Furthermore, it is not an 'expense … that would be necessary to maintain the property' consisting of the tolls 'in its actual state' within the meaning of s. 48(3) of the 2001 Act."

42. In coming to this conclusion the trial judge rejected Eurolink's contention that the Revenue Share should be viewed as a disadvantage of the property, and their argument that the PPP Agreement committed the NRA in both private and public law to create the tolls and pass them immediately to Eurolink for 30 years on the basis that the Revenue Share is paid. He also rejected their contention that the Revenue Share should be treated as an expense "*necessary to maintain the property ... in its actual state*". He made a key finding at para. 23: -

> "Eurolink is entitled to demand and receive all tolls levied. The obligation to account for the 'Revenue Share' is based on the contract. Eurolink is not an agent to receive the Revenue Share. While the agreement might be described as a 'joint venture', the right to charge and collect the full amount of the tolls has been farmed to Eurolink until the PPP agreement to terminate. The obligation to make payments of the 'Revenue Share' is founded on the PPP agreement."

In paragraph 24 the trial judge outlined Eurolink's central argument that the PPP agreement is a creature of statute, noting –

> "Eurolink argues that the effect of the provisions of the 1993 Act is that the tolls in the hands of any hypothetical tenant equate to the netted off obligation after deduction of the

'Revenue Share' because any hypothetical tenant will be obliged to make the payment as a statutory obligation."

In making this argument, Eurolink relied on the following statement of Lord Buckmaster in Port of London Authority v Orsett Union [1920] A.C. 273 at 305: -

> "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament. The character and extent of the various deductions from the gross revenue must be fixed in relation to the conditions."

43. As the trial judge noted, Eurolink also relied on the judgment of MacMenamin J. in the Supreme Court *in Westlink Toll Bridge Limited and Celtic Road Group (Dundalk) Limited v Commissioner of Valuation* [2013] IESC 42 ("***Westlink (No. 2)***"), where the majority of the Supreme Court (Clarke J. concurring with MacMenamin J., Fennelly J. dissenting on this issue) concluded that the Revenue Share was a "*charge ... payable by or under any enactment in respect of the property*". Eurolink also invited the trial judge to apply the reasoning adopted by MacMenamin J. on the cross-appeal by the Commissioner in respect of Celtic Road Group (CRG)'s appeal (on which issue the court was unanimous) which led to a decision that the maintenance expenses of CRG for road upkeep of an un-tolled stretch of Motorway were "*expenses ... necessary to maintain the property in that state"*, meaning its "*actual state*".

44. The trial judge commenced his analysis at para. 28 where he referred to the speeches of Viscount Simonds and Lord Reid in *Imperial Tobacco Company (of Great Britain and Ireland) Limited v Pierson (Valuation Officer)* [1961] A.C. 463, at 472 and 474, which were quoted with approval by MacMenamin J. in *Westlink (No. 2)* in that part of his judgment that addressed the cross appeal. *Imperial Tobacco* concerned valuation for rating purposes of rights under licences

to exhibit advertisements on land and buildings. Viscount Simonds at para.472 agreed with the judgment of the Lands Tribunal (Erskine Simes Q.C.) where it was stated -

> "… that the right which is deemed for rating purposes is the right to use any land in its extended meaning for the purpose of exhibiting advertisements which is led out or reserved, and to ascertain what that right is one must, I think, look at the terms of the document by which the grant is made or reserved and that the value of the hereditament is the value of the right so granted or reserved… ."

Lord Reid, at p. 474 said: –

> "But this is not an ordinary hereditament. The hereditament created by section 56 is not land but a right to use land, and therefore"… what has to be valued is not land but the appellants' right to use the land. The only right to use land which is let out or reserved to the appellants is that given to them by their agreement with the Corporation, and therefore it appears to me that the sole question is what is the value of that right.
>
> In valuing corporeal hereditaments, land, one takes the land as one finds it. So, also, in valuing an incorporeal hereditament, or right, one must take the right as one finds it."

45. The trial judge agreed, in para. 32, with the proposition that "*the right granted could not be treated for rating purposes as more extensive than that given by the terms of the grant*". However at para. 33 he observed of *Imperial Tobacco* that: –

> "As the right to use the land was the property to be rated, it followed that the letting value of the work subsequently done to the land under the agreement such as the erection of a billboard was not to be taken into account in valuing that right as a species of property, and the House of Lords so decided."

46. The trial judge did not accept that it followed that obligations attached to a licence to pay a fee or other payment became deductible as *"expenses ... necessary to maintain the property in that*

state ..." which must be borne by the tenant taking the hypothetical tenancy mandated by s. 48(3).

47. The trial judge then addressed Eurolink's argument based on the decision on the cross-appeal in *Westlink (No.2)*: -

> "39. In *Westlink (No. 2)* the Supreme Court decided that contractual maintenance obligations under a PPP agreement covering a section of the M1 motorway which was not tolled ought to be taken into account in calculating the NAV of the tolls as 'necessary to maintain the property in that state' within s. 48(3) of the 2001 Act on the basis that the existence of the incorporeal hereditament which was being rated depended on compliance with this obligation in the sense that if the concessionaire defaulted in this maintenance obligation the agreement could be terminated.
>
> 40. The Court concluded that the words 'necessary to maintain the property in that state' in s. 48(3) of the 2001 Act meant, in the context of an incorporeal hereditament, what was contractually necessary to keep the right in existence rather than the annual expenses which a hypothetical tenant from year to year would pay out to maintain the value of the right leased as an income earning asset. 'Actual state' was equated with continued existence of the property rather than its current qualities and disadvantages as a property available for rental."

48. The trial judge rejected Eurolink's contention stating: –

> "42. I do not feel bound to extend the rationale of the decision of the Supreme Court in *Westlink (No. 2)* which relates to maintenance in the manner advocated by Eurolink. Such extension would result in like not being valued with like. This equality of treatment is a fundamental objective of rating law."

In ensuing paragraphs the trial judge explained that incorporeal rights such as easements or tolls often give rights of enjoyment of other property short of occupation, but where the grant of the incorporeal right is silent as to repair, the holder of the right must put the land in a condition which will allow exercise of the right – not as a matter of obligation, but as a matter of necessity. He stated: –

> "45. …The statutory construct under s. 48(3) of the 2001 Act requires that it be assumed that the hypothetical tenant undertakes the cost of defraying the expenses of keeping the property in the state which will support the hypothetical rent, irrespective of the contents of a grant which might place the obligation on the grantor or the grantee or on neither of them, and irrespective of whether the grantor may terminate for failure to comply with grantee obligations.
>
> 46.The same observation may be made in respect of tolls. Supposing the agreement considered in *Westlink (No. 2)* said nothing about maintaining the tolled road, or did not contain a clause entitling the Road Authority to terminate for repudiatory breach, the statutory construct under s. 48(3) of the 2001 Act would still require that the tenancy from year to year be valued on the basis that the tenant would maintain the road because this would be an expense necessary to keep the property in the condition to sustain the annual rent. This might well involve maintaining more of the road than the part tolled in order to sustain traffic volume. I will give another example. It may be necessary for the hypothetical tenant from year to year of a fishery to stock it."

He considered that it would be "*somewhat anomalous*" to treat incorporeal rights, at least for a given period of time and which may be terminated for breach of grantee obligations to pay rent or do other things as different for valuation purposes to such rights where they are granted outright, or cannot be terminated during the currency of a term granted. He therefore saw "*no*

real distinction" between incorporeal property and physical land which would justify an interpretation of s. 48(3) as allowing a different rating treatment, depending on whether the property was or was not a tangible immovable and whether there was a right to terminate for breach of monetary obligations, asking the question: –

> "Why should easements which are leased with the right of termination in the event that rent is not paid be treated for rating purposes as different property from easements which are granted in perpetuity?"

He proceeded: -

> "50. If the contention of Eurolink that this is the true effect of s. 48(3) of the 2001 Act is correct, the valuation of occupation of an incorporeal right which can be determined for breach of grantee obligations is not carried out on the annual occupational value of the property granted but on the value of that property after the costs of meeting monetary obligations which may be enforced by exercise of a right to terminate in the event of breach by the grantee are subtracted.
>
> 51. This is not in accordance with the intent of the Oireachtas as manifested in s. 48(3) of the 2001 Act that properties be rated on a uniform basis, treating like with like. As was pointed out on behalf of the Commissioner in argument, an objective of the rating legislation is that there be consistency in treatment of similar property in accordance with the statutory construct.
>
> 52. I do not agree that the meaning of "*other expenses ... necessary to maintain the property in that state*" in s. 48(3) extends to payments of rent or other sums to a grantor of incorporeal rateable property enforceable by termination of the grant. I do not accept that the Supreme Court in *Westlink (No. 2)* intended this outcome as a result of its decision.

53.It is said on behalf of Eurolink that the fact that incorporeal rights which are not granted in perpetuity will come to an end if they can be terminated prematurely in reliance on a forfeiture entitlement in the event that contractual payments are not made in some way justifies a difference in treatment of the payment obligation as 'other expenses … necessary to maintain the property in that state.' I do not agree. This is all premised on the terms in fact agreed between the grantor and the current occupier of the incorporeal property being relevant to the rating construct, which they are not, except to the very limited extent allowed by the decision of the Supreme Court in *Westlink No. 2)*."

49. The trial judge then analysed Eurolink's argument that the Revenue Share should be deducted on the ground that it is inherent as a disadvantage in the tolls. He considered that this was not an issue decided in *Westlink (No. 2)* where MacMenamin J. for the majority in the Supreme Court concluded on the primary issue that the Revenue Share was deductible from gross receipts as "*a charge payable by or under an enactment in respect of the property*" within s. 48(3) of the 2001 Act as it then stood – see paragraphs 33 and 34 of the judgment of MacMenamin J. As the trial judge noted s. 48(3) was amended in 2015 by deletion of the words "*and charges (if any) payable by or under any enactment*".

50. The trial judge went on to consider obiter dicta in the judgment of MacMenamin J. which were relied on by Eurolink to support its argument that the Revenue Share is an inherent disadvantage in the tolls, and should not have been included when calculating Westlink's gross receipts for the purpose of the R & E method of calculating NAV. In the relevant passages MacMenamin J. stated:

"35. While the issue did not arise in the instant case, it is important to point that the learned authors of *Ryde*[3] point out at para. E.622 that any restriction on the profit making capacity of a particular property imposed by law does have to be taken into account; but

[3] *Ryde on Rating and the Council Tax,* Issue 44 (London, Butterworths, 2008).

where the restriction arises by means of a private arrangement it is not to be taken into account in rating calculations. The authors states:

> 'Where an undertaking is occupied in order to earn profits, those profits may be said to be limited by statute in two ways: *vis* (1) by a limitation of the charges which the trading occupier can make as between him and the public; (2) by an appropriation of the whole (or part) of the profits when earned to particular objects. It is clear from the cases above cited *[in particular Port of London Authority -v- Orsett Union Assessment Committee* (1920) AC 273] that limitations of the former kind must be taken into account, but limitations of the latter kind must not.'

36. In support of these observations, the learned authors cite two cases; (1) *Rhymney Railway Company* (1869) L.R. 4 Q.B. 276 and *Brecon Markets Company v St. Mary's Brecon* (1877) 36 L.T. 109. While the question did not fall for determination in the appeal, it is arguable that, by reference to the statutes and to the contract, the provisions fall within the definition of a limitation of profits clause which the trading occupier is entitled to make as between him and the 'public'. Consequently, it might be said that limitations of this type may be taken into account. I express no concluded view on this question however."

51. The trial judge took the view (para.60) that the issue before him had not been fully argued before the Supreme Court in Westlink (No. 2), and that the comments of MacMenamin J. were expressly stated to be "*additional observations on the primary issue*", and *obiter dicta*. He stated:

> "61. In the appeal before the Supreme Court, the Commissioner sought for the first time to argue that the subtraction of the "royalty payments" in the R & E valuation would

involve a "double count": see paras.40-41 of the judgment of MacMenamin J. This argument was not permitted.

62.In my view, this touches the heart of the issue in this case. The inclusion of the 'Revenue Share' as an expense in reaching the NAV using the R & E method of valuation points to deduction of something which that valuation seeks to establish."

"63. If something does not look right or produces a result which is peculiar such as a potential double count or the "pocket of unrated property" referred to by counsel in argument before me, the reason may be that an argument which would lead to such a result is incorrect. The thought that struck me about this case was that if the PPP agreement was terminated and the tolls were back with TII at the valuation date, the 'Revenue Share' would become irrelevant. The NAV of the tolls for rating purposes would be calculated by reference to the whole of the annual receipts."

52. The trial judge went on to examine the argument that the Revenue Share is a restriction upon the profit earning capacity of the tolls, posing the question (in para.69) as to whether the Revenue Share "*is in fact a 'disability' imposed on the tolls by or under the 1993 Act*". He emphasised in para. 71 that '*the property' is valued in accordance with a statutory construct which assumes it is in its current* state *available for a tenant to occupy on a letting from year to year*", and that if it is already let the quantified obligation of the tenant to pay rent is not deductible "*as the object of the exercise is to determine the hypothetical value of the annual occupation rent of the property under the statutory construct*". He observed (at para. 73) that "*in many cases, payments by the occupier to another as a condition of occupation of property will not give any indication of what an occupying tenant from year to year under the statutory construct is likely to pay*", and that (para. 74) *"The terms of an agreement giving occupation or property may work to the disadvantage of the actual occupier when that property comes to be*

valued for rating purposes". He referred by way of example to *R (Overseers of St. Mary Cardiff) v. Rhymney Valley Railway Co.* [1869] L.R. 4 Q.B. 276 ("***Rhymney***") which concerned a lease of wharves to a railway company under which the lessors, the trustees of the Marquis of Bute, were entitled to rent and in addition, under a local Act of Parliament, to dues which it had the privilege to levy for use of the wharves (payable by users of the wharves directly to the trustees). The wharves were valued at their full earning potential, including the element attributable to the dues even though they were collected by the lessor. Owens J. then states, at para. 77: –

> "So, grantee obligations in an actual letting of rateable property to the occupier may bear little relation to the statutory assumptions of the tenant's obligation set out in s. 48(3) of the 2001 Act and are irrelevant as they do not affect a letting to the hypothetical tenant."

53. In para. 79 the trial judge continued: –

> "The "*tolls*" of the Kinnegad bypass which must be rated are a statutory construct. Tolls *are a franchise which allows the holder to charge the public and receive payment for the use of a facility such as a public road or a public navigation or a public ferry or a public market monopoly and may give control over tolled activities on land or water to enforce the right. Tolls were formerly granted under the royal prerogative and are now creatures of statute. The receipts generated by the franchise are also described as 'tolls'. The franchise is rateable property*."

54. The trial judge then traced the creation of the toll franchises at issue by the NRA under the power to create them conferred by sections 57 and 58 of the 1993 Act, and the power of the road authority under s.59(1) to charge and collect tolls in the amounts specified in bye-laws. He observed in para. 80 that: –

"The statute or the terms of the grant or the nature of the right may permit the holder to farm out the franchise by giving it to a third party in return for financial return or remuneration. The provisions of the 1993 Act do not require that any specific payment structure or rate of return to the road authority be adopted where the tolls are farmed. Remuneration to the road authority may take the form of a fixed rent or a royalty payment based on turnover or rent calculated by reference to receipts or income or the arrangement may permit the sharing of toll income in the sense that the grantor is entitled to receive payments calculated by reference to a percentage of turnover or profits."

55. The trial judges noted that the Toll Scheme was adopted in 2001, prior to the PPP Agreement which was executed in 2003. He notes it terms, and included an estimate of the charges for different classes of vehicles which was later mirrored in the PPP Agreement and in that the Bye-Laws. The Bye-Laws were made in November 2005, and specified the maximum amounts of the tolls, and the trial judge stated in para. 85 "*that [t]his was a necessary step to create the franchise under s. 59(1) of the 1993 Act*". He then stated: -

"86. The Bye-Laws do not contemplate that Eurolink must always be "the Toll Company". Part 1 of the Bye-Laws defines "the Toll Company" as follows:

> '… means at any time, such person as is a party to an agreement with the NRA at such time in relation to, or among other things, the collection of tolls on the Toll Road and the application of the proceeds of such tolls being, as of the date of these bye-laws Eurolink Motorway Operation Limited.'"

56. Having noted that the Bye-Laws were made under s. 61(1) of the 1993 Act, the trial judge then stated: –

"88. The franchise of the NRA (now TII) to charge and collect tolls on the Kinnegad Bypass came into existence on 12 December 2005 when the bye-laws came into effect.

At that stage all of the statutory pre-conditions to the creation of this franchise under s. 59(1) of the 1993 Act had been satisfied. The proposed public road had been completed and was ready to be open for traffic. The effect of the PPP agreement was that the franchise passed immediately to Eurolink upon its creation."

57. The PPP Agreement provided for maintenance for a period of 30 years, during which period Eurolink was entitled to receive the "*Operational Payments*" of which it was entitled to *"charge, and (subject to the terms of this Agreement) retain…*". The trial judge then referred to clause 1.1 of Part 4 of Schedule 15 of the PPP Agreement, quoted earlier, which records Eurolink's agreement to pay the Revenue Share "*so as to enable the Authority to participate in the revenue being generated by the Project Road.*", and the payment provisions of set out in Part 4.

The foregoing led the trial judge to the following important conclusions: -

> "91. The obligations of the parties relating to the 'Revenue Share' are contained in the PPP agreement. The tolls are not enjoyed in partnership. The "*Revenue Share*" is not a "*reservation*" of occupation of some element of the franchise which as a result has not passed from NRA/TII to Eurolink, nor is it a re-grant by Eurolink of a right to charge and collect some undivided share of the toll income. Counsel for Eurolink submitted that the PPP agreement provisions relating to the 'Revenue Share' made it different from the 'royalty payments' considered by the Supreme Court in *Westlink (no. 2).* In my view, the substance of the obligation of the toll concessionaire to make payments is much the same. It is not a split of ownership of a property which results in joint occupation. It is a contractual arrangement relating to how a fee for exclusive occupation is calculated by reference to receipts and paid over to the grantor of the property."

58. The trial judge found support for this in s. 59(3) of the 1993 Act which provides that where an agreement under s. 63 provides for the collection of tolls by a person specified in the agreement

"*that person and his servants and agents may collect the tolls to which the agreement relates*". He then recites s. 63 of the 1993 Act, quoted earlier in this judgment, which permits a Road Authority to enter into an agreement with a third party, and under ss. (1)(e) of which there may be agreement "*to operate and manage (including provide, supervise and operate a system of tolls in respect of the use of the road) the road for or with the authority*".

59. The trial judge then reprised Eurolink's submissions on this issue: -

- The wording of the PPP Agreement does not allow Eurolink to "*retain*" the Revenue Share.
- The PPP Agreement does not have the status of a private agreement because it is made under s. 63 of the 1993 Act, and within the statutory framework Eurolink is the holder of a franchise with special statutory rights on terms that it must pay over the Revenue Share.
- The obligation to make payments is both a contractual obligation and a statutory commitment under s. 63(5), the legal effect of which is that Eurolink does not own the Revenue Share.
- The public law status of the PPP Agreement is that the provisions relating to the Revenue Share constitute a "*restriction on the profit making capacity of a particular property imposed by law*" *per* para. 35 of the judgment of MacMenamin J. in *Westlink (No. 2).*

60. The trial judge disposed of these arguments as follows:

> "99. The Eurolink argument presupposes that the tolls available to the hypothetical tenant from year to year under the letting imagined by s.48(3) of the 2001 Act can only be tolls governed by the terms of the PPP agreement. The statutory provisions make clear that the franchise consisting of the tolls under a toll scheme has an independent existence which does not depend on the PPP agreement. The rights given by the PPP agreement are not a separate franchise to that created under the toll scheme.

100. The NRA used the statutory machinery to create the tolls specified in the toll scheme. When this franchise came into existence it immediately passed to Eurolink under the terms of the PPP agreement. However, this does not mean that the tolls are one and the same thing as the provisions of the PPP agreement.

101. The franchise will continue to subsist and the tolls will be chargeable after the expiry of the 30-year term of the PPP agreement or if it is terminated early. This case is not analogous to the *Imperial Tobacco* case. In that case the rateable property would cease to exist if the licence expired and the grantee gave up occupation.

102. If the PPP agreement comes to an end it will not be necessary to make further bye-laws to put another toll concessionaire in place. Even if this was necessary it would not be determinative of the status of the PPP agreement. The PPP agreement does not get a superior status for rating purposes to any agreement which TII may enter into with a different concessionaire on possibly different terms for the collection of the tolls and upkeep of the bypass. All such arrangements are equally irrelevant as they only relate to enjoyment of the tolls by the current occupier.

103. Even if the tolls were regarded as property which would come to an end on the termination of the PPP agreement, the "Revenue Share" would still represent the fee payable by the current occupier in return for occupation. The fact that both statute and contract stipulate an agreement and obligation to pay that fee does not convert it into a disability of the property in the occupation of the hypothetical tenant under the statutory rating construct.

104. Is every occupation rent or other royalty or fee reserved in a grant from a public body authorised to give property by statute in return for remuneration, such as a lease of

land or a lease of petroleum rights or mineral rights to become a deductible item for rating purposes? No.

105. In my view, the Eurolink argument confuses the property which the hypothetical tenant will take with the obligations of another person who happens to be in actual occupation of that property under a different arrangement. It matters not that this different arrangement is authorised by statute and that the obligations of each party to the other are statutory as well as contractual."

61. The trial judge therefore agreed with the Commissioner that the fact that the PPP Agreement was made under statute and had a public law element did not convert the Revenue Share into something which should be regarded as a disability of the tolls. He also agreed with the analysis of the Tribunal in para. 16.6 of its determinations dated 16 September 2019 that the property to be rated is the whole toll franchise and not some notional part of it after deducting the Revenue Share under the PPP Agreement (para. 107). This was not altered by Clause 14.1(j) of the PPP Agreement, which conferred on Eurolink the entitlement "*to charge ..., and (subject to the terms of this Agreement) retain, tolls*" because it is clear from the Agreement that the tolls were not occupied as a partnership asset (para. 109). He continued –

"109. As the 'Revenue Share' is personal to the arrangement between Eurolink and TII, rather than an inherent feature of the tolls, it is not possible to reduce their occupation value for rating purposes by agreements containing provisions charging the 'Revenue Share' on the tolls or for netting off of the values of obligations or by declaring trusts of toll proceeds in a PPP agreement."

62. Referring to s. 63(1) of the 1993 Act under which the franchise may be operated by a third party and may provide for "*payment to or retention by*" another person "*of all or part of the proceeds of tolls in respect of the toll road the subject of the scheme*", the trial judge held that "*proceeds*

of tolls" referred to the revenue stream of the franchise consisting of the toll amounts collected, and did not convert the legal nature of what was receivable into some right or disability of the tolls which was other than an obligation to pay money. "*It does not convert the payment obligations of any toll concessionaire into inherent disadvantages of the property for rating purposes either, as I have already explained.*" (para. 110)

63. At para. 111 the trial judge considered the expectation of the current lessor (TII) under the PPP Agreement to be irrelevant to the statutory construct and he also did not consider relevant the commercial purpose of the Revenue Share as expressed in either the PPP Agreement, or in pre-tender documentation:

> "112. … These sorts of declarations do not determine whether a property is afflicted by restrictions on its earning capacity in the hands of all occupiers and they cannot have any role in determining the correct basis of valuation."

64. The trial judge also considered the Tribunal to be correct in para. 16.6 of its determinations where it decided that it was not entitled to consider the impact of default in making payments under the PPP Agreement, as that fell "*outside the statutory valuation construct*" (para. 114).

65. He also concluded that the Tribunal was correct in deciding that the Revenue Share was not a statutory restriction on the capacity of the tolls to generate income and profit. He reasoned: -

> "115. … The hypothetical tenant under s.48(3) of the 2001 Act is not taking a tenancy from year to year of the tolls subject to a commitment to remit the "Revenue Share". This obligation is a feature of the agreement with the current occupier of the tolls but it is not inherent in the franchise. If it is to be regarded as a restriction on the ability to make profit in the sense that it affects the bottom line in a profit and loss account or income statement, that restriction only applies to the commitment by Eurolink."

66. The trial judge rejected the submission that the tolls should be treated differently because Eurolink had made a commitment to pay the Revenue Share as part of a contract with a public law element. If that were correct it would mean that purely private commercial arrangements which gave a right of occupation of the rateable property in return for an income stream, and with the same contractual structure as the PPP Agreement, would result in different treatment of that property for rating purposes. He further reasoned: –

> "119. The reason why provisions such as s.63(5) of the 1993 Act appear in statutes is recognition by the Oireachtas that public money and public rights and benefits are involved in toll road schemes and that it is in the public interest that commitments in PPP agreements relating to the construction, operation and maintenance of toll roads be impressed with the character of public law rights and obligations. It was not the intention of the Oireachtas in enacting provisions in the 1993 Act allowing road authorities to grant concessions of their tolls to give special rating benefits to toll concessionaires. I am not persuaded that the law requires me to find that what Eurolink is contending for is a consequence of toll concession arrangements which have been made under those provisions.
>
> 120. The only statutory restriction on the earning power of the franchise is the limitation of the maximum tolls for the different classes of vehicles. The "Revenue Share" limitation does not attach to the tolls in the same way.
>
> 121. In my view, there is nothing in the judgments in *Port of London Authority v. Assessment Committee of Orsett* [1920] 2 A.C. 273 and the other cases relied on by Eurolink to support the claim that the "Revenue Share" is a restriction on the earning capacity of the tolls. It is a restriction on earning capacity only in the sense that it is a

cost to the current occupier of enjoying that franchise, and nothing more. This relates to matters which are not material to the rating hypothesis."

67. Accordingly, the trial judge agreed with the conclusions of the Tribunal at paras. 16.7.4 and 16.7.5 of its determinations.

Eurolink's arguments and grounds of appeal

68. In written and oral submissions to this court counsel for Eurolink submitted that:

1) The Revenue Share was not "within the grasp of" Eurolink, such that it did not count as part of the gross profits for the purposes of the R&E method of valuation.
2) The Revenue Share constitutes a limitation on the earning capacity of Eurolink from its right to collect tolls, which limitation arises from law/statute.
3) The payment of the Revenue Share was necessary to maintain the right to collect tolls.

69. There was considerable overlap between these arguments, but subtending them all was the proposition that the property to be rated is the right to collect the tolls, an incorporeal hereditament, constituted by the Toll Scheme created in 2001 under s. 58 of the 1993 Act, and the PPP Agreement entered into in 2003 under s. 63(3), and the Bye-laws adopted in 2005 under s. 59 – and that, in order to establish the NAV, regard must be had to the actual terms of the PPP Agreement relating to the grant of the right and defining it's parameters (Grounds of Appeal at 3.1 and 3.3).

70. This proposition underpinned the most relevant Grounds of Appeal, which I do not propose to set out in full, and led to the following arguments for deduction of the Revenue Share from the gross income from tolls:

1) that the Revenue Share is an intrinsic feature of the tolls/integral to the right to collect tolls and should be viewed as a share of the tolls which is never "*within the grasp*" of Eurolink under the R&E method. (Grounds 1 and 2);

2) that because the tolls were created under statute, and by reason of s. 63(5) of the 1993 Act, there was a statutory (as well as contractual) duty to pass on the Revenue Share to TII;
3) that Eurolink must pay the Revenue Share in order to maintain the right to tolls in existence and to avoid contractual/statutory default (Ground 3.1);
4) the duty to pay the Revenue Share amounts to a statutory restriction on the capacity of the tolls to generate income/profit (Ground 7), the purpose of which was to prevent the earning of excessive profits (Ground 6);
5) that the trial judge failed to apply the reasoning of the majority of the Supreme Court in *Westlink (No. 2)*, and the unanimous reasoning of the Supreme Court in respect of the cross-appeal in *Westlink (No. 2)*.

These arguments and the response will now be examined more fully, but it is appropriate to start with the Eurolink's proposition that the PPP Agreement should be considered as part of/intrinsic to the Tolls.

PPP Agreement as part of the Tolls

71. Central to Eurolink's arguments is that the tolls are established by the Toll Scheme and the PPP Agreement, and Bye-laws, and that, under the terms of the PPP Agreement, the Revenue Share does not come within the grasp of Eurolink, or, alternatively, is a necessary expense to maintain the property in its actual state for the purposes of s.48(3). Absent that payment, it is said, the rateable property would cease to exist. As in the High Court, counsel relied on *Imperial Tobacco*, arguing that the incorporeal right must be valued by reference to the grant, and in estimating the NAV you must take the incorporeal right as you find it i.e., subject to the Revenue Share, which is deductible as it is necessary to maintain the right. Counsel argued that the obligation to pay the Revenue Share defined the scope of the incorporeal hereditament, and that it must be paid in order to avoid default, in which event the rateable property would cease to exist. Counsel also relied on dicta in the judgment of MacMenamin J. in the cross appeal in

Westlink (No. 2) for the proposition that in estimating the NAV of the tolls it is necessary to consider the terms and conditions of the PPP Agreement, and when this is done the Revenue Share is not fairly regarded as part of the gross income to which Eurolink is entitled.

72. I do not disagree with the principles enunciated in *Imperial Tobacco* that for rating valuation purposes in order to ascertain the incorporeal hereditament or right it is necessary to consider the "*the terms of the document by which the grant is made or reserved*" (per Viscount Simonds), and that in "*in valuing an incorporeal hereditament, a right, one must take the right as one finds it*" (per Lord Reid). In *Imperial Tobacco* that meant considering the licence agreement under which the right to exhibit advertisements on a building was granted. But this begs the questions "*what is the right/rateable property being valued?*" and "*by what document(s) is that right/rateable property created?*" Before answering these questions it is appropriate to consider whether Eurolink's reliance on *Westlink (No.2)* is well placed.

73. The issue on the cross-appeal in *Westlink (No.2)*, in which the Commissioner was the appellant and Celtic Road Group (Dundalk) Limited ("CRG") , the respondent, was whether the High Court was correct in finding that the costs to CRG of maintaining the entire length (54.7km) of the M1 was deductible in calculating the NAV under s.48(3) as "*repairs…[or] other expenses …that would necessary to maintain the property*" in its actual state, or whether (as the Commissioner contended) the deduction should be limited to the costs of maintaining the tolled section of the M1 (21.74km).

74. This decision is more fully analysed later in this judgment when I come to consider Eurolink's argument that the Revenue Share is deductible in order to maintain the tolls in existence. For present purpose it is fair to say that in his judgment MacMenamin J., taking his lead from *Imperial Tobacco*, emphasises that it is necessary to "*consider the entirety of the contractual arrangement*" in order to determine what is "*necessary to maintain the property in that state*". Taking into account all the contractual repair obligations of CRG he concluded that the

continuance in being of the tolls "*hinges on the repairs being carried out to the entire road*" and accordingly all of the maintenance expenses were deductible in arriving at the NAV.

75. It self-evident that a very different deduction from gross income was under consideration in the cross appeal in *Westlink No.2*. For this and other reasons that I elaborate upon later, including those set out in by the trial judge at paras. 39-53 of his judgment, I agree with the trial judge that the rationale adopted by MacMenamin J. in the context of motorway maintenance expenses in *Westlink (No.2)* should not be transposed or extended to the issue of deductibility of the Revenue Share in the present appeal. In my view it is not an authority that supports Eurolink's proposition in this appeal, and, not being precisely in point, it is not binding on this court. Nor do I find it persuasive of Eurolink's core argument.

76. To the suggestion from the court that the rateable property was created only by the Toll Scheme and the Bye-laws, counsel for Eurolink argued that the PPP Agreement was integral, and that the motorway would not have been constructed and the toll infrastructure built unless there had been the PPP Agreement. Counsel argued that the Revenue Share was not "akin to rent", and that the tolls were consideration for the construction of the motorway/tolls, and designed to prevent Eurolink earning "super profits" from the tolls.

77. Counsel further argued that no party other than Eurolink could be regarded as a hypothetical tenant for the purposes of estimating the NAV under s. 48(3), because only Eurolink as the contractual counter party of TII could demand and collect the tolls, and this is reflected in Bye-Law 3 under which "the Toll Company" demands, charges, collects and recovers the tolls, and in the Bye-laws "the Toll Company" is defined to mean: -

> "At any time, such person as is party to an agreement with the NRA at such time in relation to, among other things, the collection of tolls on the Toll Road and the application of the proceeds of such tolls being, as of the date of these By-laws, Eurolink Motorway Operation Limited."

78. It is undoubtedly the case that the first task in estimating the NAV is to identify the rateable property. I do not accept as correct the core argument made by Eurolink that identifying the rateable property, or the "*scope of the right*, in this instance required the Commissioner to consider the terms and conditions of the PPP Agreement. It was a finding of the Tribunal – and one that I did not understand to be disputed by Eurolink - that "*the subject property is the tolls*". The tolls were created by the Toll Scheme, adopted by the NRA on 5 November 2001 – in anticipation of the construction of the motorway – and came into being when the Bye-Laws relating to it came into effect on 12 December 2005. It is the combination of the Toll Scheme and the Bye-Laws that created the rateable property. The trial judge was correct to conclude that "*The NRA used the statutory machinery to create the tolls*" and that "*When this franchise came into existence it immediately passed to Eurolink under the terms of the PPP agreement*" (para.100). I would not disagree with the characterisation by the trial judge in para.80 of his judgment of the PPP Agreement as a "*farm out*" of the toll franchise to a third party by an agreement made under statute s.61(3) of the 1993 Act. To better explain these conclusions it is necessary to refer to the Toll Scheme and Bye-Laws.

79. The Toll Scheme at Clause(s) provides: –

> "The [NRA] *may*, in accordance with s. 63 of the 1993 Act, as amended by s. 275 of the Planning and Development Act, 2000, enter into an agreement with a third party, hereinafter called "the Concessionaire", in relation to the collection of tolls on the Proposed Road and the application of the proceeds of such tolls and other matters.
>
> The [NRA] *may* again, from time to time, in accordance with section 61 of the 1993 Act, as amended by s. 274 of the Planning and Development Act 2000, make such bye-laws as it considers expedient for the purposes of operation and management of the Proposed Road." [emphasis added]

80. It is notable that the permissive word "*may*" is used. It was not obligatory for the NRA (later TII) to enter into a s. 63 Agreement. The NRA could have decided to charge and collect the tolls itself; equally the Toll Scheme was not specific as to the identity of any concessionaire with whom it might reach agreement.

81. The Toll Scheme provided in Schedule C "*Estimated Amounts of the Tolls that it is Proposed to Charge*", and stated that: –

> "The tolls actually to be charged were all to be specified in bye-laws to be made by the National Roads Authority under section 61 of the Roads Act, 1963, as amended by section 274 of the Planning and Development Act, 2000."

The effect of this was that two things had to occur in order for the Toll Scheme to come into being and effect as a rateable property: firstly the proposed roadway had to be constructed; secondly the Toll Scheme required the NRA to promulgate bye-laws to establish the toll charges to be made to different classes of vehicles. The second step was primarily necessary in order to specify the maximum amount of the tolls, as the Toll Scheme itself only gave indicative/estimated figures. Once these two steps were taken the Tolls came into being, and the conferral of the right to collect the tolls on Eurolink under the PPP Agreement could take effect.

82. The statutory process for the adoption of bye-laws prescribed by s. 61 of the 1993 Act (as amended) required the NRA to undertake prior consultation with the Commissioner of An Garda Síochána, publication of bye-laws in locally circulating newspapers, and the taking into account of any objections or representations arising from such publication and (once made) the publishing of the adopted bye-laws in *Iris Oifigiúil* and publication of notice of their making in local newspapers. Section 61(10) then provides that: –

> "A person who contravenes a bye-law made under this section commits an offence."

83. The Bye-Laws were adopted on 8 November 2005, and Bye-Law 18 provided that:

> "These Bye-Laws shall come into effect on 12 December 2005".

Accordingly the tolls – the rateable property – as a matter of law were created by the Toll Scheme in combination with the Bye-Laws, and came into existence on 12 December 2005.

84. It is of note that this legal position is reflected in the PPP Agreement in which Eurolink in clause 6.5(f) undertakes to comply with the "*Scheme Orders*", which is defined to include the Toll Scheme, and the Bye-Laws "*in respect of the Project made or to be made pursuant to s. 61 of the Roads Act*." However this is not determinative, and does not mean that under the rating construct it is appropriate to look beyond the Toll Scheme and Bye-Laws that created the right to the tolls.

85. The PPP Agreement does not itself contain any words of grant creating tolls, comparable for instance to words of grant by a fishery owner to a fishing club creating the right to fish on a stretch of water, or the words of grant in the licence agreement in *Imperial Tobacco*. There was no need, as the tolls were created by the Toll Scheme (a draft of which is included in Schedule 17 to the PPP Agreement) and the Bye-Laws that were to be made. Moreover the road tolls could not be granted by agreement in any event – their creation/grant was governed by statute.

86. It is also important to observe that there is no fixed period in respect of which the tolls created by the Toll Scheme and the Bye-Laws are to exist. The Toll Scheme does not provide for any termination date. Moreover the Bye-Laws which set "*Base Tolls*" for different classes of vehicles are subject to annual increase by reference to the CPI, or other change arising from any alteration in VAT Rates (this gives "*Maximum Tolls*" chargeable in a given year) – in other words the Bye-Laws make provision that allows for inflation or VAT changes. This means that the tolls will continue to exist in law as rateable property when the PPP Agreement expires in 2033, and, absent a renewal of the PPP Agreement, or a fresh s. 63 Agreement being entered into by TII with another operator, upon such expiry the tolls will become "*occupied*" for the

purposes of the 2001 Act by TII. They will, in that event, revert to the occupation of TII, which may well then become the party liable to pay rates (although that is not an issue that the court needs to decide). I agree with the trial judge that: -

> "101. The franchise will continue to subsist and tolls will be chargeable after the expiry of the 30-year term of the PPP agreement or if it is terminated early."

87. To reiterate, in my judgment the PPP Agreement does not create the tolls. They are first created by the Toll Scheme and Bye-Laws, and thereupon farmed out to Eurolink as concessionaire. The terms upon which Eurolink enjoys occupation of the rateable property – the tolls - are set out in the PPP Agreement. I agree with the trial judge that the PPP Agreement is a contractual arrangement relating to how a fee for exclusive occupation is calculated by reference to receipts and paid over to the NRA/TII as grantor of the tolls. The Revenue Share is the fee payable by Eurolink as current occupier of the rateable property in return for occupation – it is, as the trial judge found, "*personal to the arrangement between Eurolink and TII, rather than an inherent feature of the tolls*" (para.109).

88. Eurolink seek to counter these conclusions by pointing out, correctly, that the Bye-Laws contain a definition of "*the Toll Company*" as meaning: -

> "at any time such person as is party to an agreement with the NRA at such time in relation to, among other things, the collection of the tolls on the Toll Road and the application of the proceeds of such tolls, being as of the date of these Bye-Laws, Eurolink Motorway Operation Limited"

The Bye-Laws refer thereafter in several places to "*the Toll Company*", which must be taken to mean Eurolink so long as it is the party entitled to collect the tolls under agreement with the NRA/TII. Counsel also points to Bye-Law 3 which states "*The Toll Company may demand, charge, collect and recover tolls as set out therein.*" It is therefore submitted on behalf of

Eurolink that express references in the Bye-Laws to Eurolink as the only Toll Company make the PPP Agreement (and the Revenue Shares provisions) under which it occupies integral to the right to collect the tolls.

89. In using the phrase "*as of the date of these Bye-Laws*" this definition itself contemplates there being a Toll Company other than Eurolink at some future time. That is easy to understand because the PPP Agreement expires in 2033, if not terminated earlier, so that at some point the tolls will revert to TII or be the subject of a new agreement or an agreement with another operator. But more importantly, these references to "*Toll Company*" and Eurolink do not have the suggested effect that the rateable property was in some way created by the PPP Agreement; they are only a reflection of the fact that by virtue of the PPP Agreement the NRA was simultaneously passing on to Eurolink the exclusive right to charge and collect the tolls.

90. Counsel also submitted that only NRA/TII was empowered under s. 59 of the 1993 Act to "*charge*" tolls under statute, suggesting, as I understand the argument, that therefore the tolls were charged by TII and only collected by Eurolink, and were therefore in some way not within the grasp of Eurolink. A similar argument was made and rejected by the Supreme Court in *Dublin County Council v. Westlink Toll Bridge* [1996] 1 I.R. 487 ("***Westlink (No. 1)***"), in respect of the equivalent provision under the earlier legislation, s. 2(1) of the Local Government (Toll Roads) Act 1979. At p. 499 O'Flaherty J. (with whom the other members of the court agreed) stated: -

> "Under the legislation that we must construe, it is clear that only a local authority can 'charge' tolls in the sense of bringing them into existence. But once in existence as far as the scheme and agreement are concerned it is clear that the tolls belong to the defendant. It seems that the concept of 'tolls' and the proceeds of tolls are used inter-changeably in the legislation. There is, in any event, no practical distinction between the two concepts."

In my view this statement applies with equal force to s. 59 of the 1993 Act, the provision that enabled the NRA to bring the tolls at issue into existence. Once the road authority has brought the toll into existence it can reach an agreement under s. 63 of the Roads Act 1963 with a toll operator to collect the tolls.

91. The foregoing leads to the conclusion that the rateable property is the whole of toll receipts, and, as the trial judge found, "*not some notional part of it after deducting the an annual amount equivalent to the "Revenue Share" under the PPP agreement*" (para.107). I will later in this judgment address Eurolink's other arguments for contending that the Revenue Share is not within its grasp.

Can TII be a hypothetical tenant for the purposes of s.48(3)?

92. Eurolink argued that it could not. TII contented that, notwithstanding the references to Eurolink as "the Toll Company" in the Bye-Laws, TII could be a hypothetical tenant for the purposes of s. 48(3), and that as such, it would be in receipt of the entirety of the tolls without any Revenue Share obligation. This, if correct, supports its argument that the NAV must therefore be estimated on the entirety of the toll income less repairs, insurance, and other expenses, but without regard to any Revenue Share.

93. Eurolink countered this with the argument that because the Bye-Laws refer expressly to Eurolink as the Toll Company entitled to charge and collect the tolls, there could be no other hypothetical tenant or occupier of the tolls for the purposes of s. 48(3) other than Eurolink. Therefore, Eurolink argued, it was necessary to consider the actual terms and conditions of the PPP Agreement under which Eurolink collected the tolls and had to remit the Revenue Share to TII.

94. Eurolink's argument presupposes that the Bye-Laws cannot be changed, or new ones made. The primary purpose of the Bye-Laws is the regulation of the amount of the toll charges, with

ancillary operational provisions establishing vehicle driver/owner liability to pay, exemptions from payment e.g. for ambulances and fire brigades, and the creation of offences to regulate and enforce the tolls. I have outlined earlier the straightforward process that TII must follow in order to promulgate new bye-laws under s. 61. The Bye-Laws as promulgated are easily revoked by new bye-laws that would enable TII to become direct operator of the tolls in the event that the PPP Agreement expired or was determined early. The court was informed that this is what occurred with the M50 tolls, where the operator was bought out and TII became both owner and occupier/operator receiving all the tolls.

95. For the purposes of the rating construct under s. 48(3) I do not believe that a technical impediment that can easily be overcome by an owner of a rateable hereditament, and which is within its power to overcome, should exclude such owner from consideration as a hypothetical occupier. To do so would be taking the statutory construct too far. If Eurolink's argument were correct (and I do not believe it is) it would have the surprising effect that on determination of the PPP Agreement there would be no concessionaire, and no tolls could be collected by TII, notwithstanding the Toll Scheme (which would still exist) and s.59(1) of the 1993 Act under which a road authority "*may charge and collect tolls of such amounts as may be prescribed for the time being in bye-laws*". If correct, it would seem to follow that there would be no rateable property in continued existence, resulting in a "*pocket of unrated property*", the phrase used by the trial judge, notwithstanding the Toll Scheme and the fact that under the 2001 Act 'tolls' are rateable property. In my view, such a result would not reflect the intention of the legislature in s.59(1), or the intention of the legislature in the 2001 Act to impose rates on rateable property, subject to certain exemptions.

96. It should not be forgotten that Eurolink makes this argument in support of its main contention that the Commissioner is obliged to have regard to the actual terms of the PPP Agreement under which it occupies the rateable property in estimating the NAV. However as I have indicated

earlier, in my view, that approach is fundamentally at odds with the statutory construct under s.48(3).

Capital outlay

97. Eurolink relies on the fact that following its successful tender it expended capital on the construction of the motorway, and that, but for such capital expenditure, no tolls (and no Revenue Share) could exist. It suggests that this was "*consideration*" for the Revenue Share.

98. In my view, the fact that Eurolink made this capital investment is not relevant to establishing the NAV. Under the rating construct, it is not appropriate to take into account who may have created the rateable property, or at what expense. If that were so, then the Commissioner would be undertaking an entirely different exercise to that contemplated by the rating construct embodied by s. 48(3). Indeed the shared cost of construction in this instance illustrates this very point: following enquiry at the appeal hearing the court was informed that of the €335m total construction costs, approximately €162m in construction grants was received from the NRA/TII. If Eurolink's argument was correct would the Commissioner also have to factor in the grant aid, and if so, how would that be done? There is no provision for it in s.48(3). In this respect an incorporeal hereditament is no different to a corporeal hereditament, where the estimate of NAV must relate to the relevant property without regard to construction costs, or whether it was constructed, for example, by a person occupying under a building lease.

99. This may lead to what, on its face, may appear to be a harsh or unfair result, or counterintuitive, or a "*departure from real world conditions*", to adopt the phrase used by counsel for TII. Be that as it may, and as urged by TII, this cannot be an argument for not applying the formula promulgated by the legislature in s. 48(3), which continues the long established and well understood rating construct first provided for in this jurisdiction by s.64 of the Poor Relief (Ireland) Act, 1838: -

> "64. Every such rate shall be a poundage rate made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which one year with another the same might in their actual state be reasonably expected to let from year to year, the probable average cost of repairs, insurance, and other expenses, if any, necessary to maintain the hereditaments in their actual state, and all rates, taxes and public charges, if any, except tithes, being paid by the tenant."

It can be no coincidence that the legislature in consolidating the rating legislation in the 2001 Act decided not to change the basic rating construct for establishing the NAV. This also means that relevant and authoritative UK caselaw decided under the same construct continues to be persuasive.

100. Moreover, it is now an express objective of the rating lists established under the 2001 Act that there be equity and uniformity. Under s. 19(5) the Commissioner in compiling valuation lists under valuation orders "*shall achieve both (insofar as reasonably practicable) (a) correctness of value, and (b) equity and uniformity of value between properties on that valuation list*"; and under s. 29(a), as inserted by s. 16 of the Valuation (Amendment) Act 2015, the Commissioner is empowered to amend the valuation of a relevant property when of the opinion that "*it is necessary to do so in the interests of equity and uniformity of value*". These objectives would be set at nought if, contrary to the wording used in s. 48(3), regard could be had to the costs of creating the rateable property.

"Super profits"

101. Eurolink argued that a key objective of the manner in which the Revenue Share was structured and calculated under Part 4 of Schedule 15 of the PPP Agreement was to prevent Eurolink earning "*super-profits*" from the tolls, and that as such the Revenue Share should not be included in the gross income under the R&E method.

102. I see no force in this argument. Firstly, for reasons already given, considering the terms of the PPP Agreement in estimating the NAV is not the correct approach under the rating construct.

103. Secondly, what Eurolink actually asks the court to do is consider content from the "*PPP Invitation to Negotiate*" – the 102-page tender document for the project road issued in 2002. Eurolink points to clause 7.8.2 where under the heading "*Risk Transfer*" it states –

> "7.8.2 Tenderers are expected to structure the Revenue Share such that PPP Co does not make excessive profits in their high traffic scenario. The purpose of the Revenue Share is to limit the potential for excessive returns and not to transfer the risk back to the Authority."

104. On its own terms this cannot be considered because the PPP Invitation to Negotiate is superseded by the PPP Agreement, which includes, at clause 62, a "*Whole Agreement*" provision excluding from the PPP Agreement any prior agreement, understandings or representations.

105. Thirdly, the PPP Agreement itself says nothing about excessive profit or super-profits, and in Part 4 of Schedule 15 at para.1.1 merely refers to revenue sharing "*…so as to enable the Authority to participate in the revenue being generated by the Project Road".*

Revenue Share "not within the grasp of" Eurolink

106. Eurolink contended that the part of the tolls remitted to TII by way of the Revenue Share were not "*within the grasp*" of Eurolink, a phrase that appears to have been used by the Tribunal in *Westlink (No. 2)*. This contention rested on the terms of the PPP Agreement and in particular Schedule 15 Part 4, the effect of which was that specified percentages of the tolls had to be remitted by Eurolink to TII. Eurolink argued that its contractual duty to remit these percentages was also a statutory obligation under s. 63(5) of the 1993 Act. It was contended, therefore, that

the Revenue Share should not properly be regarded as income from the tolls to which it was entitled for the purposes of the R&E method of valuation.

107. The first answer to this is that already given – that under the rating construct the Commissioner must have regard to what the hypothetical occupier of the tolls would pay as "*rent*", and not what Eurolink as occupier pays under the actual terms of the PPP Agreement.

108. "*Relevant property*" in Schedule 3 of the 2001 Act includes "*property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in para. 2 of this Schedule…*", and it lists in para. 1(h) "*Tolls*". The condition in para. 2 is that the nature of the occupation is such as would have been rateable under the enactments in force prior to the 2001 Act coming into force – or if unoccupied "*capable of being the subject of rateable occupation by the owner of the property.*"

109. Prior to the 2001 Act coming into force it was held in *Westlink (No.1)* that the plaintiff was entitled to recover rates in respect of tolls in respect of the use of a public road. Under the Local Government (Toll Roads) Act 1979 (the predecessor to Part V of the 1993 Act) a road authority was entitled to charge and collect tolls, and under s. 3 could make toll schemes for the establishment of a system of tolls in respect of the use of a road. Under s. 9 the road authority was empowered to enter into an agreement with another person to do certain things, including collecting tolls, and on terms and conditions relating to payment to, or retention by, the person of all or part of the proceeds of the tolls. O'Flaherty J., with whom the other members of the court agreed, addressed the nature of a toll as a rateable hereditament, and the nature of the defendant's occupation. At p. 496 he stated: -

> "The trial judge had no difficulty in holding that there was nothing in the point that the defendant was not in occupation of this particular hereditament. He said that when an agreement under s. 9 of the Act of 1979 had been entered into, that agreement may *have the effect of ousting for a particular period the power of the Council to collect tolls and*

> *conferring it instead on the other party to the agreement*. He held that when the agreement was read as a whole that is what happened here. He found that the defendant was not in occupation of tolls or ancillary offices merely as an agent for the plaintiff, as would be so for instance in the case of a caretaker. Neither did he think that there was any substance in a second leg to that submission which was advanced, and which was to the effect that the tolls were merely ancillary to the public road which cannot have a rated occupier because of its benefitting the public.
>
> I would uphold the learned trial judge's finding. While it is clear that the power to charge and collect tolls is given to a road authority by s. 2, sub-s. 1 of the Act of 1979, it is equally clear from a perusal of sub-s. 3 of that section that where an agreement under s. 9 is entered into then it is permissible for the other party to the contract to collect the tolls to which the agreement relates.
>
> Section 124 of the Act of 1838 [Poor Relief (Ireland) Act, 1838], *inter alia*, provides as follows: -
>
> > 'The word "occupier" shall include every person in the immediate use or enjoyment of any hereditaments rateable under this Act, whether corporal or incorporeal …'
>
> Here, the position of the defendant is that it is required under the agreement for a period of 30 years to manage, supervise and operate a system of tolls.
>
> That it is the occupier of the hereditament rather than the beneficiary of the profit or use derived from the hereditament that is to be rated is well-established."

[Emphasis added].

Later in his judgment, O'Flaherty J. stated (p. 499): -

"Under the legislation that we must construe, it is clear that only a local authority can 'charge' tolls in the sense of bringing them into existence. But once in existence, as far as the scheme and agreement are concerned it is clear that the tolls belong to the defendant. It seems that the concept of 'tolls' and the proceeds of tolls are used inter-changeably in the legislation. There is, in any event, no practical distinction between the two concepts.

…

The defendant, in my judgment is deriving – and deriving directly – a profit or use from these tolls. The defendant is obviously in business to make a profit. The defendant does not seek altruistically to benefit the public, without expectation of profit, as did the Commissioners in the *Londonderry Bridge* case."

110. It is, therefore, clear that the condition in para. 2 of Schedule 3 of the 2001 Act is satisfied in that the occupation of tolls was rateable under enactments enforced prior to the 2001 Act coming into force.

111. The Case Stated, as it is required to do by s. 39(3) of the 2001 Act, sets out the facts upon which the determinations of the Valuation Tribunal were based. At para. 3 in the Case Stated, under the heading *"Facts Agreed or Found"* the relevant property is described thus: -

"3.1 The subject property is the tolls collectable from users of vehicles of all types which traverse the M4 Motorway…

3.2The subject property is 'relevant property' within the meaning of the Act.

3.8The subject property was the tolls."

These were the tolls created by the Toll Scheme created by the NRA pursuant to the powers conferred on it under s. 57 of the 1993 Act. The Toll Scheme sets out the location of the roads

(in 2001 it was a 'proposed road'), the classes of vehicles and road users for whom the proposed road was intended, the classes of vehicles and road users who were to be charged tolls for the use of the proposed road, and an estimate of the amounts of the tolls to be charged, as set out in Schedule C. The Toll Scheme also indicated that the NRA "*may*" in accordance with s. 63 of the Roads Act, 1963 enter into an agreement with a third party "*in relation to the collection of tolls on the proposed road and the application of the proceeds of such tolls and other matters*". Schedule C set out that the tolls actually to be charged would fall to be specified in Bye-laws to be made by the NRA under s. 61 of the 1993 Act (as amended). The Toll Scheme could therefore not come into being until the proposed roads had been constructed and bye-laws made in relation to the operation and management of the toll roads under s. 61 of the 1993 Act.

112. The necessary Bye-laws were made in November 2005, and were effective from 12 December, 2005. It was at that point that the "*relevant property*" namely the tolls (or the right to charge and collect the tolls, or the proceeds of the tolls) came into existence. These tolls i.e., all of the tolls that are collected from vehicles pursuant to the charges for the time being under the Toll Scheme, are the incorporeal hereditament which is the rateable property that falls to be valued. There can be no dispute about this in my view.

113. As recorded earlier, s. 3 of the 2001 Act contains the definition of "*occupier*", and it bears repeating: -

> "'Occupier' means, in relation to property (whether corporeal or incorporeal), every person in the immediate use or enjoyment of the property".

The relevant property is the tolls, or the right to receive the tolls, which is the same thing. As Eurolink is currently "*in the immediate use or enjoyment of the property*" by virtue of the PPP Agreement, it is the "*occupier*" for the purposes of the 2001 Act.

Under the PPP Agreement, TII does not have the right to collect any of the tolls – the exclusive right to do so is vested in Eurolink as current occupier. In the sense of the word adopted by O'Flaherty J., TII is "*ousted*" from any entitlement to charge or collect tolls during the continuance of the PPP Agreement.

In this context the trial judge was correct in his findings in para. 91 of his judgment that the tolls are not enjoyed in partnership; that the Revenue Share is not a "*reservation*" of occupation of some element of the tolls to TII; that the Revenue Share is not a "*regrant by Eurolink of a right to charge and collect some undivided share of the toll income*"; that there is "*not a split of ownership of a property which results in joint occupation*", and that the PPP Agreement is for "*exclusive occupation*".

114. Also significant is that in the Case Stated in the recitation of "*Facts or Found"*, it is noted at para. 3.7 that "*both parties accepted that the receipts and expenditure method ('R&E') is the appropriate valuation method to ascertain the net annual value of the subject property and relied on the application of the Guidance Note*".

115. Eurolink submits that under this methodology the Revenue Share should not be treated as part of the gross income from the tolls. This contention is unsustainable because it contradicts the fundamentals of the R&E method set out in para. 4.2 of the Guidance Note, the first three of which bear repeating: -

"(a) Gross Receipts should be determined by taking into account all income reasonably able to be derived from occupation of the property.

(b) The proper Cost of Purchases made in order to produce those receipts should be deducted to determine the Gross Profit.

(c) From the Gross Profit the Working Expenses should be deducted to determine the Divisible Balance."

116. Accordingly it is clear that "*all income reasonably able to be derived from occupation of*" the tolls is all of the tolls collectible by the occupier – or more properly, the hypothetical occupier. Once it is accepted that Eurolink has the sole and exclusive right to charge and collect the tolls, it is in fact the "*occupier*" of all of the tolls. Moreover, s. 59(3) of the 1993 Act provides: -

> "(3) Where an agreement under section 63 provides for the collection of tolls by a person specified in the agreement, that person and his servants or agents may collect the tolls to which they relate."

This provides the statutory basis for the collection of all of the tolls by the occupier, in this instance Eurolink.

117. The Case Stated in recording the Determination of the Tribunal at para. 7.1(b) states: -

> "[The Tribunal] found that the fact that the PPP Agreement made provision for retention of all or part of the proceeds of the tolls by the operator does not mean that the Revenue Share is never received by the hypothetical tenant operator of the Toll Road. The question is not what income is *"within the grasp"* of the Appellant, but rather the Tribunal must determine what income the hypothetical tenant could reasonably derive from occupation of the subject property. Under the rating construct the hypothetical tenant includes the landlord and if rateable, the landlord would have to pay rates on the entirety of the tolls collected. The Tribunal concluded that in valuing the subject property, the income reasonably able to be derived from the subject property is the income from all the tolls collected."

In my view this is the correct approach in applying the R&E method to the toll income.

118. In written submissions counsel for TII sought to rely on evidence emerging at the Tribunal from cross-examination of Mr. Juan Perez, a witness called on behalf of Eurolink. Mr. Perez agreed that Eurolink collected all of the tolls and deposited them in a bank account in Danske Bank

and at the end of each month transferred them to Banco Santander. Mr. Perez agreed that from Bank Santander the Revenue Share was transferred to TII, and expenses were paid, including bank repayments and insurance, and he agreed that these were interest bearing accounts.

119. Whilst at first blush this evidence might seem to support TII's contention that all of the tolls including monies that might later be transferred as the Revenue Share came into the hands of Eurolink and were banked by it as part of the gross receipts from the tolls, in my view it is evidence that in truth is not relevant to estimating the NAV under the R&E method. This is because the rating construct looks at the hypothetical tenant/occupier and "*all income reasonably able to be derived from occupation of the property*". How income is actually received and banked cannot therefore be determinative and arguably has no relevance (although it could potentially have a relevance to the issue of whether there is a limitation imposed by law or Statute on the profit earning capacity of the property, an issue which is considered later in this judgment).

120. In conclusion on this issue I agree with the trial judge that the Tribunal was correct in finding that for the purpose of the R & E method the income/gross receipts include "*all income able to be derived from occupation of the property*" and encompasses the entirety of the tolls that a hypothetical tenant/occupier could derive from occupation, without any deduction of Revenue Share.

Revenue Share – a restriction on profit making capacity imposed by law?

121. Eurolink submitted that the combined effect of the 1993 Act and the PPP Agreement amounted to a limitation of profits clause – a ceiling intended to prevent the toll operator from making super profits – which limited the profits which the trading occupier of the toll is entitled to make as between himself and the public. It was submitted that s. 63(5) creates a statutory duty that the parties to an agreement "*shall carry out the agreement in accordance with its terms and conditions and a road authority shall have all such powers as may be necessary for that*

purpose". Reliance was placed on the statutory process under s. 58 for the creation of a toll scheme, and s. 59(3) which provides that "*where an agreement under s. 63 provides for the collection of tolls by a person specified in the agreement, that person and his servants and agents may collect the tolls to which this agreement relates*." Counsel also highlighted s. 63(2) under which a toll agreement: –

> "may –
>
> (a) provide for the application of the proceeds of tolls, systems of accounting for tolls collected and the methods of times of payment of proceeds of tolls to the persons to whom they are to be paid under the terms of the agreement"

122. In response TII contended that the rateable property, the tolls, were created by the Toll Scheme and Bye-Laws, and then "*granted onwards*" by the PPP Agreement. While accepting that the PPP Agreement was not a "*purely private arrangement*", because of the creation of a statutory duty under s. 63(5), counsel contended that that subsection had very limited significance in the rating context, and did not have the effect of rendering the Revenue Share a limitation on the profit earning capacity of the tolls under statute, or as between Eurolink and the public. Moreover the Bye-Laws, which limited the maximum tolls that could be charged and collected, was not a limitation on earning capacity. Counsel submitted that the only true limitation on earning capacity was the volume of traffic passing through the tolls.

123. In argument, counsel for Eurolink placed reliance on the obiter dictum of MacMenamin J. in *Westlink (No. 2),* and extracts from Ryde on Rating, and certain UK case law referred to in that text.

124. It will be recalled that in *Westlink (No. 2)* MacMenamin J. addressed firstly the primary appeal in which Westlink and CRG asserted that the Revenue Share which they were required to pay under their respective contracts with the local roads authorities made under s. 63 of the Roads

Act 1963 were deductible as "*charges (if any) payable by or under any enactment*", the wording originally included in s. 48(3) of the 2001 Act, but since deleted by amendment. Section 48(3) then provided:

> "Subject to s. 50, for the purposes of this Act, 'net annual value' means, in relation to a property, the rent for which, of one year with another, the property might, in its actual state, be reasonably be expected to let from year to year, on the assumption that the probable cost of repairs, insurance, and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes *and charges (if any) payable by or under any enactment* in respect of the property, are borne by the tenant."
>
> [Emphasis added to the words that were deleted by amendment effected by virtue of s. 27 of the Valuation (Amendment) Act 2015]

125. In his decision on this issue MacMenamin J. (which whom Clarke J. agreed, and Fennelly J. dissented) noted "*[t]he extraordinarily close linkage*" between the two contracts and the provisions of s. 63(1) and s. 63(2) of the 1993 Act. He concluded: -

> "31. … What can the agreement be, other than an agreement entered into 'under' the section? In my view, this allows for only one answer. The agreements in question were made *under* s. 63 of the 1993 Act. The conclusion is further supported when one comes to s. 63(5). There, it is provided:
>
> > 'The parties to an agreement *under this section* shall carry out the agreement in accordance with its terms and conditions and a road authority shall have all such powers as may be necessary for that purpose.'

Again, it will be noted that the phrase 'agreement under this Section' is deployed. The duties are imposed on both parties to comply with the agreement. I do not think it can be said this

provision is otiose. Nor do I think it can simply be seen as an enabling provision conferring *vires* on the National Road Authority. It goes much further. It imposes a statutory duty on both parties to an agreement made 'under' the section."

126. MacMenamin J. therefore concluded that the trial judge had misdirected himself in law and that, as found by the Valuation Tribunal, the Revenue Share fell to be regarded as a charge "*payable by or under any enactment in respect of the property*" within the then meaning of s. 48 of the 2001 Act, and therefore "*deductible in the calculation of the 'net annual value' of the relevant properties in question*". He added: -

> "It also follows, therefore, that I do not consider that the contracts are simply a restrictive covenant or a private arrangement."

127. In passing, it is worth noting that in his robust dissent Fennelly J. expressed the view that "the royalty payment is not a '*charge*' and is certainly not '*payable by or under any enactment*.'" He considered the toll agreements were made under the *power* to make such agreement under s.63(1), and he adopted the words of O'Flaherty J. in *Westlink (No.1)* that the agreements *'ousted'* the NRA from collection of the tolls. He stated:

> "17. The key point, in my view, is that these matters are all provided for and governed in detail by an agreement freely entered into between each operator and the Authority."

He considered *"charges"* should be interpreted in light of the preceding words "*rates and taxes"* and that it would do violence to the language and intention of the provision to treat the Revenue Share payments as amounting to a charge.

Secondly he did not regard the Revenue Share as being paid *"in respect of the property"*, but rather considered it was a payment under agreements freely entered into. It is hard to resist the logic of his position. The 1993 Act enables the agreement but does not dictate its terms or impose any particular obligation in respect of payment – it is at all times a matter for agreement between NRA/TII and the operator.

128. Returning to the judgment of MacMenamin J., having decided the primary issue on the then wording of s.48(3) he went on to add "*one or two observations*" directed at the issue under discussion, namely whether the Revenue Share is a restriction on the profit making capacity of a particular property imposed by law. He stated –

> "35. While the issue did not arise in the instant case, it is important to point *[sic]* that the learned authors of *Ryde*[4] point out at para. E.622 that any restriction on the profit making capacity of a particular property imposed by law does have to be taken into account; but where the restriction arises by means of a private arrangement it is not to be taken into account in rating calculations. The authors state: -
>
> > 'Where an undertaking is occupied in order to earn profits, those profits may be said to be limited by Statute in two ways: *viz* (1) by a limitation of the charges which the trading occupier can make as between him and the public; (2) by an appropriation of the whole (or part) of the profits when earned to particular objects. It is clear from the cases above cited [*in particular Port of London Authority v Orsett Union Assessment Committee* [1920] AC 273] that limitations of the former kind must be taken into account, but limitations of the latter kind must not.'
>
> 36.In support of these observations, the learned authors cite two cases; (1) *Rhymney Railway Company* [1869] L.R. 4 Q.B. 276 and *Brecon Markets Company v St. Mary's Brecon* [1877] 36 L.T. 109. While the question did not fall for determination in the appeal, it is arguable that, by reference to the statute then to the contract, the provisions fall within the definition of a limitation of profits clause which the trading occupier is entitled to make as between him and the 'public'. Consequently, it might be said that

[4] Op. cit., 2008 Ed.

limitations of this type may be taken into account. I express no concluded view on this question however."

Counsel for Eurolink placed some reliance on this observation, but conceded that it was (at best) an obiter dictum. It is, in truth, not even an obiter dictum, because MacMenamin J. only observes that the question is "*arguable*", and he expresses "*no concluded view on this question*".

129. Counsel instead placed greater reliance on the extract from Ryde on Rating, and the case law to which the authors refer, including the cases mentioned by MacMenamin J. Counsel referred to the November 2021 edition of *Ryde* (Vol. 1, Issue 89, Lexis Nexis), and paras. [621 – 626], where the following appears: -

"Effective statutory restrictions on profit

[621]. If premises are occupied for the sake of making profit 'any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered' in estimating the relatable value.[1] 'The actual hereditament of which the hypothetical tenant is to be determined must be the particular natural position or by the artificial conditions of an Act of Parliament'[2]. Thus, in rating a dock or railway company, the limitation imposed by a statute on the tolls which the company could charge was taken into account as limiting the rent which the hypothetical tenant would pay. In *Sculcoates Union v Hull Docks*[3], a railway company had under the special Acts the right to run, free of toll, over lines belonging to the dock company: it was held that in rating the dock company, the statutory prohibition against charging tolls must be taken into account. Again, where rateable value was calculated from the profits made in an undertaking and a claim of excess profits duty had been made (though it was under appeal), it was held that the alleged liability must be taken into account[4].

1. LCC v Erith Parish (*Churchwardens*) and West Ham Parish (*Churchwardens*) v LCC [1893] AC 562 at 592.
2. *Port of London Authority v Orsett Union Assessment Committee* [1920] AC 273, per Lord Buckmaster at 305; but see also his Lordship's remarks in *Poplar Metropolitan Borough Assessment Committee v Roberts* [1922] AC at 103.
3. [1895] AC 136
4. *Port of London Authority v Orsett Union Assessment* [1919] 1 KB 84."

[Footnotes as in the text].

130. Paragraph [622] is unchanged from the 2008 edition quoted by MacMenamin J. in *Westlink (No. 2)* and was also relied on by counsel. In his submissions counsel for Eurolink urged on the court that the Revenue Share was a restriction on profit earning capacity from the tolls that was imposed by statute. However, no doubt conscious of the fact that the PPP Agreement which establishes the Revenue Share was not one made between Eurolink and the public, he urged the court that it was not requisite that the statutory limitation be made between the trading occupier and the public, and that the essential feature was the statutory restriction on profit making capacity.

131. Counsel for Eurolink then called in aid the case of *Sculcoates Union* cited in the above extract from *Ryde*, and the judgment of Lord Herschell LC (with whom Lord Davey concurred), where he stated, at p. 148-149 : –

> "… We are dealing here with a profit-bearing undertaking. The parishes do not ask that the land shall be valued merely as land, or land covered with water, but they say, "These are docks with wharves, railways, and all these adjuncts and appliances, and it is as docks capable of earning a profit that they ought to be rated. You are to find out what a tenant from year to year in view of the profits earned would be likely to give, and upon that principle they have been rated." But then it is said, "but they could earn more profits than

they are earning, and therefore you ought to suppose that a hypothetical tenant would give more." But, if the Legislature have said that they shall not earn these suggested further profits because they shall not charge tolls, how can it be established as a matter of fact that they could earn more? It appears to me that if you are to disregard such statutory restrictions as these, you might just as well say that a railway company ought not to be rated only according to the tolls which it receives – ought not to be rated even according to the tolls which it could by law receive within its maximum, but that you ought to disregard its statutory maximum and ask what a tenant from year to year would give for the railway if he could charge any tolls which he pleased.

My Lords, I do not think there is any foundation for such a proposition…"

132. However I do not believe that *Sculcoates* supports Eurolink's proposition. In that case there was an express legislative provision – s. 53 of 24 & 25 Vict. c. lxxix – which prohibited the dock company from taking a rent for the railway and tramway lines. It was a case where money could not be earned at all because of the statutory prohibition.

133. Counsel also relied on *Port of London Authority v Assessment Committee of Orsett Union* [1920] AC 273. The Port of London Authority was a body corporate established by Statute for the purpose of administering, preserving and improving the Port of London. Under the Port of London Act, 1908 the undertakings of certain existing dock companies were transferred to the Port of London Authority in exchange for the issue of various classes of Port stock, and it had the same powers of taking dues from vessels using the docks as the outgoing company. The Act also provided for the application of the receipts of the Port Authority in payment of:

a. working expenses,

b. interest on the various classes of Port stock and any other loans raised by the Port Authority,

c. all sums required by the Act to be paid: –

1. into a sinking or redemption fund,
2. into a reserved fund created by the Act,

and it directed that the ultimate balance should be applicable for the benefit of the port as the Port Authority might determine. The Port of London appealed against a rate made upon it in respect of a hereditament which formed part of the undertaking of one of the outgoing companies where no allowance had been made for the tenant's profits beyond allowing interest on the capital employed, despite the statutory provisions that required the Port Authority, after discharging working expenses and interest to pay income into a sinking or redemption fund or reserved fund. The issue fell to be considered under s. 1 of the Parochial Assessment Act, 1836, a provision comparable to s. 48(3) of the 2001 Act in that the rate fell to be assessed on the following rating hypothesis: –

> "… upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in the state to command such rent…"

Lord Buckmaster, following the decision in *Sculcoates*, at p. 305 stated: –

> "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial condition of an Act of Parliament. The character and extent of the various deductions from the gross revenue must be fixed in relation to the conditions."

134. Counsel therefore argued that in assessing the NAV under s. 48(3) it was necessary to examine the PPP Agreement, and the restriction on retention of the proceeds of the tolls represented by the Revenue Share, which was a restriction said to arise under statute in that the PPP Agreement was made pursuant to s. 63 of the 2001 Act.

135. In contending that this extended to the earning capacity of Eurolink from the toll receipts, counsel also referred to the following extract from the judgment of Lord Dunedin in *Port of London Authority*, at p. 297: -

> "… If you take the sum which an undertaking will bring in and deduct what it costs to run it, and find a balance, that is if you like to call it so a profit. I think the better words would be "earning capacity". But call it what you like – there it is. What becomes of it afterwards is another matter"

However, later in his judgment Lord Dunedin makes it clear that statutory restrictions in relation to earning profits are to be taken account in the rating construct, but restrictions in the disposal of the profits are not deductible. He stated, on p. 299: -

> "Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value – the latter does not."

In his judgment Lord Birkenhead LC restated certain propositions of law, the fourth of which is relevant to this issue. At p. 284 he stated –

> "Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all.
>
> In other words, if the law has prevented the hereditament being profitable at all, then the occupation is of no value, and if the law has restricted its profit-earning capacity, then the

effect of such restriction will tend to diminish the value. This proposition does not mean, and ought not to be understood to mean, that, where profits can lawfully be earned, but such profits must be applied in a particular way or for a particular purpose, the occupation of the hereditament is valueless and therefore not rateable, or, on the other hand, that the tenant derives no profit from the occupation, and therefore that the whole profit increases the net value of the land."

Viscount Haldene agreed, and as with the other Law Lords distinguished the case of *Mersey Docks v Liverpool Overseers* L.R. 9 Q.B. 84. He stated, at p. 292: -

> "My lords, the scheme established by the Port of London Act, is materially different from what that scheme was taken to be. Insofar as the appellants can increase their revenue (and this is permitted to them within limits prescribed for dues and rates), the surplus so obtained is to go for the benefit of a Port in such form as they choose. They may increase the annual value of the property by investing the surplus in this fashion. It therefore appears to me that their position is quite different from that attributed to the trustees of the Mersey Docks. For the latter could neither accumulate and invest surplus revenue nor have they stockholders who received interest from them with the character of profit."

136. It is clear from all of this that the House of Lords was drawing a distinction between statutory restrictions on the capacity of an undertaker to earn income from the rateable hereditament, applicable between the undertaker and members of the public, on the one hand, and statutory restrictions requiring an appropriation of the whole or part of the profits, when earned, to particular objects, on the other. Counsel for TII submitted, and in my view correctly, that the profitability of the subject rateable property – the right to collect the tolls – depends ultimately upon traffic volume, and is not constrained by statute. Section 63(1) does provide that the terms and conditions of an agreement with another person in relation to tolls may include "*the*

payment to or retention by the person of all or any part of the proceeds of the tolls", but this is not a legislative provision that constrains the making of profits; rather it is one that allows NRA/TII to reach agreement with an operator on a Revenue Share, which involves a participation in the toll proceeds – but it is not a limitation on the amount of proceeds that may be collected. What dictates that is traffic volume. Furthermore, insofar as the Revenue Share arises after the tolls have been collected, it is a contractually agreed appropriation post earning – it is not a restriction on earning capacity.

137. I find persuasive against Eurolink's argument two decisions referred to in *Ryde* (2021 edition) at para. [625]. The first of these, which the trial judge also found persuasive, is *Rhymney Railway Co* (1869) L.R. 4 Q.B. 276. In *Rhymney* it will be recalled that wharves - i.e. the mooring location for boats wishing to dock, being the actual structure above water – were let by the trustees of the Marquis of Bute to the railway company, but by agreement certain wharfage dues were made payable directly by users of the wharf to the trustees. However, the railway company, as the occupier of the wharves, was rateable for their full value, including the wharfage dues even though they were not receivable by the railway company. Before quoting from the judgment of Mellor J., who delivered the judgment of the Queen's Bench, it should be noted that the trustees occupied the docks i.e. the area of water leading to the wharves, but this was not a case of joint occupation. At p. 282, Mellor J. stated: -

> "But it was contended on behalf of the appellants that they were not so rateable on the ground that, although the wharfage dues arose from the use of the wharves which were occupied by the appellants, yet they were not received by the appellants, but by the trustees of the Marquis of Bute, on their own account; and that as the appellants did not, and could not, derive any benefit from these dues, they could not in any way be considered as enhancing the rateable value of the appellants' occupation.

The argument in substance comes to this, that the appellants are not liable to be rated in respect of the entire value of the land occupied by them, but only to the extent of the beneficial interest which they derive from such occupation.

It is clear that no rate in respect of these wharfage dues could be imposed on the trustees of the Marquis of Bute, who are occupiers of the docks only, and not of the wharves; and therefore, unless the appellants were liable to be rated in respect of the increased value of the wharves arising from these wharfage dues, the parish would be wholly deprived of any rate in respect of a very considerable part of the true value of the wharves. If the trustees had made no demise of the wharves but had themselves remained in possession of them, as well as in receipt of the wharfage dues, they would have been rateable in respect of the entire value of the wharves, taking into account the dues in question. So if the trustees had included in their demise to the appellants the right of receiving the wharfage dues, the appellants, even though liable to pay an increased rent equal to the amount of the dues, would in like manner have been rateable for the entire value of the wharves as enhanced by the dues. And it would appear very unreasonable and unjust that by an arrangement between the parties like that which exists in this case, and whereby the trustees give to the appellants the sole right of occupation, but reserve to themselves the right of receiving the dues, which form in substance a large part of the profits and value of the occupation, they should be able to exempt this part from all rateability.

We are of opinion that no such consequence will follow, and that the appellants, as sole occupiers of the wharves, are liable to be rated in respect of the full rateable value of the premises in their occupation, without regard to the precise amount of benefit which they themselves derive from such occupation."

138. This resonates with the present appeal where Eurolink is in exclusive occupation of rateable property, the tolls, but asserts that the estimate of NAV should be based not upon the entire value of the rateable property which it occupies, but only upon the tolls less the Revenue Share which under the terms of the PPP Agreement must be paid to TII. Just as the Marquis of Bute did not occupy the wharves, TII is not the "*occupier*" of the toll proceeds, or any of them. It follows that unless Eurolink is liable to be rated in respect of the full value of the toll receipts, including those that may be notionally attributable to the Revenue Share, the rating authority will be "*wholly deprived of any rate in respect of a very considerable part of the true value of the [tolls]*". As Mellor J. pointed out, if the trustees had themselves remained in possession of the wharves, as well as in receipt of the wharfage dues, they would have been rateable in respect of the entire value of the wharves, taking into account the dues in question.

139. Although counsel for Eurolink submitted that TII could not be regarded as a hypothetical tenant of the tolls – an issue on which I have already found against Eurolink – it is the case that if the NRA/TII had not made any agreement pursuant to s. 63(3) in relation to collection of the tolls, but had instead collected the tolls itself, thus remaining in occupation of the rateable property, NRA/TII would have been rateable in respect of the entire value of the toll proceeds.

140. Mellor J. also makes the important point that it would be unreasonable and unjust that a private agreement between parties could lead to an exemption of part of the income from all rateability. That observation applies equally to an arrangement such as the PPP Agreement in respect of the collection of tolls. As counsel for TII pointed out there can be no "*island*" of a rateable property (or, as the trial judge put it, no "*pocket of unrated property*") that is exempt from rates, unless that exemption is provided for in statute. If Eurolink's argument were correct there would be a risk that the Revenue Share would be such an island, although the possibility could not be excluded that the Revenue Share would then be treated as property rateable in the hands of TII. Such a result in the present appeal cannot arise as it is clear that under the Toll Scheme

and Bye-laws it is the operator, Eurolink, that receives the entirety of the toll proceeds, including those that may notionally form part of the Revenue Share.

141. In *Ryde* at para. [625] the authors usefully comment on *Rhymney*: –

> "… The correctness of this decision may be shown thus: if the lease to the railway company had included the right to receive the dues, as subject to the payment of a higher rent, it is clear that the railway company would have been rateable for the full value of the wharves, including the dues. A substitute for such a lease, a lease reserving the dues to the lessors, with an exactly proportionate reduction of rent: the reservation of the dues would be in substance a reservation of rent in another form, and the method of paying rent under such a lease would not alter the real value of the premises."

142. The second case referred to in *Ryde,* at para. [626], is *Brecon Markets Co. v St. Mary's Brecon* [1877] 36 LT 109. By virtue of a local Act, Brecon Markets Co. were incorporated and authorised to regulate the marketplaces belonging to the Corporation of Brecon, and to receive all tolls payable therefrom which were thereby vested in them. They were however by another section required to pay to the Corporation of Brecon £210 each year, to be charged on the scheduled tolls, markets and marketplaces vested in Brecon Market Co. by the Act. This annual sum was required to be devoted by the Corporation to the payment of incumbrances incurred by the building of the old marketplace. The Brecon Market Company, under the authority of the Act, constructed new marketplaces on land vested in them, and collected tolls from the old and new markets. It was held that Brecon Market Co. were not entitled to a deduction of the £210 from the net annual value of their tolls in the assessment of the Poor Rate. Mellor J. stated: –

> "I think they can have no doubt about our judgment in this case, although the contention on the appellants' has been most ingeniously argued. The market company are by

> themselves or their lessees to receive the whole of the tolls, which are the profits derived from the land. There is an appropriation of money from the tolls for certain purposes, but nothing in the Act of Parliament affects this question as to their rateable amount. Here all the appellants' property is liable to contribute to this rate; the parish cannot be deprived of that portion of the assessment of the profits of the land, which, by an arrangement between the market company and the Corporation, is appropriate as a first charge to the Corporation. It is not provided that the company are to receive specific tolls, nor are such tolls vested in them by the Act. Any other mode of rating than that which has been adopted will be contrary to the established principles, and unfair to the other rateable property in this parish."

Lush J. agreed, holding: –

> "All the tolls paid for the use of the market are to go first into the hands of the appellants, and the deductions allowed for the Statute must, therefore, be made from that amount. The whole of the tolls are vested in the appellants, and no part is specifically, as has been contended, vested in the Corporation. There is an arrangement in the nature of rent between the appellants and the Corporation, but, even although it is rightly called a first charge upon the appellants' receipts, it cannot come within the authorised deductions for the computation of their rateable valuation."

143. Counsel for TII argued, in my view correctly, that Brecon Markets Co. had a stronger case for deduction from gross receipts in estimating the NAV than Eurolink has in respect of the Revenue Share because there was a statutory provision directing payment of the £210 each year to the Corporation of Brecon. It was an appropriation of money from tolls "*for certain purposes*", and not therefore a limitation on the charges which the Brecon Market Co. was entitled to receive by way of tolls. Eurolink's argument is weaker because the Revenue Share is not one arising directly under statute; rather it is a payment agreed contractually between

negotiating parties, and it does not seem to me that the creation of a statutory duty in s. 63(5) of the 1993 Act which underpins the contractual duty alters that position.

144. Counsel for TII also referred the court to *City of Worcester v. Assessment Committee of the Droitwich Poor Law Union* (1876) Vol. II Exchequer Division 49, in which the Court of Appeal affirmed the decision of Blackburn J. on a case stated concerning the rating of waterworks. The City of Worcester in its capacity as a local health board and urban sanitary authority erected and occupied works for the purpose of supplying water. In order to benefit local inhabitants, the City of Worcester made the scale of charges so low as to leave a profit far less than would have accrued to a company carrying on the works as a commercial undertaking. In adopting the scale of charges this low the local board intended to carry out the provisions of the Public Health Act 1848, the object of which was to ensure a supply of water at a low price for sanitary purposes. However, they were assessed to rates on the waterworks by the respondents on the amount which might have been earned by a trading company carrying on the waterworks for their own benefit. At first instance Cleasby B. stated (at p. 58): -

> "The only question, therefore, is, of whether a public body exercising their powers properly for the benefit of the inhabitants, and making their rates bone fide for that purpose, and so regulating their conduct by the restriction, as it may be called, of acting in obedience to the Act of Parliament, can be properly represented for the purpose of rating by a hypothetical tenant acting under no such restriction. We are of the opinion that they cannot. They only acquire the right to the rates by the Act of Parliament for the purpose of carrying the objects of the Public Health Act properly into effect, and the profitable occupation which they in fact have is the only one which they can properly have, and it would be strange to rate them, not in respect of what they can properly enjoy and do enjoy, but in respect of what they cannot properly enjoy and do not enjoy."

The Court of Appeal agreed, Mellish L.J. stating, at p. 60: -

> "… we think that the Corporation, in making a water-rate under s. 93 of the Public Health Act, are bound to make an estimate of the sum they actually require for the maintenance of their waterworks, and cannot legally levy a larger sum by a water-rate than the sum they so require."

It was therefore a case in which the City of Worcester could not be rated as occupiers of the waterworks on the basis of profits at a commercial level which the law did not permit them to earn.

145. *Droitwich* lends support to the principle that it is only where there is a statutory restriction, as between the undertaker in occupation of rateable property *and members of the public*, on the earning capacity from the relevant property that this must be taken into account in estimating the NAV.

146. It is not disputed that MacMenamin J. in *Westlink (No. 2)*, speaking for the majority, decided the primary issue on the basis of the specific wording of s. 48(3) that the royalty payments in that case were a "*charge payable by or under any enactment*". With reference to the observation of MacMenamin J. that it was arguable that the Revenue Share was in any case deductible from gross receipts on the basis that it was, by reference to statute and contract a "*limitation or profits clause*" as between trading occupier and the public, the trial judge remarked at para.60 that "i*t is clear that the issue before this Court was not fully argued in Westlink (No. 2)*". In Ground of Appeal 3.2 it is pleaded that there was no valid basis upon which the trial judge could have come to that view, particularly as the Tribunal in *Westlink (No. 2)* had found that the Revenue Share was deductible from gross receipts independently from the reference to "*charges (if any) payable by or under any enactment*".

147. I do not consider that this to be a good ground of appeal. It is significant that relevant extracts from *Ryde* (2008 edition), and the case law referred to therein were considered by the trial judge, and he found particularly persuasive, as do I, the decision in *Rhymney*. It is clear that

the trial judge carefully examined the question of whether the Revenue Share was a limitation on the earning capacity from the tolls between the occupier and the members of the public using the roads imposed by the 1993 Act. In preparing this judgment I have given careful consideration to the same case law, and have also found persuasive the decision in Brecon Markets, and come to the same conclusion as the trial judge. Whether this particular question was or was not fully argued before the Supreme Court in *Westlink (No. 2)* is also of little or no significance as the furthest that MacMenamin J. was prepared to go was "*observe*" that the toll operator's point was "*arguable*". In my view, this ground fails.

Revenue Share – "necessary to maintain the property in that state"

148. In this submission Eurolink again relied heavily on the argument that the tolls are an incorporeal hereditament established not just by the Toll Scheme and the Bye-laws, but also the PPP Agreement. Counsel relied particularly on the analysis of the Supreme Court in the cross-appeal in *Westlink (No. 2)* in the judgment of MacMenamin J., with whom Clarke J. agreed. Fennelly J. while dissenting on the primary issue simply agreed with MacMenamin J. in his judgment on the cross appeal, without conducting his own analysis or giving reasons.

149. As indicated earlier the cross appeal concerned the toll contract between CRG and the NRA under which CRG had an obligation to repair the entire length of the M1 motorway notwithstanding that the tolled section was considerably shorter. The issue that arose was whether allowance should have been made under the R&E method in estimating the NAV for CRG's liability to repair the entire length of roadway, even though the toll related only to the shorter section of road. The Tribunal had found in favour of CRG on this point, a decision that was upheld by the High Court (Charleton J.), and on that issue the Commissioner cross-appealed to the Supreme Court.

150. The issue that the Supreme Court had to decide was whether this expense was "*repairs…and other expenses (if any) necessary to maintain the property in that state*" i.e. "*in its actual state*",

in order to qualify as a deduction under s. 48(3) of the 2001 Act. MacMenamin J. rejected the Commissioner's submission that as CRG was only in occupation of the tolls and tolled section of roadway the deductible maintenance expenses should be limited to those related to the tolled section. He considered that the "*relevant property*" falling to be valued under s.48(1) included both corporeal and incorporeal property, and that no distinction between them was drawn in s.48(3). He stated :

> "60. Each term of s. 48(3) is highly relevant. It provides that the average annual cost of repairs which the tenant must bear is "that which would be necessary to maintain the property *in that state*". The phrase "*in that state*" must be referable back the term "*actual state*", also used in s. 48(3), which is to be seen as part of the premise on which the yearly rent is paid. I consider that the terms "*in that state*", and "*actual state*", must both be construed as referring to both the corporeal *and* incorporeal property. It means in real terms: that which is necessary to maintain the status quo. No alternative interpretation is allowed for within the terms of the Act. Accordingly, I am forced to conclude that the term "*at its actual state*" cannot simply mean that one is limited to assessing the *physical* condition of the corporeal property seen in isolation from its incorporeal dimension."

MacMenamin J. then referred to the majority decision of the House of Lords in *Imperial Tobacco*, and the finding that the right to fix an advertising sign on a building was to be valued by reference to the incorporeal right without regard to the physical work to be carried out on foot of it. He quoted with approval from Viscount Simonds to ascertain what the incorporeal right is requires looking at the terms of the document "*by which the grant was made or reserved*". He also quoted with approval from Lord Reid where he observed, at p. 474: –

> "What has to be valued is not land but the appellant's right to use land. The only right to use land which is let out or reserved to the appellants is that given to them by their

agreement with the Corporation, and therefore it appears to me that the sole question is what is the value of that right."

"In valuing corporeal hereditaments, land, one takes the land as one finds it. So, also in valuing an incorporeal hereditament, a right, one must take the right as one finds it."

151. In the closing and decisive passages in his judgment, which are relied upon by Eurolink, MacMenamin J. stated: -

"64. In my view, the situation here is that one must look to is what is provided for in s. 48(3) of the Act of 2001. What is necessary to maintain the property *in that state?* This necessitates looking to what is necessary in order to continue the appellant's incorporeal hereditament in legal existence. Its continuance in being hinges on the repairs being carried out on the *entire* road.

65**.** In my view, it matters not whether one is speaking here of an incorporeal or corporeal hereditament. What is essential to the definition is what flows from the provisions of Celtic's agreement with The National Roads Authority, which stipulated that the Authority had the right to terminate the agreement, in the event of Celtic's non-compliance. Thus, Celtic's incorporeal right to collect the tolls would lapse, or be terminated, in the event that it failed to comply with the maintenance obligations. This contractual duty is critical in defining what is "necessary to maintain the property *in that state".* Celtic's entitlement to collect the toll is solely a product of the agreement. Going with the corporeal hereditament, there is an obligation to maintain the entirety of the toll road; failure of compliance with that legal duty would have the consequence of the failure of the *incorporeal* hereditament - Celtic would be liable to lose the right to collect the toll. Thus, I conclude Celtic's entitlement to collect the toll, and thus to "occupy" the

property, was (and is) entirely dependent upon compliance with the maintenance obligations in relation to the entire motorway.

66. I do not think any distinction in principle can be drawn between the observations of Viscount Simonds and Lord Reid in *Imperial Tobacco,* and the situation which obtains here. Moreover, the proposition that the obligation can be ignored in valuing the right runs counter to the terms of the contract. The proposition relies upon a view as to the position of a hypothetical tenant, which, in my view, is entirely divorced from the considerations that such hypothetical tenant would engage in, when carrying out the process of valuation. In real terms, it would be unthinkable that a hypothetical tenant would not take the entirety of the duties and the rights into consideration.

The 1996 *Westlink* case

67. It might be said that in *Dublin County Council v Westlink Toll Bridge Ltd* [1996] 1 I.R. 487, tolls were recognised by this Court as being *incorporeal* hereditaments. The Court noted that the toll bridge operator itself argued that the toll was an incorporeal hereditament. A passage from that decision must be seen in its true context. At p. 493 of the judgment O'Flaherty J. stated that the "property" was "the tolls". He stated:

"We are concerned exclusively with the rateability of the tolls. The rateability of the buildings and other structures, (other than the structure at which the tolls are collected) is not an issue".

68. When the judge stated that the Court was concerned exclusively with the rateability of the tolls, and that the rateability of the buildings and other structures was not in issue, he was not speaking of the broader context which is in issue here. Here, it is

the *contracts* which render the right and duty an incorporeal hereditament, a concept which is broader in nature than the narrow question of the rateability of the "tolls", used in quite a different sense in *Westlink.* Again applying the principles of interpretation referred to earlier, one must identify what there must be in order to maintain Celtic's "property", both corporeal and incorporeal, in "that state". This necessitates a consideration, not just of the physical element, or simply the right to receive money, but the entirety of the contractual arrangement. The right gives rise to a duty which devolves upon the rate payer, without which the rate payer would be deprived of the right to collect tolls. In my view therefore, the views of the learned High Court judge on this issue should be upheld; allowance should be made for Celtic's liability to repair the entire length of the roadway."

Analysis

152. The trial judge did not accept Eurolink's proposition, based on *Westlink (No.2)*, that in the context of an incorporeal hereditament what was contractually necessary to keep the right in existence was deductible as "*necessary to maintain the property in that state*" and this extended to the Revenue Share. Taking what he termed *'*a cautious *approach'* to the invitation to follow *Westlink (No.2)*, he stated –

> "43. I do not feel bound to extend the rationale of the decision of the Supreme Court in *Westlink (No.2)* which relates to maintenance in the manner advocated by Eurolink. Such an extension would result in like not being valued with like. This equality of treatment is a fundamental objective of rating law."

153. In ensuing paragraphs the trial judge elaborates on his "*equality of* treatment' point. He observes, correctly, that if the grant of an incorporeal right such as an easement was silent on repair, the statutory construct under s.48(3) would require that it be assumed that the

hypothetical tenant would undertake the cost of repair to maintain the property "*in its actual state*". He then reasoned that if the agreement in *Westlink (No.2)* said nothing about maintaining the tolled road, or did not contain a clause entitling the road authority to terminate for repudiatory breach, the statutory construct would still require valuation on the basis that the tenant would maintain the road as a necessary expense to keep the property in the condition to sustain the actual rent. He observed –

> "46…This might well involve maintaining more of the road than the part tolled in order to sustain the traffic volumes. I will give another example. It may be necessary for the hypothetical tenant from year to year of a fishery to stock it."

Developing this further he stated –

> "48. It would be somewhat anomalous to treat the incorporeal rights which are leased or given for a period and which may be terminated as a result of breach by the grantee of obligations to pay rent or do other things as different for valuation in rating purposes to such rights when they are granted outright or where they cannot be terminated for breach of grantee obligations during the currency of the term granted.
>
> 49…
>
> 50. If the contention of Eurolink that this is the true effect of s.48(3) of the 2001 Act is correct, the valuation of occupation of an incorporeal right which can be determined for breach of grantee obligations is not carried out on the annual occupation value of the property granted but on the value of that property after the costs of meeting monetary obligations which may be enforced by exercise of a right to terminate in the event of breach by the grantee are subtracted."

This, the trial judge considered, would "*not be in accordance with the intent of the Oireachtas as manifested in s.48(3) of the 2001 Act that properties be rated on a uniform basis, treating like with like*" (para.51). He therefore rejected the argument, opining that "*I do not accept that the Supreme Court in Westlink (No2)intended this outcome as a result of its decision.*"

154. It may be said that in these passages the trial judge has presented alternative reasoning, that is not dependent on the contractual terms of the toll contract, upon which the Supreme Court might have come up with the same result in the cross appeal in *Westlink (No.2)*. The trial judge is not to be criticised for that, and I find myself in agreement with his thoughtful analysis of Eurolink's argument. I too am not persuaded that the judgment or reasoning in *Westlink (No.2)* can be transposed to the issue of whether the Revenue Share is deductible under the rating construct.

155. Moreover, and while I certainly do not mean to suggest that the decision of the Supreme Court was in error, with the greatest of respect to the court the judgment of MacMenamin J. is not without some difficulty.

156. It is relevant to note that before the Supreme Court the Commissioner applied to amend the cross-appeal so as to contend that there ought not in fact be any deduction allowed for maintenance for any part of the M1. For reasons set out earlier in the judgment of MacMenamin J., that application was refused. The Commissioner was, therefore, confined to arguing that the maintenance deduction should be limited to the cost of maintaining the tolled section (21.74km), rather than the cost of maintaining the entire length (54.7km). This may have distorted the debate because the Commissioner was not able to argue that, given that the relevant property was the tolls (and not any part of the motorway), expenditure on the motorway could not be considered necessary to maintain the relevant property (the tolls) in its "*actual state*", nor could it be said to be the cost of repair of the relevant property. Accordingly, and contrary

to what he would have wished, for the purposes of the appeal the Commissioner had to accept that some maintenance costs were to be allowed by way of deduction.

157. MacMenamin J. referred at the end of his judgment to *Westlink (No.1)*, in which the Supreme Court recognised road tolls as incorporeal property and as such a rateable hereditament. He stated that in the cross appeal before him there was a broader context in that " *[h]ere it is the contracts which render the right and duty an incorporeal hereditament*". However in *Westlink (No.1)* Westlink also occupied the tolls under agreement for a 30 year period and was therefore liable to rates, and, as we have seen, both the High Court and the Supreme Court in *Westlink (No 1)* considered that the agreement in that case had the effect of "*ousting for a particular period the power of the Council to collect tolls and conferring it instead on the other party to the agreement*". It followed that it was the company, and not the Council, that was in rateable occupation. *Westlink (No. 2)* also involved the rateable valuation of tolls held under a s.63 agreement, and it is hard to see how the contractual franchising out of the tolls is a point of difference from the tolls the subject of agreement in *Westlink (No. 1)*.

158. A further conceptual difficulty is that it does not appear that CRG was in occupation of a corporeal hereditament, namely all or part of the M1 motorway (as opposed to carrying the obligation to maintain it). The only "*relevant property*" that CRG was in occupation of was the toll/right to collect the tolls.

159. Leaving aside these observations, the outcome of the cross-appeal was clear –the costs of maintaining the entire M1 were deductible because that was a contractual obligation of CRG. The terms of the actual agreement were taken as a given in terms of what the hypothetical tenant would have to take into consideration. While that logic might appear to be capable of being transposed to the primary issue in *Westlink (No. 2)* - viz. whether the Revenue Share was to be taken into account or disregarded for the purposes of calculating the NAV – it does not in fact feature in MacMenamin J.'s analysis on that issue. In contrast Fennelly J. in his dissent on the

primary issue considered that "*an agreement freely entered into between each operator and the Authority*" was fatal to Westlink's contention that the royalty payments were deductible. Notwithstanding that the same logic might be thought to imply that the agreement should not be given such decisive effect on the cross appeal on the maintenance issue, he concurred with MacMenamin J.'s judgment in the cross-appeal.

160. For all these reasons I do not find that *Westlink (No.2)* supports Eurolink's contention that the Revenue Share is deductible as an expense necessary to maintain the property in its actual state.

Conclusion

161. I am satisfied that trial judge correctly answered the Case Stated. Although they are set more fully earlier, my core reasons for agreeing with the trial judge are summarised as follows.

162. For the purposes of estimating the NAV under s.48(3) of the 2001 Act the "*relevant property*" is the tolls under the two toll franchises. These are incorporeal property created by the Toll Scheme adopted in 2001, in combination with the Bye-Laws adopted in 2005, and are property that came into existence when the Bye-Laws came into effect on 12 December 2005.

163. The tolls became vested in Eurolink as occupier by virtue of the PPP Agreement, but the PPP Agreement did not create the tolls. Accordingly, the terms of the PPP Agreement relating to the Revenue Share do not fall to be considered under the statutory construct under s.48(3) which instead requires consideration of what the hypothetical occupier of the tolls might reasonably be expected to pay, year on year, on assumptions as to repair, insurance etc.

164. For the purposes of the R&E method of calculating the NAV under s.48(3) the "*gross receipts*" comprise the entirety of tolls, without deduction of the Revenue Share.

165. Eurolink's arguments have **not** persuaded me *inter alia* –

- that the PPP Agreement the Revenue Share is intrinsic/integral to the right to collect the tolls;

- that the Revenue Share is not "*within its grasp"*.
- that the purpose of the Revenue Share is to prevent Eurolink making "super profits", or (if it was), that that would be a relevant consideration under the rating construct in s.48(3) of the 2001 Act;
- that Eurolink must pay the Revenue Share in order to maintain the right to tolls to avoid contractual and statutory default (under the PPP Agreement and s.63(5) of the 1993 Act respectively), and that on this account the Revenue Share is deductible;
- that the duty to pay the Revenue Share is a statutory restriction on the capacity of Eurolink to generate income/profits from the tolls, whether between Eurolink and public who pay the tolls, or at all;
- that the Revenue Share is deductible as a payment necessary to maintain the tolls or that it is otherwise deductible from gross receipts under the R&E method.

166. I would, therefore, dismiss this appeal.

167. As this judgment is being delivered electronically, as is usual I will indicate what costs order I propose should be made. As TII was entirely successful in opposing the appeal it should be entitled to its costs of the appeal to be paid by Eurolink, such costs to be adjudicated by a Legal Costs Adjudicator in default of agreement. Should either party seek a different order to that proposed they should so notify the Office of the Court of Appeal in writing or by email within 10 days from the date of electronic delivery of this judgment, and a short hearing will be arranged. In default of such notification the proposed costs order will be made. In the event that a party seeking a different order is unsuccessful in that application that party will be at risk of a further costs order against it.

Barniville P. and Collins J. have indicated that they concur with this judgment and the orders proposed to be made.