THE HIGH COURT

[2021] IEHC 84

[2020 No. 943 SS]

BETWEEN

EUROLINK MOTORWAY OPERATION LIMITED

APPELLANT

V.

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 8th day of February 2021.

1. Section 48(3) of the Valuation Act 2001 (the 2001 Act) is almost identical to valuation provisions in rating legislation in the State and in the United Kingdom going back to the early 19th century. It now reads as follows:

> "…,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."

2. Rates are levied on the "occupier" of rateable property. "Occupier" is defined in s.3(1) of the 2001 Act as meaning, "in relation to property (whether corporeal or incorporeal), every person in the immediate use or enjoyment of the property."

3. The substance of the question asked in this appeal by way of case stated from the Valuation Tribunal is whether in conducting a valuation under the provisions of s.48(3) of the 2001 Act, the estimated annual value of what is described as a "Revenue Share", being payments which Eurolink Motorway Operation Limited (Eurolink) is obliged to remit to Transport Infrastructure Ireland (TII) under the terms of a public private partnership (PPP) agreement made under s.63 of the Roads Act 1993 (the 1993 Act), should be disregarded in determining the "net annual value" (NAV) of the toll rights of the Kinnegad bypass on the M4/M6 motorway.

4. I use the word "disregarded" because resolution of this issue does not depend on which valuation method is adopted in arriving at the NAV of the toll rights. As the receipts and expenditure (R&E) method of valuation was applied in this case, the effect of the Tribunal's decision was that the estimated annual receipts were not reduced by an element equivalent to the annual estimated amount of the "Revenue Share" in calculating the amount available as the divisible balance used to determine the bid of the hypothetical tenant under s.48(3) of the 2001 Act.

5. In order to answer the question asked by the Tribunal, it is 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. 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.

6. While the general rules relating to valuation of property for rating purposes may be stated simply, they are often not easy to apply in practice.

7. If property being valued for rating purposes is in fact currently occupied in return for occupation rent or 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. This is because that property must be valued on the basis of the bid of the hypothetical tenant for occupation using the statutory valuation construct.

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.

9. Where rateable property is let, the terms of any letting dealing with covenants for repair and renewal are irrelevant. If the terms of the letting are silent on obligations to repair or renew, this is also irrelevant. The only relevant matter in the valuation is the statutory assumption 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.

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 on 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 other 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 property and disadvantages which flow from the terms on which a particular person is in occupation of that property is central to the resolution of the issue in this case.

12. It is necessary to be careful when considering the English authorities dealing with valuation of public utilities, such as docks and power stations. Some of these authorities considered situations where legislation governing the operation of the utility was such

that the statutory undertaker operating that utility was the only possible hypothetical tenant. Analysis of whether the particular utility had inherent legal features which prevented or restricted earning capacity arose in that context. These authorities do not deal with the impact of arrangements where occupation of a rateable property can be given by a statutory undertaker to somebody else and has been given to somebody else, as is the case here.

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.

16. Eurolink argues that the valuation under s.48(3) of the 2001 Act should take the "Revenue Share" into account as a disadvantage of the property. It says that this should be deducted from gross receipts in the R&E valuation. The PPP agreement only allows Eurolink to "retain" a proportion of the toll receipts in the sense that it obliges Eurolink to account to TII for the "Revenue Share", calculated using a formula which takes traffic volume and other factors into account.

17. Eurolink refers to the PPP agreement and provisions of the 1993 Act and the relevant bye-laws. The PPP agreement committed the National Roads Authority (NRA) in both private and public law to create the tolls and pass them immediately to Eurolink for 30 years in accordance with its terms. Eurolink argues that the tolls cannot be valued by reference to the bid of a hypothetical tenant without taking the "Revenue Share" into account because payment of this is a statutory restriction on the income earning capacity of the tolls. The NRA has now been subsumed into TII.

18. Eurolink also submits that the "Revenue Share" should be treated as an "expense… that would be necessary to maintain the property" " in its actual state" as part of the valuation

assumption required by s.48(3) of the 2001 Act and that it should be deducted for that reason.

19. Eurolink refers to documents in the PPP tendering process indicating that a purpose of the formula devised to calculate the "Revenue Share" is to ensure that over the 30-year term of the PPP agreement Eurolink will not get over-remunerated. The PPP agreement states that the purpose of the "Revenue Share" provisions is "so as to enable the Authority to participate in the revenue being generated by the Project Road."

20. The Commissioner of Valuation (the Commissioner) argues that the statutory construct of the notional tenancy under s.48(3) of the 2001 Act requires valuation of a hypothetical tenancy of the "tolls" described in Schedule 3 para. 1(h) of the 2001 Act and that the terms of the PPP agreement dealing with "Revenue Share" should be disregarded. The Commissioner contends that the right to receive all of the payments under the toll scheme relating to the Kinnegad bypass is enjoyed by Eurolink and that Eurolink is in error in seeking to treat the "Revenue Share" as a limitation on profit earning capacity inherent in the tolls.

21. The "Revenue Share" formula designates a percentage of the toll revenue for each class of tolled vehicle as for the benefit of TII. This varies over the life of the agreement and also where average daily traffic per month for any class of vehicle exceeds the base number of vehicles in a series of bands of traffic frequency. The lowest percentage for each class of tolled vehicle within the lowest band of average daily traffic frequency is 16%. This increases to 74% in the six final years of the life of the agreement. The highest percentage, based on traffic frequency, is 90%.

22. Payments of the "Revenue Share" to TII are made in arrears. The PPP agreement includes look-back clauses which allow retrospective adjustment of payments based on traffic flow figures and netting off of payment liabilities due from Eurolink to TII and vice versa. The PPP agreement covers many matters, including the construction and maintenance of the motorway. The motorway was built by Eurolink and the agreement obliges Eurolink to maintain it. Eurolink does not occupy the tolled stretch of motorway but it has the exclusive toll rights.

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 terminates. The obligation to make payments of the "Revenue Share" is founded on the PPP agreement.

24. At the centre of the Eurolink argument is the proposition that the right given by the PPP agreement is a creature of the statute which gives it legal effect and that it is impossible to divorce the right to levy tolls on the Kinnegad bypass from the other provisions of the agreement, including the obligation to deduct and pay over the "Revenue Share". Eurolink argues that the effect of 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. Eurolink refers to 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 the extent of the various deductions from the gross revenue must be fixed in relation to the conditions."

25. Reliance is placed by Eurolink on judgments in *Westlink Toll Bridge Ltd and Celtic Road Group (Dundalk) Ltd v. Commissioner of Valuation* [2013] IESC 42 (*Westlink (No 2)*). I am invited to apply the reasoning which led the majority of the Supreme Court to conclude that the "Revenue share" was a "charge …payable by or under any enactment in respect of the property". I am also invited to apply reasoning in judgments of the Supreme Court in that case which led to the decision that maintenance expenses for road upkeep of an un-tolled stretch of the M1 motorway were "expenses….necessary to maintain the property in that state" meaning its "actual state".

26. Eurolink submits that it logically flows from the reasoning used by the Supreme Court deciding that the "royalty payments" were "charges payable by or under any enactment in respect of the property", that the nature of the "Revenue Share" is a statutory feature of the tolls which affects their value for rating purposes.

27. The Supreme Court in *Westlink (No 2*) did not answer the question of whether the valuation construct under s.48(3) of the 2001 Act required that the terms of the agreement relating to what were described as the "royalty payments" be disregarded in valuing the tolls.

28. I propose to deal with the "expenses …necessary" issue first. Eurolink referred me to comments in the speeches of Viscount Simonds and Lord Reid in *Imperial Tobacco Company (of Great Britain and Ireland) Ltd v. Pierson (Valuation Officer)* [1961] A.C. 463 at 472 and 474 which were quoted in the majority judgment of the Supreme Court delivered by MacMenamin J. in *Westlink (No 2).*

29. I refer to the following passages. I am including a slightly longer extract from the speech of Viscount Simonds than that quoted by MacMenamin J.

30. Viscount Simonds at p. 472:

> "My Lords, the view that I have tried to express was put so cogently by the tribunal that at the risk of repetition I will quote two sentences from an admirable judgment: 'It is I think clear,' says Mr. Erskine Simes, 'from the use of the word "that" that the right which is deemed for rating purposes to be a separate hereditament is the right to use any land in its extended meaning for the purpose

> of exhibiting advertisements which is let 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. While it is, of course, true that the value must be ascertained as at the date of the proposal, it is the royal value of the grant and not of some other grant. The grant has its value irrespective of whether it is in fact exercised and it is the grant which is the rateable hereditament, not the exercise of the grant'. I agree."
>
> "But the appellants are not for rating purposes in occupation of a hereditament consisting of a structure. Whether there is a structure there or not, they are rateable in respect of a right which is deemed to be a separate hereditament which is in their occupation."

31. Lord Reid at p. 474:

> "…what has to be valued is not land but the appellants' 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."

32. These comments were made in the context of valuation for rating purposes of rights under licences to exhibit advertisements on land and buildings. It was urged that the right granted could not be treated for rating purposes as more extensive than that given by the terms of the grant, a proposition which I agree with.

33. Before I pass from *Imperial Tobacco* [1961] A.C. 463, I wish to make some further observations on that authority. An English statute made rateable as separate property a right let out or reserved to use land or structures on land for the purpose of exhibiting advertisements. As the right to use the land was the property to be rated, it followed that the letting value of 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.

34. It does not follow from this that obligations attached to a licence to pay a fee or other payment capable of being quantified as an annual expense become 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) of the 2001 Act.

35. The rent or fee payable by the tobacco company for the advertising space under the licence was £150 per annum. As the result of the decision of the House of Lords, the annual value for rating purposes was reduced from £165 to £150. It was not reduced to

"nil". I very much doubt if the House of Lords would have been willing to come to a conclusion that the annual value should be fixed at "nil" if the licence had included a power to terminate for failure to pay the rent.

36. In order to perform the hypothetical valuation exercise, all that was required was that it be assumed a hypothetical tenant would be prepared to take possession of the rights granted by the licence at the valuation date as a tenant from year to year and pay a rent for that privilege. Viscount Simonds was only approving of the decision of the Tribunal to examine the licence agreement to see what rights were given. Those rights constituted the rateable property.

37. An example was given in argument of a licence that might expire in four months. It is irrelevant that the licence might expire shortly because the valuation under s.48(3) of the 2001 Act is a "now" valuation of something in existence as of the valuation date which is presumed to continue. If a rateable right ceases to exist at some point it will also cease to be rateable. If it does not cease to exist as a result of the expiry of an agreement relating to its current occupation it will become rateable in the hands of any subsequent occupier. Any terms under which the right is granted to the current occupier are replaced by the expenses which are assumed to be borne by the hypothetical tenant under the statutory construct and the rent is fixed under that construct accordingly.

38. It is worth noting that Viscount Simonds at p. 473 indicted that the basis of his decision was that the wording of the particular section of the English Act was unambiguous and required a departure from usual rating law in the sense that the physical property occupied under the licence consisted of valuable signage which was not valued for rating purposes.

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.

41. It was pressed on me very strongly that this reasoning should extend to the financial commitments of Eurolink to make payments of the "Revenue Share" under the PPP agreement. I take a cautious approach when presented with this type of invitation and

test the proposition by examining what the consequences might be and how it fits in with established legal rules. To paraphrase a statement of the late Judge Antonin Scalia, after hearing the reasons for doing what a party is asking of me, and the reasons for doing other things or nothing at all, I must be persuaded that what is asked of me is best; both in this case and in cases that may follow.

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.

43. In the case of incorporeal property, qualities and disadvantages may flow from the state of property over which the incorporeal right is enjoyed. For instance, a fishery is of no value if there are no fish in it.

44. Incorporeal rights such as easements, fisheries and franchises such as tolls or petroleum extraction rights and other similar rights are listed as rateable in Schedule 3 to the 2001 Act. These rights often give rights to enjoyment of other property short of occupation. Toll franchises may relate to roads or other rights such as rights to provide a public ferry on an exclusive basis or operate a market at a location. In the case of the tolls over a road, the right is to collect the fees from the tolled road and to control the right of the public to pass along the tolled section of road for that purpose.

45. Where a grant of an incorporeal right relating to or over land such as an easement is silent on 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. 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 on 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 volumes. I will give another example. It may be necessary for the hypothetical tenant from year to year of a fishery to stock it.

47. In the case of land, it is possible to grant or reserve easements outright in fee simple or by lease, and either alone or as part of a disposal or lease of land with easements. In the case of a grant in fee simple the easement such as a right of way is usually not capable of

being terminated. In the case of a leased easement or a lease of land along with an easement or a licence to maintain an advertisement on a structure the right is usually terminable for failure to pay rent or adhere to covenants in the case of a lease or as a remedy for repudiatory breach in the case of a licence which does not give an estate in land.

48. It would be somewhat anomalous to treat 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. In the examples which I have referred to there is no real distinction that I can see between incorporeal property and physical land which would justify an interpretation of s.48(3) of the 2001 Act as allowing a differing rating treatment, depending on whether property is or is not a tangible immovable and whether there is a right to terminate for breach of monetary obligations of the grantee. Why should easements which are leased with a 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?

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.

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).*

54. I now refer to the issue of substance in this appeal. This is the issue of whether the "Revenue share" should be deducted on the ground that it is in some way inherent as a disadvantage in the tolls. The Supreme Court in *Westlink (No 2)* did not decide this issue.

55. The judgments in *Westlink (No 2)* do not set out the questions raised in the case stated by the Tribunal. However, it is clear that an issue in the High Court and in the appeal to the Supreme Court was whether the Tribunal was correct in law in holding that the "Revenue Share" " should not have been included when calculating Westlink's gross receipts for the purpose of ascertaining (through recourse to the Receipts and Expenditures Method of Valuation) 'the net annual value' of the relevant property": see para. 34 of the judgment of MacMenamin J.

56. It was considered unnecessary to decide this issue because the Supreme Court concluded 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.

57. This affirmed the determination of the Tribunal that "in any event the revenue share is a charge payable by or under an enactment within the meaning of Section 48 of the Valuation Act 2001 which must be deducted when calculating the 'net annual Value'": see para. 34 of the Judgment of MacMenamin J.

58. Section 48(3) was amended in 2015 by deletion of the words "and charges (if any) payable by or under any enactment". This change is not relevant to what I have to decide.

59. The High Court and the Supreme Court in *Westlink (No 2)* focussed on whether the "royalty payments" were a "charge payable by or under any enactment" which the hypothetical potential tenant could factor into his bid as an annualised expense under s.48(3) of the 2001 Act without testing the underlying premise. If the "royalty payments" were shown to be an inherent disadvantage of the property, or if they were a statutory charge only payable by a particular occupant by virtue of the terms of a particular agreement and not payable by the hypothetical tenant under the s.48(3) valuation construct, the issue of whether they should be treated as a "charge payable by or under any enactment" might be irrelevant.

60. It is clear that the issue before this Court was not fully argued in *Westlink (No 2).* The comments of MacMenamin J. in paras. 34-36 of his judgment are stated to be "additional observations on the primary issue" and are obiter dicta. He identified that primary issue in para. 10 of his judgment as follows:

> "Are the royalty payments identified in contracts charges payable under the enactments, or are such payments simply payable on foot of private contractual arrangements entered into between the two companies and the National Roads Authority?"

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 a 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 first 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.

64. I now turn to the other judgments in *Westlink (No 2).* Fennelly J. dissented on the issue of whether the "royalty payments" were a "charge payable by or under any enactment." His judgment did not discuss whether the Tribunal was, apart from this, correct in law in deducting the "royalty payments" from gross receipts when calculating the NAV of the property using the R&E method. He affirmed the judgment of Charleton J. in the High Court reported at [2009] 1 I.L.R.M. 143 without giving reasons for his decision on this aspect of the appeal.

65. Charleton J. referred to this matter in para. 24 of his judgment and stated the following:

> "….it seems to me, that in arriving at the rateable valuation, the Commissioner for valuation is entitled to have regard to restriction upon the profit earning capacity of the undertaking. That, however, does not mean that the income derived from the toll is to be treated as if it never was a return to the appellants. I approve as correct the following passage from Guy R.G. Roots Q.C. et al, *Ryde on Rating and Council Tax,* issue 44 (Butterworths, London, April 2008) , at para E[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 rateable value. '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'. So that, in rating a dock or railway company, the limitation imposed by 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* [[1895] A.C. 136], a railway company had under 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 duly had been made (although it was under appeal), it was held that the alleged liability must be taken into account; [*Port of London Authority v. Orsett Union Assessment Committee* [1919] 1 K.B. 84]."

66. Charleton J. concluded on this aspect of the matter that he proposed to advise the Tribunal that it erred in law in treating what he described as "the division" of tolls as a tax or charge which was payable by or under an enactment. He appears to have made no definite finding on whether the "royalty payments" were a "restriction upon the profit making capacity" inherent in the tolls.

67. Turning to the two authorities cited in the extract quoted by Charleton J., the decision in Orsett was over-ruled by the Court of Appeal in *Yeovil Rural District Council v. South Somerset and District Electricity Co Ltd* [1948] 1 K.B. 130. Excess profits tax is a species of income tax which cannot be deducted from receipts to arrive at the divisible amount for the purpose of calculating the tenant's share.

68. The decision in *Sculcoates Union* was that where a company occupying and operating a dock was prohibited by statute from levying tolls (meaning fees) for use of railway lines linked to the North Eastern Railway Company network which were part of the dock system, the value of the docks to a hypothetical tenant from year to year could not be increased on the basis that the hypothetical tenant could charge for the use of the railway line. The restriction on charging for the use of the railway line applied to any occupier of dock, including the hypothetical tenant. A clear example of a similar restriction here is the prohibition in the toll scheme on charging for ambulances and other specified vehicles.

69. It is necessary to examine whether the "Revenue Share" is in fact a "disability" imposed on the tolls by or under the 1993 Act. I must examine the legal nature of what is being rated and analyse whether the law imposes disabilities on that thing, irrespective of who may enjoy it, including the hypothetical tenant under the rating construct.

70. What is the extent of the property which is available to be rated? Can it be said that the obligation to account for the revenue share is something inherent in its "actual state" which must be taken into account in applying the valuation mandated by s.48(3) of the 2001 Act?

71. The effect of s.48(3) of the 2001 Act is clear. 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. If it is already let, the quantified obligation of the tenant to pay rent, royalties or other fees, whatever they are called, under the lease or exclusive licence may not be deducted, as the object of the exercise is to determine the hypothetical value of the annual occupation rent of the property under the statutory construct.

72. In applying the statutory construct, actual rent paid may have relevance to the fixing of the hypothetical value, depending on whether it is market rent based on what a hypothetical tenant in a free market would be prepared to pay for a similar letting to the hypothetical letting. Where such comparable lettings are not available the R&E method of valuation is used.

73. 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. For example, a property may be let or given in return for a capital fine and an annual rent which is less than the market rent. Part of the consideration for the arrangement might be other commitments such as the agreement for the construction of the motorway in this case. These payments or commitments are not annualised and are disregarded in assessing the NAV using the statutory construct in s.48(3) of the 2001 Act.

74. The terms of an agreement giving occupation of property may work to the disadvantage of the actual occupier when that property comes to be valued for rating purposes. An example referred to in argument and relied on by the Commissioner is the decision in R *(Overseers of St. Mary Cardiff) v. Rhymney Valley Railway Co* (1869) L.R. 4 Q.B. 276. The issue was assessment of wharves in Cardiff which were occupied by the railway company under a lease from the Bute estate. The Bute estate reserved the right to receive dues which it had a privilege to levy under a local Act of Parliament for use of wharves which were now occupied by the railway company. The dues were not separately rateable but they were part of the value of the wharves. The Bute estate was not in joint occupation of the wharves.

75. The actual arrangements between the Bute estate and the railway company were irrelevant. The wharves were valued at their full earning potential. This included the element attributable to the dues which were collected by the trustees of the Bute Estate. The arrangements with the railway company under which the Bute estate was allowed to continue to collect the wharfage dues on the property which had been let could not affect valuation of the wharves for rating purposes as including a right to levy wharfage for goods unloaded at them. If the law were otherwise, the Bute estate and the railway company could by agreement create a pocket of unrated property and deprive the rating authority of a rate in respect of a very considerable part of the value of the wharves.

76. It would also follow from this that if the arrangement was that the railway company was given the right to charge the dues with an obligation to remit them to the Bute estate, the wharves would be valued under the statutory construct without regard to the cost of that obligation. The income earning property in the possession of the occupying tenant from year to year was the wharves which had the right to the dues attached to them. The object of the valuation exercise was to assess the annual occupational rental value of the wharves with all their rights and advantages.

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. A landlord's obligation to comply with legislation relating to rent restriction in receiving rent under any existing tenancy may also be irrelevant as it will not impact on the rent which the new hypothetical tenant coming into occupation under the hypothetical tenancy from year to year would be prepared to pay.

78. The decision of the *House of Lords in Robinson Brothers (Brewers) Limited v. County of Durham Assessment Committee* [1938] A.C. 321 illustrates some of these principles in operation. That case involved the rating of a public house owned by a brewery and leased as a tied public house to an occupying tenant. The liquor licence was a feature of the property which was relevant for rating purposes as any potential tenant would take the property for use as a public house. The tie covenant was in the lease and was not a restrictive covenant on the house in the hands of any occupier. It was disregarded as "a consideration other than rent," in the sense that in a free market the property would be let at a greater rent. In a lease of a tied house the rent is artificially reduced by reason of personal restriction imposed on the tenant. This reduced rent is not the basis on which a tenant would bid to go into occupation of the property under the statutory hypothesis. The fact that a brewery might pay more in the market as a potential lessee because it might bid as the hypothetical tenant to take a tenancy of the property as a free house and let it to a tied tenant was relevant in assessing the hypothetical rent.

79. 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.

80. 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 a 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.

81. The creation of the right to charge tolls in respect of this road is provided for by s.59(1) of the 1993 Act which states:

> "Subject to the provisions of this Part, a road authority may charge and collect tolls of such amounts as may be specified for the time being in bye-laws made by it under section 61 in respect of the use of a toll road."

82. A number of steps must be taken to create the franchise. The road authority must prepare, advertise and adopt a toll scheme as required by ss. 57 and 58 of the 1993 Act. Nothing in these provisions required that the Kinnegad bypass toll road scheme make mention of or commit to any intended arrangement to farm collection of tolls. Any proposal of a road authority on these matters has the status of "information" relating to the general arrangements for the maintenance and operation of the toll road, which must be contained in the explanatory statement required by section 57(4). By s.58(3)(a) the road authority determines the date on which the toll scheme comes into force.

83. The toll scheme is in schedule 17 to the PPP Agreement. This is a very brief document. It was adopted in 2001, prior to the PPP agreement which was executed in 2003.

84. It deals with the matters provided for in s.57 of the 1993 Act, including a schedule of estimated charges for different classes of vehicles which is mirrored in the PPP agreement and in the bye-laws. Clause (e) of the scheme, headed "Other Information" specifies as follows:

> "The National Roads Authority may, in accordance with section 63 of the Roads Act, 1993, as amended by section 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 the tolls on the Proposed Road and the application of the proceeds of such tolls and other matters.
>
> The National Roads Authority may, from time to time, in accordance with section 61 of the Roads Act, 1993, as amended by section 274 of the Planning and Development Act, 2000, make such bye-laws as it considers expedient for the purposes of the operation and management of the Proposed Road."

85. The bye-laws for this toll road were made in November 2005 and specified the amount of the tolls. This was a necessary step to create the franchise under s.59(1) of the 1993 Act. The bye-laws set out a schedule of what are called "Base Tolls" calculated on 2000 prices for various classes of vehicles as adjusted by annual indexation and states that within this scale the "Appropriate Tolls" are those "chargeable by the Toll Company as agreed with the NRA…. provided that such Appropriate Tolls shall not exceed the Maximum Tolls" as defined in the bye-laws.

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, 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."

87. Section 61(1) of the 1993 Act permits the road authority, after consultation with the Commissioner of the Garda Síochána, "to make such bye-laws as it considers expedient

for the purposes of the operation and management of a toll road." Section 61(3) specifies, inter alia, that without prejudice to the generality of s.61(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."

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 preconditions 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 opened for traffic. The effect of the PPP agreement was that the franchise passed immediately to Eurolink upon its creation.

89. In summary, the PPP agreement provided for the construction of the bypass by Eurolink and for maintenance for a period of 30 years from the time when the bypass was opened. During that period Eurolink is entitled to receive payments called "Operational Payments." Clause 14.1(j) of the agreement specifies that Eurolink "shall be entitled to charge, and shall charge, and (subject to the terms of this Agreement) retain, tolls from the Permit to Use Date. Without prejudice to the generality of the foregoing, it is acknowledged that, as contemplated by para. 1 of Part 3 of Schedule 15 (Payments), the PPP Co shall collect tolls from the Permit to Use Date." Clause 1.2 (a) of the PPP agreement states that headings may not be consulted in interpreting the agreement. Schedule 15 states as follows under a heading "Revenue Sharing":

> "1.1 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."

90. Other provisions of Part 4 of this Schedule and Clause 33 deal with monthly and annual reconciliation and payment obligations and methods used to calculate the "Revenue Share" which is defined in Clause 1.1 of the PPP 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)." While Schedule 12 was not provided to me, the body of the PPP agreement

makes clear that what are called "Operational Variations" under Part 3 of Schedule 12 may have effect in respect of "Tolling Variations" arising from changes in the bye-laws which were in draft form at the time of the PPP agreement which might change indexation factors relating to toll fees in Schedule 15, or changes in the toll scheme.

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 regrant 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 (No2).* 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.

92. Section 59(3) of the 1993 Act provides as follows:

> "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 the agreement relates."

93. The statutory authority which permits the PPP agreement is s.63 of the 1993 Act, as amended, which as of the date of the PPP agreement provided as follows:

> "(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 the 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,
> (e) 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,
>
> (2) Without prejudice to the generality of subsection (1), an agreement under this section may-
>
> (a) provide for the application of the proceeds of the 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 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 the road authority shall have such powers as are necessary for that purpose."

94. Other statutory provisions give "road undertakings" which are defined as including persons coming within s.63(1)(e) of the 1993 Act powers to recover tolls, including default tolls as provided for in bye-laws as a debt. The "road undertaking" is given access to licencing records of vehicles for the purpose of collecting tolls and fees and it is an offence 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 and to avoid paying tolls. Road undertakings may use cameras and documents signed by their staff giving details of vehicles passing tolling stations and photographic evidence are admissible in proceedings for recovery of tolls without formal proof. By s.65 the Minister for Transport may make regulations "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". No regulations have been made under this provision.

95. Eurolink submits that the tolls of the Kinnegad bypass are the rights conferred on it by the PPP agreement. Emphasis is placed on the fact that the wording of the PPP agreement does not allow Eurolink to "retain" the "Revenue Share". It is submitted that this agreement does not have the status of a private agreement because it is made under s.63 of the 1993 Act. Reliance is placed on the position of Eurolink within the statutory framework as holder of the franchise with special statutory rights on terms that it must pay over the "Revenue share" .

96. Eurolink points to the fact that the obligation to make payments is both a contractual obligation and a statutory commitment under section 63(5). Eurolink claims that the legal effect of this is that it does not own the "Revenue Share".

97. Eurolink argues that the effect of the public law status of the PPP agreement is that the provisions relating to the "Revenue Share" are a "restriction on the profit making capacity of a particular property imposed by law", quoting an extract from para. 35 of the judgment of MacMenamin J. in *Westlink (No 2).*

98. If this argument were correct and a PPP agreement provided for an annual rent or a royalty-based payment instead of what is termed the "Revenue Share", the commitment to make these payments would also be "a restriction on the profit making capacity of a particular property imposed by law."

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.

106. I agree with the submission on behalf of the Commissioner that the fact that the PPP agreement is made under statute and has a public law element does not convert the "Revenue Share" under that agreement into something which should be regarded as a disability of the tolls.

107. I also agree 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 an annual amount equivalent to the "Revenue Share" under the PPP agreement. This is what produces the income stream and for the purpose of determining the extent of the property rated what becomes of the income stream afterwards is irrelevant.

108. The wording in Clause 14.1(j) of the PPP agreement relating to toll receipts which confers on Eurolink an entitlement "to charge, …, and (subject to the terms of this Agreement) retain, tolls from the Permit to Use date" does not alter this because it is clear from the agreement that tolls are not occupied as a partnership asset.

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.

110. Section 63(1) of the 1993 Act deals with the terms on which the franchise may be operated by a third party and this 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 phrase "proceeds of tolls" is a reference to the revenue stream of the franchise consisting of the toll amounts collected. This provision does not convert the legal nature of what is receivable into some right or disability of the tolls which is 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.

111. The Tribunal considered that the categorisation of the "Revenue Share" as equivalent to rent may not be the key to answering the question posed. The "Revenue Share" for any year is capable of being quantified as an estimated annual amount and represents the contractual expectation of TII as to what it will receive as remuneration for giving over the tolls. This looks at the expectation of the current lessor, which is irrelevant to the statutory valuation construct.

112. I do not see the commercial purpose of the "Revenue Share" expressed in either the PPP agreement or a pre-tender document which has no contractual significance as a relevant consideration. 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.

113. The purpose of the R&E exercise is to calculate the rent which the hypothetical tenant would pay by taking gross receipts and subtracting the expenses of earning the gross receipts of the undertaking to produce a divisible sum from which the rent is calculated. To include the "Revenue Share", if it is specific only to the agreement under which a particular occupier holds the tolls, would distort the divisible balance.

114. The Tribunal was also 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 TII agreement. This is outside the statutory valuation construct for reasons which I have already given.

115. 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. 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.

116. The decision of the House of Lords in *St James' and Pall Mall Electric Light Co Ltd v. Westminster Assessment Committee* [1934] A.C. 33 was relied on by Eurolink. In that case the statutory obligation of the ratepayer undertaker, which was the only potential hypothetical tenant, to make payments to sinking funds in order to maintain its right to run an electricity undertaking until 1971 was held not to be an expense of earning the receipts of the electricity business. It is said that the "Revenue Share" should be contrasted as it is an expense of earning the toll receipts.

117. I do not find this persuasive. I agree that a payment of a rent or a royalty or a "Revenue Share" under a lease or agreement such as the PPP agreement is an expense, but only in the sense that any payment of a tenant in possession of rateable property under the terms of an agreement which governs that occupation is an expense. However, this type of expense would be excluded from the rating hypothesis if the agreement under consideration here was made between two purely private undertakers. The fact that the grantor undertaker is acting under statutory powers and that the grantee undertaker is getting the advantage of that grant on payment terms makes no difference.

118. I cannot see why the tolls of the Kinnegad bypass should be treated differently because of the fact that the concessionaire in occupation has made a commitment to pay the "Revenue Share" as part of a contract with a public law element. If this were correct, it

would mean that purely private commercial arrangements which give a right of occupation of rateable property in return for an income stream and have the same contractual structure as the PPP agreement result in different treatment of that property for rating purposes from that which would flow from the same arrangements involving a public sector element under statutory provisions which regulate and allow private commercial participation in public infrastructure projects. This does not treat like with like for rating purposes.

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.

122. It follows that I also agree with the conclusions of the Tribunal at paras. 16.7.4 and 16.7.5 of its determinations.