THE HIGH COURT

[2023] IEHC 72

Record No. 2021/ 33 R

BETWEEN

CINTRA INFRAESTRUCTUREAS INTERNACIONAL SLU

APPELLANT

- AND –

THE REVENUE COMMISSIONERS

RESPONDENT

Judgment of Ms. Justice Butler delivered the 14th day of February 2023

Introduction

1. This is an appeal by way of case stated under s. 949AQ of the Taxes Consolidation Act, 1997 ("TCA 1997") which raises a net issue of statutory interpretation, namely what is the meaning of the phrase "*land in the State*" in s. 29(3)(a) of the TCA 1997. This issue arises in the context of the disputed liability of a non-resident company to pay capital gains tax (also "CGT") on profits accruing on the disposal of shares in another, Irish, company. That liability in turn depends on whether the shares in the Irish company derive their value from "*land in the State*". The Appeal Commissioner held that they did not as the Irish company did not have an estate or proprietorial interest in the land in question.

2. The respondent succeeded in its appeal before the Appeal Commissioner such that the Revenue is now the appellant before the High Court. As the identity of the appellant has switched as between the two, for ease of reference I shall refer to the parties as "Cintra" and "Revenue".

Factual Background

3. Cintra is a company incorporated in Spain and resident in that jurisdiction for tax purposes. Until 2016 it was the majority shareholder in an Irish company, Eurolink Motorway Operations Limited ("Eurolink"). In 2003 Eurolink entered into what is commonly known as a PPP Contract (Public-Private Partnership) with the National Roads Authority ("NRA") in respect of a project which comprised the design, construction, operation, maintenance and finance of a road scheme known as the M4/M6 Kinnegad to Kilcock motorway ("the Project"). Since the contract was entered into, the NRA was merged with the Railway Procurement Agency in 2015 to become Transport Infrastructure Ireland ("TII") and I shall refer to both the NRA and TII interchangeably depending on the timeframe under discussion.

4. Public-private partnership agreements of this type facilitate the construction of public infrastructure through a significant element of private financial investment. Generally, PPP agreements provided a number of mechanisms through which the private partner, in this case Eurolink, will recoup its investment and make a profit. Most significantly here the road was subject to a toll scheme under s. 63 of the Roads Act, 1993 and the PPP contract provided that Eurolink was entitled to retain a significant proportion of the toll charges which it would collect on behalf of NRA/TII over the 30 year duration of the contract. I will look in more detail at some of the provisions of the PPP contract in due course. What is important at present is the broad contractual scheme under which Eurolink built the motorway on behalf of NRA/TII and, then, when the motorway was open to the public, was obliged to collect the tolls which NRA/TII is entitled to charge, retains a portion of the amount collected and remits the remainder to TII. Ownership of the road and of the land on which it is built remains vested in TII and under the PPP contract Eurolink was granted rights of access "*for the*

purposes of carrying out the project." Given that the road is now constructed, the continuing access is for the purpose of Eurolink performing toll collection, maintenance and other obligations under the PPP contract.

5. Under s. 980 of the TCA 1997 the purchaser of an asset the disposal of which gives rise to a liability to capital gains tax is obliged to deduct withholding tax in an amount of 15% of the purchase price and to pay this sum to the Revenue Commissioners. However, if a Revenue Inspector is satisfied that no CGT is in fact payable in respect of the disposal a certificate, known as a CG50, is issued by him with the effect that withholding tax does not have to be deducted by the purchaser from the proceeds of sale. Prior to the sale of Cintra's shares in Eurolink, the intending purchaser sought a CG50 from Cintra. In the course of an exchange of correspondence, Revenue refused to provide the requested CG50 on the basis of its view that the transaction was subject to capital gains tax. This led to earlier litigation between the same parties. Although Cintra sought a declaration that the sale of the shares was not subject to capital gains tax, the judicial review proceedings were disposed of on a narrower ground, namely, that the letters in which the opinion of Revenue as to the liability of the transaction to capital gains tax was set out were non-binding and, thus, not judiciable (see judgment of Twomey J. [2016] IEHC 349).

6. Given the opinion expressed by Revenue in the correspondence the subject of Cintra's unsuccessful judicial review, it is not surprising that matters then proceeded along entirely predictable lines. On 11th October, 2016 Revenue served a notice of assessment to CGT on Cintra in an amount of just over €868,000 reflecting an alleged chargeable gain of €2.6m on the sale of the shares. On 7th November, 2016 Cintra appealed against that assessment. The Appeal Commissioner delivered his determination on 18th February, 2021 in which he found that the appellant (*i.e.,* Cintra) did not come within the charge to Irish capital gains tax and, therefore, allowed the appeal. Revenue then requested that the Appeal Commissioner state

a case for the opinion of this court under s. 949AQ of the TCA 1997 which he duly did on 8th July, 2021.

7. I will consider both the Appeal Commissioner's determination and the case stated in more detail in due course. At this stage it is sufficient to set out the questions of law posed by the Appeal Commissioner for the opinion of this court although it might be noted that the legal arguments advanced by the parties were more general in nature and did not focus specifically on the answers to these questions. Needless to say, given that the questions were posed using a formula whereby the Appeal Commissioner asked if he was correct in making certain findings, Revenue submitted that all of the questions should be answered "*no*" whereas Cintra responded by submitting that all of the questions should be answered "*yes*". The questions are as follows: -

> *"(i) Was I correct in finding or inferring that a proprietary interest in land was necessary for non-residents to be charged to tax pursuant to s. 29(3) of TCA 1997?*
>
> *(ii) Was I correct in finding that when construing the word "land" for the purposes of s. 29(3)(a), I should confine myself to considering the meaning given to that word by s. 5 of the TCA 1997?*
>
> *(iii) Was I correct in finding that "land" for the purposes of s. 29(3)(a) means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in s. 11(4) of LCLRA 2009?*
>
> *(iv) Was I correct in finding that Eurolink had a limited and non-exclusive contractual licence to use the lands under and adjacent to the motorway?*

(v) Was I correct in finding that the PPP Contract between the NRA and Eurolink did not confer or grant to Eurolink estate in land and was not an interest in land?

(vi) Was I correct in finding that the value of the Eurolink shares sold by the appellant derived their value with a greater part thereof from Eurolink's rights under the PPP Contract between the NRA and Eurolink, and not directly or indirectly from land in the State?"

8. Before looking at the arguments of the parties and the Appeal Commissioner's analysis of the issues it may be useful firstly, to set out the relevant legislative provisions; secondly, to consider the potentially relevant parts of the PPP contract and thirdly, to address briefly the jurisprudence in respect of the task facing this court on an appeal by way of case stated under the TCA 1997.

Legislative Framework

9. There is a significant degree of agreement between the parties as to the applicable law until they part company over the correct interpretation of s. 29(3)(a) of the TCA 1997. (Note all references to legislation in the balance of this judgment are to the TCA 1997 unless otherwise stated.) It is accepted as a basic proposition that liability to capital gains tax under s. 29(2) applies only to chargeable gains accruing during a year of assessment for which the taxpayer "*is resident or ordinarily resident in the State*". It was also agreed that the general rule is subject to the exceptions created by s. 29(3) and that these exceptions were intended to ensure that a non-resident taxpayer is liable to capital gains tax on the disposal of certain assets within the estate, most notably land and minerals. The relevant portions of s. 29(3) provides as follows: -

"*(3) Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident nor ordinarily resident in the State shall be chargeable to capital gains tax for a year of assessment in respect of chargeable gains accruing to such person in that year on the disposal of—*

(a) land in the State,

(b) minerals in the State or any rights, interests or other assets in relation to mining or minerals or the searching for minerals, …"

10. Although no question of the disposal of minerals arises in this case, Cintra relies in part on a comparison between the language used in subparagraphs (a) and (b) to make an argument that non-proprietary interests in land are not caught by subparagraph (a). The argument made is that the express mention of "*rights*" in subparagraph (b) means that in the absence of an equivalent reference in subparagraph (a), rights in land cannot be read into subparagraph (a). Subparagraphs (c) and (d) both refer to assets held in particular circumstances, neither of which is relevant for present purposes.

11. As the transaction in issue in this case was the sale of shares, s. 29(1A) is also relevant. The parties acknowledge that this provision was intended to ensure that liability to pay capital gains tax could not be by-passed by non-resident persons arranging to have valuable assets held by companies and effectively transferring the asset through a transfer of the shares in the company which is the holder of the asset. The relevant parts of s. 29(1A) provide as follows:

"(1A)(a) In this subsection –

…

"Relevant assets" means assets mentioned in –

(i) subsection (3)(a) or (b), …

(b) A disposal of relevant assets, for the purpose of this section, includes the disposal of shares deriving their value or the greater part of their value directly or indirectly from those assets, other than shares quoted on the stock exchange."

Thus, the disposal of shares deriving their value (or the greater part of their value) directly or indirectly from *"land in the State"* – being an asset mentioned in s. 29(3)(a) – is subject to capital gains tax. Section 29(1A)(c) contains provisions relevant to the calculation of the proportion of the value of shares to be attributed to the relevant asset. However, the amount of capital gains tax assessed by Revenue has not been put in issue on this appeal which focuses on the liability of Cintra to pay any capital gains tax.

12. The central issue for the court to decide is the meaning of the phrase "*land in the State*" under s. 29(3)(a) TCA 1997 and whether, as a consequence of s. 29(1A)(b) the disposal by Cintra of its shares in Eurolink was liable to capital gains tax because those shares derived their value from land in the State. The parties agreed that Eurolink's rights and interests in the PPP contract, however they might be properly characterised, were based entirely within the State. Since there was no dispute as to the location of the land over which Eurolink purportedly has rights, the issue narrowed down to the meaning of the word "*land*" for the purposes of s. 29.

13. Section 5 of TCA 1997 contains a definition section for the purposes of the Capital Gains Tax Acts. Section 5(1) starts with the introductory phrase "*In the Capital Gains Tax Acts, except where the context otherwise requires*" and then proceeds to define certain individual words and phrases. These include "*land*" and "*lease*", the latter of which is relied on by Revenue in one of its central arguments. The relevant definitions are as follows: -

" "land" includes any interest in land;

"lease"—

(a) in relation to land, includes an underlease, sub-lease or any tenancy or licence, and any agreement for a lease, underlease, sub-lease or tenancy or licence and, in the case of land outside the State, any interest corresponding to a lease as so defined, and

(b) in relation to any description of property other than land, means any kind of agreement or arrangement under which payments are made for the use of, or otherwise in respect of, property,

and "lessor", "lessee" and "rent" shall be construed accordingly;"

Revenue argue that since land indisputably includes a leasehold interest and since *"lease"* is defined so as to include a licence, it follows that for the purposes of the TCA 1997, *"land"* must be taken to include *"licence"*. As the contractual rights of access conferred on Eurolink under the PPP contract amount in law to a licence, Revenue argues that value deriving from these contractual rights must be treated as value deriving from land.

14. I have adverted above to the fact that in the absence of a CG50 the purchaser of the shares was obliged to deduct withholding tax of 15% from the purchase price and pay that amount to Revenue under s. 980 TCA 1997. The details of s. 980 are not relevant to the issues the court has to decide but it is notable that similar phraseology to that which appears in s. 29 is used. For example, s. 980(2) provides that the section applies to a list of assets which include at (a) land in the State and at (d) shares in a company deriving their value directly or indirectly from assets specified, *inter alia*, in para. (a). Therefore, the withholding tax regime is clearly intended to be co-extensive with s. 29 in terms of both the persons who are chargeable and the transactions to which it applies. The parties agreed that should it ultimately be held that this transaction did not come within s. 29(3) then the amounts of withholding tax already deducted and paid to Revenue would be repaid to Cintra.

15. The parties pointed to two other acts where the phrase "*land*" is defined but disputed the relevance of those definitions and the extent to which the court should look at or rely on those other pieces of legislation. Firstly, Revenue relied on a combination of s. 21 and Part 1 of the Schedule to the Interpretation Act, 2005. Section 21(1) of the 2005 Act provides: -

> *"21(1) In an enactment, a word or expression to which a particular meaning, construction or effect is assigned in Part 1 of the Schedule has the meaning, construction or effect so assigned to it."*

In Part 1 of the Schedule *"land"* is defined as follows: -

> *""land" includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land;"*

16. Revenue argued that in line with the Interpretation Act 2005, *"land"* as used in the TCA 1997 necessarily includes rights in or over land. The relevance of this definition was disputed by Cintra for a number of reasons. Most significantly Cintra pointed to sections 4 and 20(1) as establishing that the definitions contained in the Interpretation Act are displaced where an enactment contains its own interpretation section or sections which ascribe a different meaning to the words in question. Cintra described this as both the TCA 1997 and, as a subset of that, the Capital Gains Tax Acts, having their own internal dictionaries. For completeness these sections provide as follows: -

> *"Section 4(1) – A provision of this Act applies to an enactment except insofar as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made."*

And –

> *"Section 20(1) – Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except insofar as the contrary intention appears in –*

(a) the enactment itself, or

(b) the Act under which the enactment is made."

17. Further, Cintra pointed to the fact that the TCA 1997 predates the Interpretation Act, 2005 and was enacted at a time when the Interpretation Act, 1937 applied. In fact, the provisions of s. 29(3)(a) in which the disputed phrase "*land in the State*" appears were lifted directly from s. 4(2) of the Capital Gains Tax Act, 1975 which introduced Capital Gains Tax in this jurisdiction and thus significantly pre-dates the 2005 Act. The definition of land in the Interpretation Act 1937 is materially different to that contained in the 2005 Act being defined as including "*messuages, tenements and hereditaments, houses and buildings, of any tenure*". Most notably, the concluding phrase "*estate, right or interest in or over land*" on which Revenue places particular reliance does not appear in the 1937 Act definition. However, I am not satisfied that the court should place any particular reliance on the 1937 Act definition of "*land*". This is because the Interpretation Act, 2005, unlike its predecessor, is not intended to be solely prospective in its application. Under s. 4(1), which is set out above, the 2005 Act applies to "*an enactment*" unless the contrary intention appears. Under s. 2 of the 2005 Act an enactment is defined as meaning an act or a statutory instrument and an *"act"* in turn is defined as meaning either an act of the Oireachtas or a statute which was in force in Saorstát Eireann immediately before the coming into operation of the Constitution and which was continued in force by virtue of Art. 50 of the Constitution. Therefore, insofar as a definition contained in the Interpretation Act, 2005 is not displaced by a contrary intention it applies to all subsisting legislation whether passed before or after its own enactment and commencement. Thus, the real issue is whether the definition of land in the 2005 Act is displaced by the definition of land in the TCA 1997 itself – albeit that the Oireachtas in 1997 (or 1975) could not have been aware of the definition that would be introduced in 2005.

18. In pointing to certain provisions of the Land and Conveyancing Law Reform Act, 2009 ("LCLRA 2009") Cintra did not contend that it was of direct application to the TCA 1997 but rather argued that because the LCLRA 2009 represents a codification of the common law, its treatment of the concept of "*land*" reflects the legal understanding of that concept as used in the TCA 1997. In looking at the provisions of Part 2 of the 2009 Act relied on by Cintra it is useful to bear in mind that the central thrust of that part is not the definition of land, or even of estates and interests in land, but rather the abolition of feudal tenure and the prospective prohibition on the creation of fee farm grants, fee tail estates and the grant of leases for lives. Thus, s. 10 of the 2009 Act provides as follows: -

> *"10.— (1) The concept of an estate in land is retained and, subject to this act, continues with the interests specified in this Part to denote the nature and extent of land ownership.*
>
> *(2) Such an estate retains its pre-existing characteristics, but without any tenurial incidents.*
>
> *(3) All references in any enactment or any instrument (whether made or executed before or after the commencement of this Part) to tenure or estates or interests in land, or to the holder of any such estate or interest, shall be read accordingly."*

Section 11(1) of the 2009 Act provides that the only legal estates and land which may be created or disposed of are the freehold and leasehold estates specified in the section. Section 11(2) goes on to identify the forms of fee simple which constitute a freehold estate and subsection (3) identifies that a leasehold estate arises when a tenancy is created for any period of time or any recurring period. Subsection (4) then goes on to provide a list of "*the only legal interests in land which may be created or disposed of*". These include easements, a right of entry attached to a legal estate or a wayleave or other right to lay cables, pipes, wires etc. Cintra argues that contractual rights of the type in issue in the PPP contract do not

fall within the list of *"interests in land"* under s.11(4) of the LCLRA 2009 and consequently were not within the concept of land as it was understood by the Oireachtas in enacting the TCA 1997.

The PPP Contract

19. The PPP Contract between the NRA and Eurolink was signed by the parties on 24th March, 2003 and commenced on that date. For the purposes of the contract, Eurolink was described as the PPP Co. Under Clause 1.1, the project the subject of the contract was defined as: -

> *" "Project" means the design and construction of the Works and the Additional Works, the conduct of the Operations, the completion of the Handback Requirements and all other obligations of the PPP Co under this Agreement during the Contract Period and the financing of such activities."*

"Operations" is itself defined as follows –

> *" "Operations" means the activities of, or acts required of, the PPP Co as set out in the relevant O&M Requirements in connection with:*
>
> *(a) the performance of any obligations of the PPP Co under this Agreement; and*
>
> (b) *the conduct of any works or maintenance or operations of the PPP Co on or in relation to the Project Road or the Site or Off Site Areas."*

The O&M requirements are in turn defined as the standards, specifications, procedures and other requirements for the operation and maintenance of the Project Road as set out either in the PPP contract, its schedules or various Bye-Laws. The contract period was for 30 years from the commencement date unless the contract is terminated in accordance with its terms

on an earlier date. Assuming that such termination will not take place, the PPP contract will remain in force until March, 2033.

20. The PPP contract is a complex and lengthy document covering the design and construction of the road, its operation (including tolling) during the contract period and the handing back of the road to TII at the conclusion of the contract period. The provisions relevant to the issues the court has to decide are largely found in Part 4 which is headed *"Property"* and in Clause 9 headed *"Land"*.

21. Under Clause 9.1 the NRA/TII is to make access available to the site and off-site areas to the PPP Co for the purposes of the project. This access is subject to a range of listed rights (14 in number) including rights of public passage, the rights of the users of the project road (*i.e.,* the public) of the NRA itself and any relevant road authority and of certain third parties. The rights of access under Clause 9.1 are further and expressly limited under Clause 9.3(a) as follows: -

> *"9.3 Limitations*
>
> *(a) The rights of access given under Clause 9.1 (Access for PPP Co) shall subsist for the purposes of carrying out the Project and for no other purpose. Any access given under Clause 9.1 (Access for PPP Co) shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land and, for the avoidance of doubt, the PPP Co acknowledges that it shall have no freehold, leasehold or tenancy rights in the Site or the Off-Site areas."*

22. Cintra places particular reliance on this clause and on the fact that the access rights under the PPP contract are provided only for the purposes of carrying out the Project and shall not be deemed to grant any legal estate or other interest in the land to which access is being provided. Finally, under Clause 9.5 any land acquired by the PPP Co in respect of the

Project must be conveyed to the NRA at the NRA's request free of charge. As I understand it this does not refer to the Site and Off-Site areas on which the works and accommodation works were to be carried out by the PPP Co, which land remained the property of or under the control of the NRA/TII but was subject to the rights of access granted under Clause 9.1. Instead it refers to any additional land acquired by the PPP Co during the Project.

23. As it happens, Revenue do not dispute the *prima facie* effect of Clause 9.3(a) of the PPP contract and accept that the rights of access granted under Clause 9.1 do not confer any proprietary interest in the relevant lands on Eurolink. Instead Revenue argues that in circumstances where there is a licence in place, it is not necessary that the company have such a proprietary interest in order for its shares to derive their value from land. Revenue also point to two other clauses in the PPP contract. The first of these is clause 39 under which 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*" arguing that as rates are *prima facie* payable by the occupier of property it connotes an interest on a part of Eurolink in the property so occupied. The second is clause 53 under which the PPP contract itself may be assigned with the contract enuring to the benefit of the parties' successors and "*permitted assignees*". As pointed out by Cintra under clause 53.2(a) the PPP contract can only be assigned by Eurolink with the prior consent of TII.

Relevant Legal Principles

24. The parties addressed the court, at a level of some generality, on some basic legal principles applicable to the determination of a case stated and to statutory interpretation. These principles were not seriously in dispute between them.

25. Relying on the decisions of the Supreme Court in *Mara v Hummingbird* [1982] ILRM 421 (Kenny J.) and *Ó'Culacháin v McMullan* [1995] 2 IR 217 (Blayney J.) more recently applied by the High Court in *Karshan (Midlands) Limited v Revenue Commissioners* [2019] IEHC 894 (O'Connor J.), counsel for Cintra outlined the approach the court should take on a case stated when considering the determination of the Appeal Commissioner. As is well-established, this entails accepting findings of primary fact made by the Commissioner unless there is no evidence to support them but the court being at large as regards purely legal questions. The more difficult category for the appellate court lies in between primary facts and purely legal questions and comprises secondary facts or inferences drawn from primary facts by the Appeal Commissioner which are characterised as mixed questions of fact and law. Indeed, it seems to me that a mixed question of fact and law will not necessarily comprise an equal division between matters legal and matters factual and the extent to which an inference is predominantly factual or predominantly legal will vary, not just on a case by case basis, but as regards different findings in a single case. If inferences are based on an incorrect view of the law they can be set aside but if the Appeal Commissioner has taken a correct view of the law, the resulting inferences should not be set aside unless they are such that no reasonable Commissioner could have drawn them.

26. The relevance of these undisputed principles might be queried in circumstances where the basic facts were largely agreed between the parties and where no oral evidence was given before the Commissioner. However, there are a number of findings of material fact expressly made by the Commissioner and on which Cintra places significant reliance. These are, firstly, a finding at para. 196 of the Determination that "*Eurolink has a limited and non-exclusive contractual licence to use the lands which will last for the duration of the PPP Contract*"; secondly, a finding at para. 203 of the Determination that "*The contractual licence granted to Eurolink by the PPP Contract was not coupled with the grant of a*

proprietary interest"; thirdly, at para. 214 a finding that Eurolink collects significant amounts of tolls from the users of the Project Road and retains a high percentage of the amount so collected which income represented the company's sole turnover between 2013 and 2016 and finally, a finding at para. 225 that the value of Eurolink's shares derived their value from Eurolink's rights under the PPP Contract between Eurolink and the NRA which contract was personalty and a *chose in action* and, thus, not a relevant asset within s. 29(1A)(a).

27. Accepting that *Ó'Culacháin* and *Mara v Hummingbird* constitute the prism through which the court should look at the issues on the appeal, Revenue emphasised that there were no findings of primary fact made as "*there was no evidence*". I don't think the latter statement is quite correct. No oral evidence was given but there was evidence before the Appeal Commissioner in the form of documentary evidence of the PPP contract and of Eurolink's financial status. I note that the Appeal Commissioner did not purport to make findings of primary fact as such but instead made the findings outlined in the preceding paragraph as ones of "*material fact*". Without disputing their materiality, I think these findings are essentially inferences drawn from the evidence which was before the Appeal Commissioner and, insofar as inferences are a mixed question of fact and law, these inferences have a very substantial legal element. Thus, the court is not obliged to treat these findings of material fact as findings of primary fact and, because of their substantial legal element, the court should look closely at the legal propositions on which these findings are based.

28. The other broad area in respect of which the parties were agreed as to the legal principles – although not on the correct outcome when those principles are applied – is the interpretation of revenue statutes. The Appeal Commissioner relied on a summary of the relevant rules by McKechnie J. in *Dunnes Stores v. Revenue Commissioners* [2019] IESC

50 as approved by O'Donnell J. in *Bookfinders Ltd. v. Revenue Commissioners* [2020] IESC 60. Although the *Bookfinders* judgment was delivered by the Supreme Court after the hearing before the Appeal Commissioner had concluded, no issue was raised as to the appropriateness of his having taken this significant judgment into account. Indeed, both parties relied on *Bookfinders* in their arguments before this court.

29. In circumstances where there is no disagreement as to the principles to be applied I propose to simply summarise those principles without, I hope, doing a disservice to either of the judgments mentioned above. A significant feature of the recent jurisprudence is a move away from the notion that revenue statutes constitute a special type of legislation to which particular and very strict rules of statutory interpretation apply. Whilst there are some discrete principles which may be applied to the interpretation of revenue statutes, for the most part the approach to be followed is the same as for all legislation. The object of all statutory interpretation is to ascertain what the Oireachtas meant by the words used in the statute. Generally, the ordinary, basic and natural meaning of the words should prevail. The word used should be read in context meaning in the context of the section in which they appear and of the immediate surrounding sections and, more generally in the context of the act when read as a whole. As it happens, although the section in issue is found in TCA 1997 its application is restricted to the Capital Gains Tax Acts which are a subset of the TCA 1997. It seems to me that that is the appropriate context in which the phrase *"land in the State"* falls to be construed.

30. Other rules of construction may come into play if the meaning of the provision (when read in context) is unclear. I will consider those invoked in this case, primarily by Cintra, in the analysis which follows. If the meaning of the provision remains unclear even after the potential applicability of various rules of construction has been considered, then regard can be had to the purpose of the enactment. This does not entail a purposive interpretation

designed to achieve the supposed legislative objective divorced from the language actually used, but allows for the construction of a phrase or of a section which is consistent with and reflects the object and purpose of the enactment when read as a whole.

31. The principle against doubtful penalisation (called in aid here by Cintra) should only be applied at the end of the process if there is still genuine doubt about the meaning of a provision. It allows for the strict construction of a provision in a revenue statute so as to prevent the unfair imposition of a new or additional liability through the use of slack language. The Appeal Commissioner expressly declined to apply this principle on the basis that the interpretation of the provision did not give rise to the level of doubt necessary to justify its application.

32. Finally, although it was not raised as an issue by either party in this case, O'Donnell J. in *Bookfinders* confirmed that s.5 of the Interpretation Act 2005 which concerns the construction of ambiguous or obscure provisions or provisions which would, on a literal interpretation, be absurd or fail to reflect the plain intention of the Oireachtas does not apply to revenue statutes. This does not mean that regard cannot be had to the purpose of the provision in interpreting a revenue statute in the sense outlined in paragraph 30 above.

Determination of Appeal Commissioner

33. The determination of the Appeal Commissioner sets out the relevant facts, the applicable statutory provisions and the arguments of the parties in an admirably comprehensive fashion. His analysis of the issues is broken down under four headings. The first focusses on the correct interpretation of s.29(3)(a) of TCA 1997; the second on the nature of Eurolink's interest, if any, in the land under and adjacent to the motorway; the third on whether that interest, if any, constitutes *"land in the State"* for the purposes of s.29(3)(a)

and the fourth on whether Eurolink's shares derive their value from *"land in the State"*. This seems to me to have been an entirely logical way to approach the issues.

34. In respect of the first issue the Appeal Commissioner noted the diametrically opposed arguments made by the parties as to whether *"land"* under s.29(3)(a) necessarily required some proprietary interest. He noted the absence of a complete or self-contained definition of land in any of the acts to which he had been referred, the legislation invariably featuring definitions whereby land is taken to *"include"* particular things. He accepted Cintra's argument that that *"land"* should be construed by reference to the definition contained in s.5 of the TCA 1997 rather than by reference to the definition of the same word in the Interpretation Act 2005. He rejected the Revenue's argument that the definition of *"land"* in section 5 should be read in conjunction with the definition of *"lease"* in the same section and, thus, should be taken to include licenses. Consequently, he concluded that land meant a freehold or leasehold estate and any of the lesser interests in land formerly recognised by the Common Law and now codified in s.11(4) of the Land and Conveyancing Law Reform Act 2009. As he did not find the meaning of the word land to be imprecise or ambiguous, the Appeal Commissioner did not have regard to secondary material to which he had been referred, including Ministerial statements at the time of the enactment of the Capital Gains Tax Act 1975. Neither party placed on any reliance on these materials in this appeal.

35. On the second issue the Appeal Commissioner looked in particular at clauses 9.1 and 9.3 of the PPP contract and concluded that, having regard to the PPP contract as a whole, Eurolink has a limited and non-exclusive contractual licence to use the lands which will last for the duration of the contract (finding at para. 196 of the Determination as referred to above). In reaching this conclusion, the Appeal Commissioner took account of the jurisprudence which acknowledges that a document described as a licence may in fact confer a greater interest amounting instead to a tenancy (see *Gatien Motor Company v. Continental*

Oil [1979] IR 406 and Griffin J. in *Irish Shell v. Costello* [1981] ILRM 66). These cases establish the need to look at the entire of a transaction and all of the terms of a contract between parties to ascertain whether the relationship created is actually that of landlord and tenant rather than licensor and licensee. Revenue do not contend that the PPP contract creates a tenancy or that Eurolink has a leasehold interest in the land under or adjacent to the motorway (save in the narrow sense that lease should be construed to include a license under section 5 of TCA 1997). Rather, the argument made is that it is not necessary that a company have a proprietary interest of any sort for its shares to derive their value from land. Interestingly, when dealing with the nature of Eurolink's rights or interest under the PPP contract, Revenue accepted that the PPP contract did not give a proprietary interest in land but argued that it was "*a more complicated animal than simply a licence*". As I read the two cases referred to above (relied on indirectly by Revenue in its written submissions quoting from a *"User Guide"* for PPP contracts published by the National Development Finance Agency), the court did not envisage the categorisation of licenses such that the benefit of some licences could be equated with *"land"*. Rather, it anticipated that some documents purportedly entered into as licenses would in fact create a different relationship, namely that of landlord and tenant which would, indisputably, fall within the definition of land.

36. In light of the finding made at para. 196, the Appeal Commissioner proceeded to consider under the third heading whether this limited and non-exclusive contractual licence constitutes "*land in the State*" for the purposes of s.29(3)(a). In this context he considered whether the right of assignment of the PPP contract under clause 53 and the fact that the agreement shall enure for the benefit of the successors of both parties, meant that the right of access to the land created under the PPP contract amounted to an interest in that land.

37. In rejecting this argument, the Appeal Commissioner noted that the right of access to lands under the PPP contract could not be assigned independently of the PPP contract itself,

which assignment requires the consent of TII. In that context he characterised the access rights as "*subsidiary rights necessary to make the contract performable*" (para. 200). Whilst acknowledging that in some circumstances the grant of a licence to access land may be necessary to enjoy a proprietary interest in the land in question, the converse is not the case and a contractual licence conferring rights of access to land - as in the PPP contract- does not confer a proprietary interest in the land itself nor is such a proprietary interest necessary to enjoy the rights of access so conferred. Consequently, he concluded that the grant of access rights under the PPP contract was not coupled either with the grant of any proprietary interest (para. 205 of the determination) and was not itself an estate or interest in land (para. 206).

38. These findings all fed into the Appeal Commissioner's conclusions under the final heading, namely whether Eurolink's shares derived their value from land in the State. Revenue argued that notwithstanding the absence of a proprietary interest, shares could still derive their value from land. Much of the argument centred on the tolls scheme and whether TII charge the toll which is then collected by Eurolink on its behalf or whether Eurolink charge and collect the toll. There was no dispute but that the entire of Eurolink's turnover was dependent on the volume of tolls collected and the portion it was entitled to retain under the PPP contract.

39. Revenue argued that as the motorway (undoubtedly *"land*") generates the tolls received by Eurolink, the value of its shares is indirectly attributable to land. This argument falls short in light of the fact that the power to charge and collect tolls is conferred under statute on roads authorities which in turn have a statutory power to authorise, by agreement, the collection of tolls to third parties in exchange for the provision of services including the operation and management of roads which of itself includes the collection of tolls (ss. 59 and 63 of the Roads Act 1993). However, the Appeal Commissioner did not regard this as

determinative in circumstances where it was not disputed the Eurolink collects significant amounts of tolls from the users of the motorway and retains a high proportion of the tolls so collected (para. 214). Instead, he held that the phrase "*directly or indirectly*" in s.29(1A)(b) did not have the very broad meaning contended for by Revenue. Rather, it was intended to prevent non-residents hiding behind corporate structures to avoid paying capital gains tax in particular by interposing more than one corporate entity between themselves and a relevant asset. Therefore, he concluded that Eurolink's shares derived their value from its contractual entitlement to retain a portion of the tolls collected by it under the PPP contract (para. 224) and, thus, from its rights under that contract which was not a relevant asset under s.29(1A)(a) (para.225).

40. The case stated does not, as is sometimes the case, repeat the contents of the determination in full. Instead it summarises the reasons Revenue contends the determination is erroneous identifying the inferences/findings at paras. 196, 215 and 225 as all being based on errors of law. The Appeal Commissioner outlines the exchanges between the parties leading to the formulation of the questions of law. Between paras. 13 and 29 the Appeal Commissioner sets out the "*facts proved or admitted*" relevant to the proposed appeal. These include more detail than I have set out in this judgment as to the payment by TII for the services provided by Eurolink under the PPP contract and on the operation of the toll scheme. Between paras. 38 and 51 he summarises his determination.

41. The questions posed in the case stated are framed somewhat differently to the headings under which the Appeal Commissioner discussed the same issues in his Determination. This is no doubt because he posed the latter as open-ended questions to himself within which he could tease out the issues whereas the former are necessarily phrased as queries as to the correctness of specific conclusions reached by him at the end of that process. Nonetheless, the focus is on the same issues most particularly the interpretation and meaning of *"land"*

under s.29(3)(a) in light of the definitions in s.5 of TCA 1997 and whether his findings of material fact to the effect that Eurolink had a limited and non-exclusive contractual licence to use lands which did not grant an estate in land or comprise an interest in land were correct and, of course, the correctness of his ultimate conclusion that the shares in Eurolink did not derive their value directly or indirectly from land in the State but rather from its rights under the PPP contract.

Discussion – Meaning of "Land"

42. In looking at the questions posed by the Appeal Commissioner it seems to me that the first three deal in various ways with the correct construction of the word "*land*" in s.29(3)(a). The fourth and fifth concern the findings made by the Appeal Commissioner as to the nature of Eurolink's rights under the PPP contract, whether these are characterised as findings of secondary fact or as inferences drawn from primary facts. The last is in part a global question as to the correctness of his ultimate conclusion but also brings into the focus the meaning of the phrase *"directly or indirectly"* under s.29(1A)(b) of the TCA 1997. Thus, the answer to four of the six questions will depend largely on the interpretation of the relevant parts of s.29 of the TCA 1997 and it is to this to which I first turn.

43. The central dispute between the parties is as to the correct interpretation of the word *"land"* in s.29(3)(a). Revenue makes three arguments. The first aproaches s.29(3)(a) through the prism of s.29(1A) and is to the effect that the requirement that shares in a company derive their value directly or indirectly from land is not of itself limited to value derived directly or indirectly from an estate or interest in land. Thus, the use of land in which a company has no proprietorial interest, for example on foot of a licence, is, on Revenue's argument, capable of coming within s.29(1A)(b). In teasing out that argument, Revenue had to concede that not only did it mean that the concept of land was open-ended but that it was

potentially unlimited. Assuming an activity is being carried out by a corporate entity, it would for example cover a business selling photographs of scenic locations taken from land in respect of which the landowner had granted the photographer a right of entry for the purposes of taking the photographs. Not only was this argument unattractive but it seemed an unlikely basis for the imposition of a liability to tax. I will return to this issue when looking at s.29(1A) and the limits of "*indirectly*" deriving value.

44. Secondly, Revenue argued that the interpretation it offered of the word *"land"* in s.29(3)(a) was informed by the definition of *"land"* in s.5 which in turn was bolstered by the definition of the same word in the Interpretation Act 2005. Counsel focused on the last clause of the 2005 Act definition – "*any estate, right or interest or over land*" which, by including a right over land covers things which do not amount to an estate or an interest. Crucial to this argument is that both an estate and an interest in land are traditionally understood as being proprietorial in nature whereas a right *simpliciter* does not necessarily connote any proprietorial right. I note in passing that the first part of this definition seems to have been intended to ensure that the concept of land included buildings and structures on land (and, since 2005, land that is covered by water). Whilst this had been historically the subject of some doubt it is no longer so and the first part of the definition is not relevant for present purposes.

45. Neither the section 5 definition nor the 2005 Act definition of *"land"* attempt to exhaustively define the concept of land as such. Instead they each state that the concept will include certain things, albeit different things in each case. Revenue characterised these definitions as being open-ended and deliberately framed in a non-prescriptive way. Thus, it was argued that whilst the section 5 definition expressly includes interests in land it does not exclude rights over land. Consequently, it followed that matters contained in the more

extensive list under the 2005 Act definition fell within the open-ended concept of land under section 5.

46. This analysis was not especially helpful. Even allowing for the fact that a definition which simply states that something is included within a concept necessarily means that the concept is potentially broader than just the thing included, it does not follow that you can look to a longer list of things included in a different definition of the same concept to say that these must also be regarded as being within the primary concept. It might reasonably be asked in the context of s.5 of the TCA 1997, if the definition of land automatically includes interests and rights why is it specified that it includes interests but silent as to rights? Pointing to the inclusion of *"rights"* in a different list in another piece of legislation does not answer the difficult question as to the different treatment of rights and interests in section 5 itself.

47. Insofar as the longer list on which Revenue relied was contained in an Interpretation Act definition, Cintra made two argument in response. The first was to point to the general scheme for the interpretation of statutes as evident from s.4(1) and s.(20)(1) of the 2005 Act. The definition of a word in the Interpretation Act applies generally to other legislation unless the contrary intention appears. The contrary intention can appear in the other legislation itself, which of course is the act the court is attempting to construe. Thus, where a piece of legislation includes a definition of a word or phrase which is also defined in the Interpretation Act, the operative definition for that piece of legislation will be the one appearing in its own text rather than that appearing in the Interpretation Act. Counsel described this as the internal dictionary of an act displacing the general dictionary of the Interpretation Act.

48. In my view this analysis is correct. The inclusion of a definition section in an act is intended to govern the meaning of the words so defined for the purposes of that legislation. It would lead to significant legal uncertainty if a word or phrase, defined for the purposes of

a particular piece of legislation, could be regarded as having an additional or alternate definition applied to it by virtue of the same word or phrase being defined differently in the Interpretation Act. This is so even where the definitions are both framed as ones which *"include"* certain matters in the meaning of a core concept which is otherwise undefined. The very fact that the lists of things which are included are different suggests that the Oireachtas did not intend that the concept would be understood identically both generally and for the purposes of the particular act. Consequently, where the list of matters included are different, the broader list cannot simply be incorporated into the core concept without careful consideration as to whether that concept, in its natural meaning, is capable of being understood as encompassing each element of the broader list in the context of the particular act.

49. The word *"land"* has multiple meanings, not all of which are relevant in a revenue context, much less in the more specific context of capital gains tax. Clearly *"land"* in this sense does not mean a country nor does it mean the physical action of the verb *"to land"*. Given that broadly speaking revenue statutes deal with the taxation of income and property, the sense in which *"land"* is used in a revenue statute will necessarily be linked to real property or, more indirectly, to the generation of income from property. This is the natural and ordinary meaning of the core concept of land in the context of the TCA 1997 but the limits of that concept are not especially well defined. Legally speaking, the concept of *"land"* in the sense of real property is capable of comprising a large number of different interests (using that word neutrally) which range across a spectrum from absolute ownership to more peripheral rights. In construing the word *"land"* in s.5 of the TCA 1997 the court is attempting to ascertain where on this spectrum the Oireachtas intended to fix the outer limits of the concept for the purposes of capital gains tax.

50. Here, the definition of land as including interests in land under s.5 of the TCA 1997 is necessarily narrower than a definition which includes estates, rights and interests in land. On a spectrum of how the concept of *"land"* is understood under Irish law, estates in land represent the core concept and the greatest expression of a person's potential ownership of land (with a freehold estate necessarily connoting a somewhat greater interest than a leasehold estate). Other, lesser interests in land which are nonetheless proprietorial in nature and which connote a significant connection to the land over which they operate fall further along this spectrum. Such interests have long been recognised under the Common Law and their recognition is now codified by s.11(4) of the Land and Conveyancing Law Reform Act 2009. These interests vary significantly in their nature and extent and, to add to the confusion, some of them are referred to as "*rights*" (e.g. rights of way, turbary rights etc.). However, they differ from "*rights*" in the sense in which that word is used in the phrase "*estate, right or interest in or over land*" because they can be assigned or disposed of by the holder, a fact which is recognised in s.11(9) of the LCLRA 2009.

51. Rights over land which do not amount to an estate or interest necessarily connote a weaker still connection to the land to which they relate. Whilst the range of such rights is potentially unlimited, contractual rights which are not coupled with any estate or interest in the land to which they relate fall within this category. Although licences have long been recognised as not constituting an estate or interest in land, the case law has tended to focus on whether occupation of premises pursuant to a licence in reality constitutes a tenancy (see *Street v Mountford* [1985] 1 A.C. 809). it may be more difficult conceptually to categorically place a "*licence*" along the spectrum between interests which do not amount to estates in land and rights over land which do not amount to an interest in that land. As each licence will vary, I accept that the terms of the licence have to be examined in order to determine the extent to which it might create an interest in rather than merely a right over land.

52. Whilst I will return to consider the terms of the PPP contract in light of the proper interpretation of "*land*" in s.5, generally speaking where a right of access is granted to land for the purpose of enabling the grantee to enter onto and to use the land for the purposes of the contract and only for those purposes, this does not amount to an interest in land which can be assigned by the grantee independently of the contract to which they relate. Where the contract can only be assigned with the consent of the other party (i.e. the grantor of the access rights), the rights of access necessarily lie at the opposite end of the spectrum to an estate in land.

53. When viewed in this way it is evident that in the section 5 definition of land, the Oireachtas terminated the scope of the concept of land at a point on the spectrum where it includes interests in but does not include rights in or over land. The 2005 Act definition is broader including as it does both rights and interests, but it cannot simply be imported into section 5 just because both definitions deal with land. The same cannot be said of "*estates*" in land. Estates in land are fundamental to our understanding of land as a legal concept and, thus, are part of the core concept itself. If estates were to be excluded from the section 5 definition because they are not expressly listed as being included, the definition itself would cease to have a real meaning capable of being applied in a revenue context. This is not so as regards rights over land, the exclusion of which does not negate the core concept of "*land*".

54. The argument made by Cintra examined the extent to which the inclusion of certain matters necessarily excludes others. Counsel for Cintra relied on a passage from Bennion (8th Ed. p.698) under the heading "*Words of Extension*":-

> *"The expressio unis principle is often applied to words extending the meaning of a term. Where it is doubtful whether a stated term does or does not include a certain class and words of extension are added which cover some only of the members of the*

class, it is implied that the remaining members of the class are excluded. The most common technique of extending the indisputable meaning of a term is by the use of an enlarging definition, that is one in the form of A includes B. Where the stated B does not exhaust the class of which it is a member, the remaining class members are taken to be excluded from the ambit of the enactment."

The argument made was that the methodology of including an "*interest in land*" as words of extension necessarily excluded rights in land because they are not mentioned. In my view the effect of applying this principle is largely similar to the argument based on s.4(1) and s.20(1) of the Interpretation Act, 2005 with which I have just dealt. It does not depend on a broader definition appearing in a different piece of legislation, much less an Interpretation Act, but instead on the grouping of interests and rights in and over land as a class, sometimes referred to as the "*indicated class*".

55. I do not accept counsel for Revenue's outright dismissal of this passage from Bennion and certainly not for the suggested reason that it is outdated. There is much common sense in the proposition advanced. However, its applicability to the particular circumstances is open to question not least because, as counsel for Cintra fairly observed, it is not clear that we are in an "*indicated class*" situation and no argument was addressed to the court on the issue of whether estates, interests and rights in and over land form a class and on whether interests and rights can do so in the absence of estates. In any event, because of the views I have already expressed on the first argument I do not find it necessary to reach a conclusion on this particular argument.

56. There is one additional mater to which Cintra points which supports the interpretation of land under section 5 and by extension in s.29(3)(a) as not including rights. In the immediately following subparagraph, s.29(3)(b), gains made by a non-resident on the disposal of minerals within the State are bought within the charge to capital gains tax. Cintra

argues the fact that subparagraph expressly and expansively includes "*rights, interests or other assets*" in relation to mining and minerals whereas the preceding subparagraph does not mention "*rights*" in relation to land, suggests that rights were deliberately not included in the scope of "*land*" caught by s.29(3)(a). However, I am cautious about reading too much into this as the term "*minerals*" itself is defined in section 5 of the TCA 1997 by reference to the definition of that term in s.3 of Minerals Development Act 1940. That latter definition is an exhaustive one rather than one simply indicating that certain things are included so the usefulness of the comparison which Cintra seeks to draw is, in my view, limited.

57. The third and final point made by Revenue is based on the definition of "*lease*" which immediately follows that of "*land*" in section 5 of the TCA 1997. That definition, insofar as the lease relates to land, expressly includes a licence. Thus, it is argued that as land indisputably includes leasehold estates and as a lease as defined includes a licence, then by extension the definition of "*land*" must include a licence by reference to the same internal dictionary. Although described as a fall-back argument and not addressed at all in the written submissions filed by Revenue, it was pursued with some vigour.

58. Cintra argued that there was a requirement for a specific definition of lease for capital gains Tax purposes. This is because a lease has particular characteristics as a wasting asset the value of which is directly related to the unexpired residue of the lease at the time of its disposal. Therefore, there is a special regime for the taxation of the capital gains relating to leases which includes methods for making allowances for the ongoing reduction in the value of a lease during its term when assessing the amount of any gain made on its disposal. Even accepting that this is correct, it does not necessarily explain why the statutory definition of lease (incorporating, as it does, a licence) should not be read into the definition of land in the same section.

59. Cintra advanced a number of arguments as to why this should not occur describing Revenue as playing hopscotch through the definition section. The primary argument was that the definition of land makes no express reference to "*lease*" so there is no direct connection between the two definitions indicating that they are to be read together. If there were, then clearly the argument for saying that the definition of land must incorporate the definition of lease would be commensurately stronger.

60. Further, Cintra argued that there was a difference between a leasehold interest as an estate in land and the lease itself under which such interest is held. Whilst this is certainly so as a matter of principle and would definitely have a bearing for example on stamp duty, it is less clear that it is of any particular relevance for the purpose of capital gains as the value of a lease is entirely based on the fact that it represents and is capable of conveying a leasehold estate.

61. More persuasively Cintra pointed to the fundamental difference between a lease and a licence, the former creating the relationship of landlord and tenant and the latter simply making something lawful which would otherwise be unlawful. In the case of the PPP contract the grant of access rights to the relevant land prevents Eurolink's use of the land for the purposes of fulfilling its contractual obligations being a trespass. All of the definitions in section 5 are prefixed by the phrase "*except where the context otherwise requires*". In circumstances where neither of the relevant definitions in section 5 make reference to each other, the context does not require the extended and artificial definition of lease (as including a licence) to be read into the definition of land. Thus, it is argued the internal architecture of section 5 and its relationship with s.29(3)(a) neither permits nor requires the interpretation urged by Revenue.

62. With some hesitation I have concluded that these arguments are correct. Although the deceptive simplicity of the argument made by Revenue is attractive, if it was intended that

the definition of land was to be extended so radically and artificially by the inclusion of licences that would require to be done expressly in the definition itself (as is the case in the schedule to the Interpretation Act 2005) or by an express cross-reference to the extended definition of lease. As neither of these things were done, I am satisfied that the definition of land should not be altered or extended by the inclusion of something which does not naturally or logically fall within its terms, which would be inconsistent with the express reference only to an interest in land and which is not otherwise referred to in the definition itself.

Review of Questions (i) to (v) posed by Appeal Commissioner:

63. Based on the above analysis it is evident that I am satisfied that the Appeal Commissioner was correct in the findings he made that are the subject of questions (ii) and (iii) of the case stated namely that in construing "*land*" for the purposes of s.29(3)(a) he should confine himself to the meaning of that word in section 5 of TCA 1997 and in finding that "*land*" for that purpose means a freehold or leasehold estate or one of the lesser interests formally recognised by the Common Law and now codified in s.11(4) of the 2009 Act. By extension it follows that the Appeal Commissioner was correct in finding or inferring that a proprietary interest in land was necessary for non-residents to be charged a tax pursuant to s.29(3) of TCA 1997. A proprietary interest connotes ownership and whilst possession of a legal or equitable estate in land is not necessary for the holder to have an interest in land, the interest relied on nonetheless must be one capable of being owned. In the circumstances the answer to the first three questions posed in the case stated is "yes".

64. The fourth and fifth questions in the case stated relate to the findings made by the Appeal Commissioner at paras. 196 and 206 of his determination. Whilst these are described by him as findings of "*material fact*" and relied on by Cintra as factual findings for the purposes of arguing that they should not be disturbed (per *Mara v. Hummingbird,* see above),

I am satisfied that they are inferences drawn from primary facts as evidenced in the documentation before the Appeal Commissioner. This does not of course affect their materiality to the issues which he had to decide. Insofar as an inference is a mixed question of fact and law, there is clearly a significant legal element to these inferences in that the first relates to the characterisation of Eurolink's rights under the PPP contract as a limited and non-exclusive contractual licence to use the lands and the second is a conclusion that the PPP contract did not confer on or grant to Eurolink an estate in land and was not an interest in land.

65. Most of the argument had before the court centred on the correct legal interpretation of the phrase "*land in the State*" in s.29(3)(a) and on whether the shares in Eurolink could be said to derive their value "*directly or indirectly*" from land in the State. Very little of the argument made by the Revenue addressed the factual findings made by the Appeal Commissioner as to the nature of the rights conferred on Eurolink under the PPP contract. Indeed, the provisions of that contract were not open to the court until Cintra made its reply to Revenue's opening submission. The replying submissions made by Revenue only engaged with these issues to a very limited extent, in fairness because the central argument made was that it was irrelevant whether the PPP contract conferred a proprietary interest or not since the shares could derive their value from land without being connected to a proprietary interest in land.

66. The written submissions filed on behalf of Revenue point to certain provisions of the PPP contract which, it is contended, indicate that something more than a mere contractual licence had been granted. These provisions have already been adverted to and include the fact that Eurolink was liable for rates, and that the PPP contract itself could be assigned and would be binding on the successors of Eurolink if so assigned during its term. It is contended that these aspects of the PPP contract go beyond a limited non-exclusive licence. Reference

was made to the case law under which a court can scrutinise the terms of an agreement to see if truly constitutes a licence or if instead it creates the relationship of landlord and tenant. The difficulty with Revenue's argument on this point is that it was not contended that the PPP contract created a tenancy between the NRA and Eurolink. Indeed, in my view it could not be so contended. In making the argument that aspects of the PPP contract go beyond "*a limited non-exclusive licence*" Revenue did not identify how this contract should be characterised. Much of the other arguments made by Revenue accepted that the relationship created by the PPP contract was a licence (see the arguments dealt with above as to the extended definition of "*lease*" under section 5 of TCA 1997).

67. In circumstances where Revenue does not suggest that the rights of access conferred under the PPP contract amount to more than a licence, the only issue that could be taken with the Appeal Commissioner's finding is either that the licence so conferred is not limited or that it is somehow exclusive. The latter argument can be disposed of easily by reference to clause 9.1 of the PPP contract under which the rights of access are conferred. That clause expressly sets out in fourteen subparagraphs the rights of access of other parties, including the general public as users of the proposed motorway, to which the rights conferred by the NRA on Eurolink are subject. Manifestly those rights are not exclusive.

68. The issue as to whether the rights are limited is slightly more complex particularly because the PPP contract itself is a very valuable contract such that any rights conferred thereunder would not in normal terms be regarded as "*limited*". However, the rights are limited in two significant ways. The first is that they are limited for the duration of the contract (under clause 9.2) and the second is that they are limited in that they "*subsist for the purposes of carrying out the project and for no other purpose*" (clause 9.3). Whilst the balance of clause 9.3 is a statement that no legal estate or other interest in land is deemed to be granted under the PPP contract and an acknowledgment that Eurolink has no freehold,

leasehold or tenancy rights in the land to which the contract relates, this would not be legally definitive if the terms of the contract themselves indicated otherwise. However, I do not think that the other terms of the contract and in particular those pointed to by Revenue are sufficient to displace the intention of the parties that no estate or interest in land was thereby granted. The rights of access to the land granted in clause 9 of the PPP contract are not freely assignable by Eurolink. The contract to which the rights of access are attached may be assigned but only with the consent of TII. Payment of rates, if levied by the rating authority, is indicative of occupation of land or premises but the allocation of liability to pay rates under a contract is not necessarily so indicative. Consequently, I am satisfied that the Appeal Commissioner was correct in the conclusion referred to at question (iv) of the case stated.

69. For the same reasons I am satisfied that the PPP contract did not confer on or grant to Eurolink an estate in land and was not an interest in land. Again, Revenue did not seriously argue otherwise since its main argument was based on the contention that a proprietary interest in the land was not necessary for shares to derive their value from land. In those circumstances I am also satisfied that the finding referred to in question (v) of the case stated was correctly made by the Appeal Commissioner.

Meaning of "Directly or Indirectly" – Question (vi)

70. That brings the court to the last question in the case stated which deals in a global way with the correctness of the Appeal Commissioner's finding under s.29(1A) of the 1997 TCA that the value of the Eurolink shares the subject of the appeal derived from Eurolink's rights under the PPP contract and not directly or indirectly from land in the State. I think it was undoubtedly correct for the Appeal Commissioner to conclude that the value of Eurolink's shares was derived from its interest in the PPP contract. The PPP contract was, and is, a very valuable one. As is commonplace for contracts of that type it entailed the construction

by Eurolink of a stretch of motorway for which it received some staged payments which did not reflect the full value of the works carried out. In addition, it contracted to operate and manage the road on behalf of NRA/TII for a period of thirty years from the date of the contract. The management of the road included the delegated right to collect tolls charged by the NRA/TII under the tolls scheme adopted pursuant to statute. The significant value of the contract lies in the entitlement of Eurolink to retain a substantial proportion of the tolls collected. Thus, over the lifetime of the PPP contract through this toll income it both recoups its original investment, covers its operating costs and makes a profit.

71. However, it does not necessarily follow just because the value of the shares derives from these contractual rights that it is not also at least indirectly attributable to "*land in the State*". In this regard Revenue made a somewhat discrete argument to the effect that the payment of tolls by motorists is linked to the use by the motorist of the project motorway and thus, the use of land. In this way it is contended that the significant income derived by Eurolink under the PPP contract is in fact, indirectly, based on the use of land.

72. This brings into focus the correct interpretation of the phrase "*directly or indirectly*" in s.29(1A) of TCA 1997. The point is not entirely a standalone point because much of the argument centred around whether an economic benefit derived from the use of land which was not coupled with an interest in was too remote to be regarded as generating a share value even indirectly derived from the land.

73. There are a number of immediate difficulties with this argument. Firstly, it necessarily interposes an additional word into s.29(1A)(b) namely "*the use of*". Thus, the argument is not that Eurolink's shares derive their value from land in the State but from the use of land in the State. Secondly, the use which is identified as generating the income is not use by the company whose shares are being sold (i.e. by Eurolink) but use by third parties.

74. Accepting that the phrase "*directly or indirectly*" necessarily means that the connection between the company's shares and the land does not have to be immediate, when the connection is not immediate an issue necessarily arises as to the point at which it becomes too remote to be said to arise even indirectly. This is something which has to be closely examined and determined on a case by case basis. For example, the court queried whether shares in a haulage company engaged in the business of transporting goods in vehicles over the exact same stretch of motorway could be said to derive their value from land because they are using the motorway. On one level the connection would be more direct since it is use of the road by the company whose shares are in issue. Revenue conceded that on the case it was making, the use by a haulage company of the road in those circumstances would mean that the value of its shares was derived at least in part from land. Almost all businesses in the State "use" land in this sense, being physically based in premises on land or, at very least, passing over land including over or through infrastructure on land. In my view reading the phrase "*use of*" into the text before "*land*" for the purposes of section 29(1A) makes the section impermissibly vague and indeed almost completely open-ended.

75. Further it would be inconsistent with the general scheme of the Capital Gains Tax Acts to treat the word "*indirectly*" in section 29(1A)(b) as importing into the meaning of "*land*" for the purposes of section 29(1A) matters which are not covered by the definition of that phrase in section 5. However, I do not think I need to decide the case on this point as, in my view, the use of land by third parties is too remote to attribute the value of Eurolink's shares as arising even indirectly from such use.

76. I accept the point made by Cintra to the effect that the phrase "*directly or indirectly*" was included by the Oireachtas primarily to ensure that capital gains tax could not be avoided by a company holding land through a subsidiary company. Thus, land held by a subsidiary company can be treated as being indirectly held by the company whose shares are in issue.

However, this does not mean that the possibility of share value deriving "*indirectly*" from land in the State is limited to circumstances where there is a subsidiary company in being. That said, in my view there must be some greater proximity between the land in question and the company whose shares are being valued than the ability to generate an income from the use of that land by members of the public through a contractual licence.

77. Of course, Eurolink also uses the land to which it has a contractual right of access under the PPP contract. If I am wrong in the view which I have expressed on an *obiter* basis at paragraph 75 above (that the word "*indirectly*" does not extend the statutory definition of "*land*" for the purposes of section 29(1A)), it is then necessary to consider the actual use of the land by Eurolink. As previously noted, the rights of access conferred by clause 9 of the PPP contract are conferred for the purposes of the Project only. That means that Eurolink had a contractual right to access the land initially for the purpose of designing and constructing the road. The road is long since built such that it cannot be said more than a decade later that Eurolink's shares continue to derive value from the carrying out that construction. Thereafter, the rights of access were conferred for the purposes of operating and maintaining the road. Leaving aside the element of operation which entails collecting tolls, the maintenance of the road is a burden on and at a cost to Eurolink and does not generate a profit which might be said to enhance its share value.

78. This leaves access by Eurolink to the road for the purpose of collecting the tolls charged (by TII) to third party users of the road. I have already held that the use by third parties of the road is too remote to constitute use by Eurolink or to indirectly cause the value of its shares to be derived from such use. I think that the characterisation by Cintra of Eurolink as a service provider in relation to the road, including as regards the collection of tolls for the use by third parties of the road, is correct. The value of Eurolink's shares derives from the provision of this service and the payment to which it is entitled for providing it

rather than from the road itself in which it has no interest. By analogy, a company providing cleaning services to commercial buildings does not derive its share value from the "land" comprised in those buildings notwithstanding that it has a right of access to them for the purposes of its cleaning contract.

79. I do not think it necessary to conclude definitively that there must in all circumstances be a proprietary interest in land before a company can derive its value indirectly from land. However, this is not the conclusion that the Appeal Commissioner reached. I am satisfied that he was correct in the conclusion that is the subject of question (vi) of the case stated, namely, that the shares in question did not derive their value directly or indirectly from land in the State but instead derived their value from Eurolink's rights under the PPP contract.

Conclusion

80. In light of the above analysis the answer to each question posed in the case stated is "Yes" and the appeal should be dismissed.