Neutral Citation [2008] IEHC 255

THE HIGH COURT

2006 No. 565 SS

BETWEEN

CELTIC ROADS GROUP (DUNDALK) LIMITED

APPELLANT

AND
COMMISSIONER OF VALUATION

RESPONDENT

AND
LOUTH COUNTY COUNCIL

NOTICE PARTY
2006 No. 688 SS

AND BETWEEN

WEST-LINK TOLL BRIDGE LIMITED

APPELLANT

AND
COMMISSIONER OF VALUATION

RESPONDENT

AND
FINGAL COUNTY COUNCIL

NOTICE PARTY

Judgment of Mr. Justice Charleton delivered on the 11th day of July, 2008

1. This single judgment is being given on two cases stated by the Valuation Tribunal pursuant to s. 39 of the Valuation Act 2001. The case stated in respect of the Celtic Roads Group (Dundalk) Limited is dated 28th April, 2006, while the case stated in respect of the West-Link Toll Bridge Limited is dated 25th May, 2006. Both cases raise common legal issues. The hereditament in each case is also similar.

2. The central issue in this case is the proper approach that should be taken in valuing the rateable hereditament. The difficulty arises because of the complex nature of the scheme under which that hereditament operates. Celtic Roads Group (Dundalk) Limited built and now collect tolls on part of the M1 Dublin to Belfast motorway which is sometimes also called the Dundalk Western bypass. West-Link Toll Bridge Limited operates the toll bridge over the Liffey on the M50 motorway. In the case of Celtic Roads, the notice of appeal to the Valuation Tribunal was against an initial rating by the Commissioner of Valuation. In the West-Link case, the Commissioner of Valuation revalued the hereditament, following on the building of a second bridge beside the first one over the river Liffey, and it was against this valuation that an appeal was made to the Valuation Tribunal. As regards both of these appeals, there is a central issue in each case.

Central Issue

3. I will turn shortly to the contracts under which each appellant collects tolls. As traffic passes through each of the hereditaments, the appellants collect tolls, set at different rates by statute, in respect of various kinds of motor vehicle, both private and commercial. They keep only a percentage of these tolls, however. This revenue is to reimburse them in respect of the building of the Dundalk Western bypass, in the case of Celtic Roads, and the second bridge on the M50, in respect of West-Link. Both appellants argue that the valuation of the relevant property for rating purposes should take into account only that portion of the toll which they are entitled to keep. The rest, they say, is to be excluded from the net annual value of the property for rating purposes because it is statutorily excluded as a tax or charge borne by them which is payable under the Roads Act 1993. This case therefore hinges around the correct interpretation of s. 48 of the Valuation Act 2001. Whereas that section is cast in modern form, it derives from the Poor Relief (Ireland) Act 1838, the Valuation (Ireland) Act 1852, and the Valuation (Ireland) Amendment Act 1854. The section in its modern form in the Valuation Act 2001 reads:-

> "The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.
>
> (2) *Subsection (1)* is without prejudice to section 49.
>
> (3) Subject to *section 50*, for the purposes of this Act, 'net annual value' means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant."

4. Section 49 is quoted later in this judgment, when it becomes relevant to a different issue. A similar statutory mechanism for valuation in England is contained in schedule 6 para. 2(1) of the Local Government Finance Act 1988, which is, in turn, derived from the Parochial Assessments Act 1836, and this reads:-

> "The rateable value of a non-domestic hereditament shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command that rent."

5. The English Act has a slightly different wording but it is not one that renders irrelevant the English authorities to which I will refer in the course of this judgment. In order to decide this issue it is necessary to have recourse to the complex web of public and private arrangements whereby tolls are collected at the West-Link Bridge, by West-Link, and on the M1 by Celtic Roads.

West-Link Agreement

6. The supplemental agreement providing for the construction of the new bridge on the M50 motorway was made on 7th June, 2001, between the National Roads Authority and West-Link Toll Bridge Limited. I am told that this agreement is due to last for 30 years. That agreement recites the original agreement of 16th October, 1987, in which the predecessor of the National Roads Authority had

been the County Council of the County of Dublin. Under the current agreement a gross toll revenue share is payable by way of a fee by West-Link to the Minister for the Environment. West-Link procured the design, construction, financing, maintenance and operation of the new bridge in accordance with ancillary contract documentation that was approved in advance by the National Roads Authority. The entire cost of designing, constructing, financing, operating and maintaining the new bridge was borne by West-Link and the Minister and the National Roads Authority were relieved of any liability in that regard save as provided for in the contract. Clause 4.1 provides that West-Link is to "occupy the Toll Road and shall be required to manage, supervise, operate and maintain a system of tolls in accordance with the New Toll Scheme for traffic using the Toll Road". On collection of the toll, West-Link is obliged under the contract to apply the proceeds of the toll towards meeting its financial obligations. These are set out in the contract as being the payment of the gross toll revenue share to the Minister for the Environment; the cost of operating the system of tolls and of maintaining the Toll Road; and the recovery of construction costs. Clause 4.3 sets out the portion of the tolls collected that are payable to the Minister. This is calculated on the basis of it being a percentage of the gross toll revenue that is collected in any year where the daily traffic volume exceeds 27,000 vehicles. Then the percentage of gross toll revenue is said to vary between a minimum of 30% and a maximum of 80% in accordance with the average annual daily traffic volume which is measured in accordance with spans set out in the contract. Where the vehicles using the roadway average between 8,000 and 27,000, the Minister gets 30% of the gross toll revenue. For the next 10,000 vehicles over 35,000 vehicles the percentage increases to 40%. Where there are 45,000 vehicles using the road on average annually the gross toll revenue paid to the Minister increases to 50%. Where that figure is exceeded, then the figure for the gross toll revenue payable under contract to the Minister is 80%. I am told, and I accept, that the reasons for these spans is to avoid the potential scandal of excess profit deriving from tolls on the public highway.

7. The tolls payable by each such vehicle using the bridge are set in accordance with by-laws that are made by the Minister for the Environment pursuant to s. 58(1)(a) of the Roads Act 1993. In the contract, a new set of draft by-laws are appended. These provide, in article 3, that the toll company may demand, take and recover tolls from motorists using the facility, that no one may use the toll road without paying the appropriate toll and that West-Link can refuse to permit a driver to pass who does not pay the toll; see articles 9, 10, 11 and 12.

8. The appending to the agreement of the draft set of by-laws, which was subsequently passed, is significant. It provides West-Link, as the contractor and subsequent operator, with some fair idea of the turnover that might be expected in respect of tolls on building the facility and on occupying the hereditament. Obviously, in those circumstances, both parties will have made calculations as to the volume of traffic that is probable in order to ascertain what revenue is likely to be generated under the draft by-law whereby a base toll level is set out. Maximum tolls are then to be calculated by adding to the base toll by reference to the Consumer Price Index and the relevant VAT rate; see article 14. Since the date of this contract, the tolls have been increased. Under s. 4.6.3 of the contract it is provided that where the National Roads Authority, without the consent of West-Link alters the by-laws so as to prevent the tolls being increased in accordance with the indexation provisions, the gross toll revenue share payable to the Minister is to be decreased by an amount equal to the deficiency between the monthly tolls actually recovered and the monthly tolls that would have been recovered if the indexing had been made. Provisions are also made in the event that the National Roads Authority abolishes the tolls altogether.

9. Before turning to the relevant statutory provisions, a comment is apposite. This agreement was entered into in consequence of negotiations between West-Link and the National Roads Authority. The parties concluded it because they felt it was of benefit to each side. It is thus difficult to see it as anything other than a commercial agreement arrived at by free bargaining. The number of vehicles travelling through the facility might be regarded as imponderable. It seems to me, however, that the calculations carefully set out in the agreement are based upon projections deriving from the research of the parties. Each individual vehicle using the facility generates a toll, unless they are, like Garda, Army and ambulance vehicles, exempted. The level of that toll is set by a by-law. Even there, however, it is clear that the parties would not have been willing to enter into the agreement but for a provision appending a draft of the relevant by-law to the agreement and providing for a minimum level of toll and, additionally, dealing with a contingency whereby inflation reduced the effective economic level of the toll or whereby a decision was taken at a political level to reduce or abolish that source of revenue.

10. When one turns to the Celtic Roads agreement one sees provisions which are similar, but which, as to the detail, are different. The level of revenue being paid by West-Link to the Minister for the Environment arises in consequence of an agreement. As in many other commercial transactions, the amount of revenue that might be generated in consequence of the arrangement effected between the parties is dependent upon market conditions. The difference between this agreement and the market place is that the unit level of income derived from the agreement is set by statute. The difference with the market place is that provision can rarely be made for the contingency of a decrease in the value of a product, where as here it may happen through inflation outstripping the rate of increase in the by-laws. For this eventuality, provision is made not by statute, but through a consensus arrived at between the parties.

The Celtic Roads Agreement

11. In the Celtic Roads appeal I have not been supplied with the full copy of the agreement between the National Roads Authority and that appellant. It was before the Valuation Tribunal, however, and such of it as is before me proves to me that the comment just made in respect of the Celtic West Link agreement, in the previous paragraph, is equally apposite here. Again, I am told that this agreement is due to last for 30 years. In a similar way to the West-Link agreement, the Celtic Roads agreement provides for a share of the gross toll revenue to be paid out of receipts. Here the recipient is the National Roads Authority. Under Clause 1.2 of Schedule 15 to the agreement, Celtic Roads is to pay a royalty of 95%, calculated on an average basis, up to January, 2006. Thereafter, the share that is to be paid, which is described as a royalty, is reduced to 55%. Similarly, provision is made for indexation, for exemption of certain vehicles, for changing the amount of the toll unit and the initial toll scheme, in that regard, is also annexed to the agreement.

The Hereditament

12. In *Dublin County Council v. WestLink Toll Bridge Limited* [1996] 1 I.R. 487, it was argued by the appellants that they were not in occupation of West-Link Toll Bridge. Whereas s. 63 of the Poor Relief (Ireland) Act 1838, had expressly referred to tolls as being a hereditament, it was argued that since the bridge on the M50 was dedicated to public purposes it was not rateable, unless, under the Act, a private profit was being derived from it. The Supreme Court held that the occupier of the hereditament, rather than the beneficiary of the profit or use derived from the hereditament, is to be rated; see the judgment of O'Flaherty J. at p.497. The Supreme Court noted the statutory scheme under which the tolls had been set and also had regard to the contract under which a share of the tolls was to be paid to Dublin County Council. While the comment that follows was not necessary to the decision, I nonetheless repeat it here before going on to make my own analysis. At p. 499 O'Flaherty J. stated:-

> "Under the legislation that we must construe, it is clear that only a local authority can 'charge' tolls in the sense of bringing them into existence. But once in existence, as far as the scheme and agreement are concerned it is clear that the tolls belong to the defendant. It seems that the concept of 'tolls' and the proceeds of tolls are used inter-changeably

in the legislation. There is, in any event, no practical distinction between the two concepts.

Counsel for the defendant submitted that we should place great reliance on the word 'directly' in the proviso to s. 63 of the Act of 1838. It is submitted that the tolls go to defray the cost of the road and, indubitably, the road is dedicated for use by the public. While that is so, and the agreement indeed provides for this to be done, nonetheless, the tolls are to belong to the defendant to derive such profit as it may from them for the duration of the agreement.

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

The Legislation

13. Central to the arguments of the appellants is that their entitlement to collect tolls is derived from statute. It is correct that legislation regulates, through by-laws, the level at which those tolls are set and the obligation on motorists to pay such tolls to, in the case of West-Link, the Minister for the Environment, and in the case of Celtic Roads, the National Roads Authority. The entitlement of the relevant local authority to set tolls and to receive the money that is collected as a toll also have, as they must, a statutory basis. The respondents' answer to this argument is that the royalty derived from the occupation of the hereditament is a matter set by contract: in consequence, the division of the toll should not be looked to for the purpose of valuation since that would infringe the fundamental principle of rating law that the value of the hereditament is to be judged not on the basis of any specific agreement entered into between the parties but on the basis of evaluating the hypothetical rent of the unoccupied hereditament.

14. Any local authority is a creature of statute. It does not derive its power to raise funds, to spend them, or to set up schemes for their disbursement, by virtue of equity or common law. Instead, every power that a local authority seeks to exercise must derive from a specific statutory provision. It is not entitled to exceed the powers granted to it or to assume ancillary powers absent statutory authority; Patrick Butler, *Keane on Local Government*, 2nd Ed., (Dublin, 2003,) chapter 1. A scheme for a toll road is, in that regard, especially complex. The local authority will have to buy land, to maintain the land in a safe condition, to find an appropriate contractor, to have the scheme built, to enter into a contract providing for remuneration, to set a toll, to define the parties to whom it does, and does not, apply and to provide for collection and, in the case of a public/private partnership where a scheme is built by a private enterprise in consideration of a return in consequence of public use, the possible division of the income that derives therefrom. The fact that all of these matters are provided for in statute, together with ancillary powers, does not necessarily mean that a form of taxation is being imposed. The Local Government (Toll Roads) Act 1979 first provided for the setting up of toll schemes on public roadways in modern Ireland. That Act was revised and re-enacted in the Roads Act 1993, which is the fundamental statutory authority in this case. Some of the powers of the local authority in relation to toll roads had already derived from previous enactments. Some enactments appear to repeat the powers of a local authority without necessarily stating that the enactment is made for the purposes of avoiding doubt. For instance, under s. 211 of the Planning and Development Act 2000, it is provided that where a local authority acquires lands for the purpose of their functions under the Act, it "…may be sold, leased or exchanged, subject to such conditions as it may consider necessary where it no longer requires the land for any of its functions…". This kind of express provision might seem to be unnecessary since local authorities already had such powers in relation to lands, for otherwise they could not function at all. An argument might be proffered to a court, and accepted, however, that the existing legal powers of local authorities never covered dealing in parcels of land expressly for planning purposes. Who knows that such an argument might not succeed? Undoubtedly, concern at what might be regarded as an ancillary function to a statutory enactment has ensured that the doctrine of legal formulism ensures the tireless repetition by re-enactment of the powers and functions of statutory bodies.

15. This is exemplified by the Roads Act 1993. Under s. 16 it establishes the National Roads Authority. Then, s. 17 provides for directions and guidelines to be given by the Minister for Local Government under s. 41. Under s. 19 a range of powers are given to the National Roads Authority in relation to national roads that include design, preparation, maintenance, schemes for traffic signs, making provision for parking, allocating money, specifying standards of construction, carrying out training, and pursuing research. Section 19(3) provides for consequential and necessary powers. Under s. 24 the National Roads Authority may receive a grant, and under s. 25 it may borrow money. The chairman and members of the authority, the chief executive, the staff, and the transfer of those staff from the public service, are all provided for. The authority may provide services, may pay pensions and may receive directions from the Minister.

16. Part 5 of the Act deals with toll roads. It provides that a local road authority, or the National Roads Authority, can prepare a scheme for the establishment of tolls under s.57. Under s. 58 as inserted by s. 272 of the Planning and Development Act 2000, the Minister must approve such a scheme. Only the National Roads Authority or a local authority is entitled to set tolls. This is done pursuant to by-laws that are passed under ss. 59, 60 and 63. The detailed provisions of s. 63 indicate a concern to ensure that nothing is left out of the legislation which is necessary for the proper operation of a toll scheme. Section 63 provides for agreements to finance the maintenance, construction, operation and management of toll roads. Section 63(5) provides that the parties to any such agreement should carry it out. It seems to me to be necessary to quote the entirety of s. 63 as amended by s. 275 of the Planning and Development Act 2000. This provides:-

> "(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 costs of the maintenance of the road,
>
> (c) to construct or join or assist in the construction of the road for or with the authority,
>
> (d) to maintain or join or assist in the maintenance of the road 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,
>
> (f) Such other things connected with or incidental or ancillary to or consequential upon the foregoing as may be specified in the agreement.

(2) Without prejudice to the generality of subsection (1), an agreement under this section may –

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

(b) specify the period for which the agreement shall have effect and provide for its termination or suspension and for matters connected with or incidental or ancillary to or consequent upon the expiration of the agreement or such termination or suspension, and,

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

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

(ii) by the road authority by any other party to the agreement,

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

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

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

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

17. In addition to that provision under the third schedule to the Act, implemented under s. 42, the National Roads Authority is made a body corporate and is conferred with power to acquire and dispose of land. Section 12 of that appendix provides that where the authority proposes to enter into a contract for construction or maintenance works on a national road, it can seek tenders before entering into that contract.

18. It is argued that by virtue of s. 63(5), the relationship between the appellants in this case and the National Roads Authority is not that of private parties to an agreement. I am satisfied that the legislature intended to give to the National Roads Authority, and to every relevant local authority, all such powers as might be necessary for the purpose of entering into a private contract whereby a road might be constructed and maintained and whereby the application of the proceeds of tolls might be split pursuant to an agreement. Without the power contained in s. 63(5) it is more than open to argument that any specific provision of any particular contract, which of necessity will not be definable in advance, is *ultra vires* the powers of a statutory authority.

19. It is further argued that s. 63(1) determines that a toll scheme providing for the payment of all or part of the proceeds of a toll to the National Roads Authority, or to a local authority, causes it to be a rate or a tax which is chargeable or payable by or under an enactment within the meaning of s. 48(3) of the Valuation Act 2001. That argument, it seems to me, breaks down if the words inside the brackets in s. 63(1) are removed for the sake of analysis. These words have effect. But, they refer to a special kind of arrangement that can, in the sense of empowerment for legal purposes, and not must, be entered into. The National Roads Authority, and a local authority, both are empowered under s. 63(1) to enter into any agreement. That agreement could be to build the road, or to build the bridge in the case of West-Link, for a particular fee, or to maintain it on the basis of a particular payment for a particular number of years, or to collect the tolls for a particular number of years and to pay the entire of them, subject to a service payment, to the local authority. The point is that such an agreement might provide for that scheme or that it might also be agreed, here inserting the words within the brackets, that some portion of the toll might be retained while the rest would be paid to the authority.

20. In that regard, I note that in rating law that the manner in which the rent, for the purposes of s. 48(3), is calculated does not depend on a form of words. While toll schemes in Ireland are modern, they were also a creature of the Victorian era. The manner in which a hypothetical landlord and a hypothetical tenant may arrive at a rent can be effected in many different ways. The law is not a stranger to such schemes, or to the necessity to analyse them in terms of the traditional understanding necessary to assess the net annual value.

21. In *Roadstone Ltd v. Commissioner of Valuation* [1961] I.R. 239, a company bought lands from which a valuable stone was to be quarried. The issue in the case was whether the quarry hereditament was to be treated separately for rating purposes from the hereditament that was valued as land. At pp. 261 and 262, Kingsmill Moore J. stated the following:-

"Royalties are a species of rent and the Judge will be entitled to have regard to royalties paid for similar stone, but again the circumstances of the payment will require to be closely scrutinised. What a County Council will pay in royalties for a relatively small supply of stone out of a quarry adjoining the roads on which it will be used would normally be greater, and perhaps very much greater, than any royalty which the owner of a hill of greenstone could possibly hope to extract from a commercial company working on an enormous scale.

A case which bears a close resemblance to the present is *R. v. North Aylesford Union*. a cement company were occupiers of a chalk pit from which they extracted the chalk to use in the process of cement making in their adjacent works. Nearby were other chalk pits producing similar chalk which was used for ballasting ships. Admittedly the chalk was of greater value for making cement than for ballasting ships and accordingly it was sought to give in evidence the profits from the use of the chalk in the cement works. It was held that such evidence was inadmissible. The question to be decided was what was the annual value of chalk pits in the neighbourhood, not what the cement company could make out of the chalk.

'The rateable value of the chalk pit is the value which a tenant would be expected to give for it. That value involves two elements: first, what would a tenant make by it; and what would he get equally good chalk for in the neighbourhood? No tenant gives all that he can afford to give, and the true test is not what he could afford to give but what a tenant would be likely to give who took the pit from year to year. It is not the profits a man makes that make the difference, for, whether he gains or loses in his trade, the rateable value is the same': per Blackburn J., at

> p. 149. 'The criterion of rent is no doubt dependent to some extent on the amount of profit, but the proper test is not whether a tenant could afford to give more rent if he got more profits. The actual profits are not material': per Mellor J., at p. 149.
>
> The remarks of Blackburn J. in the cases already quoted show that although the profits a tenant might *expect* to make from the use of a hereditament will affect the price he will be willing to pay for it they are only one of many elements in ascertaining the rent, and the profits he actually does make are not a material matter. These depend not only on the value of the deposits but on his skill, his enterprise, his organisation and a host of other matters. Moreover, the profits made by processing the rock on the lands of Pluckerstown must be excluded from consideration, as were the profits of the cement works in the *Aylesford Union* Case."

22. It is argued in this case that in arriving at the net annual value for rating purposes a judge should have regard to common sense and economic considerations. This submission accords with sound authority. However, the necessity to look to economic considerations does not mean that a contract that is entered into by the will of parties seeking, on the one hand, a public service, and, on the other, a reasonable return of profit, should be construed as entering into an agreement to pay a tax or charge under statute. The correct approach is that set out by Kingsmill Moore J. in the *Roadstone* case at p. 261. There he said:-

> "To ascertain the hypothetical rent involves postulating a hypothetical tenant or tenants and a hypothetical landlord or landlords. The hypothetical tenant will consider what profits he can make out of the use of the hereditament after paying expenses and out-goings, and will not pay a rent so large that it does not allow him a reasonable return; but if the demand for hereditaments of the class under consideration is large and the supply small the rent he will pay may approximate to a rackrent. If, however, the supply is large and the demand small (as is alleged to be the case here) then the hypothetical landlords will compete for the opportunity of making these lettings and the tenant may be able to secure the hereditament at a much lower rent which will allow him a large margin of profit. The rent will depend upon the 'higgling' of the market: *Talaroch Mining Co. v. St. Asaph Union* (2), per Blackburn J., at p. 486; *Mersey Docks v. Liverpool* (3), per Blackburn J., at pp. 96, 97; *R. v. London and North Western Railway Co.* (4), per Blackburn J., at p. 144. Thus the relative abundance of greenstone is an element to be taken into consideration for there will be many hypothetical landlords in competition with each other. But before other sources of supply are taken into consideration the relative situations and ease of working must also be examined. A supply on the edge of the Wicklow Mountains would probably be less easy to approach by road and less central for distribution than that at Carrick. A supply on a flat site would be more expensive to work than this deposit which lies in a low hill into which a quarry can easily be driven. The relative advantages of Carrick over what I may call 'marginal' sites (on the analogy of 'marginal lands') would naturally be reflected in a differential rent."

23. A tax has certain specific characteristics. It is involuntary; it may increase or decrease; it may be abolished, or it may be imposed, at the wish of the legislature; and it is inescapable once the conditions for taxation are fulfilled. Fundamentally, however, any tax fulfils in law the characteristic that is similar to the position of a local authority in law: no tax can be levied, and no other revenue charge can be made pursuant to an enactment, unless the nature of the tax, its rate and the circumstances under which it applies are defined by law. Here, in contrast, the division of the toll proceeds is pursuant to an agreement entered into following on negotiations.

24. I do not regard the formulation in the English Act whereby "all usual rates and taxes" are to be excluded as having a bearing on this matter in these specific circumstances. Rather, 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 RG Roots Q.C. et al, *Ryde on Rating and the Council Tax*, Issue 44 (London Butterworths, 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 the special Acts the right to run, free of toll, over lines belonging to the dock company: it was held that, in rating the dock company, the statutory prohibition against charging tolls must be taken into account. Again, where rateable value was calculated from the profits made in an undertaking and a claim of excess profits 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]."

25. It follows that I must advise the Valuation Tribunal that its approach to this matter, in treating the division of tolls as being a tax or charge that was payable by or under an enactment, was wrong in law.

The Rates Reduction Factor

26. Valuations orders are first made by the Valuation Commissioner under s. 19 of the Valuation Act 2001. A revision to the valuation list may be made, under s. 28(4) of the Act, if a material change of circumstances has occurred, since a valuation was last carried out. The valuation must be reduced to the 1988 level and must conform to what is called the tone of the list, whereby properties within an area can be seen to have been valued on a similar basis.

27. For the purposes of these valuations the Commissioner used the Consumer Price Index. On behalf of both appellants it was argued that the Consumer Price Index was not a property index and internal precedent had shown that it had been rejected by the Valuation Office when dealing with global valuations. It was submitted that the correct method that should be used by the Commissioner of Valuation was that which had been utilised in consequence of an investigation in determining values for a number of telecommunications companies, including BGE, O2, BT, Meteor and Vodafone. In those instances the respondent discarded the Consumer Price Index. According to the evidence presented before the Valuation Tribunal, some 5,000 properties relevant to the hereditaments there in question were analysed and a factor of 0.2664% was found to be correct in reducing the 2004 net annual value to the 1988 level in order to conform with the tone of the list.

28. This approach to the rates reduction factor was disputed by the notice parties in this case. They pointed out that in the entirety of Dublin, both city and county, including the new functional county council areas of Fingal and Dún Laoghaire-Rathdown, the rate used was 0.63%. In the case of Louth and Meath the rates reduction factor was set at 0.5%. In terms of other rates prevailing in

any other part of the country, my understanding from counsel is that the Louth and Meath figures generally prevail save in Ennis, Co. Clare where the rates reduction factor is set at 0.4%.

29. It should be remembered that utilities are valued pursuant to s. 53 of the Valuation Act 2001, which authorises the Minister to require the Commissioner to carry out a valuation of particular properties which are occupied by specific public utility undertakings resulting in a global valuation. Under s. 58 of the Act, an order under s. 53(8) may be adjusted to make it relative to the value of other properties appearing on the relevant list. Here, the operative section of the Act is s. 49. This reads:-

> "(1) If the value of a relevant property (*in subsection (2)* referred to as the 'first-mentioned property') falls to be determined for the purpose of *section 28 (4)*, (or of an appeal from a decision under that section) that determination shall be made by reference to the values, as appearing on the valuation list relating to the same rating authority area as that property is situate in, of other properties comparable to that property.
>
> (2) For the purposes of *subsection (1)*, if there are no properties comparable to the first-mentioned property situated in the same rating authority area as it is situated in then-
>
> (a) in case a valuation list is in force in relation to that area, the determination referred to in *subsection (1)* in respect of the first-mentioned property shall be made by the means specified in *section 48 (1)*, but the amount estimated by those means to be the property's net annual value shall, in so far as is reasonably practicable, be adjusted so that the amount determined to be the property's value is the amount that would have been determined to be its value if the determination had been made by reference to the date specified in the relevant valuation order for the purposes of *section 20*,
>
> (b) in case an existing valuation list is in force in relation to that area, the determination referred to in *subsection (1)* in respect of the first-mentioned property shall be made by the means specified in *section 48 (1)* and by reference to the net annual values of properties (as determined under the repealed enactments) on 1 November 1988, but the amount estimated by those means to be the property's net annual value shall, in so far as it is reasonably practicable, be adjusted so that the amount determined to be the property's value is the amount that would have been determined to be its value if the determination had been made immediately before the commencement of this Act.

30. It is clear from the text of s. 49(2)(b) that where there is an existing valuation list then the Commissioner is obliged to look at the rates reduction factor which has historically been in place at that time. I do not see that there is any scope for a new factor being introduced into this case. The Valuation Tribunal used the Consumer Price Index. Where one is looking at an income stream, as in this case, and not at a property value, it seems to be peculiarly appropriate. In the Celtic Roads case the Valuation Tribunal concluded that the rates reduction factor contended for at 0.2664% was inappropriate and found that the rates reduction factor should be that prevailing in Louth, namely 0.5%. When dealing with this issue in the West-Link appeal, the Valuation Tribunal held as follows:-

> "On this issue the Tribunal determined that Mr. Aylward's methodology was correct. The figure of 0.2664% tendered by Mr. Killeen on behalf of the appellant was a figure arrived at by the Valuation Office acting under particular provisions of the Valuation Act 2001, dealing with the valuation of statutory undertakings. The subject property, however, fell to be valued in accordance with ss. 48 and 49 of the Act of 2001, and in the circumstances, in the Tribunal's opinion it would be unwise and possibly unfair to other ratepayers to introduce a rate reduction factor other than the factor of 0.63% used uniformly in Fingal and South County Dublin rating authority areas."

31. It seems to me that the doctrine of curial deference, whereby the High Court on judicial review is reluctant to interfere with the decisions of specialist tribunals, is expressly limited to the questions of fact which are within their area of expertise. It does not concern pure questions of law. Neither is it to be used as a means of avoiding striking down a decision which is *ultra vires* or which flies in the face of fundamental reason and common sense. It seems to me that the approach of Barr J. in his judgment in *Tennyson v. Corporation of Dún Laoghaire* [1991] 2 I.R. 527 at p. 534, correctly encapsulates this principle:-

> "The Oireachtas has provided in the planning code a forum for the adjudication of appeals from decisions of planning authorities within the first category i.e., those relating to planning matters *per se*. Such appeals are heard and determined by An Bord Pleanála which is a tribunal having the benefit of special expertise in that area. The court is not an appropriate body to adjudicate on such matters and in my view it ought not to interfere in disputes relating to purely planning matters. However, where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of a development plan in the light of relevant statutory provisions and the primary objective of the document, then these are matters over which the court has exclusive jurisdiction. An Bord Pleanála has no authority to resolve disputes on matters of law."

32. This appeal by case stated constitutes one of the rare instances where the High Court is being asked to revise a decision made on evidence in relation to a specialist matter by a specialist tribunal with an expertise relating to the facts before it. It is different to the pure question of law concerning the interpretation of s. 48 of the Valuation Act 2001. No basis has been put before the court upon which it could interfere with the decision as to the rates reduction factor arrived at in respect of both appellants.

Occupation

33. Under its contract with the National Roads Authority, Celtic Roads is obliged to maintain the entirety of the motorway amounting to a stretch of 54.7km of road. This must be subject to such maintenance as keeps it in good condition and it must be such, towards the end of the contract period, as to amount to an investment which will provide a satisfactory residual life when the entire stretch of motorway is handed back to the State at the end of the thirty year period. I note that as of the relevant valuation date only 43.7km of the roadway were open to the public. The system of tolls, however, only arises in relation to the stretch of the M1 motorway from Gormanstown, Co. Meath to Monsterboice, Co. Louth. This is a distance of 21.74km. On this stretch of roadway, on having entered it, a vehicle cannot leave, whether it is going north or south, without passing through the toll plaza and therefore paying the appropriate toll.

34. It is contended, arising from the provisions of s. 48(3), that the net annual value requires that the Valuation Tribunal should have factored in that the cost of repair that would be necessary to maintain the property as this would be borne by the tenant. The Valuation Tribunal dealt with the matter in the following way:-

> "The nature of the arrangement between the NRA and the appellant is such that the tolls during the concession period

are set at levels which reflect the economic benefits and risks to both parties including the ongoing responsibility of the appellant to maintain and operate 54.7km of roadway to stipulated standards. In this situation, the Tribunal considered that it would be fair to say that the base tolls could have been set at lower levels had the appellant been obliged merely to maintain a length of 21.74km only."

35. In Guy RG Roots Q.C. et al, *Ryde on Rating and the Council Tax*, Issue 44 (London Butterworths, April 2008,) the following is stated at para. E[189]:-

> "The definition of 'rateable value' requires the assumption that the hypothetical tenant bears the costs of repairs and insurance and the other expenses necessary to maintain the hereditament in a state to command the rent. Where, as in the ordinary form of lease for a term of years, the tenant undertakes the cost of repairs and insurance, no deduction under either of these heads for expenses borne by the tenant must be made from the actual rent if it is proposed to estimate the rateable value by reference to that rent. The tenant must be assumed to have taken into account the liability to repair and insure in fixing the rent, and to have agreed to pay a lower rent than he would have paid if the landlord had undertaken the liability. The obligation to repair in the statutory definitions includes internal decoration. Under the General Rate 1967, it was held that the obligation to repair included the obligation to put the hereditament into repair where necessary, and that accordingly ordinary lack of repair had to be disregarded for valuation purposes, although serious defects could, in certain circumstances, be taken into account."

36. I also feel much influenced by the same author's treatment of other relevant precedents. In that regard it is apposite to quote the following paragraphs, which occur at paras. C[171] and C[172] to [182]:-

> " In certain circumstances, the heridatament may be more extensive than the area actually in use at the relevant time. In *R v. St. Mary the Less, Durham Inhabitants* [(1791) 4 Term Rep 477] and in *R v. Aberystwith Inhabitants* [(1808) 10 East 354], attempts were made to escape from being rated for part of a house by shutting up that part. In both cases, the court held that the person rated was, notwithstanding the subdivision, rateable for the whole house. At the time when those cases were decided, the courts were far less willing than they are at the present day to recognise the existence of two distinct occupations, and two separate rateable hereditaments under one roof; and it was considered that structural severance was essential to the existence of distinct occupations, but this doctrine is now exploded; [see *Allchurch v. Hendon Union Assessment Committee* [1891] 2 QB 436 at 441]. The prevalence in modern times of flats, apartments and other subdivisions of a building under one roof would modify the view of the law which would not be taken if dwellings were still rateable.

At paras. C[172] to [182] it was further stated that:-

> "Decisions to the effect that a hereditament may be more extensive than the area actually used are not confined to dwellings. In *R v. Heaton* [(1856) 26 LTOS 200] land was held rateable one half of which was laid down in grass and the remainder left out of cultivation. In *Consett Overseers v. Durham County Council* [(1922) 128 LT 310], it was decided that a blast-furnace plant, forming one industrial undertaking, and consisting of eight furnaces with the land, railway sidings, and other appurtenances necessary for its working, ought to be rated as a single hereditament, although it was a normal condition of the working of such a plant that some of the furnaces should at any given time be out of use for a substantial period, owing to the necessity for relining them. In *Moffatt (Valuation Officer) v. Venus Packaging Ltd* [(1977) 20 RRC 335], premises which were formerly used as a whole for manufacturing purposes and entered in the valuation list as one hereditament, were partially redeveloped. The manufacturing was moved into the new part, and the old part left unused. The two parts were separated by a wall with one interconnecting door. The Lands Tribunal held that the premises should be entered in the list as two hereditaments."

37. I find it very difficult to come to the conclusion that as there is a necessity to maintain the whole of the relevant property, only the portion of it which offers the certainty of generating a toll should be subject to the statutory allowance in respect of maintenance. As to what is, and what is not, "the property in that State" for the purpose of s. 48 of the Valuation Act 2001 is both a question of fact and a question of law. No argument has been put before me that convinces me that the Valuation Tribunal is incorrect on this last point.