Appeal No. VA14/5/959

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Keith Kirwan **APPELLANT**

And

Commissioner of Valuation **RESPONDENT**

In Relation to the Issue of Quantum of Valuation in Respect of:

Property No. 1945585, Hospitality, at Kirwans Kilbarrymeaden, Kill, County Waterford.

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 8TH DAY OF NOVEMBER, 2016

BEFORE:

Stephen J. Byrne - BL	**Deputy Chairperson**
Pat Riney – FSCSI, FRICS, FIAVI	**Member**
Rory Hanniffy – BL	**Member**

By Notice of Appeal received on the 4th day of September, 2014 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a net annual value of €20,400 on the above described relevant property on the grounds as set out in the Notice of Appeal as follows:

"Estimated NAV is excessive and inequitable. Inequitable to value the property 370% and 232% more than other two pubs in the area based on occupier supplying his trading figures. Commissioner is placing a value of 3x the net effective rent on the kitchen. The revision officer at appeal has attempted to make adjustments to the turnover for the fact that the pub is overtrading but these allowances are insufficient. The operator's goodwill would be non-transferable to the hypothetical tenant."

The Tribunal, having examined the particulars of the property the subject of this appeal; having confirmed its valuation history; having examined and considered the written evidence and having heard the oral evidence on the 23rd day of August, 2016 adduced before us by Mr Eamonn Halpin on behalf of the Appellant, who contended for a net annual value of €9500, and Mr Liam Hazel on behalf of the Respondent to the appeal,

DETERMINES

The subject property is a single storey ground floor licensed premises located in the village of Kill in the County of Waterford. It is approximately 20 km South West of Waterford City. It is situated approximately 5km South of the N25 Lane Dungarvan to Waterford City Road. It lies on the R681 the Main Bunmahon to Waterford City Road which runs directly through the village.

The property comprises of a bar and lounge, an off-licence section, stores, kitchen and cold room. The total floor area of the property is 178.58 square metres. This is agreed. The property has an external beer garden measuring 30 square metres.

The property is held freehold by the Appellant.

Kill is what might be termed a small rural setting boasting approximately 281 inhabitants. The village has five commercial properties, three of the five are licensed premises.

In addition to the subject property, there is 'Dunphys' and 'McCormacks'. As stated, both are located in the same village as the Appellant.

As of the valuation date, McCormacks, whilst retaining its licence, was not, it seems, trading. Both the subject and Dunphys were trading. All three occupiers, it seems, furnished the Respondent with trading information. In the case of McCormacks, the information as furnished reflects the position on the ground. The trading information, in other words, evidences nil returns for this particular business.

The evidence establishes a relatively unique and mutually beneficially commercial arrangement between this Appellant and Jennie O'Brien.

Whilst there was a measure of mild controversy on the issue, the Tribunal accepts the evidence of Mr. Halpin that this Appellant, at a cost of in or about €25,000, installed and fitted a modern fully functioning kitchen.

As has been stated, there was moderate issue taken with this assertion in the course of the evidence. Mr. Halpin, in evidence, stated that the kitchen was, and to his knowledge, installed in or about 2010 and/or 2011.

Mr. Hazel, understandably and properly, made the point in cross-examination that such expenditure ought to have featured in the accounts as furnished and which, on the face of it, encompassed dates as given in evidence.

In so doing, Mr. Hazel underscores the importance of professional witnesses under Oath attesting to matters which are true and accurate. It is clear from consideration of the accounts as furnished that this, by any means significant, expenditure does not appear directly in the accounts as furnished for the year ended 31st December 2010 and the year ended 31st December 2011.

The Tribunal notes a figure for depreciation on fixtures, fitting and equipment for the year ended 31st December 2010 in the amount of €29,829. Whereas this does not equate precisely to the sum as offered in evidence by Mr. Halpin, it may be the case that this figure for depreciation is intended to reflect the fact that this particular amount had been expended in that particular year. In other words, it may well be the case that the kitchen was in fact installed and fitted at an earlier date than that given in evidence by Mr. Halpin. Mr. Hazel, to his credit, accepts that this is possible. It may well be, and as the Tribunal has pointed out, that the figure for depreciation as reflected in the accounts for the year ended 2010 is intended to allow for and/or incorporate this particular expenditure.

In addition, it strikes the Tribunal that this is not the kind of detail that Mr. Halpin and/or his client are likely to invent and/or fabricate, whether as to the fact that the kitchen was installed and/or to the cost of same.

Mr. Hazel did not, when questioning Mr. Halpin, take issue with the fact that the kitchen was installed. Further, he did not take direct issue with the evidence as offered by Mr. Halpin as to the cost of same.

On balance, therefore, the Tribunal accepts the evidence that this Appellant did in fact install and fit a kitchen at a cost of in or about €25,000. On balance, the Tribunal accepts that the kitchen was installed and fitted some time in or about 2009/2010.

Having expended such a significant sum on the kitchen, the Appellant was understandably going to do everything he could to ensure that his investment paid off. This ultimately led him into the commercial arms of Ms. O'Brien. As stated and as is clear from the uncontested evidence, this formed a somewhat unique arrangement wherein Ms. O'Brien holds the kitchen on a yearly licence. She pays monthly an agreed licence fee of €8,950 in consideration of which she has use of the kitchen. By agreement the annual licence fee includes rates, building insurance and repairs. It does not include electricity.

Ms. O'Brien takes any profits and/or suffers any losses attributable to the consumption or non-consumption of food on the premises. It is clear from the photographs of the internal of the subject property that the premises is designed by fit-out to accommodate what might (no discourtesy intended) be termed "bar food".

It is reasonably clear from the data as furnished by the Appellant and by Ms. O'Brien to the Respondent and which, in turn, was put in evidence before this Tribunal that the putting in place of this somewhat unique arrangement has worked reasonably well for both the Appellant and Ms. O'Brien.

The data as furnished suggests or indeed evidences relative if modestly successful co-joined enterprises. On the Appellant's case, the data which has been put in evidence, evidences a modest income and/or profit subject, it is assumed, to the appropriate measure of Income Tax.

It seems reasonable to conclude from the data as furnished and from the evidence as adduced and largely uncontested, that the Applicant has derived significant benefit in terms of value of the drink sold from having the guile or acumen to put in place the infrastructure and thereafter importantly the unique commercial arrangement with an individual who, from the evidence, time and again and consistently over a period of in or about four years, has produced food of sufficient quality and value to sustain a modest enterprise in difficult times economically and in a small rural village.

In addition to the food and the on-sales, the subject property boasts a relatively small (structurally) off-licence. The turnover figures for this particular enterprise, run as it is from a confined space which is no larger than the proverbial shoe-box, are frankly surprising. Given that the core client base is in or around at most 281 and given the relatively speaking rural location, the achieving of such a relatively significant level of off-sales must, and in the circumstances, be attributed to an appreciable degree to the individual guile and acumen of the operator, this Appellant.

Mr. Halpin, in advancing his appeal on behalf of the Appellant, argues strongly that the rate as struck is unfairly excessive. His argument is as simple as it is straight forward. Equally, it is compelling. Simply put, Mr. Halpin invites the Tribunal to look to the village of Kill. He invites the Tribunal to consider licensed premises in the village. He invites the Tribunal to consider the rate as struck for the other two public houses and to consider by comparison the rate as struck for the subject property.

Mr. Halpin makes the case, which case is prima facie, borne out by consideration of the respective rates as struck, that the subject is required to pay rates at a level which is significantly and disproportionately in excess of the properties which present as immediately and directly comparable in the sense that those properties are, broadly speaking, comparable to the subject in terms of (a) size; (b) location; (c) intended and/or permitted use; each property has the benefit of a licence. This, in summary, is the Appellant's case. The Appellant agitates through Mr. Halpin for parity of treatment with the occupiers of what might fairly be characterised as neighbouring properties. In broad terms, he is asking for a rate which is in line with those properties. In making this case and having regard in particular to the figure for rates which Mr. Halpin urges the Tribunal to accept as fair and reasonable, Mr. Halpin appears to accept that pound for pound, the subject property presents as "*colloquially*" the "*best pub*" in the village.

In addition to drawing support from the village of Kill, Mr. Halpin draws the Tribunal's attention to what he maintains are comparable properties in (on his account) comparable locations. By reference to the rates as struck for these properties, Mr. Halpin makes the case that the rates as struck for the subject are significantly and (he maintains) disproportionately in excess of the rates as struck for those properties which he puts in evidence as comparable. Indeed it is prima facie clear from consideration of the respective rates as struck that this is, in fact, the case.

Mr. Hazel, on behalf of the Respondent, takes issue. He asserts that the rate as struck is fair and reasonable. He argues that the Respondent is, by law, required to strike a rate which is equitable and uniform and constitutes individual ratepayer's 'fair share' of the overall tax burden. This is, of course, and as a statement of principle, correct.

The Tribunal is cognisant of this and takes it into consideration when determining the merits (or otherwise) of the case which has been advanced on behalf of the Appellant. In order to carry out its statutory duty fairly and impartially, the Tribunal in a case such as this where, on the face of it, a straight forward, relatively simple and relatively compelling case is advanced, the Tribunal is of the view that it is incumbent upon it to consider and inquire into the rate which has been struck in this particular case.

The approach to valuation adopted by the Respondent is, it seems, based primarily upon what is termed "fair maintainable trade". In passing, the Tribunal notes that this is a method of valuation which has, broadly speaking, become accepted by and acceptable to both the Commissioner and ratepayers (their professional advisers).

Briefly, it is a method which has been used when determining the fair and equitable rate for licensed premises and, as a variant, licensed premises offering food for consumption as a significant adjunct. Evidently, in order to apply this particular method, the valuer must have before him or her data furnished to him or her by the owner and/or operator of the undertaking involved. This is done on a voluntary basis. Significantly, as evidenced in this appeal, the owner and/or operator furnishes accounts for a number of years, which said accounts give a flavour of the turnover of the business for those years. In some instances and where relevant, the figures as furnished for turnover are broken down into individual constituent parts, notably:

- on-sale drink
- food
- off-licence

The valuer, having been furnished with this information (evidence), sets about considering same and so as to determine a rate which is uniform and equitable and in addition meets the requirements as expressly provided for under Section 48(1) of the Valuation Act, 2001.

From the information as furnished, the valuer, it seems, arrives at what has been referred to in evidence as "fair maintainable trade" (FMT). It is clear from the evidence in this particular case that FMT is not and is not intended to equate with the actual turnover figures as furnished by the ratepayer to the Commissioner, whether those figures are taken in respect of a particular financial year or whether, as an average of the financial years as furnished. Insofar as the Tribunal can determine, FMT is intended to present as the valuer's fair and best estimate of what the property is likely to achieve (turnover-wise) and in a typical year and assuming that the hypothetical tenant is interested in the property and naturally enough wants to have some idea of the level of business he or she is likely to achieve and should he or she decide to acquire same.

Having arrived at his or her estimate of FMT, the valuer then, it seems, sets about calculating the net annual value. This, it seems, involves the valuer applying a percentage of FMT. The percentage to be applied varies, depending on whether one is considering drink and in turn depends on whether one is considering on-sales and/or off-sales and in turn depends on whether one is considering food. Regarding on-sales drink, the percentage to be applied is contingent on the level of FMT assessed. Bands are applied. The higher the FMT, the greater the percentage that is applied.

The apparently agreed practice and/or convention among valuers is that net annual value is arrived at by application of a percentage of FMT. The percentage to be applied in respect of drink on-sales in this particular case appears to be 8% and having regard to the figure arrived at for FMT. The agreed percentage to be applied to food appears to be, subject to the apparently practice and/or convention, that the first €100,000 of food (FMT) is excluded with the agreed percentage, that is to say 6% being applied to the balance. As to the percentage to be applied to the off-licence FMT, there is, in this case, a measure of disagreement between the opposing experts. Mr. Halpin, on behalf of the Appellant, suggests the percentage which should be applied is 3% of FMT. Mr. Hazel, on the other hand, argues in favour of a percentage of 5%. For the moment, the Tribunal notes that the parties appear and in principle to agree that net annual value for the off-licence component of licensed premises can be arrived at by applying a percentage to the FMT.

Mr. Hazel purports to have carried out this exercise or approach to valuation in this particular case and is satisfied that he has done so fairly, uniformly and equitably. From the figures as furnished and more particularly the figures as furnished in respect of turnover, the Respondent has arrived at the following FMT:

On-sales: €150,000
Off-sales: € 50,000
Food (FMT): €200,000 - less allowance of €100,000 giving €100,000.

The total FMT figure as arrived at by the Respondent is a sum of €400,000. This, and having regard to the turnover figures as furnished for the relevant year represents, on the Respondent's case, an appropriate and fair figure giving the Appellant all or any credit due for what has been referred to in evidence as individual features of the transaction.

An issue which arose in the course of "earlier proceedings" (see Appendix) concerned McCormacks pub. Mr. Halpin, in the course of these earlier proceedings, queried why this particular property had such a low value vis à vis the subject and mindful of the fact that it had been put to comparable use and was in the same small location (Kill). Allied to this, Mr. Halpin asked why and in such circumstances this property was not used by and/or indeed referred to by the Respondent, by way of comparison.

This struck the Tribunal as a reasonable line of inquiry and in the particular circumstances. The Tribunal motivated by this line of inquiry and on its own motion and having secured the consent of the Respondent, sought details from the Respondent concerning, in particular, the approach taken to the rate as struck for McCormacks.

The Respondent duly complied with this request. The pertinent documentation has been put in evidence by Mr. Hazel and appears by way of Appendix to Mr. Hazel's précis of evidence. For ease of reference, this documentation has been appended to this Decision.

Frankly, and this is not intended in any way to discredit Mr. Hazel, who the Tribunal accepts is doing his best, the information as furnished offers no meaningful assistance as to how the Respondent came to decide that a licensed premises in the same small village as the subject has a rate which is appreciably and significantly less than that considered fair and reasonable for this Appellant.

From the limited information supplied, the Tribunal notes that this particular licensed premises, McCormacks, has not been trading and as a consequence, the valuer concerned did not when striking the Rateable Valuation, have before him any figures in respect of turnover.

It appears to be accepted that McCormacks was not, at the relevant time, equipped to supply food. In reality therefore, the property was, it seems, operating solely as a licensed premises and fell accordingly to be valued for rates on that basis.

It appears to be the case that the rate as struck was arrived at by application of the apparently accepted practice of FMT. As earlier noted, FMT when applied, requires and in the normal course of things, consideration of (inter alia) turnover and by reference to data as furnished by or on behalf of the operator/ratepayer.

It seems however that where, as in McCormacks, information on turnover is not supplied, the Respondent estimates FMT by, it seems, applying some kind of average drawn from the figures as furnished by what might be termed compliant ratepayers. In other words, those ratepayers who go to the time, trouble and expense of preparing detailed sets of accounts and furnishing same to the Respondent.

If one confines oneself momentarily to the rate-paying microcosm as represented by the village of Kill, this apparently two-tiered application of FMT outwardly gives rise to something of an anomaly:

- Two co-existing licensed premises have been subjected to materially different applications of what is or purported to be a unified and accepted valuation method, that of FMT.

- The subject property has been valued by reference to FMT based, it seems, on turnover figures as supplied by the Appellant.

- McCormacks, on the other hand, has been valued by reference to FMT based, it seems on an average drawn from a general pool of information supplied.

This outwardly, at least, has given rise to a situation where, as emphasised by Mr. Halpin, the compliant ratepayer ends up faced with being assessed at a significantly and appreciably higher rate than his neighbouring non-compliant ratepayer.

This, and on the face of it, is anomalous. Equity, uniformity and fairness require the individual who seeks to impose such a manifestly irrational scheme to offer some coherent and rational explanation for same.

The evidently disproportionate disparity of treatment as between neighbouring ratepayers occupying broadly comparable properties is of concern. It requires careful consideration. There may, of course, be some rational and coherent explanation, which is consistent with a proper application of the relevant statutory provisions and which and in the circumstances of this particular case has this particular ratepayer assessed with an NAV of €20,400 whilst broadly comparable properties, a stones' throw away are paying rates at a significant and appreciably lower amount, notably Dunphys NAV at €8,800 and McCormacks NAV at €5,000.

The Tribunal has been put on inquiry and has in turn put the Respondent on inquiry.

Simply put, what is it about this particular property that merits the evidently disproportionate disparity of treatment?

Is it location? It cannot be. As noted and as evidenced, all three public houses are located in the same village (Kill).

Is it size? Mr. Halpin makes the case that Dunphys is similar in size to the Appellant. He is not challenged on this. McCormacks is, it seems, smaller in size.

From the photographs as furnished, each of the properties is nondescript. McCormacks is outwardly mundane. The subject and Dunphys make efforts at external colour. Dunphys boasts a thatched roof which may lend it a measure of what might be termed 'character'.

Side by side, each of the properties presents and each in its own way typifies licensed premises in rural modest populated settings.

Is it the use to which the properties are put?

Each property has the 'benefit' of a publican 7-day on-licence. McCormacks, whilst it is not trading, has retained its licence. Its current use of interest to the hypothetical tenant is of premises which is equipped to and authorised to sell drinks for consumption on the premises with, one assumes, modest over-the-counter off-sales.

Dunphys is trading. It appears from the estimated FMT, drawn it is assumed, from the turnover figures as furnished, to the Respondent that Dunphys is not enjoying the same level of trade as the subject.

The standout distinguishing features of the subject in terms of use are the food trade and the off-licence. These are features which the Respondent, when assessing the appropriate and fair level of rates, is entitled to consider and having considered same, is in principle entitled to "mark up", as it were.

In reality, these are the only features of this particular property which mark it out for distinction and which might fairly be viewed as warranting the application of a rate higher than that deemed applicable to two proximate properties having comparable use.

The parties have in evidence referred to a "stand back and look" approach to valuation. The opposing experts appear to agree that it is a practise which can and should form part of the "process" involved in assessing the value for rates purposes.

Insofar as the Tribunal can determine, this approach requires the valuer who has arrived at a figure which he or she regards as fair and/or reasonable in principle to take a step back and consider pertinent details and/or circumstances which might, and in the individual case, warrant some adjustment.

On occasion, a valuer will no doubt stand back, look and come away happy that the figure in mind does not require any material adjustment. On other occasions, the valuer will stand back and look and in this period of quiet and informed contemplation conclude that some adjustment is warranted.

The Tribunal has been informed on Oath by Mr. Hazel that the Respondent has and in this particular case and in the course of the valuation process "stood back" and having taken the opportunity to do so "looked" at the situation and having looked at the circumstances concluded that an adjustment was warranted.

The Tribunal's understanding as gleaned from the less than clear evidence on this particular issue is that the "stand back and look" informed Mr. Hazel's decision to reduce the NAV from €24,000 to the sum as ultimately assessed to a NAV of in the amount of €20,400.

Further, the Tribunal's understanding as gleaned from the less than clear evidence on this particular issue is that the adjustments from the turnover figures as supplied to FMT which the Tribunal accepts is an adjustment which, in a sense, favours the Applicant, was an adjustment inspired by and/or informed by an engagement by the valuer concerned in the "stand back and look" approach.

It is not at all clear to the Tribunal what the Respondent is looking for or when the Respondent stands back with a view to looking. The Tribunal nevertheless accepts that this exercise presented as a bona fide effort on the part of the Respondent to give the Appellant the appropriate reduction and so as to take account of features of the property and/or use which ought not to be weighed against the ratepayer when assessing the level of rates which he is required to pay.

The Tribunal returns to what is, in the Tribunal's view, a very pertinent question in the particular circumstances of this appeal – what is it about this particular property that justifies the application of a net annual value which is significantly in excess of the net annual value which has been set for Dunphys and for McCormacks?

Having regard to the evidence as put before the Tribunal, the answer to this question lies, it seems, not so much in the physical attributes of the property or its location, but with significant emphasis on the use to which this property has been put, notably the provision of food and the provision of a discrete off-licence.

It is accepted, and indeed there appears to be little or no issue on this, that these distinguishing attributes of the subject property merit some difference in treatment as between the subject and the other properties referred to, namely Dunphys and McCormacks.

In essence, it is the scale of the difference in treatment which is starkly in issue. Mr. Halpin maintains that these features (the provision of food/off-licence) do not in and of themselves and in the circumstances of this particular case justify disparity of treatment of the magnitude which has been applied in this case.

In so doing, Mr. Halpin has and on his client's behalf and as he is entitled to do, put it up to the Respondent. Simply put, he has asked the Respondent to put forward a simple coherent and rational explanation for this evident and significant disparity of treatment.

Having put it up to the Respondent, the Respondent has, and with respect, been found wanting. The reasons offered for the disparity of treatment, notably the fact that the subject property offers food and a discrete off-licence service, whilst justifying a measure of disparity of treatment between the Applicant and his neighbouring publicans, these features do not in and of themselves warrant, justify or rationalise the exceptional degree of disparity of treatment meted out to this Appellant and vis à vis his immediate comparators and/or competitors.

Mr. Halpin has argued and Mr. Hazel appears to accept that this Respondent, when assessing rates, must and as a matter of principal, exclude from consideration features of the property/use which are on balance attributable to what is referred to as "business acumen".

The rationale for this is readily understood. The individual whose business acumen pushes a business into healthy turnover and in turn into healthy profit drives himself and the business into extended arms of another branch of revenue, that is to say, the Collector General, with such turnover and/or profit scrutinised and with appropriate tax lawfully deducted and paid.

It would and in the circumstances be palpably unfair for such profit, driven as it is by business acumen and endeavour, to be taken into account on the one hand when assessing liability for Corporation and/or Income Tax and at the same time taken into account when striking the appropriate measure of rates to be borne by the same individual. Such collateral intrusion on an already stretched tax base demands extreme caution.

All of this illustrates the potential mischief of a too rigid application of the practice, when assessing rates for licensed premises by reference to FMT, informed as it is by evidence of turnover.

This is not for one moment to suggest that valuers should abandon a tool that has, it seems, served both ratepayer and respondent well and fairly over a period of time and has evolved into, it seems, a well-established part of the process of valuation employed for such properties.

It does however suggest that caution should be exercised and in extreme cases as identified herein to ensure that rigid adherence to assessment by reference to FMT as it is by turnover does not result in markedly disparate treatment to broadly comparable occupiers.

Further, it suggests that the valuer must, and as best he can and when assessing rates by reference to FMT, informed as it is by turnover, strike a balance between what might be termed:

Applicable/relevant turnover (on the one hand), i.e. turnover which is attributable to the property, its location, physical attributes and/or potential use, all of which are legitimately in play when considering the property and from the standpoint of the hypothetical tenant.

Non applicable turnover (on the other hand), i.e. turnover which might be fairly attributed to the business acumen of the operator and which will or ought and in the normal course of things fall to be assessed as income/profit liable to Personal and/or Corporation Tax.

In this particular case, the Tribunal accepts the broad thrust of the argument as advanced by Mr. Halpin. The level of turnover achieved by this particular Appellant must, and having regard to:

- Location
- Competition: Dunphys has a significantly smaller turnover; McCormacks has a nil turnover
- Physical attributes of the subject property which, as stated, are give or take broadly similar to the proximate comparable properties

be attributable to a significant degree to the business acumen of this Appellant; in having the foresight, endeavour and aversion to risk of putting in place at significant cost this kitchen and thereafter in cultivating and nourishing the relatively unique commercial arrangement with Ms. O'Brien which has and on the evidence developed into a modestly successful restaurant and which modest success has in turn sustained a moderately successful pub trade.

In broad terms, the Appellant makes the case that the rates applicable to this property ought to be more in line, so to speak, with that of the neighbouring comparable properties, namely Dunphys and McCormacks.

The Tribunal accepts this argument for reasons as set out herein and partly because the argument is relatively compelling, as supported by the evidence as adduced and partly because of the Respondent's failure to put forward any coherent or rational explanation for what has

been identified as an appreciable disparity of treatment as between the Appellant and the occupiers of proximate comparable properties.

Further and in broad terms, the Appellant makes the case for an adjustment downwards of the rate to be applied and so as to exclude from consideration aspects of the subject property and/or use which said aspects when properly viewed are attributable to the Appellant's business acumen.

Again and for reasons as set out herein, the Tribunal accepts the broad thrust of this argument as advanced on behalf of the Appellant. In fairness to the Respondent, he appears to accept and in principle that a measure of adjustment is required in the circumstances and to reflect those aspects of the property and/or use which are, when properly viewed, attributable to the Appellant's business acumen. Indeed, the decision of the Tribunal in the case of William and Carmel Hartley, Appellant and The Commissioner of Valuation, Respondent VA 14/5/724 when put before the Tribunal by Mr. Hazel appears to support the principle that in an appropriate case adjustment downwards can and should be made to allow in particular for aspects of the property or use which are and when properly viewed attributable to the business acumen of the individual operator.

Turning then from the general to the specific, it might be asked what measure and/or level of adjustment can and should be made and so as to properly, fairly, reasonably recalibrate the rate which this Appellant should pay achieving:

- Fairness to the individual ratepayer (this Appellant)
- Equity, uniformity and ultimately fairness as between all ratepayers in the relevant local authority area
- The statutory requirement of Section 48 of the Valuation Act, 2001 which requires the Tribunal when assessing and/or determining the appropriate measure of rates to have regard to the net annual value as defined being 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 certain prescribed assumption.

Mr. Halpin has argued that the correct appropriate net annual value is €9,500. He has and in evidence put forward three alternative approaches to valuation:

(i) Direct comparison
(ii) Estimate of weekly rent
(iii) Turnover/rental income

The net annual value as contended for by Mr. Halpin is, it seems, an average of the three discrete and alternative approaches.

There is no reasonable explanation advanced by Mr. Halpin as to why this particular and somewhat novel approach to estimation of net annual value can or should commend itself to the Tribunal.

Taking each of the alternatives in turn:

(i) **Direct comparison**

It is not clear to the Tribunal where this figure is drawn from. No real effort has been made to explain and by reference to the evidence as adduced how this figure is arrived at and why the Tribunal should have regard to it in assessing and determining net annual value.

(ii) **Weekly rent**

This approach is similarly afflicted. No real effort has been made to explain and by reference to the evidence as adduced how this figure is arrived at and why the Tribunal should lend weight to same when assessing and/or determining the net annual value.

(iii) **Turnover/rental income**

This is a hybrid, for want of a better word. It is informed in part by FMT. It seeks to depart from the orthodox approach to FMT.

The Tribunal's understanding is that FMT has and by agreement been used by the parties as what might be termed the method of choice in terms of assessing the net annual value of this particular property. As has been stated earlier, what is or what appears to be at issue between the parties is the value to be put on FMT in this particular case, such value to properly and fairly mark the reduction which ought to be allowed for the Appellant's business acumen and to bring the property in line with neighbouring properties.

As has been noted, the starting point on the journey to FMT in the case of a compliant ratepayer is consideration of the turnover figures as supplied encompassing the period for which the rate on revaluation is struck.

This particular property caters for:

- Drink
- Food
- Off-licence

The turnover figures for the relevant period have, it seems, been furnished for each of these individual uses.

Mr. Hazel in evidence (unchallenged) and from figures as supplied by the Appellant and as appears from his précis at page 11, evidences drink on-sales (turnover) as being for the year 2011 €193,930; off-sales turnover €67,422 and in respect of food €190,553. It is assumed that the accounts for a number of years are furnished and so that trends can be discerned, whether they be upwards and/or downwards, and so as to assist when making the adjustment from turnover to FMT. This being so, the accounts appear to show, insofar as drink sales are

concerned, a modest, if sustainable reduction in turnover from the year 2010 onwards. Insofar as food is concerned, this has only been operational for the years 2011 and 2012 and appear to evidence a modest increase in turnover over that period.

It seems reasonable and when calculating FMT by reference to turnover, to consider, in the first instance, the turnover figures as furnished by the ratepayer (a) in respect of the relevant period and in respect of earlier and later periods so as to give an indication of trend; (b) in respect of each of the discrete uses which the evidence clearly establishes this property enjoys.

As has been stated, Mr. Halpin appears to argue that some kind of hybrid approach is warranted in the circumstances of this particular case. More particularly, he appears to argue that the food turnover should fall out of the equation entirely and that a discrete approach to valuation applies, notably that discrete value be put on the kitchen portion of the premises and by inference, the food and by reference to the licence fee as paid with an appropriate adjustment made for the kitchen fittings and for insurance and repairs and indeed, rates. This particular line of argument does not, with respect and in the circumstances of this appeal, make any sense. If Mr. Halpin or his client intended to take serious and principled issue with the Respondent's inclusion of food when arriving at the overall assessment, the client and/or Mr. Halpin should not have furnished the Respondent with figures which are clearly intended to inform the Respondent of the level and/or measure of turnover of food enjoyed by this particular property.

In furnishing this data to the Respondent, the Appellant informs the Respondent, and in turn the Tribunal, that he agrees in principle to the Respondent arriving at FMT by reference, inter alia, to food turnover.

What other possible and reasonable explanation is there for the furnishing by this Appellant to the Respondent of this information. Clearly the Appellant deemed it relevant at the time. Why else would he furnish such sensitive and otherwise confidential information to this Respondent? Clearly, such data was intended by the Appellant to assist the Respondent with the assessment of rates in respect of the licensed premises and where, as evidenced, this particular licensed premises offers food as a significant feature of the operation of the property.

The Appellant cannot now and without good and satisfactory explanation, seek to distance himself from this material representation. No good and/or satisfactory explanation has been advanced.

Furthermore, the Appellant and Ms. O'Brien have, undoubtedly for their own reasons, come to a commercial arrangement. It is not for the Tribunal to look beyond or behind same. The Tribunal is however entitled to note that such a commercial arrangement has been made between two commercial concerns. Further the Tribunal is entitled to note that by agreement the Appellant has freely assumed legal responsibility for all or any applicable rates.

It necessarily follows from this commercial arrangement as voluntarily entered into by the Appellant that he accepts exclusive ownership of such liability for rates as may derive from the use of the property for the provision of food. This is a natural and inevitable consequence of

the licence agreement as entered into between the Appellant and Ms. O'Brien and the terms as contained therein as to who should assume responsibility for the payment of rates.

Further, the Tribunal is less than impressed by what has been termed the hybrid approach to valuation. Either the Appellant accepts that the FMT approach to valuation applies, or he does not. If he accepts that it applies, then this method, if it is to retain its integrity, must apply, warts and all to food and to drink. If the Appellant takes issue and in principle with the application of the FMT approach to valuation, he should, with respect, have indicated this plainly from the outset and have put forward an alternative and acceptable approach to valuation and one which complies with the statutory requirements of Section 48.

Accordingly, the Tribunal does not and in the circumstances accept the Appellant's argument that food falls from consideration to be replaced by this alternative formulation, put in evidence by Mr. Halpin.

As has been stated, fair and proper assessment in the circumstances of this particular case merits a significant reduction in the net annual value as arrived at by the Respondent and so as to take into consideration the business acumen of the Appellant and to bring the subject property in line with the parade of other properties in the immediate locality.

Whilst the broad thrust of the Appellant's case is well made and sustained, regrettably the case in support of the measure of quantum leaves a lot to be desired. It is not, however and thankfully, so terminally afflicted as to preclude the Tribunal from finding in favour of an otherwise meritorious Appellant. This, should it have come to pass, would and in the circumstances have been lamentable.

All of that said, the Tribunal has been put in the rather unhappy position of doing the best it can from the evidence as advanced and with a view to:

- Achieving fairness for this particular Appellant
- Ensuring fairness, equity and uniformity and so that the burden of commercial rates is distributed as equitably and as fairly as possible.
- Complying with the statutory requirements as laid down under Section 48 of the 2001 Act.

As stated, the Appellant is entitled to a reduction, and an appreciable reduction at that.

The Appellant is not, for reasons as stated, entitled to discount for the food component in the manner contended for by Mr. Halpin.

The Appellant is entitled to a reduction which fairly marks:

(a) The Appellant's undoubted business acumen in driving and sustaining a food and drink business in a locality which presents significant obstacles to same, as evidenced by the relative commercial torpidity of neighbouring comparable properties.

(b) The position of the subject property vis à vis licensed premises in the immediate locality and in equivalent and/or similar localities in County Waterford.

The Respondent attempts to stand over a FMT for drink on-sales at €150,000. For reasons as set out in this Determination, this is not and in the circumstances, sustainable. For the above reasons, the Tribunal accepts the figures put forward by the Appellant for this and is, in the circumstances, prepared to accept the Appellant's figures for FMT on sales. This marks, and in the Tribunal's view, the appropriate adjustment and in the circumstances.

The Tribunal notes that the parties are agreed on the percentage to be applied in the circumstances. This yields a net annual value for drink on-sales at €100,000 at 8% equalling €8,000.

Regarding food, the Tribunal determines that FMT is, and in the circumstances, the appropriate guide to assessment in this particular case.

It is not clear what, if any, discount has been applied by the Respondent and so as to allow for the matters referred to. As stated, a significant discount is warranted in the circumstances of this particular appeal. The Appellant has not meaningfully engaged with the Tribunal in coming to a determination of an equitable FMT in respect of food. The Tribunal is of the view that some element of food must be allowed for and where the property has been modified to cater for same and has a proven capability of meeting market demand for food and over a sustained period. This cannot be entirely attributable to business acumen. It is and/or must be attributable in part to the subject property, the locality, the absence of any immediate competition for this discrete and evidently relatively buoyant market.

In circumstances where the Appellant has not meaningfully engaged with the Tribunal on this discrete issue, the Tribunal feels constrained to adopt the figures for FMT (food) as put in evidence by the Respondent. This is a figure of €200,000. Applying the reasoning above, the Tribunal is of the view that a reduction in food from the €200,000 as argued by the Respondent to a sum in the amount of €140,000 is fair and reasonable and equitably accommodates the matters referred to.

To this sum of €140,000 the standard discount (which the Tribunal's view in and of itself constitutes a significant measure of exemption, albeit one that is intended to apply universally), the sum of €100,000 is applied, yielding a sum of €40,000. The agreed percentage of 6% is applied to same, giving a net annual value of €2,400 in respect of this particular component.

The Tribunal notes that the figure for off-sales FMT appears to be agreed at €50,000. The percentage to be applied is not, it seems, agreed. The Appellant maintains that 3% should apply. The Respondent argues that 5% has been applied across the board, as it were.

The Tribunal is of the opinion that some modest reduction should be allowed to take account of certain individual characteristics, notably:

Size. This is by any measure small. It measures 14.53 square feet. Mr. Halpin, in evidence, stated that it was small. Mr. Hazel did not really take issue with this.

Business Acumen. This Appellant evidently spotted a market for something other than an over the counter off-licence in this relatively rural setting. This cannot and should not however be overstated. It does not take a significant measure of business acumen to open an off-licence on site, as it were.

The Respondent's efforts to achieve uniformity as between ratepayers are to be encouraged. Accordingly, the Tribunal sees no basis upon which to accede to the Appellant's suggestion that a lower percentage should be applied in the circumstances of this case. As stated, no rational basis for this has been made.

The Tribunal will, and in the circumstances, mark the Appellant's entitlement to a reduction in the FMT in the circumstances from €50,000 to €40,000. The percentage to be applied is 5% of €40,000, giving a net annual value of €2,000.

In summary therefore, the Appellant is entitled to succeed for reasons as set out in this Determination. The appropriate reduction is as follows:

Drink on-sales NAV:	€8,000
Food NAV:	€2,400
Off-sales NAV:	€2,000
Total NAV:	**€12,400**

And the Tribunal so determines.

Appendix

Proceedings commenced before a division of the Tribunal comprising Stephen Byrne (Deputy Chair), Pat Riney, (Member) and Michael Lyng, (Member). Proceedings so commenced on the 30th day of July 2015. On that date there was a preliminary point raised by the Appellant concerning discovery of documents. The Tribunal heard Submissions in relation to same and having heard Submissions, determined that the Appellant was entitled to discovery of the documents sought. There is a Ruling to that effect which can be marked as Addendum A to this Appendix. (For reference, this Ruling appears at page 66 of the Respondent's précis of evidence). Having directed that the Appellant was entitled to discovery, the Tribunal adjourned the substantive hearing so as to allow the parties time to comply with and consider the said Ruling.

Having adjourned the substantive hearing, same came on for hearing and before the same division on the 7th day of April 2016. In the course of the hearing, an issue arose and concerning McCormacks Public House, property No. 1945578. On foot of this issue the Tribunal adjourned

the proceedings and having secured the agreement of the parties and in particular the Respondent, directed that the Tribunal and the Appellant be furnished with all information as to how the NAV of €5,200 was reached during revaluation of McCormacks pub.

Evidence having been heard, the appeal was adjourned and so as to allow the parties time to give effect to this particular Ruling.

In the interim, the Tribunal sought and as best it could to accommodate the parties by a resumption of the hearing prior to Mr. Lyng's term of office coming to an end. Dates were offered but were not, through any fault, acceptable to the parties. In the circumstances, Mr. Lyng's term of office came to an end prior to finalisation of the proceedings. The parties were invited to attend a hearing at which the Deputy Chair and Mr. Riney were present and with a view to seeing what could be done and in the circumstances outlined and mindful in particular of the fact that the division as originally constituted could not now hear the proceedings to finality. This hearing took place on the days of the 30th day of July, 2015 and the 7th day of April, 2016. The parties were represented at this particular hearing. The Tribunal comprising as it did Mr. Byrne and Mr. Riney, having heard Submissions from the parties, decided and in the particular circumstances of this case, that the appeal proceed afresh. The Tribunal asked the parties whether they had any preference or whether in particular they objected to or alternatively agreed to the two members who had presided over what might be termed the original proceedings participating in the fresh hearing. The parties, having considered the matter, were both of the view that it would, if possible, be preferable that the fresh hearing include Mr. Byrne and Mr. Riney. The Tribunal informed the parties that it would, and as best it could, accommodate the parties by having a hearing as soon as possible.

The proceedings were then adjourned and commenced afresh before the current division comprising Stephen Byrne, Pat Riney and Rory Hanniffy.