

Appeal No: VA17/5/098

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

**NA hACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015**

MICHAEL WATCHORN

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

In relation to the valuation of
Property No. 79313, Hospitality at 10 John Street Lower, Kilkenny, County Kilkenny

B E F O R E

John Stewart – FRICS, FSCSI

Deputy Chairperson

Barra McCabe – BL, MRICS, MSCSI

Member

Úna Ní Chatháin - BL

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 22ND DAY OF MARCH, 2021

1. THE APPEAL

1.1 By Notice of Appeal received on the 4th day of October 2017 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value ‘(the NAV)’ of the above relevant Property was fixed in the sum of €112,500.

1.2 The two grounds of appeal as set out in the Notice of Appeal are that the determination of the valuation of the Property is not a determination that accords with that required to be achieved by section 19 (5) of the Act because

(1) “The valuation of the subject property is excessive and inequitable. The property’s value as set by the Commissioner is not in line with its potential rental value.

(2). The occupiers have a very significant amount of personalised goodwill which should not be taxed, as evidenced by the valuations of other pubs in the street including PN 79377

(Shem's), PN79381 (Breathnach's), PN79415 (Egan's), PN 2202375 (The World's End), PN 79422 (Billy Byrne's), PN 79420 (Burke's), PN 79424 (O'Gormans)."

1.3 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €52,000.

2. REVALUATION HISTORY

2.1 On the 25th day of May 2017 a copy of a valuation certificate proposed to be issued under section 24(1) of the Valuation Act 2001 ("the Act") in relation to the Property was sent to the Appellant indicating a valuation of €112,500.

2.2 Being dissatisfied with the valuation proposed, representations were made to the valuation manager in relation to the valuation. Following consideration of those representations, the valuation manager did not consider it appropriate to provide for a lower valuation.

2.3 A Final Valuation Certificate issued on the 7th day of September 2017 stating a valuation of €112,500.

2.4 The date by reference to which the value of the property, the subject of this appeal, was determined is the 30th day of October 2015.

3. THE HEARING

3.1 The Appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 11th March 2020, having been adjourned from the 14th of May 2019 for the Respondent to adduce proof of service of a notice pursuant to section 45 of the Act in respect of the Property, the Respondent, in reliance upon section 34(3) of the Act as amended, having objected to the Appellant being permitted to rely upon certain trading information that he failed to supply to the Respondent pursuant to such notice. At the hearing, the Appellant appeared in person and was represented by Mr Eamonn Halpin BSc (Surveying), MSCSI, MRICS of Eamonn Halpin & Co Ltd and the Respondent was represented by Mr Robert D O'Neill BL and Mr Adrian Power-Kelly FRICS, FSCSI, ACI Arb gave evidence on behalf of the Valuation Office.

3.2 In accordance with the Rules of the Tribunal, the parties had exchanged their respective reports and précis of evidence prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief in addition to giving oral evidence.

4. ISSUES

4.1 A procedural issue was raised by the Respondent in reliance upon s. 34(3) of the Valuation Act 2001, as amended, being whether or not the Appellant should be permitted to rely on trading information from accounts prior to the valuation date to ground or support his appeal, due to the Appellant's alleged failure to comply with a notice served upon him pursuant to s. 45 of the Act in not supplying the said information.

4.2 The floor area of the property was not agreed. The Respondent contended that the Property had an overall floor area of 557 sq. m, including stores. The Appellant contended that the Property comprised 536 sq. m on the basis of accommodation consisting of under 200 sq. m divided between 3 bar areas, 33 sq. m of chill out space, 111 sq. m of a polythene covered rear yard, and 192 sq. m of storage

4.3 The quantum of the valuation of the subject Property.

5. RELEVANT STATUTORY PROVISIONS:

5.1 The net annual value of the Property has to be determined in accordance with the provisions of section 48 (1) of the Act which provides as follows:

“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.”

5.2 Section 48(3) of the Act as amended by section 27 of the Valuation (Amendment) Act 2015 provides for the factors to be taken into account in calculating the net annual value:

“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 be expected to let from year to year, on the assumption that the probable annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant.”

6. PROCEDURAL ISSUE

6.1 The Appellant sought to adduce business accounts as evidence in support of his appeal. The Respondent objected to the introduction of this evidence on the basis that specified trading information, including turnover, profit, and expenses for the years 2013, 2014, 2015 and 2016, was sought by notice dated 21 November 2016 under s. 45 of the Valuation Act and was not provided in response to the notice. In reply to this objection, the Appellant’s representative stated that no such notice was received by the Appellant. It was common case that the accounts and trading information were furnished to the Respondent in June 2018, several months after the issue of the valuation certificate on 17 September 2017.

6.2 Section 45(1) of the Act provides that:

“An officer of the Commissioner, or a person, acting on that person’s behalf, may serve a notice on—

- (a) the occupier of any property (whether relevant property or not),
- (b) an interest holder, or
- (c) such other person who, in the opinion of that officer or person so acting as aforesaid, has information in relation to such property,

requiring him or her to supply, within a period specified in the notice (being a period of not less than 28 days beginning on the date of the service of the notice), and in a manner specified in the notice, to the person who served it such information as is specified in the notice, being information that is necessary, in the opinion of that person, for the purpose of the performance by the foregoing officer, or another officer, of the Commissioner of his or her functions under this Act.”

6.3 Section 34(3) of the Act provides that:

“A person who fails to supply information specified in a notice served under *section 45(1)* prior to the issue of—

(a) the valuation certificate pursuant to *section 24* or *28*,

...

shall not be permitted to ground or support an appeal to the Tribunal by reference to information that the person has so failed to supply.”

6.4 Section 66(1) of the Act provides that:

“A certificate, notice or other document under this Act shall, subject to subsection (2), be addressed to the person concerned by name, and may be issued to, given to or, as the case may be, served on the person in one of the following ways:

(a) by delivering it to the person,

(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address,

(c) by sending it by post in a prepaid letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address,

(d) where the address at which the person ordinarily resides cannot be ascertained by reasonable inquiry and the certificate, notice or other document relates to land, by delivering it to some person over 16 years of age resident or employed on the land or by affixing it in a conspicuous position on or near the land, or

(e) by such other means as may be prescribed.”

6.5 The Respondent produced a copy of the s. 45 notice said to have been sent to the Appellant and furnished a redacted extract from the Respondent’s “activity log”, recording activity relating to the subject Property. This indicated that documentation under s. 45 had issued in respect of the subject Property on the 6th of December 2016. Mr. Power-Kelly in his evidence in chief explained that the Valuation Office “activity log” showed which occupiers of rateable properties were issued section 45 notices. He stated that s. 45 notices were sent out in bulk, and that reminders were issued stating that it was a statutory requirement to complete the questionnaire attached seeking extracts from business accounts and to return it. Mr Power-Kelly stated that he subsequently sought the accounts from Mr. Halpin.

6.6 The Appellant stated that the s. 45 notice produced by the Respondent to the Tribunal was addressed to Michael Watchorn, c/o Dylan's Bar, 5 John Street Lower, Kilkenny. The Appellant stated that there was no post box at 5 John Street Lower, Kilkenny and that no such correspondence was received there. He stated that there was no trading entity "Dylan's Bar". In cross-examination, the Appellant confirmed the name above the door of 5 John Street Lower is "Dylan's Whiskey Bar". When questioned about other correspondence from the Respondent, the Appellant stated that he may or may not have received it. When asked whether that was the case in respect of the s. 45 notice, the Appellant stated that he was suffering from health problems at the relevant time and may or may not have received the notice but that the address was incorrect. When asked to state whether or not he had received the s. 45 notice, the Appellant said that he did not remember.

6.7 The Respondent filed written submissions, submitting that the words of the Act were to be given their ordinary meaning and accordingly that the Appellant was not entitled to rely on information not supplied within the time limited in the s. 45 notice.

6.8 Mr O'Neill submitted orally that the evidence given by the Appellant was that the s. 45 notice "may have" been received and that Dylan's Whiskey Bar was at 5 John Street Lower. The Act was very clear that if a s. 45 notice was not replied to, the information not supplied could not be relied upon and therefore the Appellant should not be permitted to adduce evidence of turnover or the other information sought in the s. 45 notice in support of his appeal.

6.9 The Appellant filed written submissions submitting in essence that the Respondent had not adduced evidence of service of the s.45 notice nor established that the information requested was necessary. Mr Halpin submitted orally that he did not accept that the onus of proof in relation to the issue of service was on the Appellant. Mr Halpin asked that the actual trading accounts for the business be considered, specifically the substantial expenditure on music and entertainment.

6.10 The Respondent filed supplemental submissions in response to the Appellant's submissions, submitting that the onus of proof was on the Appellant at all times, and that the Respondent was not required to adduce evidence of reasons for service of a s. 45 notice.

6.11 It is to be observed that before a person is obliged to furnish information to the Respondent, a notice pursuant to section 45 of the Act must have been sent to that person in accordance with the requirements set out in section 66 of the Act.

6.12 If it is disputed or not admitted that a section 45 notice has been posted at all, then it is for the Respondent to satisfy the Tribunal on the balance of probability that it was. A certificate of posting from An Post is one way in which the fact of posting could be proved, but it is not the only way and the Respondent may choose to rely on other evidence. If it does so, it will be for the Tribunal to decide whether it is satisfied that the notice was posted and, if the Tribunal is so satisfied, it will be for the intended recipient to establish that it was not received.

6.13 Provided that it can be satisfied on the evidence that a section 45 notice requesting the Appellant to supply the information that he now seeks to rely upon on this appeal had been properly delivered or posted to the Appellant, the Respondent enjoys the benefit of the statutory presumption of service by reason that section 25 of the Interpretation Act 2005 provides:

“Where an enactment authorises or requires a document to be served by post, by using the word ‘serve’, ‘give’, ‘deliver’, ‘send’ or any other word or expression, the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

6.13 Accordingly, the Tribunal must examine what evidence has been adduced by the Respondent to demonstrate that service of a s. 45 notice was effected upon the Appellant in accordance with section 66. If the Respondent cannot prove that a notice was delivered or posted, the provisions of section 34(3) cannot come into play. If the Respondent can prove that a notice was delivered or posted, the notice is presumed to be received unless the contrary is proved by the Appellant.

6.14 The Respondent simply produced a copy of a section 45 notice presumably printed from a computer held record which is dated 21 November 2016 and records the Appellant’s name, gives his address as c/o Dylan’s Bar, 5 John Street Lower, Kilkenny, and the information required to be supplied, and also produced an Extract from a Valuation Office “Activity Log”.

Inferentially, the Respondent contended that the Tribunal can be satisfied from these records that a section 45 Notice was sent to the Appellant.

6.15 The Activity Log details fall well short of being sufficient evidence to prove, even to the civil standard, that a section 45 notice was actually sent to the Appellant in accordance with the provisions of section 66 of the Act. It indicates that “s. 45 documentation issued”, the name of an official is redacted, and a date “06/12/2016”. It does not record the mode of service. Even if the Respondent could show that a section 45 notice was intended to be sent to the Appellant, there is no evidence to show that any such Notice was actually sent or how it was sent. This is important in a case where the Respondent bears the onus of proving each and every fact necessary for the Tribunal to hold that an appellant should not be permitted to ground or support an appeal to the Tribunal by reference to information that the Appellant is alleged to have failed to supply to the Respondent.

6.16 The Tribunal acknowledges that in large organisations such as the Valuation Office, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a section 45 notice into an envelope (on a specific date), correctly addressed it to a given appellant’s address held on file and then sealed it in a postage pre-paid envelope before committing it to the tender care of An Post. That is why the Tribunal will admit evidence of a system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material. Mr Power-Kelly is not an employee of the Respondent and so is not a person who can give evidence of the system utilised by the Respondent to effect service of section 45 notices. As no such evidence was adduced in this case and no real evidence was given as to the date of service, the place of service, the manner of service, and no certificate of posting was produced, the Respondent has failed to prove that a section 45 notice was served on the Appellant in accordance with the requirements of section 66 of the Act. The Tribunal will therefore permit the Appellant to support his appeal by reference to the trading information.

7. APPELLANT’S CASE

7.1 Mr Halpin described the subject Property and gave evidence setting out the areas of each portion of the property, amounting to a total trading area of 341.84 sq. m and storage space of 192 sq. m. Mr Halpin submitted general commentary in relation to the prevailing property

market conditions and specifically the licensed pub market in Kilkenny City. He stated that the key driver of the business at the subject Property was the acumen of the operator and pointed out that it is the value of the building and not the business that is to be assessed. He argued that the Appellant spent €2,000 per week on entertainment and that there was no comparable expenditure on entertainment by any other pubs on John Street Lower, adding that if there was, such pubs would have comparable turnover. He stated that the subject Property was not a super pub and was not comparable to any of the super pubs in Kilkenny and the matter under consideration was the amount a hypothetical tenant would actually pay for this kind of a licensed premises, at this location in Kilkenny. He stated that super pubs were not comparable properties, and that the valuation of the subject Property was entirely out of line with the valuations of all comparable properties. Mr Halpin directed the Tribunal to page 11 of his précis wherein he had set out the principal questions which in his opinion had to be addressed:

1. Does the occupier's actual on-sale turnover represent FMT?
2. What is the appropriate percentage the hypothetical tenant would bid as rent on the FMT?
3. Does the figure arrived at by this method yield a fair rent or does a further final adjustment need to be made?

7.2 He confirmed that the subject property comprised three separate bar areas connected via a covered yard and that the premises included ancillary stores and toilet accommodation but did not have a kitchen or food preparation area. In advance of detailing comparable rental information, Mr Halpin criticised the fact that it was impossible to interpret the Respondent's valuations in the List by reason of the lack of 'Fair Maintainable Trade' (FMT) information contained therein. Mr Halpin noted that the Valuation List did not contain any information on John Street Lower. The FMT of licensed premises and therefore the FMT of comparable properties as assessed by the Commissioner, were at best an estimate based on the known information concerning the Commissioner's schematic and the NAV in the List. Mr. Halpin provided comparable information on pubs which were located on the same street as the subject Property, John Street, a schedule of which is included at Appendix A (N/A to public). He pointed out that the valuation of the subject Property was approximately three to four times the valuation of the other pubs on the John Street, excluding the last listed pub on the street, Comparable Property H, which, he argued, was a super pub and not comparable.

7.3 Mr. Halpin then undertook a review of rental comparisons, full details of which are contained at pages 15 to 23 of the Appellant's précis and which are identified at Appendix B hereto (N/A to public). He said that Rental Comparison 1, inferior in size but superior in location to the subject Property, illustrated the maximum open market rent agreed €42,000pa from November 2016 in an open market transaction in Kilkenny and that in the valuation of this property, no reason was given for disregarding the actual rent when applying an NAV of €58,600.

Rental Comparison 2 with an NAV of €99,000 was let on a related parties lease in 2017. It serves food and drink, is in a better location (on the High Street), is significantly larger than the subject Property with a ground floor bar and lounge of 500sq. m; stores 250 sq. m; kitchen 70sq. m; 1st floor kitchen 70sq. m; stores 150sq. m and basement office 50sq. m and has a much larger turnover, attributable in part to food sales. The subject Property does not serve food and yet the NAV of Rental Comparison 2 is almost 12% less than the subject Property.

Rental Comparison 3 has an NAV of €18,000 and a rent of €25,000pa from a 2-year lease dated July 2015. Mr. Halpin claimed that the Commissioner ignored the rental evidence of the third comparable when valuing the NAV and pointed out that the NAV of the subject Property was over six times the NAV of this comparable, ultimately arguing that although superior in location and larger in size, the subject Property could not be worth more than 2.25 times the actual rent of Rental Comparison 3. In fact, the valuation of the subject Property at €112,500 was 6.25times more than the NAV of Rental Comparison 3 and several times its actual rent.

Rental Comparison 4 has an NAV of €34,800 and a rent of €24,000pa from April 2013 on a four-year lease. Mr. Halpin assessed this comparable as the poorest, being located at a tertiary location at the back of the cathedral. He estimated that the subject Property was worth a maximum of 2.75 times this property in terms of actual rent but not more than that. The subject Property is assessed at several times the rent payable in respect of Rental Comparison 4 and at 3.23 times its NAV.

7.4 A review of 'Tone of the List' comparisons of other properties located on John Street, between 100m and 350m distant from the subject Property, was then undertaken by Mr. Halpin, full details of which are contained at pages 24 to 35 of the Appellant's précis and which are also identified at Appendix C (N/A to public). Mr. Halpin had previously analysed the said properties (see para. 7.2 and Appendix A, N/A to public). Mr. Halpin found that Comparable Property A, having a trading area of 242 sq. m and an NAV of €36,000, has similar characteristics and a similar potential for trade to the subject Property although the latter was

slightly superior in terms of location and frontage. Despite this, he stated that the Commissioner had estimated the NAV of the subject Property at more than 3 times higher.

Comparable Property B has a trading area of 335 sq. m over three levels and an NAV of €27,000. Mr. Halpin assessed it as inferior to the subject Property despite its size as over 50% of its trading area is not at ground floor level. Its location is slightly inferior also, but it has significant frontage on John Street. The NAV of the subject Property is more than 4 times that of Comparable Property B's NAV.

Comparable Property C has a trading area of 153 sq. m and an NAV of €28,000. It is smaller than the subject Property and in a slightly inferior location with significant frontage onto John Street. The NAV of the subject Property was approximately 4 times higher than Comparable Property C's NAV.

Mr. Halpin pointed out that while Comparable Property D, with an NAV of €28,000, is further up John Street and smaller than the subject Property (having a trading area of 106 sq. m), the subject property is not four times more valuable than this comparable, as suggested by their respective NAVs.

Comparable Property E has an NAV of €27,000 and is estimated by the Appellant to be of a similar size to Comparable Property D (approx. 100. sq m). Mr. Halpin reiterated that the subject Property is unlikely to be a multiple of four times the value of Comparable Property E, as indicated by their respective NAVs.

Comparable Property F is under appeal.

Comparable Property G has an NAV of €40,000 and is estimated by the Appellant to have a trading area of approximately 150 sq. m but is long and narrow with inferior frontage. Its NAV is higher than similar properties on John Street, but the subject Property's NAV is still 2.5 times the NAV of Comparable Property G.

Mr. Halpin described Comparable Property H, which had an NAV of €220,000 and was the property located closest to the subject Property, as a "super pub", with 5 bars and full food service, and consequently significantly more valuable than the subject Property.

An additional property, Comparable Property I, valued at €9,000 and located on Rose Inn Street, a superior location to the subject Property, was included by Mr. Halpin to illustrate the Appellant's belief that the Commissioner has placed an over reliance on the FMT method of valuation without standing back and considering other factors, not limited to but including comparable rental values. The subject Property's NAV is 12.5 times that of Comparable Property I.

7.5 The turnover figures supplied on behalf of the Appellant are set out in Appendix D (N/A to public).

7.6 Under cross examination by Mr Robert O'Neill BL, Mr Halpin said the Respondent's suggestion that the subject Property had an overall floor area of 557 sq. m was misleading. The subject Property comprised just under 200 sq. m divided between 3 bar areas, 33 sq. m of chill out space, 111 sq. m of a polythene covered rear yard, and 192 sq. m of storage. He did not accept FMT as the sole method of valuation and believed it should be subject to a final test which comprised standing back and considering all the factors which affect the value of the Property, not just the turnover. While Mr Halpin accepted that FMT was one of the bases of valuation, he thought that the starting point should be rents in the relevant area. The question to be asked therefore he said, was what would an average occupier with reasonable acumen derive as turnover and be prepared to pay to rent the premises. Mr Halpin said that the value must be based on a fair rent based on a premises being vacant and available to let and that the appeal decisions in *Keith Kirwan* and *Stephen Byrne* indicated that there should not be a slavish following of turnover which can lead to an anomaly and inaccuracies in the valuation of premises.

7.7 When it was put to Mr Halpin that he had not provided any turnover figure prior to delivery of the accounts in June 2018, he stated that he believed he supplied a turnover figure of €750,000 verbally over the phone, estimating that to be FMT at that location. His estimate that turnover would not exceed €750,000 was based on the knowledge of other properties on the street. When it was put to Mr Halpin that Mr Power-Kelly said he had not been given that or any figure Mr. Halpin replied that he could not say what had happened. It was put to Mr. Halpin that without the benefit of accounts, Mr. Power-Kelly had estimated turnover at €1.25m, which figure Mr. Halpin was not contesting. Mr. Halpin stated that the Property was significantly overtrading. He also stated that the Respondent's own knowledge of Kilkenny pubs as a basis to estimate the Appellant's turnover was undermined by the anomalous valuations of Rental Comparable 2 and Comparable Property I (€99,000 and €9,000 respectively).

7.8 When it was put to Mr. Halpin that the properties on Mr Halpin's schedule of comparable pubs located on John Street were all inferior to the subject property, he replied that the physicality of the properties was not that different, but other factors such as the business acumen of the occupier, €2,000 spend a week on entertainment made a difference and that it

was all about the profit and not about the turnover. It was put to Mr. Halpin that the turnover of Comparable Property A, which he had estimated at €450,000, was in fact €400,000. Mr. Halpin said that there was no reason why the turnover of Comparable Property A could not be increased to that of the subject Property if expenditure on entertainment was increased but as a matter of fact this premises was closed down on the date of the valuation. He reiterated that the Appellant did not have access to the comparable information that the Commissioner held. Mr. Halpin contended that although the subject Property was marginally different to Comparable Property A this did not justify an NAV that was four times higher. In relation to Comparable Property B, it was put to Mr. Halpin that while he had estimated that property's turnover at €350,000, in fact it was €300,000. He responded that when money had been spent on that property prior to the 2008 global recession, the business had achieved revenue in the region of €1.4m. He repeated that if anybody with business acumen invested €100,000 a year into entertainment, that the annual turnover of the comparable properties could be increased to over a million euro. He stated that the physical make-up of the subject Property was not superior to the other properties on John Street.

7.9 Mr. Halpin conceded that the subject Property is located relatively close to Comparable Property H but stated that as a super pub serving food all day, it is not comparable to the subject Property. Mr. Halpin also distinguished between Langton's and the subject Property as Langton's is a hotel bar. He also stated that John Street is not as good an area as High Street. Pubs located on High Street generally open at 10am while, apart from two hotels, Langton's and the Kilford Arms, which are open all the time, pubs including the subject Property on John Street generally open at 5 or 6pm.

7.10 When it was put to Mr. Halpin that the Appellant's Rental Comparable 2 has a huge food turnover, Mr. Halpin stated that the first €100,000 of food sales are not taken into account and are then discounted at 5% of turnover, but that he did not know how the NAV for Rental Comparison 2 was assessed. He stated that as a super pub, it was not truly comparable to the subject Property. Mr. Halpin also disagreed that that the Respondent's NAV Comparison 3 competed with the subject Property. He stated that it is a super pub in a more central location and that the subject Property is in competition with other pubs on John Street. He added that the Respondent's use of this property as a comparable was illustrative of the Respondent's approach that FMT/turnover was considered to be the sole relevant factor, when in fact the most important stage in the valuation should be the "stand back and look approach", something

which Mr. Halpin felt had not been done sufficiently or at all by the Respondent. Referring to a table set out on p. 17 of the Respondent's précis, Mr. Halpin pointed out that the percentage of FMT applied to the drink sales of Rental Comparable 2 (the Respondent's NAV Comparison 4), and Comparable Property H (the Respondent's NAV Comparison 1) was higher than that applied to the subject Property and other pubs, which Mr. Halpin said supported his case that they are in a different category as super pubs and not comparable to the subject Property. When it was put to Mr. Halpin that the NAV was arrived at based on a fair and reasonable assessment of each pub, and that the turnover was considered among other things in the assessment of FMT, he disagreed and stated his belief that turnover did not reflect the range of NAVs nor rental values in Kilkenny. He said that equity, fairness, and relativity was required, and stated that the NAV of the subject Property should be in the region of €27,000 to €54,000. Finally, Mr. Halpin said he agreed with the description of 'Receipts and Expenditure' method of valuation set out in the 1997 RICS Guidance Note.

8. RESPONDENT'S CASE

8.1 Referencing his précis of evidence Mr. Power-Kelly outlined the background and context of the Appeal and how it has arisen as a result of the revaluation of Kilkenny County Council rating authority area along with the valuation principles as contained in the Valuation Act 2001.

8.2 Mr. Power-Kelly described the location, size, and nature of the subject Property as substantial with a total premises and stores area of 557.74 sq. m. He commented that there was a difference between parties regarding the measurements of the Property but that pubs were not measured on a square metre basis. In terms of correctness of evidence Mr. Power-Kelly stated that the Commissioner relies on market information to inform the estimate of Net Annual Value of the subject Property as appearing on the valuation list. He confirmed that each of these transactions had been investigated and analysed in accordance with Valuation Office policy and had regard to the date of the transaction and the valuation date, any inducements, and any other features of the transaction. These investigations provide the *Net Effective Rent* and he further noted that the majority of pubs are owner occupied and of those that are rented, short term periodic tenancies are common, or tenancies may not be at arm's length.

8.3 Mr Power-Kelly confirmed that he was one of the valuation team and that he was appointed as an Appeals Officer but would not necessarily value all the properties in Kilkenny. A valuer had to look at the expectations of a hypothetical tenant and not just the occupier's performance,

but section 2(5) of the RICS Guidance note described FMT as “a method’ of valuation. He stated that an analysis of the accounts evidence supplied indicated that rents equated to between 6% and 11% of turnover and he provided two examples the details of which are set out at Appendix E (N/A to public), as being illustrative of the rent as a percentage of turnover. He acknowledged that the level of 6% dated to 2013 and constituted 6% of 2015 turnover. No representations or appeals were made in either instance. He said that where trading accounts were supplied, they were analysed, demonstrating that rent ranged between 6% and 11% of turnover. He also stated that there were 53 pubs in Kilkenny of which 23 made representations to the Commissioner of which 8 appealed to the Valuation Tribunal.

8.4 The Respondent provided a number of NAV comparisons, full details of which are contained at pages 17 to 21 of the Respondent’s précis, a summary of which is also included at Appendix F (N/A to public).

8.5 NAV Comparison 1 (the Appellant’s Comparable Property H), on John Street, has an NAV of €220,000, and Mr. Power-Kelly had found old notes that detailed its trading area at 318.5 sq. m. Mr Power-Kelly clarified at the hearing that NAV Comparisons No.2 and No.8 are under appeal while NAV Comparison no.7 was closed down on the valuation date. NAV Comparison 3, on Patrick Street, had an NAV of €317,000. NAV Comparison 4 (the Appellant’s Rental Comparable 2), located on the High Street, had an NAV of €99,000. Mr. Power-Kelly remarked that there were offices upstairs in the property. NAV Comparables 5 and 6, both located on Rose Inn Street, have NAVs of €54,000 and €27,000, respectively. NAV Comparison 6 is long and deep and has a trading area of approximately 135 sq. m. NAV Comparison 7 is on John Street, has an NAV of €36,000 and is further out than the subject Property. Similarly, NAV Comparison 9 is in a poorer location than the subject Property. It is valued at €40,500. Trading accounts were provided by the occupiers of NAV Comparisons 1, 3, and 6 but by no other occupier on the list of NAV comparisons. Mr. Power-Kelly stated that estimated FMT was arrived at in consultation with his team and experts in licensed premises, and supported by the accounts, and he considered them to be fair and equitable. He indicated there was no connection between retail values and pub values in Kilkenny City. Mr. Power-Kelly said that the percentage of 9% was supported by the above analysis. The NAV of the subject Property was calculated on these rates based on an estimated drink FMT of €1,250,000 and therefore the value should be confirmed at €112,500.

8.6 Under cross examination Mr. Power-Kelly confirmed that the Respondent had considered the method of valuation as detailed by the Appellant at page 37 of the Appellant's précis (based on the achievable FMT, without goodwill or business acumen; based on actual rental evidence; and based on the tone of the list). When asked whether he wanted to speak to the final point (that excluding the subject property and Comparable Property H/NAV Comparison 1, that the average value in John Street is €34,400; and that excluding the subject Property only, the average value is €57,600; the Appellant's conclusion that the subject Property fell at the upper end of that range and that an appropriate valuation on that basis would be in the region of €52,000), Mr. Power-Kelly stated that the trading accounts had not been provided by the Appellant, and that the properties were valued on rental evidence, and that the Respondent had tried to show relativity between turnover and NAV. He said a fair method had been adopted, across all ratepayers, and that differentiation was based on location. While the Appellant's Rent Comparable No.3 (Appendix B, N/A to public) may have been in a better location with a substantially lower NAV of €18,000, this he stated, is an inferior property being very small and having a very small frontage. It was put to Mr Power-Kelly that the floor area measurement he furnished for Comparable Property H/NAV Comparison 1 was 25 years old and therefore could be completely inaccurate, as the pub now includes five bars, and the fact that this pub could be classified as a substantially larger and better premises than the subject Property was reflected in the 10% of turnover figure applied by the Respondent. Mr. Power-Kelly responded that the subject Property has four areas and perhaps should be valued at 10%. He agreed that while NAV Comparison 3 is an exceptional property in an excellent location and that NAV Comparison 4 (the Appellant's Rental Comparable 2) is also a very good pub in a very good location, about 50% of their trade was food trade although he could not provide a turnover figure. Mr. Power-Kelly did not agree with the floor area measurement of circa 500 sq. m of NAV Comparison 4 following the 2013 refit because he measured it with a trading area of 395 sq. m which included kitchens along with first floor offices and a storage space of 150 sq. m.

8.7 When it was put to Mr. Power-Kelly that of all the pubs provided as comparators, once the super pubs were excluded, the Respondent was only furnished with the accounts of one property, he replied that if a hypothetical tenant was going to rent a property in the open market, they would have more information available to them than the Respondent. The valuation exercise that the Commissioner undertook was working towards a relativity between rents and turnover and that while they may not have had all the rents and turnover for John Street, they had rental comparisons for a wider area than this. When asked why the hypothetical tenant

would rent the subject Property at €112,500 when he could go to High Street and rent NAV Comparison 4/Rental Comparable 2, a super pub, at €99,000, he said that they were different types of pub and that a hypothetical tenant would rent the subject Property over NAV Comparison 4 because it was a nice, well fitted premises with a striking frontage like some pubs in Dublin such as O'Donoghue's. He stated that the subject Property is a nice, comfortable premises. In relation to the polythene covered archway and yard of the subject property compared to the €1.3 million fit out of NAV Comparison 4, Mr. Power-Kelly thought it was reflected in a fair valuation of the subject Property. When asked whether he thought in terms of location, physical make-up and fit out, that the subject Property was more valuable than NAV Comparison 4, he repeated that it was a fair valuation and that a "stand back and look" approach was taken.

8.8 It was put to Mr. Power-Kelly that if a "stand back and look approach" was taken to the NAV comparators of the respondent, excluding the super pubs, that there was a problem with the Property's valuation of €112,500 when all other pubs in similar secondary locations were valued between €27,000 and €54,000. Mr. Power-Kelly said the subject Property was valued without accounts so no 'red flags' were raised by the Respondent in its valuation of the subject Property. Mr. Power-Kelly was of the view that the non "super pubs" included in the Respondent's schedule of NAV Comparisons (Appendix F, N/A to public) did not raise any 'red flags' in respect of the range of values because he said the Appellant was only considering a figure not the properties themselves and that NAV Comparison 9 was located at the end of the street which was not salubrious. He said that whether 9% or 10% was applied took into account location. While the NAV of the subject Property is four times that of the Appellant's Comparable Property B, which is well fitted out over two floors, he believed that this is justified based on the location and the quality of the subject Property.

8.9 Mr. Power-Kelly did not agree that the subject Property and the Appellant's Comparable Property B were broadly comparable. He said the Commissioner's scheme of valuation was rational and relative and had regard to information from trading accounts, where available. He did not know how many pubs spent €2,000 a week on entertainment and he felt it depended on each individual property whether this was a large amount of expenditure on entertainment. While the operator of the subject Property did not have any late-night exemptions, it was open to a hypothetical tenant to apply for ~~such an~~ exemptions.

9. SUBMISSIONS

9.1 The Appellant made no legal submissions on the substance of the appeal.

9.2 Mr O'Neill submitted that FMT was in issue, being the basis on which public houses are valued, and not turnover. He submitted that the only evidence of exceptional business acumen was the expenditure of €100,000 on entertainment which was not real evidence, and that the business was doing well as it was in a good place.

10. FINDINGS OF FACT AND CONCLUSIONS

10.1 On this appeal the Tribunal has to determine the value of the Property so as to achieve, insofar as is reasonably practical, a valuation that is correct and equitable so that the valuation of the Property as determined by the Tribunal is relative to the value of other comparable properties on the valuation list in the rating authority area of Kilkenny County Council rating authority.

10.2 From the evidence adduced by the parties, the Tribunal finds the following facts. The subject property is a licensed premises located on John Street Lower with rear frontage onto John's Quay, Kilkenny City, County Kilkenny. The ground floor trading area comprises separate bar areas (The Dylan and Biddy Early's) on either side of a central passageway (Cocktail Terrace) with a central courtyard beer garden and glazed roof, which also services a rear Bar (Dylan's Whisky Bar), function area and ancillaries. There are customer toilets and stores on the ground and upper floors and there are no on-site kitchen facilities.

(a) Floor area:

10.2 The floor area of the property was not agreed. The respondent gave the floor areas of the licensed premises and stores as 557.74 sq. m in total and did not provide a breakdown. The appellant stated the overall area to be 533.84 sq. m in total and provided the following breakdown:

USE	Floor Area M ²
Bar (Biddy Early's)	129.52
Bar (The Dylan)	67.92
Rear Bar / Function Area	33.17
Covered Yard	111.23

Stores (John's Quay, ground floor)	96
Stores (John's Quay, loft)	96

10.3 Mr. Halpin's evidence breaking down the floor areas of the Property was not challenged by the Respondent. When the discrepancy in figures was raised, Mr. Power-Kelly simply stated that pubs were not valued on a square metre basis. The Tribunal accepts the evidence given by Mr. Halpin regarding the floor area of the subject Property and finds that the subject Property has a trading area of 341.84 sq. m and 192 sq. m of stores.

(b) Determination of value of the subject property

10.4 The Tribunal is of the view that it is long established in practice that usually the appropriate method of Valuation in licenced premises is by the application of a percentage to the Fair Maintainable Trade. However, in considering what the Fair Maintainable Trade may be, and what factors affect it, consideration has to be given to more than just the turnover, and a judgement has to be made as to whether a premises is under or over trading and what level of Fair Maintainable Trade the reasonably competent operator or Hypothetical Tenant could achieve or maintain. There is also the question of equity and fairness between rate payers, and it must be borne in mind that what is being valued is the property and not the business. This Tribunal is conscious of not straying from an established method of Valuation and does not propose to value licenced premises on the basis of the size of the trading areas, but information on floor areas, in conjunction with a multiplicity of other factors, can assist in considering whether or not the level of turnover or FMT is realistic and whether or not a reasonably competent operator/the Hypothetical Tenant could improve upon or maintain that level.

10.5 The Tribunal did not find the Appellant's Rental Comparisons to be of assistance in its determination. Rental Comparable 1 was let a year from the valuation date. Rental Comparable 2 is let on a related-parties lease. Rental Comparable 3 is in an inferior location and significantly smaller. Rental Comparable 4 is in a significantly inferior location.

10.6 The Appellant also provided comparative information on 7 pubs not under appeal which were located on John Street, although most were located further up John Street than the subject Property. Estimates of the Fair Maintainable Trade were derived for four of these eight pubs by Mr. Halpin using the Net Annual Value and areas based on a rate of 8%. Two of these

estimates were corrected in cross examination. The trading area for two of the pubs was unknown. Neither party disputes that the subject Property is trading at a level significantly in excess of its competitors on the street apart from Comparable Property H/NAV Comparison 1, which is in a more prominent location and comprises a superior premises than most of the other pubs on John Street. This is supported by the turnover figures furnished by the Appellant.

10.7 The Respondent provided a list of 7 NAV comparisons not under appeal. It was not disputed that four of those are in superior locations on different streets, being more centrally located. The three remaining comparators all featured in the Appellant's list of comparators also, being located on John Street.

10.8 The Tribunal accepts Mr. Halpin's argument that the subject Property is not a super pub, and is not comparable to large scale, "self-sustaining" operations which are open all day and evening, serving food as well as drinks. While the subject Property is a substantial premises and itself comprises two front bars and a rear bar/function room, it is more comparable to the other wet pubs which only open in the evening. Consequently, the Tribunal does not find the Respondent's NAV Comparisons 1, 3 or 4, being the "super pubs" to be relevant or of assistance. The Respondent's NAV Comparisons 5 and 6 are in a superior location on a different street and are valued at €54,000 and €27,000, respectively. It was mentioned in evidence that NAV Comparison 6 is a long, deep premises, and has a trading area of approximately 135 sq. m, so it is significantly inferior in size to the subject Property.

10.9 Of the Comparable Properties relied upon by Mr. Halpin, Comparable Properties C, D and E are not comparable to the subject Property in that they are inferior in location and significantly inferior in size. Comparable Property F is under appeal and Comparable Property H is not of assistance, being a "super pub". Comparable Property B, valued at €27,000, at first glance appears to be very similar to the subject Property but in fact over 50% of its 335 sq. m trading area is located at first floor level and it has an inferior location. Comparable Property A/NAV Comparison 7, which is valued at €36,000, is inferior in size and location to the subject Property. Comparable Property G/NAV Comparison 9 is also inferior in size, location, and frontage to the subject Property.

10.10 The properties relied upon by the parties' valuers which the Tribunal considers most comparable to the subject property are the Respondent's NAV Comparison 9, which

corresponds to the Appellant's Comparable Property G, and the Respondent's NAV Comparison 7, which corresponds to the Respondent's Comparable Property A.

10.11 While the Appellant did not give very detailed evidence relating to the business acumen of the occupier, the Tribunal is of the view that the facts speak for themselves. By the Respondent's own estimate, which was supported by the figures provided by the Appellant (see Appendix D, N/A to public), the Appellant's turnover greatly exceeds the turnover of the other pubs on the street (apart from the "super pub"), including the two most comparable properties. Significant expenditure on entertainment is not in itself sufficient to draw in customers and increase turnover without the application of business acumen and shrewd management. It is the view of the Tribunal that this needs to be taken into account when arriving at a figure for FMT for the subject Property. With the exception of Comparable Property H/NAV Comparison 1 which the Tribunal was informed has 50% food sales, the Respondent did not rely on trading accounts for any other property on John Street, including the subject Property. The Respondent therefore did not provide any comparable FMT evidence or rental evidence for any properties on John Street. In this regard the Tribunal noted that the Respondent failed to obtain financial accounts for most of the comparable properties on John Street, instead relying on NAV comparisons of larger premises which had a better fit out, in superior locations on High Street, Patrick Street and John Street Upper itself, and all of which served food in contrast to the subject Property. It is the Tribunal's considered view that these are issues that must have a material effect on the reliance on the tone of the list.

10.12 The Tribunal finds that the rate of 9% for drink has been established from the evidence adduced.

10.13 The Tribunal finds the valuation of the subject Property is out of line with the comparable pubs on the street, to an extent not warranted by the degree of superiority of the subject Property to the comparable licensed premises on John Street Lower. The Tribunal is persuaded by the evidence on behalf of the Appellant that the Appellant has demonstrated superior business acumen in achieving a significantly higher turnover than other businesses on John Street in comparable properties.

10.14 At the same time, the subject Property is clearly superior to the most comparable properties cited, in its location, size and fit out. It is located at the city end of the street and is

composed of three well fitted out bar spaces arranged around reasonably significant circulation space. The Tribunal has taken account of the requirement to achieve as far as is practicable the correctness of value and the equity and uniformity of value between properties on the valuation list. The Tribunal finds that a reasonably competent or efficient operator would achieve FMT of €900,000 per annum. Applying the percentage of 9%, this results in a valuation which is more in keeping with the tone of the list.

USE	TYPE OF SALES	EST FMT	RATE %	NAV
Licensed premises	Drink	€900,000	9%	€81,000

DETERMINATION:

Accordingly, for the above reasons, the Tribunal allows the appeal and decreases the valuation of the Property as stated in the valuation certificate to €81,000.

And the Tribunal so determines