



Neutral Citation Number: [2024] UKUT 232 (LC)

Case No: LC-2023-681

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE VALUATION TRIBUNAL FOR ENGLAND**

22 August 2024

**Royal Courts of Justice,
London WC2A 2LL**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING - valuation - alteration of rating list - farm themed leisure attraction in a composite hereditament - receipts and expenditure method – effect on value of rights reserved - appeal dismissed

BETWEEN:

CHARLES WATERS

Appellant

-and-

WAYNE COX (VALUATION OFFICER)

Respondent

**Finkley Down Farm,
Finkley Road,
Finkley,
SP11 6NF**

Mr Mark Higgin FRICS FIRRV

13-14 June 2024

*Mr Cain Ormondroyd, for the appellant
Mr Hugh Flanagan, instructed by HMRC Solicitors, for the respondent*

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The following cases are referred to in this decision:

BNPPDS Limited & BNPPDS Limited (Jersey) v Trustees for Blackrock UK Property Fund and Andrew Ricketts (VO) [2022] UKUT 129 LC

Coll (LO) v Waters [2016] EWHC 831 (Admin)

Dawkins v Ash Brothers [1969] 2 AC 382

Fryer v Cox [2022] UKUT 229 (LC)

Facciolo v Constantin (VO) [2020] UKUT 0123 (LC)

Hughes (VO) v York Museums and Gallery Trust [2017] UKUT 20 (LC)

Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street AC [1937] 2 KB 445

Williams (VO) v Scottish and Newcastle [2001] EWCA Civ 185

Wishart v Hulse (VO) [2018] UKUT 224 (LC)

Introduction

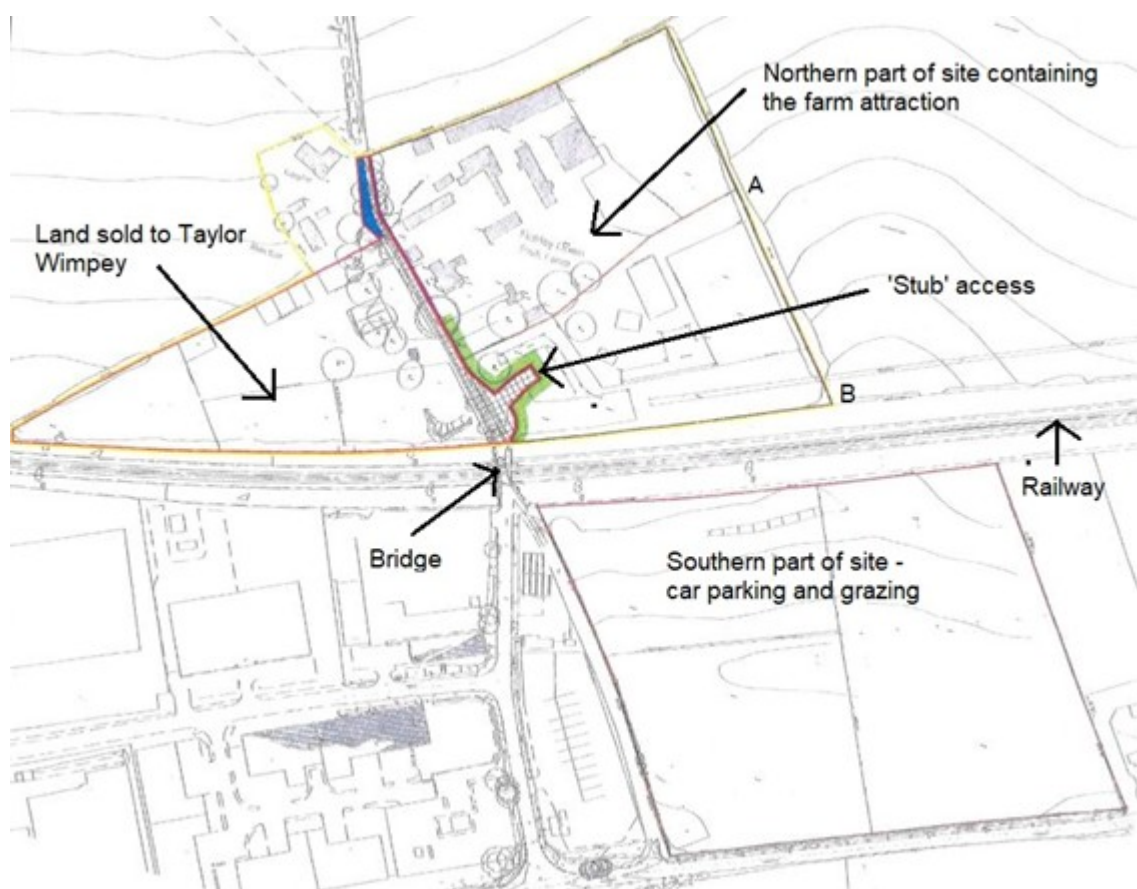
1. This is an appeal against a decision of the Valuation Tribunal for England (the VTE) dated 18 September 2023, in which it dismissed an appeal against a Valuation Officer's notice of decision in relation to the 2017 List entry for Finkley Down Farm of rateable value £100,000.
2. This is the second time in a little over two years that the Tribunal has determined the rating assessment of a farm themed leisure attraction. As in the first case, *Fryer v Cox* [2022] UKUT 229 (LC) which is usually referred to as '*Apple Jacks*', the means of valuation is not in dispute, it is the components of the receipts and expenditure method that the parties have been unable to agree.
3. In this case the appellant seeks a reduction in the assessment to a rateable value of £54,500 and the respondent seeks to maintain the existing rateable value.
4. I inspected the attraction on 11 June 2024 accompanied by the appellant Mr Waters, Mr Barry Davies and the respondent Valuation Officer Mr Wayne Cox. At the hearing Mr Cain Ormondroyd appeared for the appellants and Mr Hugh Flanagan represented the respondent. I am grateful to them all for their assistance.

The facts

5. I distinguish between the hereditament as a whole which I shall refer to as 'the farm' and the 'farm attraction' which is the part of the farm which contains the leisure activities and animals. The farm is located about 1.5 miles northeast of Andover town centre, adjacent to open countryside and close to the Walworth Industrial Estate. The A303 trunk road is some 1.5 miles to the south and its junction with the A3093 provides a convenient point from which to access to the attraction via the spine road of the Walworth Industrial Estate.
6. The farm, which opened in 1981, currently occupies two sites either side of the London to Salisbury railway line. The northern most site contains the farm attraction, utilising buildings that previously formed part of an arable farm of several hundred acres. Today, the farm attraction itself extends to about 5.5 acres, and there is an adjacent area of about an acre which is used for car parking. No farming, other than the keeping of livestock, takes place on either part of the site. The farm attraction previously extended to about 9 acres but in 2008 a triangular parcel of land of some 3.5 acres was sold to Taylor Wimpey for a housing development. The farm continued to occupy the land under a licence until the middle of 2016. I will say more about the terms of the disposal and its impact on the assessment later in this decision.
7. The southern site, which is gently sloping, is about 9.5 acres in total of which two acres is used for car parking and the remainder is used for grazing by animals that form part of the farm attraction. The railway runs on an embankment of about 5 metres in height and access for vehicles and pedestrians between the two sites is by means of a brick-built bridge under the railway.
8. The farm attraction contains three principal elements: activity areas, animal pens and buildings, and a large play barn. The outdoor activity areas contain equipment such as trampolines, climbing frames and latterly inflatable jumping pillows. The buildings housing the animals are a mixture of traditional brick and tile farm buildings which are used for farm animals and several purpose built, largely wooden structures used for more

exotic creatures such as meerkats and reptiles. The play barn is of portal frame construction with profiled metal cladding. It replaced a smaller wooden barn that was destroyed by a fire in 2012. During the construction of the new play barn, some of the indoor activities took place in a marquee, and the new play barn opened in 2013. At that point the site transitioned from seasonal to year-round opening. Mr Waters took out a loan of £500,000 to finance the construction of the new building.

9. In addition, separate buildings contain toilets, a shop, café, and storage facilities. Until recently Mr Waters lived on site in a large, two storey detached house. He used three rooms in connection with the farm attraction business. The site also contains a bungalow which at the material day for this appeal was occupied by Mr Waters' daughter who also works in the business. It is now used as an office and store. The plan below shows the location of the farm and areas of land which it previously and currently occupies.



10. Mr Waters owns the farm with his brother James who he describes as a silent partner, although James does help with some of the maintenance from time to time. Mr Waters has worked at the farm since he left school in 1981. In his witness statements he described the various roles he fulfils at the site and his 'hands on' style of management. He does not employ a manager to run any function and has quarterly directors' meetings with his brother.

Disposal of land to Taylor Wimpey

11. Before I look at the detail of the submissions and evidence it is useful at this stage to understand the substance of the sale of land in 2008 to Taylor Wimpey and the rights reserved in the sale. The land, which was triangular in shape and sold for £800,000, now

forms a part of a large residential development site stretching from the railway line in the south as far as Finkley Road in the north, a distance of about 0.5 miles. The development extends a similar distance on an east/west axis. The spine road which now runs through the development and connects to North Road at the entrance to the farm attraction is named Finkley Farm Road. Taylor Wimpey have been very active in developing the eastern side of Andover and have options on the land to the east and north of the northern part of the farm and if this land is developed the farm would find itself largely surrounded by housing in contrast to its previously rural position.

12. In completing the transaction Taylor Wimpey acquired certain rights over the land retained by the farm. The most significant of these rights is the right to carry out the 'Buyer's Works' as provided by clause 27 of the contract. This clause gave Taylor Wimpey the right, for a period of 20 years and after serving notice on the farm, to build an access road through the northern part of the farm to reach the land to the east. The contract also provided for Taylor Wimpey to acquire the land required for such an access. The exact position of the road is not prescribed by the contract. It would start at the 'stub' access shown on the plan above and end at any point between A and B on the eastern boundary.
13. The Taylor Wimpey right was subject to conditions intended to protect the farm from the disruption that building the access road would cause. These included six months' notice of the works, liaison to avoid disruption, the avoidance, so far as reasonably practicable, of any substantial works between 15 March and 31 October in any year and "reasonable and commercially sensible endeavours" to route the access as close to the southern boundary of the northern part of the farm, "as is reasonably practicable in the circumstances". In practice this would mean building the road as close to the railway embankment as possible, notwithstanding that the starting point would be the existing stub access. If the access were constructed Taylor Wimpey would provide land of an equivalent acreage to that sterilised by the works, and such land would be contiguous with the existing boundary of the farm. It is worth noting that following the vacation of the land owned by Taylor Wimpey the hereditament changed materially in terms of size and configuration between the antecedent valuation date (AVD) and the material day. The land acquired by Taylor Wimpey was largely used as grazing although part was used as a track for pedal powered go-karts. Mr Waters said at the hearing that works to paths and fencing within the retained farm attraction were necessary as a consequence of the sale of the land.

The statutory background

14. Rateable value is defined in Paragraph 2(1) of Schedule 6 of the Local Government Finance Act 1988, as amended by The Rating (Valuation) Act 1999 as: "... an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions:
 - a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
 - b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;
 - c) the third assumption is that the tenant undertakes to pay all the usual tenant's rates and taxes and bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state fit to command the rent mentioned above."

15. Statute requires that the appeal property be valued reflecting certain matters as they existed on the material day, which for the 2017 Non-Domestic Rating List and the attraction is 1 April 2017, and by reference to values pertaining at the Antecedent Valuation Date (“AVD”) which is 1 April 2015. The matters which must be taken at the material day are set out in paragraph 2(7) of Schedule 6 Local Government Finance Act 1988. The matters relevant to the appeal are:
- “(a) matters affecting the physical state or physical enjoyment of the hereditament;
 - (b) the mode or category of occupation of the hereditament;
 - (c) ...
 - (d) Matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there;
 - (e) the use or occupation of other premises situated in the locality of the hereditament.”

The receipts and expenditure valuations

16. There is no dispute between the parties that the receipts and expenditure method of valuation is the appropriate means by which to arrive at the rateable value of the hereditament. Mr Barry Davies BSc DipLE MRICS FAAV IRRV(Hons) gave expert valuation evidence for the appellant. He is principal of Davies and Co, a practice based in Kettering which specialises in the valuation of rural land and properties. Mr Wayne Cox BSc(Hons) FRICS Dip Rating gave expert valuation evidence for the Valuation Office. Mr Cox is Head of Leisure and Licensed Property, within the National Valuation Unit (NVU).
17. Both experts referred to the Joint Professional Institutions’ Rating Valuation Forum (“the Rating Forum”) guidance published in 1997 titled “The Receipts and Expenditure Method of Valuation for Non-Domestic Rating: A Guidance Note”. Notwithstanding the age of this document, it is still the only guidance endorsed by, amongst others, the Royal Institution of Chartered Surveyors (RICS), the Institute of Rating, Revenues and Valuation (IRRV) and the Rating Surveyors’ Association (RSA).
18. In *Hughes (VO) v York Museums and Gallery Trust* [2017] UKUT 20 (LC) the Tribunal summarised the methodology as follows:

"119. The receipts and expenditure method seeks to arrive at the annual rental value of premises by assessing the gross receipts which a prospective tenant would expect to achieve from a business carried on at those premises, and by deducting operating expenses, including the cost of repairs, and a sum to reflect the return on capital and profit the tenant would require, to determine the surplus which it is assumed the tenant would be prepared to pay to the landlord in rent in return for the annual tenancy. Another way of looking at the assessment is to regard its first stage as being the ascertainment of a net profit (or “divisible balance”) which may then be apportioned between the tenant, to provide a return on capital and a profit (in aggregate, the tenant’s share) and the landlord, as the rent in return for the annual tenancy (the landlord’s share).”

19. Until 2013 the farm was structured as a partnership. In August 2013 the partnership's business, assets, and liabilities were transferred to Finkley Down Farm Limited. At that point the previous financial year end of 31 August was moved to 31 March. The following table, containing data produced by the farm's accountants shows the turnover, cost of sales and gross profit for each year from 2011 to 2014 adjusted to a 31 March year end. The 2015 financial year (ending 31 March 2015) was the first year when the accounts were actually based on an April to March cycle.

Year	2010/2011	2011/2012	2012/2013	2013/2014	2014/2015
Turnover	£636,463	£719,565	£686,900	£1,144,473	£1,324,828
Cost of sales	£134,995	£152,246	£141,785	£207,242	£271,474
Gross profit	£501,468	£567,319	£545,115	£937,231	£1,053,354
Gross profit as a % of turnover	79%	79%	79%	82%	80%

20. Commendably, the experts have agreed a significant number of the components of the valuation, and I set these out in the table below together with the three items where small differences remain.

Expense	Mr Davies	Mr Cox
Rates and water	£25,000	£25,000
Heat and light	£23,500	£23,500
Insurance	£25,000	£25,000
<i>Repairs and maintenance</i>	<i>£75,000</i>	<i>£78,250</i>
Cleaning and grounds maintenance	£22,500	£22,500
Motor and travel	£8,575	£8,575
<i>Wages and NI</i>	<i>£343,500</i>	<i>£349,000</i>
Protective clothing	£725	£725
Admin expenses	£12,000	£12,000
Telephone	£3,250	£3,250
Subscriptions	£2,500	£2,500
Training	£1,225	£1,225
Accountancy and audit	£29,000	£29,000
<i>Legal and professional</i>	<i>£1,100</i>	<i>£1,000</i>
Sundry expenses	£100	£100

Advertising	£22,000	£22,000
Totals	£594,975	£603,625

21. Mr Davies based his valuation on a fair maintainable trade (FMT) of £1,192,345, 10% less than the 2015 gross receipts. He similarly adjusted the cost of sales by deducting 10% from the 2015 total resulting in a figure of £244,326. His working expenses were aligned with the actual working expenses for 2015 but with the addition of £50,000 for a manager's salary and £15,806 for equipment hire. This brought his total working expenses to £660,781. His net profit was therefore $£1,192,345 - (£244,326 + £660,781) = £287,238$. From this figure he deducted depreciation (£50,000), other income (£423) and bank charges (£20,000) resulting in a divisible balance of £217,661. He adopted a tenant's share of 75% equating to £163,246 which leaves the hypothetical landlord with a rent, or in other words the rateable value, of £54,415. Mr Davies rounded this figure up to £54,500.
22. It is worth noting at this stage that Mr Cox's valuation was rateable value £134,250, notwithstanding that the rating list entry was rateable value £100,000. He adopted a FMT of £1,325,000 based directly on the twelve months of trading leading up to the AVD. He also utilised the actual cost of sales for the same period, namely £271,475. Mr Cox added bank and financial charges of £15,800 to his working expenses resulting in a total of £619,425. His net profit was therefore $£1,325,000 - (£271,475 + £619,425) = £434,100$. He made provision for a renewal fund of £50,000 culminating in a divisible balance of £384,100. He adopted a tenant's share of 65% equating to £249,668 which leaves a rent (rateable value) of £134,432. Mr Cox rounded this figure down to £134,250. The list assessment had been arrived at by taking 8% of a FMT of £1,300,000. Arithmetically this resulted in a figure of rateable value £104,000 which Mr Cox had rounded down to rateable value £100,000.
23. There are six outstanding issues.

The issues

Fair maintainable trade

24. Mr Davies's approach to FMT questioned whether the hypothetical tenant would base his bid on the actual gross receipts or whether he would adopt a more cautious approach to ameliorate risk? He contemplated a scenario where the hypothetical tenant would present a business plan to their bank and considered that they would be prudent in their forecasting especially if overdraft funding was required. He thought that the increase in receipts from 2013 to 2014 of 66% was high and a further increase of 15.76% in the following year was unlikely to be sustained. He noted that risk could also be accounted for in the tenant's share but ultimately decided to adopt a figure of 90% of the 2014/15 financial year receipts. He did not provide a rationale for his adjustment other than saying it was a matter of judgement. He was equally opaque about his decision to use the working expenses from 2015, notwithstanding that they related to a level of gross receipts which he had discounted.
25. Such caution was notably absent from Mr Cox's approach to FMT. In his view the arrival of the play barn in 2013 was transformational. He had no regard to the trading prior to 2013 and placed most weight on the 2014/15 financial year receipts. He noted a pattern of rising turnover since 2013 (including 2015/16) and although the 2013/14 year might be regarded as a 'honeymoon' period following the opening of the play barn, there was no reason to envisage that the hypothetical tenant would not base his bid on the trading in the year preceding the AVD.

26. The accounting information supplied in evidence demonstrates a rising pattern of gross receipts and, for that matter, a stable level of gross profit. Aside from a dip in 2012/2013 when the previous play barn was destroyed by a conflagration, the trend is relentlessly upwards. At the hearing Mr Cox said that he had allowed himself a ‘cheeky look at the 2016 figures’ which showed a further increase in gross receipts. That is a luxury unavailable to the hypothetical tenant and I disregard it. Mr Cox is right to place most weight on the later years as the hereditament was materially different from 2013 onwards. The play barn had perhaps lost some of its novelty factor by the 2014/15 year but the year-on-year trading was still showing an increase and at 15.76%, a sizeable one at that. A bid at the AVD necessarily means looking into the future, predicting income and costs. The prudent hypothetical tenant would gather as much data together as possible, but I agree with Mr Cox that in this particular case, the last two years’ performance would be the most informative. Mr Davies speculated about the hypothetical tenant presenting a case to the bank but that took him in to a realm of unreality not envisaged by statute. The hypothetical tenant is assumed to be in a position to make the rental bid, there is simply no need to give any thought to a hypothetical bank manager.

In *Hughes (VO) v Exeter City Council* [2020] UKUT 7 at [36] the Tribunal said:

“No doubt it remains correct to regard the hypothetical landlord as an abstraction, an anonymous but reasonable person who goes about the letting as a prudent man of business, without giving the impression of being either over-anxious or unduly reluctant. Likewise, it should be assumed that the hypothetical tenant behaves reasonably, making proper enquiries about the property, and not appearing too anxious to take the letting.”

27. Mr Davies had sought to reflect the risk associated with the Taylor Wimpey rights in both the FMT and the tenant’s share. Conflating the two increases the prospect of double counting and whilst I understand the logic of his stance, I think that the risk of the rights being exercised is better accounted for in the tenant’s share, if at all.
28. Neither expert valuer adduced any evidence about the economic reality of trading in Andover in 2015. It would have assisted me to have had information about trends in spending patterns, employment and disposable income but none was available. It seems to me that Mr Davies is being unduly pessimistic in predicting that the hypothetical tenant would base his bid on a figure 10% less than the actual turnover in the year ending in March 2015. In a sense Mr Cox’s approach was also conservative, he envisaged a repeat of the previous year and of the two, I prefer Mr Cox’s approach as it is closer, in my judgement, to what would happen in reality. Neither party pursued an argument that the actual receipts were in any way exceptional or that Mr Waters was either of outstanding ability or conspicuously incompetent.
29. Similarly, there was no evidence from either the experts or Mr Waters regarding the effect on the overall level of receipts of relinquishing land to Taylor Wimpey in 2016. Mr Waters said at the hearing that visitor numbers had not dropped. In the circumstances I adopt a FMT of £1,325,000.

Manager’s salary

30. The question of whether it was appropriate to take account of a manager’s salary when in fact none is employed arose in *Apple Jacks*. However, in that case the circumstances were

different; the owner was also running a 300 acre farming business and the Tribunal took the following view at paragraph 66:

“We remind ourselves that in this case the hereditament is partially exempt and that the hypothetical tenant would be primarily running a farm, with the attraction as a diversification activity. It seems to us more likely than not that the hypothetical tenant would need to employ a manager to cover the kind of day-to-day work ‘in’ the business that Mr and Mrs Fryer carry out. We also note that in cross-examination Mr Cox did not dispute the figure of £35,400 as an appropriate amount to reflect that cost. We therefore adopt Mr Hunter’s approach and deduct that amount as an expense in order to reach a divisible balance.”

31. The approaches of the respective experts to this item are subtly different. Mr Davies said that the hypothetical tenant would employ a manager and that the actual circumstances in which Mr Waters adopts a ‘hands on’ approach to running the farm without paying himself a salary should be disregarded. Mr Cox disputed that conclusion but also dealt with the question of a director’s salary. He considered that a venture of this size and type would be run by an individual or family who themselves would not be providing the advice usually provided by in-house professional directors. In his view, the costs associated with the appointment of directors providing services in relation to matters such as human resources should only be included in connection with valuations of sizeable leisure properties such as the London Eye. Allowing for either a manager’s or director’s salary results in the same effect; it reduces the net profit and consequently the divisible balance. In the present case the inclusion of a director’s salary because Mr Waters is a director would effectively be a prior call on profits and as Mr Cox rightly states, care should be taken in arriving at the tenant’s share to avoid double counting.
32. Both Mr Waters and Mr Davies appended a series of job descriptions and terms of employment for various posts in the leisure sector to their evidence, and Mr Davies concluded that the cost of employing a manager would be £50,000 per annum. However, it was not clear whether these businesses were comparable in size and profitability to the farm and the figures related to posts offered in 2022 and 2023, not 2015. Mr Davies had advised many other farm attraction businesses and had included details of them in his evidence. However, he supplied no evidence about the way in which each was run, whether they relied solely on the owner or operator for management functions and whether they drew a salary. Financial details of three of his comparables were appended to his report but the wages and salary bills were not broken down between staff and managers. Mr Ormondroyd submitted that Mr Waters worked in the business free of charge but that ignored the profits shared between himself and his brother. No evidence was offered about how those profits were paid out, whether Mr Waters took monthly drawings or payment after year end, or a combination of the two.
33. Mr Cox’s approach was that favoured by the guidance; that in a small to medium sized business the hypothetical tenant would often run the business him or herself. He took support for his view from the Guidance Note which says at paragraph 5.29:

“Where the expenditure takes the form of directors’ remuneration by way of salary, contributions to pension schemes or other reward, it is necessary to consider the nature of that remuneration to ensure that it properly forms an expense and is not an item which should be considered under the tenant’s share. Where the occupier is an individual, or where the hypothetical tenant might be

expected to carry on the undertaking without advice from directors, it is normal to allow for remuneration solely in the tenant's share.”

34. The Tribunal has adopted this approach in cases involving small bed and breakfast or holiday letting businesses. Examples can be found in *Wishart v Hulse (VO)* [2018] UKUT 224 (LC) and *Facciolo v Constantin (VO)* [2020] UKUT 0123 (LC).
35. The question to be resolved is whether the hypothetical tenant would act any differently to Mr Waters. I have no evidence on which to base my decision other than the reality of Mr Waters' situation. I accept Mr Cox's approach that a small to medium sized operation would simply outsource the advice that an in-house director would provide. In this particular case there does not appear to have been any expenditure on this type of service and I do not therefore include it as a working expense. Taking all of this into account together with the practice extolled by the Guidance Note, I conclude that in this particular case it is inappropriate to allow for either a manager's or director's salary in the working expenses.

Equipment hire

36. During the course of running his business Mr Waters had cause to hire or lease Sage financial and management software, catering equipment and a generator. In the year ending 31 March 2015 these items amounted to expenditure of £15,806. Mr Davies treated this expenditure as a working expense as this approach accorded with reality and any incoming tenant would expect to continue the arrangement. Mr Cox on the other hand preferred to reflect equipment hire in his tenant's capital, reflecting the equipment in the £500,000 that he had allowed for the AVD market value of non-rateable equipment that an incoming tenant would need to provide to achieve the FMT. Mr Davies criticised this approach as it caused what he considered to be a legitimate business expense to disappear from the valuation.
37. It seems to me that businesses routinely hire equipment. This might relate to something that is required from time to time such as a portable generator or an item where a subscription model is appropriate such as accounting software. The sums involved at the farm are relatively modest and Mr Cox acknowledged that were he to adopt Mr Davies's Valuation Tribunal approach to non-rateable assets and depreciation it would reduce the assessment by rateable value £1,050. In relation to the generator Mr Cox said that it should properly form part of the landlord's chattels and was therefore part of the hereditament on offer to the hypothetical tenant. I do not have enough information about the generator to judge whether he is correct but the sums expended appear to be in the range £1,000 to £2,000 per annum which if excluded will not make a material difference to the valuation. I prefer Mr Davies's point of view, there is no reason to conclude that the hypothetical tenant would behave in a different way to the actual tenant, and I therefore include the expenditure in the working expenses.
38. A corollary of including these items in the working expenses is that it is necessary to consider whether the depreciation figure should change. Both experts adopted £50,000, but it is unclear how Mr Davies arrived at this amount. Mr Cox took the value of the non-rateable assets required to achieve the FMT to be £500,000 and adopted a 10 year, straight line write down. He contended that with the hired items included in the working expenses the depreciation would be less and the figure in the actual accounts should be used instead. I agree with this approach.

Taylor Wimpey rights reserved

39. In paragraphs 11, 12 and 13 I set out the detail of the Taylor Wimpey rights. Mr Ormondroyd said that surprisingly there appeared to be no decision of the Tribunal or

Courts that directly considered whether such a right was relevant to the valuation exercise. He referred to the well known passage in *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street AC* [1937] 2 KB 445, where Scott LJ said:

“it is the duty of the valuer to take into consideration every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down, just because it is relevant to the valuation and ought therefore to be cast into the scales of the balance”

40. Mr Ormondroyd acknowledged that matters that are personal to the actual occupier fall to be excluded from the valuation exercise as they are not a characteristic of the hereditament. The leading authority on this point is the House of Lords decision in *Dawkins v Ash Brothers* [1969] 2 AC 382. At p382 Lord Pearce said the following:

“So one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some estimate of what value should be attributed to a hereditament on the universal standard, namely a letting "from year to year." But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded in so far as they are accidental to the letting of a hereditament. They are acknowledged in so far as they are essential to the hereditament itself. It is, for instance, essential to the hereditament itself that it is close to the sea and that humans will pay more highly for a house close to the sea. One can therefore take that into account in the hypothetical letting. It is, however, accidental to the house that its owner was shrewd or that the rich man happened to want it and that therefore the rent being paid is extremely high. In the same way I think it would be accidental to the hereditament that its owner intended to pull it down in the near future. For the hereditament might have had a different owner who would not pull it down. So the actual owner's intentions are thus immaterial since it is the hypothetical owner who is being considered. But when a demolition order is made by a superior power on a hereditament within its jurisdiction different considerations apply. The order becomes an essential characteristic of the hereditament, regardless of who may be its owner or what its owner might intend. That particular hereditament has had branded on its walls the words "doomed to demolition whatever hypothetical landlord may own it." Thus the demolition order, by being a fact which is essential to and not accidental to the hereditament itself, prima facie cannot be excluded as irrelevant or shrouded by any necessary cloud of fiction.”

41. Mr Ormondroyd concluded that the same decision establishes that the “present probability of a future happening” (per Lord Pearson at p393F) is something to which the valuation exercise can have regard. He also had regard to the decision of the High Court in *Coll (LO) v Waters* [2016] EWHC 831 (Admin) where it was held that a restrictive covenant preventing occupation otherwise than as a single dwelling is a relevant factor in a valuation for council tax. The decision acknowledges that a restrictive covenant is not a matter to be taken into account in a non-domestic rating context. The court considered a submission based on part of the judgment in *Dawkins v Ash Brothers* that I set out above, that a restrictive covenant could not be taken into account because it was a result of a private agreement and not imposed by a “superior power”. Mitting J said:

“What Lord Pearce was referring to was the exercise of a superior power, by whomsoever that power may have been exercised. What he had in mind, I think, was that it was the exercise of a power which the person subject to it could do nothing unilaterally to remove. Thus the removal of a planning obligation would

require the consent of the local planning authority, or perhaps on appeal, the Secretary of State; in my judgment, so too in the case of a covenant of this nature imposed by an adjoining landowner. It would require that landowner to be persuaded by the owner of the hereditament for the restriction which must in practice affect the value of the hereditament to be removed.”

42. Mitting J concluded that there was nothing specific to the council tax legislation which required the restrictive covenant, by nature ‘essential’ to the dwelling being valued, to be disregarded. Mr Ormondroyd, who incidentally represented the Listing Officer in *Coll (LO) v Waters*, submitted that in the present case that the same logic applied; the Taylor Wimpey right could not be removed unilaterally by the owner/occupier of Finkley Down Farm and it was therefore essential to the hereditament. Furthermore, there is no specific provision in non-domestic rating legislation which requires that it be disregarded in the valuation exercise. He concluded that the possibility of the future exercise of the Taylor Wimpey right would then be a matter to which regard should be had in the valuation.

43. Mr Ormondroyd acknowledged that the decision had no consequences for non-domestic rating. Specifically, Mitting J said that:

“The statutory context in *Williams*¹¹ was paragraph 2(7) of schedule 6 to the 1988 Act. It is not necessary for me to set out a detailed explanation as to why the context is different. I am simply satisfied that the two statutory schemes are distinct and that the council tax valuation exercise is not identical to that required in the non-domestic rating scheme, not merely because it deals with the capital value of freehold land or a long lease rather than the annual letting value, but also because the statutory approach to valuation is not identical.

The outcome of this case therefore has no consequence for the non-domestic rating scheme, and nothing that I have said should be taken as applicable to it.”

44. Mr Flanagan submitted that the Taylor Wimpey right should not be taken into account because it is simply a form of option derived from a private agreement and even if he was wrong on this point, it was not value significant.

45. He disagreed that there was no decision of the Tribunal or courts that directly considered the question; the principle was established, and all of the decisions countered the position of the appellant. In particular in *Dawkins v Ash Brothers* Lord Pearce’s reference to a ‘superior power’ could only mean a statutory body or similar. Taylor Wimpey are not a ‘superior power’ but a party to a private contract.

46. Mr Flanagan submitted that the decision of the Court of Appeal in *Williams (VO) v Scottish and Newcastle* [2001] EWCA Civ 185 was directly on point:

“23. *It is common ground between the parties that the statutory rating hypothesis, as explained in case law, takes account of statutory restrictions on the use of a hereditament but not of restrictions imposed by the covenants in a lease or by restrictive covenants affecting freehold property.*”

Mr Flanagan noted that the parties in *Williams* had agreed the position but in his view an obligation affecting freehold property created by a private agreement should not be taken into account in the rating hypothesis. Mr Ormondroyd observed that the Court of Appeal had simply recorded the position between the parties, it was not obiter dictum.

¹ Note 1: *Williams (VO) v Scottish and Newcastle* [2001] EWCA

47. Mr Flanagan referred to two VTE decisions *CBRE Britannica St Helens v Grace (VO)* and *Pearl Group Service Ltd v Alexander (VO)*. In the first of these the VTE held that a freehold restrictive covenant prohibiting use as a nightclub was not a relevant matter under the rating hypothesis. The VTE concluded that an obligation of this sort deriving from a private agreement in comparison to a statutory order (such as a demolition order in *Dawkins*) was not “essential to the hereditament”.
48. In *Pearl* it was held that a leasehold covenant restricting the use of a private sports ground was not to be taken into account under the rating hypothesis. The covenant was contained in a long lease and the VTE concluded that such a covenant between private parties did not have the attributes of a statutory restriction and was not essential to the hereditament.
49. Mr Ormondroyd said that the decisions were flawed in that the VTE had concluded that the covenants should not be taken into account because there was a statutory or non-statutory procedure to modify the restrictions. He submitted that until the procedures are completed the restrictions remain and are therefore no different to a planning permission. It follows that if there is evidence that a restriction could be easily removed or is unlikely to be enforced, less weight should be attached to it in the valuation exercise.
50. Mr Flanagan sought to return to first principles. He correctly pointed out that the rating hypothesis, by means of statutory assumptions and terms, imposes a common standard or yardstick of valuation.
51. The statutory hypothesis makes no assumptions about events in the future or the likelihood of them coming to pass. In *Dawkins* at pg382 Lord Pearce said:

“...it would be accidental to the hereditament that its owner intended to pull it down in the near future. For the hereditament might have had a different owner who would not pull it down. So the actual owner’s intentions are thus immaterial since it is the hypothetical owner who is being considered. But when a demolition order is made by a superior power on a hereditament within its jurisdiction different considerations apply. The order becomes an essential characteristic of the hereditament, regardless of who may be its owner or what its owner might intend. That particular hereditament has had branded on its walls the words “doomed to demolition” whatever hypothetical landlord may own it”

The rights reserved by Taylor Wimpey are, in my view, an essential characteristic of the hereditament. The power to exercise the option lies with Taylor Wimpey and is out of the control of the hypothetical tenant. They remain an essential characteristic of the hereditament regardless of the owner or the owner’s intentions and should therefore be taken into account when considering the assessment of the property. In terms of its effect on value I note that the rights were reserved in 2008 for a period of 20 years and are only likely to be activated if Taylor Wimpey obtain planning permission for the site to the east of the farm and take up their option to buy it. At the moment that land is not zoned for development. I also observe that two years prior to the AVD Mr Waters took out a substantial loan to build the new play barn. It seems that the actual occupier regarded the potential loss of the land as a matter that was a distant possibility or if it came to pass, something which the business would withstand. The assumed tenancy is from year to year

with a reasonable prospect of continuance and I take the view that a remote contingency such as the exercise of the rights reserved is unlikely to feature in the hypothetical tenant's thinking. It follows that there is no need to have regard to it in the valuation.

Tenant's share

52. Both expert valuers referred to what the Guidance Note says (at paragraph 5.46) about the tenant's share:

“the tenant's share may be regarded as the first call upon the divisible balance. The share has to be sufficient to induce the tenant to take a tenancy of the property and to provide a proper reward to achieve profit, an allowance for risk and a return upon tenant's capital.”

Both adopted a percentage of the divisible balance as the means of arriving at the tenant's share.

53. In terms of comparators, they both referred to *Apple Jacks* where the tenant's share was 75% of the divisible balance, *BNPPDS Limited & BNPPDS Limited (Jersey) v Trustees for Blackrock UK Property Fund and Andrew Ricketts (VO)* [2022] UKUT 129 LC in which the Tribunal determined that the tenant's share was 50%, and two Valuation Tribunal decisions.
54. The first of these latter decisions related to York Maze (CHG100151577) with a tenant's share 71.5% and the second to Farmer Ted's (CHG100702281) where the tenant's share was 64%. Farmer Ted's has been appealed to this Tribunal and will be heard in April 2025.
55. In his supplemental report Mr Davies identified two additional comparables; The Big Sheep at Bideford in Devon, which had been agreed at 72% and Whitehouse Farm Centre at Morpeth agreed at 70.77%. Mr Cox described the former as having good facilities and seasonal opening. He also provided a map of the Whitehouse Farm Centre which showed some indoor facilities but not a play barn of the type at the farm.
56. Mr Davies adopted a 75% tenant's share predicated on Mr Waters' full-time, year-round work in the business and additional risk arising from the Taylor Wimpey reserved rights. In response to a question from the Tribunal he said that were he to ignore the rights his tenant's share would be in the order of 71-72%. Mr Cox concluded that 65% was a 'reasonable return', a figure that included all director's remuneration. Other than noting the percentage adopted neither expert placed any reliance on *Blackrock*, the circumstances of that case being far removed from the farm. Mr Davies relied on *Apple Jacks* as being a farm attraction with which a direct comparison could be drawn. Mr Cox emphasised the differences between *Apple Jacks* and Finkley Down Farm, including the seasonal opening of the former, its lack of utilities, a site prone to flooding and minimal indoor facilities.
57. York Maze is also a seasonal attraction without a play barn. Notwithstanding these two factors its AVD turnover of £1,601,581 was 21.3 % higher than Finkley Down Farm. Mr Cox said that the Tribunal's decision had included £60,000 per annum in the working expenses for a manager but in reality, the hypothetical tenant would be the recipient of this sum. In his view, the tenant's share taking account of this additional 'income' would equate to 75.90%. He added that the risk of precipitation in Andover was lower than in York.

58. Farmer Teds is in Ormskirk, Lancashire and has substantial undercover facilities. Its AVD turnover was £1,935,000.
59. Mr Cox's approach to the tenant's share was more forensic than Mr Davies's. Mr Cox sought to identify a safe return on capital of 2% and to assure himself that the residue, once the return on capital was deducted, was adequate to cover reward to the hypothetical tenant and risk. He pointed out that while his valuation at 65% was rateable value £134,250 the Valuation Office were not seeking to alter the existing assessment of rateable value £100,000. The additional £34,250 would benefit the hypothetical tenant and equated to a tenant's share of 73.97%.
60. Bearing in mind that the selection of the appropriate percentage for the tenant's share is the element of the valuation that has the most far-reaching consequences it was surprising that the experts only referred to six comparables. *Blackrock* is of questionable relevance; Farmer Teds is under appeal and three others are seasonal. I have no doubt that Finkley Down Farm is superior to the attraction in *Apple Jacks*. No evidence about weather patterns was adduced but it is not unreasonable to assume that historically at least, the weather in Andover is drier than in the notoriously moist 'Cheshire Gap'. The farm is on the periphery of a large town and has fewer disabilities. The quality of its buildings is superior, and it is open all year round. As Farmer Teds is the subject of an appeal to this Tribunal, I am inclined not to attach any weight to it as a comparable. I note the decision that the Valuation Tribunal made relative to two of the other farm attractions. The York Maze lacks the disabilities present at *Apple Jacks* and the percentage is appropriately less. It lacks a play barn and is therefore more susceptible to poor weather, a factor that undoubtedly explains its seasonal opening.
61. In my judgement the tenant's share should be assessed at 68% of the divisible balance. In coming to this figure I have had regard to the constraints of the site in terms of its size and split nature, and the possibility of year round opening. I have already found that it is not appropriate to adjust for the risk that Taylor Wimpey will take up its option on the land to the east of the farm and require part of the farm for an access road.

Stand back and look

62. The Rating Forum Guidance provides at paragraph 5.59:

“when the valuer has completed a valuation on the R&E method..., it is essential to review each of the elements to ascertain whether they have been correctly applied and produce a credible result”

And at paragraph 5.60

“although it is likely that comparables will not be available in sufficient numbers to enable a valuation to be prepared on the rental/comparative basis... the valuer should consider the valuation produced against the background of valuations relating to similar properties and/or businesses. If the valuation does not appear to 'fit the pattern' so far as one is discernible, the valuer should again carry out a thorough review of the valuation adopted.”

63. Both experts sought to 'sense check' their valuations against agreed assessments from other farm attractions. Mr Davies provided five examples of attractions which he described as 'truly comparable' to the farm under consideration. These were as follows:

- (i) Rare Breeds Church Farm, Stow Bardolph, King's Lynn, Norfolk. The farm park extends to some 4 acres and was formerly a dairy holding with buildings of 3,596 m² which have been retained for children's activities. The farm has outdoor and indoor activities including an animal petting area, tree houses, sand pit and climbing wall, gift shop, tractor trailer rides, baby animals, outdoor play equipment, trampolines, and a woodland trail. The 2017 List assessment of rateable value £42,000 was appealed and reduced to rateable value £21,500 by agreement.
 - (ii) Marsh Farm Visitor Attraction, South Woodham Ferrers, Essex. This attraction comprises 30 acres of farm park, an educational centre and 2,500m² of buildings. It is occupied under a 25 year lease from 2013 with Essex County Council as landlord. Mr Davies said that the 2017 List assessment of rateable value £87,750 had been reduced to rateable value £56,500 by agreement based on the 'market rent passing'.
 - (iii) Longdown Activity Farm, Longdown near Southampton. The farm park extends to some 28 acres of which 5.56 acres is open to the public (excluding the car park area). This activity farm also operates an agricultural enterprise which is exempt. The farm attraction buildings extend to 2,150 sqm. The property is occupied on a lease with a basic rent of £21,500 per annum. The 2017 List assessment was rateable value £80,000, and was reduced to rateable value £75,400, it is now subject to a Valuation Tribunal appeal. The VO have made a further offer to reduce the assessment to rateable value £52,500.
 - (iv) 4 Kingdoms Adventure Park, Newbury Road, Headley, Thatcham, Berks. A family run farm park extends to 40 acres on the Hampshire Berkshire borders. The adventure park offers indoor laser tag, climbing tubes, soft play, giant slides, and animal petting. The outdoor activities include jeeps, train, tractor rides, castle, bouncy pillows, toddler play area, boats, football play area, go-karts and dinosaurs. The 2017 List assessment is rateable value £25,000.
 - (v) Old MacDonalds Farm, South Weald, Brentwood, Essex. The farm park extends to 14.42 acres. The farm park is accessed off Weald Road and is situated 3.5 miles west of Brentwood Town Centre in open countryside but immediately adjacent to the M25 motorway. The traditional farm buildings extend to some 2,542 sqm. The car park accommodates some 200 cars. The 2017 List assessment of rateable value £66,000 was reduced to rateable value £36,500 by agreement.
64. Mr Davies considered that each of these properties to have a comparable location to Finkley Down Farm. He commented that the areas of land available for public access are very similar, particularly Longdown Activity Farm and Rare Breeds Church Farm. The farm buildings are all of a similar design, age, size, construction and area. He pointed out that a number of his comparable properties, namely Longdown, Church Farm, Marsh Farm, Whitehouse Farm Centre and Old MacDonalds Farm had all been the subject of appeals and had received a significant reduction in assessment.
65. In making these comparisons Mr Davies sought to make the point that all of the sites were assessed at figures that were substantially less than the current assessment on the farm. However, when properties are valued by means of the receipts and expenditure method there is rarely anything to be gained from such a simplistic comparison. It is their

individuality and the nuances of their trading performance that makes these properties suitable candidates for this particular valuation methodology. Two of the properties were leasehold but Mr Davies did not adduce anything in evidence that would enable me to discern whether the rents could be relied upon, much less anything that explained how the assessments had been informed by the rents.

66. Mr Cox referred to rental evidence as well, but only to note that the Tribunal had, in *Apple Jacks*, placed no reliance on it. He was correct to do so, the rental evidence available in this appeal adds nothing to that considered in the earlier appeal.
67. He was also cognisant of the Tribunal's comments in *Apple Jacks* and *Blackrock* about reliance on 'the shortened method' or in other words, valuation by means of taking a percentage of receipts. In this case he sought to use this method as means of comparison, but the Tribunal's previous criticisms still apply. It appears to me that the expression, as a single numerical value, of all the characteristics, financial performance and valuer judgement that went into agreeing an assessment, is an exercise that will produce an answer of minimal utility.
68. Nevertheless, for completeness, I record below the details of Mr Cox's comparisons.

UT(LC) Decisions	2017 Rating List Description	UT(LC) FMT	UT (LC) determined RV	RV to a % of FMT
Apple Jacks Adventure Park, Stretton, Warrington	Farm Attraction and Premises (Pt Exempt)	£755,000	£11,750	1.56%
VTE Decisions	2017 Rating List Description	VT stated FMT	VT Decision RV	RV to a % of FMT
York Maze, Elvington Lane, York, YO19 5LT	Tourist Attraction and Premises	£1,601,581	£93,500	5.83%
Finkley Down Farm, Finkley Down, Andover, Hants, SP11 8NF	Open Farm	VT did not confirm VO FMT £1,320,000	£100,000 – appeal dismissed	7.57%
Farmer Teds, Burscough, Lancs, L39 7HW	Tourist Attraction and Premises	£1,935,000 (VO) £1,946,071 (Appellant)	£125,000 – appeal dismissed	6.46% (VO) or 6.4% (agent)
Negotiated settlements	2017 Rating List Description	Settlement FMT not agreed between the experts	2017 Agreed RV	RV to a % of FMT

BewilderWood, Horning Road, Hoveton, Norwich, NR12 8JW	Woodland Activity Park and Premises	£2,250,000	£150,000	6.67%
Mead Open Farm, Billington Road, Stanbridge, Leighton Buzzard, Beds, LU7 9HL	Tourist Attraction and Premises	£1,800,000	£130,000	7.22%
Windmill Farm, Fish Lane, Burscough, Ormskirk, Lancashire,L40 1UQ	Farm Visitor Attraction and Premises (Part Exempt)	£400,000	£24,000	6%
Rand Farm, Rand, Market Rasen, LN8 5NJ	Farm Park (Pt Exempt) (C)	£575,000	£45,500	5.75%
Marsh Farm Animal Adventure Park, Marsh Farm Road, South Woodham Ferrers, Chelmsford, CM3 5WP	Farm Centre (Pt Exempt)	Valued with regard to rental agreement	£56,500 effective 1 April 2017 and 29 December 2017	N/A
Rare Breeds Centre, Church Farm, Lynn Road, Stow Bartolph, Kings Lynn, Norfolk, PE34 3HT	Farm Park and Premises	£628,000	£21,500	3.42%
Whitehouse Farm Centre, North Whitehouse Farm, Stannington, Morpeth, NE61 6AW	Farm Attraction and Premises	£917,500	£39,950	4.35%
Old McDonalds Farm and Fun Park, Weald Road, Brentwood, CM14 5AY	Farm Attraction and Premises (Pt Exempt)	£710,000	£35,400	5.14%
Fishers Farm Park, Newpound Lane, Wisborough Green, Billingshurst, West Sussex, RH14 0EG	Farm Park and Premises	£2,100.000	£120,000	5.71%

The Big Sheep, Abbotsham, Bideford, Devon, EX39 5AP	Tourist Attraction and premises	£1,327,268	£43,750	3.58%

69. The ‘stand back and look’ approach evinced by the guidance essentially asks ‘does the answer you have arrived at fit with the pattern established by other sites?’ recognising that when the receipts and expenditure method is used, all of the attributes and disadvantages are baked into the components of the valuation. The FMTs above are disparate, but without the costs of sales and working expenses the comparisons simply tell me that for some sites the notional rent as a percentage of receipts is higher or lower than at others. It enables the valuer to see whether the end figure fits within a range but that is where the benefit stops.
70. Mr Davies attached as an appendix to his supplemental report, a report by Briggs and Stone, a firm of land and property consultants based in Buckinghamshire. The report, which was produced for negotiation purposes, was commissioned by Mr Davies rather than Mr Waters and was based on a valuation date of 1 April 2017 rather than the AVD. It was intended to support the valuation sought by Mr Davies. The report concluded that the market rent of the property in its current condition and assuming that the property was held on a ten year FRI lease was £50,000 per annum. The author of the report, Mr Will Taylor MRICS FAAV, adopted the comparative method of valuation but did not provide any details of comparable transactions. He reported that owing to a lack of rental evidence he had regard to a ‘layered’ approach in which he had assessed the likely achievable combined rent of the property if the buildings were to be let for commercial (non-leisure) purposes. I find this valuation of no use at all as it is not on the same basis as the statutory definition of rateable value and purports to relate to the market two years after the AVD.

Conclusion and determination

71. Having reached a conclusion on the various items where the parties were unable to come to a consensus and splitting the minor differences on the items of working expenses where the parties were in dispute, the resultant valuation is as follows:

FAIR MAINTAINABLE TRADE		£1,325,000
Cost of sales incl direct costs		£271,474
GROSS PROFIT		<u>£1,053,526</u>
EXPENDITURE		
Rates and water	£25,000	
Heat and light	£23,500	
Insurance	£25,000	
Repairs and maintenance	£76,625	
Cleaning and grounds maintenance	£22,500	
Motor and travel	£8,575	
Wages and NI	£346,250	
Protective clothing	£725	
Admin expenses	£12,000	
Telephone	£3,250	
Subscriptions	£2,500	
Training	£1,225	
Accountancy and audit	£29,000	
Legal and professional	£1,050	
Sundry expenses	£100	
Advertising	£22,000	
Bank charges	£17,900	
Equipment hire	£15,806	
Depreciation	£33,700	
TOTAL EXPENDITURE		<u>£666,706</u>
DIVISIBLE BALANCE/NET PROFIT		<u>£386,820</u>
Tenant's share @ 68%		£263,038
Available for rent		£123,782
	Rateable value	£123,750

72. The outcome is higher than the list assessment of rateable value £100,000 and that would continue to be the case if I were to adopt Mr Davies's approach of allowing for a manager at £50,000 per annum. A comparison of the current assessment and the adopted FMT produces a figure of 7.54% which is higher than all the comparables although not by a sizable margin. I do not draw any conclusions from that figure. However, I do note that for the four properties where I have details of the net profit, a comparison of the net profit (in my calculation) to FMT, the farm is significantly higher:

Whitehouse Farm Centre	13.65%
Longdown Activity Farm	7.27%
The Big Sheep	21.65%
Finkley Down Farm	29.19%

On the basis of that limited comparison the fact that the farm has the highest rateable value to FMT ratio is perhaps not surprising. I conclude that for the purposes of the 2017 List, the farm is under assessed and the appeal is therefore dismissed.

Mark Higgin FRICS FIRRV

22 August 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.