

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2018] UKUT 0077 (LC)
Case No: RA/44/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Hereditament – valuation - material change of circumstances – appeal dismissed

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF
THE VALUATION TRIBUNAL FOR ENGLAND**

BETWEEN:

McMANUS MANAGED PUB CO LTD

Appellant

- and -

**CRAIG LEWELL
(VALUATION OFFICER)**

Respondent

**Re: Mariners Court, 125/127 The Broadway,
Leigh-on-Sea, Essex SS9 1PG**

Hearing date: 23 January 2018

Before: Paul Francis FRICS

Royal Courts of Justice, London WC2A 2LL

Nikolas Moore MRICS, instructed by McManus Managed Pub Co Ltd, for the Appellant
Duncan McLaren, instructed by HMRC Solicitor's Office, for the Respondent Valuation Officer

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DECISION

Introduction

1. This is an appeal by McManus Managed Pub Co Ltd (“the ratepayer”), from a decision of the Valuation Tribunal for England (“the VTE”) dated 30 May 2017 which dismissed its appeal against a proposal to reduce the entry in the 2010 local non-domestic rating list as a composite hereditament at £110,000 RV to £95,000 RV with effect from 12 January 2012.
2. The ratepayer made its proposal on 6 June 2014 (which is the material day for the purposes of this appeal) on the grounds that a material change of circumstances (“MCC”) had occurred pursuant to the re-opening of the nearby Vine Restaurant (“The Vine”) on 1 January 2012 following refurbishment. This had resulted in a dramatic decrease in income from both food and wet sales at the appeal hereditament. That decrease, it had been argued, resulted from an overall fall in total trade over the 12 months following the re-opening of 12%, which included a 29.2% fall in dry trade. Based on the trading accounts, the fair maintainable trade (“FMT”) for the purposes of the 2010 rating list was £903,500 for the year ended 31 December 2012, made up as to £815,000 (wet trade) and £88,500 (dry trade). Calculated in accordance with the VO’s Approved Guide for the Valuation of Public Houses (2010 list) (“the Guide”) the reduction to £95,000 RV was considered appropriate.
3. The VTE pointed out that, despite accepting that a MCC had occurred because of the changes to The Vine, the evidence showed that the current incumbent’s lease of The Vine did not commence until 24 June 2012 and it only became occupied on 21 August 2012. The effective date for the MCC was therefore 21 August 2012. Having considered the trade figures supplied from 2005/6 through to 2014/15 and noting that the dry trade at the appeal hereditament had actually increased during 2013/14 and 2014/15 (thus increasing at the material date), the VTE concluded that none of the fall in the FMT was attributable to the refurbishment and reopening of The Vine. The appeal was therefore dismissed and the RV was confirmed at £110,000.
4. The ratepayer served a notice of appeal on 26 June 2017 and the VO served a respondent’s notice on 3 August 2017.
5. In its statement of case the ratepayer accepted that the effective date sought in the appeal to the VTE was incorrect as, despite it having been refurbished and opened as “The Ivy” in early 2012, it was not until 1 August 2012 (not 21 August as determined by the VTE) that it was relaunched as The Vine, and that should therefore be the effective date.
6. The grounds of appeal to this Tribunal were that the VTE was in error by placing too much emphasis on the levels of trade at the material date of 6 June 2014, and failed to appropriately distinguish between the underlying economic and physical factors (including the

MCC). Considering the economic factors prevailing at 1 August 2008 and the physical factors including the MCC existing at 6 June 2014, it was contended that the FMT established from the trading figures for the year ended 31/12/2012 (which were c. £903,500) should be the driver for the rateable value to be applied from 1 August 2012. The valuation (in accordance with the Guide) was set out thus:

Fair Maintainable Trade:

Wet trade	£815,000	
Applicable rate	11%	
Rateable value		£89,650
Dry trade	£ 88,500	
Applicable rate	5%	
Rateable value		<u>£ 4,425</u>
TOTAL		£94,075
	Say	£94,000*

* The actual RV sought was £95,000.

7. The VO, in his statement of case, contended that the VTE had had full regard to all the evidence, and was right to conclude as it did. The decision that the RV should remain at £110,000 was considered to be fair, reasonable and correct in law. It was neither inaccurate nor excessive and it was right that the appeal should have been dismissed.

8. Mr Nikolas Moore MRICS of Underwoods, Chartered Surveyors of Northampton, appeared as advocate for the ratepayer and called his business partner, Mr Andrew Boulter FRICS to give expert valuation evidence. Mr Boulter had not, however, produced an expert witness report, but on the morning of the hearing introduced a brief “Statement of Evidence” that spoke to different figures from those set out in the statement of case. There having been no objection from the VO to its introduction at such a late stage, I admitted it and allowed a short adjournment for it to be considered.

9. Mr Duncan McLaren, a case manager with Cambridge Valuation Office appeared as advocate for the VO and called expert valuation evidence from Mr Craig Lewell MRICS, the Valuation Officer who is based at the Colchester Valuation Office Non-Domestic Rates (East) Unit and covers the whole of East Anglia, including Leigh-on-Sea, and the East Midlands.

Facts

The appeal hereditament and The Vine.

10. The appeal hereditament is a three-storey end of terrace building located at the end of a terrace of seven non-domestic units towards the eastern fringe of Leigh-on-Sea town centre. It is in an established retail thoroughfare containing mainly secondary shops and independent retailers together with various pubs, bars and bar/restaurant hybrids, and occupies a corner position on the north side of The Broadway, its return frontage being on to Leighton Avenue, a residential street. The premises comprise a public house which is now described as “The Mariners Court Pub & Kitchen”, with split level ground floor containing seating and dining areas (approximately 90 covers) with steps up to a bar and servery. There are ladies, gents and disabled wcs, and a trade kitchen together with a small private dining room to the rear. There is wrap around glazing and doors to the street frontages (including concertina type folding doors on the Broadway elevation) together with a small outside raised pavement seating area (subject to a statutory restriction on use after 10pm) on the Leighton Avenue return frontage, protected by an awning. There is a beer store to the rear and stairs up to a small office at first floor and the manager’s residential accommodation.

11. The premises are subject to a 20 year lease which commenced on 13 March 2000 at a rent of £18,500pa which is subject to three yearly reviews. It was granted to Estuary Pub Company Ltd, full control of which was acquired by the appellant ratepayer in June 2008. The tenant’s improvements carried out in 2002 are not reflected in the rent. The current rental remains at the figure of £32,500 pa to which it was reviewed in 2006, but it is agreed that the company structure means that the hereditament is effectively owner occupied.

12. The Vine “Gastro Bar”, 149 Leigh Road, is located about 1/3 of a mile to the north-east of the appeal hereditament. It occupies a similar secondary trading position on the edge of a heavily developed residential area close to the junction of Leigh Road and Lord Roberts Avenue, and includes a roped off external seating area on the Leigh Road frontage. The layout is not entirely dissimilar to the appeal hereditament in that the accommodation is of similar size, is at two levels, there being a separate and distinct seating area, a raised dining section (with a similar number of covers to the appeal hereditament) and a long bar.

13. Prior to refurbishment undertaken to those premises in late 2011 it had traded as a bar & restaurant known as “SS 9”. In January 2012 it reopened as “The Ivy” but was not successful. It was subsequently relaunched as “The Vine” on, or very shortly after, 1 August 2012.

The material change in circumstances

14. It is agreed that the opening of the refurbished premises now trading as The Vine on or around 1 August 2012 constitutes an MCC. That is the effective date for the purposes of this appeal.

The valuation

15. There are a number of reasons (as set out in Mr Lewell’s expert witness report) why the rent passing at the relevant dates is not a reliable guide when considering the valuation for

rating purposes, and it was thus agreed that the correct approach to the valuation of the appeal hereditament for the 2010 list is using the Approved Guide for the Valuation of Public Houses. Although that guide has no statutory basis it is a commonly used method of valuing public houses for rating purposes.

Issue

16. The sole issue is one of value and the effect, if any, that the physical factors existing at the material day (6 June 2014) had on the valuation of the appeal hereditament. In particular, the issue is whether The Vine was the cause of an alleged “sudden and sustained” drop in the FMT of Mariners Court.

Statutory provisions

17. The rateable value of a non-domestic hereditament is defined in paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988 (“the 1988 Act”):

“2(1) The rateable value of a non-domestic hereditament none of which consists of domestic property and none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year 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 usual tenant’s rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above.”

18. As the property is a composite hereditament, it is also to be valued in accordance with the special rule in para 2(1A) of Schedule 6 which provides:

“The rateable value of a composite hereditament none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent which, assuming such a letting of the hereditament as is required to be assumed for the purposes of subparagraph 2(1) above, would reasonably be attributable to the non-domestic use of the property.”

19. Where the rateable value is determined with a view to making an alteration to a compiled list entry the matters mentioned in paragraph 2(7) of Schedule 6 to the 1988 Act are to be taken as they are assumed to be on the material day. Those matters include:

“2(7)(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...”

20. The material day is defined in the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992. In this appeal the material day is the day on which the proposal was served on the VO (Regulation 3(7)(b)(i)). That day was 6 June 2014.

21. Regulation 4 of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (“the 2009 Regulations”) defines the circumstances in which a proposal for the alteration of a local list can be made. These grounds include at Regulation 4(1)(b) that “the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled.”

22. A material change of circumstances in relation to a hereditament is defined under Regulation 3 of the 2009 Regulations as “a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the [1988] Act.”

23. Paragraph 2(3) of Schedule 6 to the 1988 Act provides that:

“Where the rateable value is determined for the purposes of compiling a list the day by reference to which determination is to be made is –

- (a) the day on which the list must be compiled, or
- (b) such day preceding that day as may be specified by the Secretary of State by Order in relation to the list.”

For the purposes of the 2010 non-domestic rating list the day by reference to which the rateable value of non-domestic hereditaments are to be determined was specified by the Secretary of State in the Rating Lists (Valuation Date) (England) Order 2008 as being 1 April 2008, which is the antecedent valuation date (“AVD”).

24. Regulation 14(2) of the 2009 Regulations provides that:

“Subject to paragraphs (3) to (7), where an alteration is made to correct any inaccuracy in the list on or after the day it is compiled, the alteration shall have effect from the day on which the circumstances giving rise to the alteration first occurred.” In this case, that date is now agreed to be 1 August 2012.

The case for the appellant

25. At the commencement of the hearing, Mr Boulter produced the brief statement of evidence referred to above, setting out the appellant's case as it now stood and including a "Summary of Trade Information" incorporating the basic wet and dry trading figures for the years ending 29 April 2006 to 25 April 2015. That summary was the same document that had been produced in the ratepayer's statement of case. He briefly described the appeal hereditament which, he said, he had inspected in December 2002 following a major refurbishment. He had not carried out a subsequent inspection, and said he had based his valuation from his knowledge of the property and the vicinity and from information provided by his client. He said he thought that the appeal hereditament was about a ten-minute walk from The Vine, but had not walked the route himself. He had driven around the area but had not visited any of the units referred to in the VO's evidence.

26. Looking firstly at the trade levels achieved prior to the opening of The Vine, Mr Boulter said that the figures for the years ending 30/04/2009 (£1,237,824), 26/04/2010 (£1,142,902) and 31/12/2011 (£1,013,482) indicated a FMT of around £1,100,000.

27. Asked why the valuations produced in the statement of case and in his new statement differed, Mr Boulter said that his up to date valuation showing an FMT of £850,000 "following the re-opening of The Vine" was derived from the trading figures for the years ended 31/12/2012 (£902,966), 27/04/2013 (£866,682) and 26/04/2014 (£839,412). The rounded FMT of £903,500 shown in the original valuation was based upon the 2012 year alone. He had then apportioned the revised FMT as to £670,000 liquor sales, and £130,000 to food. Mr Boulter then went on to say, in his statement:

"3.12 The valuation date is 1 April 2008 and so the trade achieved in 2012/13 should be adjusted to bring it to the terms of the valuation date.

3.13 This presents a difficulty to me because of the turbulence in the licensed trade over the period between these two dates. Based on my knowledge and experience of the industry I have deducted 5.85% and thus arrive at an adjusted Fair Maintainable Trade in total for the purpose of my valuation of £800,000 (rounded)".

28. Asked to explain the 5.85% discount, Mr Boulter said that this "toning back" was not scientific and was purely based upon his experience from many years dealing with the trade.

29. Applying the percentages in the Guide produced a valuation of £80,850 which Mr Boulter rounded to the RV now sought of £80,500.

30. It was his view that the levels of trade achieved in licensed premises are typically affected by the arrival of new competition, with clientele and young drinkers in particular being notoriously fickle and mercurial in their allegiance. Not being aware of any other factors that might have caused the sudden and dramatic fall off in trade (economic factors having held

up quite well), Mr Boulter said that he had concluded the reopening of The Vine at precisely the time when trade significantly dropped off, must have been the reason. The effects continue, he said, to the present day.

31. It was accepted that the appeal hereditament was in the rating list as a public house and that its “offer” was principally to drinkers in that it tends to cater for what he described as the “popular market” and appeals to the late afternoon trade of tradesmen and the like using the establishment after work. Nevertheless, few public houses can exist without offering food, and Mr Boulter said that the trade transmuted at lunchtimes and evenings towards family users. He acknowledged that the landlord of The Vine had been the same throughout the premises’ various guises, and its entry in the register had remained unaltered through the three changes of identity. However, he said that he had been told its occupation as “SS 9” was more akin to a nightclub and thus in a different sector of the market. He thought that the late 2011 refurbishment was designed to change the establishment’s “focus and appeal”, but accepted that there was nothing to stop the operator of the appeal hereditament doing the same – those premises not having been extensively refurbished since 2002.

32. As to the trading figures that had been produced, and the VO’s interpretation of them as handed in during the hearing, Mr Boulter did not accept the VO’s argument that the 50% *increase* in turnover between July and August 2012 (as against only 43% for the corresponding period the previous year) was directly contrary to the suggestion that there had been an immediate and substantial effect upon trading. A close inspection of the spreadsheet that the VO was relying upon showed clearly, Mr Boulter said, that after a number of broadly similar years’ trading, the fall from August onwards was dramatic and sustained. He also said it was his committed view that the immediate reductions in trading actually coincided with the reopening of the premises as The Ivy in January 2012, but accepted that the MCC for the purposes of the appeals had to be struck at 1 August in accordance with the statutory provision (by which the effective date is established), when it became The Vine.

33. Asked whether other changes that had occurred in the immediate area at around the time of the MCC– such as the closing and refurbishment of the Louis XIV (which was in the same ownership as the appeal hereditament), could have affected trading figures, Mr Boulter said that was in a very different sector of the market, having reopened as a champagne and burger bar.

The case for the VO

34. Mr McLaren opened by saying that the possibility of an impact upon a hereditament’s FMT caused by the opening of a competitor in the vicinity will depend upon the specific facts and circumstances applicable in any particular case. In this case, there were issues over the trade figures produced by the ratepayer, in that “they confusingly swop between a year end at the end of April in 2006 and 2007, before changing to the end of December for some years and then changing back to the end of April from 2013 onwards.” Despite numerous requests to the ratepayer, no satisfactory explanation had been provided. Further, due to the not

inconsiderable distance between the appeal hereditament and The Vine (in local town centre terms), it was most unlikely that any effect upon trade will have been caused by its reopening.

35. It is notable, Mr McLaren said, that there is a two-year gap between the date that the MCC is alleged to have occurred, and the date of the proposal. With 6 June 2014 being the material day for considering the proposal, all material changes in the locality need to be factored in at that date, including the various openings and closings of other licenced establishments (particularly the bar/restaurant known as the Louis XIV which was closed in April 2014 and reopened following refurbishment on 31 July 2014), and any other physical factors such as changes to road layouts, parking provisions, pedestrian zones and the like. There had been no other sustained MCC proposals citing the reopening of The Vine whereas if the appellants case had merit, applications could have been expected from premises that were much closer, such as The Broker.

36. Mr McLaren pointed out that there are three hurdles for the appellant to clear. Firstly, has an MCC occurred? The VTE accepted at face value that it had, but the appellant fell at the next two: has there been any impact, and if so, is it sufficient to affect the rental bid? No evidence had been produced that came anywhere near providing conclusive support that the alleged downturn in trade had been caused by the reopening of 149 Leigh Road.

37. Mr Lewell said that although he was not a licensed trade specialist, he had dealt with a large number of MCCs across various classes of use and occupation. He had been on a relevant training course, was familiar with the Guide and had carried out a considerable amount of research and detailed physical investigations into the locality and the various bars, restaurants and pubs in the area. He said that the appeal hereditament was located within the town's established drinking circuit, whereas The Vine was very much out on a limb and not within that circuit. Its 'off-pitch' location was reflected in a zone A rate of £200 per sq m for The Broker (also on Leigh Road) against £300 per sq m on the Broadway.

38. The interior of the appeal hereditament, which Mr Lewell said he inspected on 29 December 2017, was somewhat dated in appearance and it was difficult to describe the particular 'offer' or market at which it was aimed. It had been fitted out with a nautical theme, and the lighting and décor gave it the feel of an old-style cruise liner. The general appearance was definitely not as modern as some of the other bar/restaurant hybrids in the locality including The Vine – which also had a superior drinks offer including cocktails which were promoted on a blackboard above the bar. Mariners' Court has LCD televisions strategically located throughout for football and other sporting events. There was a standard offer of beers including some more unusual varieties, but it could by no means be described as a real ale pub. From the menus on the tables, Mr Lewell described the food offer as 'traditional pub fare'.

39. Mr Huggett, the manager who had transferred from another McManus outlet in Northampton at around the time of reopening of 149 Leigh Road as The Vine in 2012, told Mr Lewell that apart from redecoration and new carpets some 7 years ago no further works had been carried out since, and neither had the pub's website been updated. The Vine, according to the VO's records, has had the same licensee throughout its various different guises since

2005, and there have been no applications for change of use. Whilst Mr Lewell questioned whether what he believed to be very limited ‘refurbishment’ carried out when the premises were launched as The Ivy and later relaunched as The Vine in 2012 could really be classed as an MCC, he said that for the purposes of his report, he had proceeded on the basis that it was. He went on to reiterate what Mr McLaren had said – that the valuation must reflect the situation at 6 June 2014. He had identified that during the period between the effective date of the MCC and the material day, there had been a number of other material changes in the locality, all of which need to be taken into consideration.

40. Firstly, and most significantly, the closure of the Louis XIV bar which was only 144 metres from the appeal hereditament, also on The Broadway, and located at the junction with Leigh Road which leads to The Vine. The Louis XIV had been comparable to The Vine in terms of its cocktail and champagne offering. It was closed following a sale in April 2014 and after an extensive refurbishment, was reopened by the new owner as Henry’s Burgers in July 2014. Given this, Mr Lewell said, if the appellant is arguing that the reopening of The Vine had resulted in a dramatic fall in turnover (thus reducing a prospective tenant’s rental bid), by the same token the closure of The Louis XIV must have at least counteracted any fall. Bearing in mind those premises were significantly closer, it could even be expected that the appeal hereditament might benefit from the closure. Further, when it reopened in July 2014, it had a very different offering and would not have been a direct competitor.

41. Secondly The Estuary, 45/45a The Broadway appeared to have been a single unit restaurant which was extended into the neighbouring former florists prior to the Antecedent Valuation Date of 1 April 2008 to create a separate bar area. This occurrence appears to have had no effect upon the appeal hereditament’s trade, as the trade figures provided show increases in 2008/09, and suggests that the market was not as sensitive to the expansion of competitors as the appellant was making out. The Estuary is, like Henry’s Burgers, much closer to the appeal hereditament than The Vine. It was further expanded to the rear in 2014, but again there is no suggestion that this might have been a contributory factor in the alleged fall off in trade at Mariners Court.

42. As to any specific analysis of monthly trade figures perhaps providing some answers, Mr Lewell said that he had initially had great difficulty obtaining these from the appellant. When some were provided, there were extensive gaps including no trading figures between May 2009 and April 2012, or between August 2012 and the material day. Although more comprehensive monthly figures were eventually made available (one day before his report was due to be filed) he said that they did not support the appellant’s contentions about the effect of The Vine. Having then had an opportunity to consider the figures, Mr Lewell produced at the hearing a graphic illustration of the trading pattern between May 2007 and July 2015. This indicated a small but steady decline in trading results throughout that period and there was no evidence of the “dramatic and sustained fall” from July 2012 that the appellant has claimed. It was also notable that income in August 2012 increased by 50% over July whereas although it was accepted that income always rose at that time of year (holiday period), in 2011 the increase was 43%, and in 2013 it was 46% for the like periods. Whilst there may have been some trade benefit resulting from the 2012 London Olympics, analysis of trade during other tournaments such as the Beijing Olympics and European football championships showed no such boost.

43. Mr Lewell also recorded that his extensive investigations of the relevant rating records showed that apart from a subsequently withdrawn MCC application for another McManus establishment (Bellini's) there had been no MCCs citing the reopening of The Vine as a reason for reductions in trade. The withdrawal of Bellini's application was surprising as its 'offer' was closer to that of The Vine than Mariners Court, both having dancing at weekends. In the two-year period between the effective and material dates there had also been many other changes to licensed premises in the vicinity over and above those that he had specifically analysed.

44. In conclusion, Mr Lewell said that based upon the information that had been before him, and his research and investigations, the appellants had failed to meet the evidential bar sufficiently to commend a reduction in the appeal hereditament's rateable value. Even if, as has been accepted, the reopening of The Vine did constitute a MCC, there is no proof it had any impact on the trading figures which had been declining for a considerable number of years.

Discussion

45. I carried out an unaccompanied inspection of the appeal hereditament, The Vine, Henry's Burgers (the former Louis XIV) and The Estuary on 27 March 2018 together with the other premises referred to in Mr Lewell's report and the area in general. Before giving my conclusions based upon the evidence and my own inspections, I think I should record my concern at how the appellant's case was presented. The statement of case was prepared and served by Mr Moore on 26 June 2017, the basic premise of which is summarised in the introduction above. In setting out the arguments that would be advanced, Mr Moore acknowledged that when a nearby competitor opens for trade in the same locality, there is a reasonable expectation that there will be a partial migration of customers. However, he felt that the adopted FMT (of £903,500) anticipated a measure of recovery from any immediate impact and was thus a true and fair assessment of what that figure should be. He went on to say, at para 6.2:

“ That although, as a result of improved economic conditions and the changes made to effectively compete with The Vine, trading had improved in the years ending April 2014 and 2015, the improved trade figures for that year support the appellant's valuation.

6.3 That, as a result of the material change of circumstances, it was necessary for the appellant to change the way in which the subject hereditament traded in order to effectively compete with The Vine. That the trade information demonstrates an immediate effect of the material change of circumstances on the fair maintainable trade of the subject hereditament and that this is not accounted for by any other cause.

6.4 That in analysing the effect on the trading performance of material change of circumstances with effect from 1 August 2012, account should be taken of the fact that the competitor establishment had traded from the beginning of 2012 under another name.”

46. The appellant's valuation is, he said, supported by the disclosed trading information (set out in an appendix to the statement of case) and “expert valuation opinion submitted by

Andrew Boulter FRICS who will be called as an expert witness.” Having failed to provide an expert witness report by the date directed by the Tribunal, the Tribunal was advised, following its inquiry, that Mr Boulter would not be producing one but wished to be called to provide oral evidence. As has been explained above he nevertheless produced at the hearing a brief statement that spoke to a reduced RV of £80,500.

47. The grounds set out in the statement of case were confusing in their content as were the figures produced to support the appellant’s argument – as the VO pointed out there were differing year ends for 2011 and 2012 the reasons for this being unexplained.

48. If Mr Boulter was aware in June 2017 that he was to be called as an expert witness, not only am I surprised that no report was produced within the expected time frame but, of even more concern, is the fact that he openly admitted he had not re-inspected the appeal hereditament, and was entirely reliant upon his recollections of a visit made some 16 years ago and upon the information provided by his client. He will not, therefore have seen The Vine in its present guise, or even as it was when named SS9 and subsequently The Ivy. He was, he admitted, entirely reliant upon his recollection of the area and will most certainly not have an up to date feel for the nature of the nearby competing businesses and any other physical factors that might have materially affected the hereditament and its trading potential. Mr Boulter’s methodology was also questionable, and the “toning back” resulting in a further 5.85% reduction was not based upon fact and was nothing more, it seems to me, than an unnecessary and unsupported stab in the dark.

49. On the other hand, the VO has provided a comprehensive and thoroughly researched expert witness report which sets out in impressive detail the relevant evidence particularly as to the differences and similarities between the appeal hereditament and The Vine together with a host of other properties in the same or very similar markets. He pointed out that no other MCC’s (other than the one that was subsequently withdrawn relating to Bellini’s (also a McManus establishment)) had been sought in relation to The Vine’s opening. There were many examples of other licensed premises that would be more, or as, likely to have affected trade including the closing of the Louis XIV and the extension to The Estuary which is only a few yards west of the appeal hereditament and is also on the Broadway.

50. The Vine is also some way away from Mariners Court and is different in its “offer”. I accept and agree with Mr Lewell’s evidence and argument and think it very much more likely that the appeal hereditament might be affected in terms of trading by any changes to establishments in the much closer vicinity. These include The Estuary which has a much more continental feel in that it is fully open fronted onto the main pavement and is both a bar and a restaurant. It was extremely busy on a Monday lunchtime when I visited the area. Yet the trading figures show that turnover at the appeal hereditament actually increased in the two years after The Estuary was extended and in my view if there were serious losses of trade caused by new openings or other factors such as major refurbishments, then those actions would be expected to show in the figures. The Vine, which refers to itself as a Gastro-bar, is clearly aimed at a young, upmarket clientele, and focusses on cocktails and the late-night drinking market more than Mariners Court. The Vine’s food offer is, in my view, more limited

than that at the appeal hereditament which has (at March 2018) an impressive and varied “pub grub” menu which I agree with Mr Lewell is likely to be aimed at the lunchtime, early evening and weekend family market.

51. Further, Mariners Court seems to me to be much more of a traditional pub than a Gastro-bar and although it does offer cocktails ‘on special offer’ is certainly not on trend with the latest fads and fashions.

52. To my mind, there is no evidence that the opening of The Vine in August 2012 (or since it opened as The Ivy in January 2012 as the appellants now assert) has, or will be likely to have, caused a noticeable or material fall off in both wet and dry trade. As the respondent points out, the figures clearly show a prolonged and sustained decline in both wet and dry trade since long before the material date. There must have been other factors – possibly a combination of them – that caused this decline. The relevant trading figures produced to support the appellant’s case are set out thus:

Year ending	29/04/2006	28/04/2007	26/04/2008	26/04/2009
Liquor	£703,933	£835,934	£847,810	£1,045,837
AWP Machines	£15,750	£13,189	£15,103	-
Food	£226,849	£226,297	£193,416	£191,987
Other	£566	£1,284	£2,106	-
Total receipts	£947,098	£1,076,704	£1,058,435	£1,237,824
Year ending	26/04/2010	31/12/2011	31/12/2012	27/04/2013
Liquor	£990,124	£888,437	£814,392	£753,890
AWP machines	-	-	-	£25,440
Food	£152,778	£125,045	£88,574	£86,227
Other	-	-	-	£1,075
Total receipts	£1,142,902	£1,013,482	£902,966	£866,682
Year ending	26/04/2014	25/04/2015		
Liquor	£707,904	£662,053		
AWP machines	£21,317	£20,444		
Food	£110,020	£126,284		

Other	£171	£42		
Total receipts	£839,412	£808,823		

53. These figures clearly indicate that far from a sudden and sustained fall in turnover in the food and drink lines from 2012, that decline commenced after April 2009 and continued steadily through to 2015 although by then food sales had started to pick up again.

54. This is a highly competitive market, and in my judgment traders in this line of business need to be one step ahead of the competition in terms of offer, ambiance and the like, if they are going to succeed. Mariners Court appears to fit well into its particular market, and presents much better than both The Broker and to a lesser extent, The Broadway. Nevertheless, I stress that my impression is that its market is very different from The Vine and I am not persuaded that its reopening would have been the cause of trading performance at Mariners Court.

Disposal

55. I therefore determine that the appellant’s case has not been made out and concur entirely with the determination of the VTE. The appeal is therefore dismissed.

56. This appeal was heard under the Tribunal’s simplified procedure which is principally a no costs regime unless either of the parties’ behaviour has been unreasonable. There being no suggestion from either of the parties that that is the case, I determine that there shall be no order as to costs.

Dated: 29 March 2018



Paul Francis FRICS