

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING - valuation - alteration of rating list – seasonal farm attraction in a part-exempt hereditament – receipts and expenditure method – appeal allowed

AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL
FOR ENGLAND

BETWEEN:

MR JOE AND MRS VALERIE FRYER

Appellants

-and-

MR WAYNE COX
(VALUATION OFFICER)

Respondent

Re: Apple Jacks Adventure Park,
Stretton,
Warrington,
WA4 4NW

Mr Mark Higgin FRICS FIRR V and Mrs Diane Martin MRICS FAAV

Heard on 24-25 May 2022

Decision Date: 02 September 2022

Richard Glover QC, instructed by Eversheds Sutherland, for the appellants
Hugh Flanagan, instructed by HMRC, for the respondent

The following cases are referred to in this decision:

Holden Vale (Conference Centre) Limited v Whitehead (VO) [2014] RA 10

Hughes (VO) v York Museums and Gallery Trust [2017] UKUT 0200 (LC)

Redrose v Thomas (VO) [2014] UKUT 0311 (LC)

Thomason v Roland (VO) [1995] RA 255

Wishart v Hulse (VO) [2018] UKUT 0224 (LC)

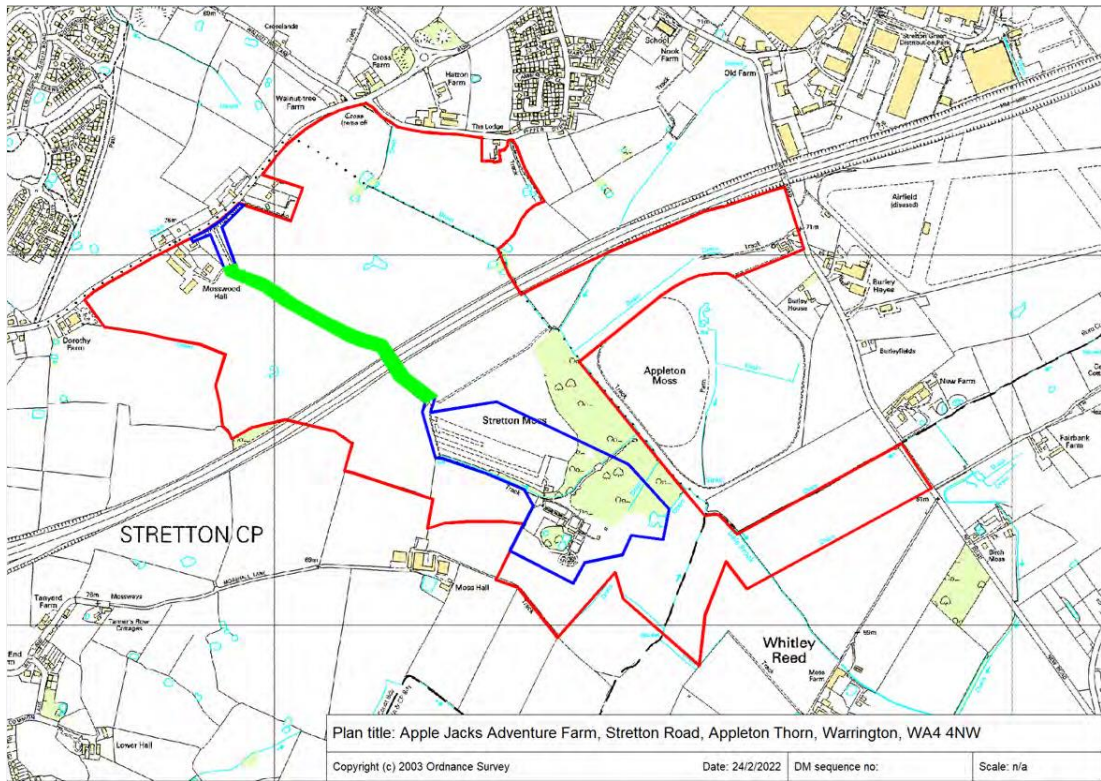
Introduction

1. This is an appeal against a decision of the Valuation Tribunal for England (“the VTE”) dated 11 February 2021, in which it dismissed an appeal against the rateable value of £35,000 entered in the 2017 list for Apple Jacks Adventure Park, Stretton, Warrington WA4 4NW (“the attraction”).
2. The parties are agreed that the attraction was in the same physical state on the material day of 1 April 2017 as at the antecedent valuation date (“AVD”) of 1 April 2015. They are also agreed that the primary method of valuation to be adopted is that of receipts and expenditure (“R&E”). We will examine this means of valuation in more detail later in the decision.
3. The appellant seeks a nominal rateable value of £1 and the respondent seeks to maintain the listed rateable value of £35,000.
4. We inspected the attraction on 10 May 2022 accompanied by Mr Joe Fryer, one of the appellants, and Mr Wayne Cox for the respondent. At the hearing Mr Richard Glover QC appeared for the appellants and called Mr Joe Fryer and Mr Colin Hunter MRICS IRRV(Hons), a Divisional Director of Lambert Smith Hampton to give expert evidence. Mr Hugh Flanagan appeared for the respondent and called Mr Wayne Cox BSc MRICS Dip Rating, Head of Leisure and Licensed Property within the National Valuation Unit of the Valuation Office Agency (“VOA”) to give expert evidence. We are grateful to them all for their assistance. The experts in particular, are commended for having reached agreement on many components of the R&E valuation.

The Facts

5. The attraction forms part of a farm of approximately 300 acres which straddles the M56 south of Warrington. The majority of the hereditament is exempt from rates, as agricultural premises, but approximately 30 acres in the middle of the farm are used for a seasonal attraction with car park. The attraction is open from Easter through to September during weekends and school holidays. It re-opens as Spooky World for two weeks around Halloween.
6. The plan below shows the hereditament outlined red, the area used for the attraction outlined blue and the access track over the motorway in green. The access track is shared with the farm operation and a public footpath also crosses the bridge. A 35 acre block immediately south of the M56 was used as landfill during construction of the motorway and the route of the access track follows its south western boundary. The attraction’s car park is sited over part of the restored landfill site, which proved unsuitable for cropping. Some sharp items in the landfill have gradually made their way over time to the surface, resulting in damage to cars and claims against Mr and Mrs Fryer.
7. The attraction has no mains services. Electricity is generated on site, by a combination of four generators, and some appliances are run off propane gas. Water is brought onto the site in tankers and stored in a 60,000 litre underground tank, from where it is treated with ultra-

violet light and pumped to the toilets and washing up areas. Cooking water is supplied separately and only bottled water is supplied for drinking. Dirty water from the toilets and kitchen is taken by tanker to a licenced dirty water lagoon 20 miles away.



8. The attraction comprises a range of buildings and structures with varying degrees of permanence. These include timber admissions buildings (also used for education), a brick-built servery (Apple Jack’s Grill) and various steel and timber framed buildings used for a shop/staff room, Jack’s Ice Cream, Spooky World attractions, storage and to house the generators. Additional structures include roofed-over containers with timber cladding which house the toilets, other containers used for the Haunted House, for storage and a first aid station. A large marquee is used for indoor soft play activities with inflatables. Timber constructions provide the infrastructure of outdoor activities including corn cannon, archery, go-karts, a zip wire, quad karts, roller-skating, a timber maze and an open air stage with seating. Although the attraction is promoted as ‘Apple Jacks Adventure Farm’ the impression we gained from our visit was that it would more appropriately be described as a leisure attraction located on a farm. With the exception of an eight acre maize maze and trailer rides around parts of the farm (with educational commentary on farming by Mr Fryer) the connection to farming is rather tenuous. There are, for instance, no livestock present on the farm and in contrast to other farm attractions to which we were referred there are more temporary buildings, a feature that has its origins in the Green Belt planning status of the site. In his evidence Mr Fryer said that short presentations about farming were provided to children, for example on the extraction of oil from rapeseed, and visitors are able to view farm machinery. The eight acre area planted each year to create a maize maze is rotated around the attraction on adjoining arable fields.

9. During October the site also hosts the Spooky World event which relies on farm resources, such as tractors and trailers, for ferrying customers between attractions and as a means of transport through the woodland areas where various scare events take place.
10. We have already mentioned the Green Belt planning status of the site and we were supplied with a copy of a Notice of Decision dated 13 May 2010 relating to a:

“Retrospective application for the permanent retention of existing buildings/structures/car parking, the erection of replacement buildings/extensions and the extension of the number of existing car parking spaces and the change in use of the land from agricultural to leisure purposes.’

In granting consent the local authority imposed a number of conditions on the use of the site. Originally these included a general prohibition on use by members of the public outside of the months of July to December, but this period was subsequently modified and extended by consent in 2011. It was stipulated that the marquees shown on the approved site plan should not remain on the site outside the period when the leisure facilities were open to the public unless otherwise prior agreed in writing with the local authority. The conditions additionally specified the opening hours (between 9.00 and 18.30) with the qualification that any events beyond these confines would again need the prior written consent of the local authority. Further conditions control the amount of noise and light generated on the site.

11. The attraction has been run in a hands-on fashion by Mr and Mrs Fryer since the first maize maze was planted in the mid 2000’s. The farm diversification was created to provide an additional income stream following closure of British Sugar factories in the West Midlands in 2004 which meant that the farm’s sugar beet crop was no longer viable. Mrs Fryer is an equal partner in the business, working full time on administration, on reception tills during the season and as part of the team cleaning and preparing the attraction in the closed season. Mr and Mrs Fryers’ farm staff, including their son and son-in-law, work on both the farm and the attraction according to seasonal needs.
12. Farm accounts, with a year end of 30 November, are produced for the whole of the appellants’ farming business, which includes another farm in addition to the hereditament. However, the receipts and expenditure for the attraction are shown separately in the accounts and the experts had regard to them to inform their respective valuations, taking a view on the budget that a hypothetical tenant would make as at the AVD. A summary of actual receipts, expenditure and net profit from 2011 to 2015 is shown below:

Trading year:	2011	2012	2013	2014	2015
Receipts	£749,745	£637,420	£760,166	£825,464	£707,577
Expenditure including cost of sales	£598,827	£600,198	£638,198	£742,148	£644,990
Net profit	£150,918	£37,222	£121,968	£83,316	£62,587

13. In 2014, when the business participated in a Groupon marketing scheme, the receipts were exceptionally high and marketing costs were low, but the large visitor numbers from a different visitor profile led to a big increase in repair costs. Profit was very low in 2012 as a

result of severe wet summer weather affecting visitor numbers. We were not provided with a breakdown between the Apple Jacks and Spooky World elements of the receipts.

14. Mr Fryer explained that he had experienced difficulty in obtaining insurance at reasonable cost owing to flooding problems and injury claims. On the most recent occasion when he attempted to secure cover it came with a stipulation that existing deep water needed to be drained from the centre of the site. These works, which proved to be difficult and time consuming, were not completed in a timescale agreeable to the insurance company. Subsequently, the difficulties of the site had made the cost of obtaining cover prohibitive and as a consequence the attraction self-insures. Mr Fryer told us that claims (against Apple Jacks) presented additional difficulties as the legal costs were onerous. They had similarly decided to take the claim handling 'in house' as well. In a typical year they experienced three or four claims and each is contested.
15. We also heard from Mr Fryer that the farm is largely sited on 'moss soil' which is prone to being compacted by visitors, exacerbating the drainage problems already mentioned. In addition, the site is located in the 'Cheshire Gap', an area prone to high levels of rainfall caused by a funnelling of moist air along the Mersey estuary. As a consequence the microclimate is very wet, and sometimes this causes the attraction to close, possibly for two or more consecutive days to allow the land to recover.
16. Mr Fryer had assessed that the hours worked in the attraction over a typical year amounted to 2,555 for himself and 2,772 for Mrs Fryer, a combined total input of 5,327 hours.

The Statutory Framework

17. 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."

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.”

18. Where, as here, part of the hereditament is exempt, paragraph 2(1B) of Schedule 6 applies:

“(1B) The rateable value of a non-domestic hereditament which is partially 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... would, as regards the part of the hereditament which is not exempt from local non-domestic rating, be reasonably attributable to the non-domestic use of the property.”

The hypothetical tenant

19. The Tribunal commented in *Wishart v Hulse (VO)* [2018] UKUT 0224 (LC) that:

“27. The basis of the valuation is the assumption of a letting to a reasonably competent or efficient operator who will expect to achieve a level of income, or turnover, and to incur a level of expenditure, which are broadly representative of an average level of performance.”

We will consider this observation in the context of the attraction later in this decision.

20. It was agreed by the parties that the hypothetical tenant in this case would be an agricultural tenant, and the rateable value is the additional rent that the tenant would have been prepared to pay at the AVD to have the benefit of running the attraction as a diversification activity on the farm.

The R&E method

21. There was no dispute as to the primary method of valuation to be adopted. In *Hughes (VO) v York Museums and Gallery Trust* [2017] UKUT 0020 (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).”

22. The Joint Professional Institutions’ Rating Valuation Forum (“the Rating Forum”) published guidance in 1997 titled “The Receipts and Expenditure Method of Valuation for Non-Domestic Rating: A Guidance Note”. Although dated, the guidance remains current in respect of methodology and was agreed by the experts to be relevant.
23. By the time of the hearing, the experts had helpfully reached agreement on many of the components in the R&E calculation. The table below shows the agreed and unagreed figures presented to us:

	Ratepayer	VO	Difference
Receipts			
Admissions	£580,000		
Food and drink	£140,000		
Merchandise	£35,000		
GROSS RECEIPTS	£755,000	£780,000	-£25,000
Cost of sales incl direct costs	£133,000	£140,000	-£7,000
GROSS PROFIT	£622,000	£640,000	-£18,000
EXPENDITURE			
Employee costs	£237,000	£237,000	
Rates	£14,297	£4,062	£10,235
Premises costs	£26,750	£26,750	
Repairs	£75,000	£55,000	£20,000
General admin	£5,000	£5,000	
Insurance	£18,000	£18,000	
Motor	£16,250	£16,250	
Advertising and promotion	£96,000	£46,800	£49,200
Legal and professional	£10,500	£10,500	
Depreciation	£50,000	£50,000	
Bank and other charges	£15,000	£15,000	
Other expenses	£6,400	£6,400	
CROSS SUBSIDY:			
Tractor and farm vehicles	£5,000	£5,000	
Manager	£35,400	£0	£35,400
TOTAL EXPENDITURE	£610,597	£495,762	£114,835
DIVISIBLE BALANCE / NET PROFIT	£11,403	£144,238	-£132,835
TENANT'S SHARE	£11,403	£109,238	
RATEABLE VALUE	£1	£35,000	

24. In relation to insurance, the expert surveyors agreed a cost of £18,000 as a reasonable premium, notwithstanding that in reality Apple Jacks self-insures.
25. We now turn our attention to the elements remaining in dispute which are the gross receipts and cost of sales, repairs, advertising and promotion, the allowance for rates, the allowance for a manager, the amount of working capital and the tenant's share.

Valuation – disputed matters

(i) AVD turnover

26. The accounts of the business and the extraction of elements attributable to the attraction are not in dispute between the experts. The receipts for those years were broken down as follows, with acknowledgement of some small discrepancies in the totals:

Trading year:	2011	2012	2013	2014
Ticket sales	£621,840	£519,611	£583,640	£615,166
Food and drink	£99,749	£88,568	£141,602	£160,009
Merchandise	£28,157	£29,221	£34,922	£50,037
Total receipts:	£749,745	£637,420	£760,166	£825,464

27. For the appellants, Mr Hunter observed that the low figure in 2012 was a result of an exceptionally wet summer leading to low visitor numbers. By contrast, he observed that the high figure in 2014 resulted from a special marketing arrangement with the on-line discount provider, Groupon, which was not continued the following year. Groupon were responsible for all advertising costs and took a share of ticket sales as commission. The ticket sales in the accounts are shown net of the Groupon commission. The increased footfall from Groupon led to associated increases in sales of food, drink and merchandise.
28. Mr Hunter therefore disregarded both the 2012 and the 2014 receipts and adopted rounded 2013 figures of £580,000 for admissions, £140,000 for food and drink sales and £35,000 for merchandise sales, giving total receipts for his R & E calculation of £755,000.
29. For the respondent, Mr Cox also placed limited weight on the 2014 accounts. In an attempt to model the likely outcome of receipts for 2014 without the Groupon scheme he adjusted the 2013 receipts using evidence from the Visit England report for 2014. Each July, Visit England publishes an annual trends report from the findings of its survey of visitor attractions in the previous calendar year, with particular focus on year-on-year changes in data. The survey is completed on a voluntary basis, following an invitation sent out by email, and the 2014 data was collected from 1,491 attractions, of which 54 (4%) were in the farms (farms/rare breeds/farm animals) category. This data showed 10% year on year growth in visitor numbers to farms from 2013 to 2014, alongside 3% growth in local visitors to attractions in the North West.
30. Mr Cox took the 2013 receipts of £760,000 and, assuming an increase in visitor numbers of 3% but no increase in admission charges, assessed the figure at the AVD at £780,000, rounded down from £782,970. He subsequently acknowledged that, at the AVD, the latest Visit England report available to the hypothetical tenant would have been the 2013 report,

published in July 2014. The equivalent figures in that report were 8% for overall growth in visitor numbers to farms and a decrease of 6% in local visitors to attractions in the north west.

31. In our opinion the Visit England reports provide a useful overview of the economic performance of visitor attractions of various kinds in each year, but we would exercise caution in relying on data from the loosely defined category of farm attraction to support adjustments in an R&E exercise for an individual attraction which is far from typical of the category. Moreover, it seems to us unlikely that the hypothetical tenant would place sufficient confidence in the data available at the AVD to assume a future uplift in visitor numbers in the north west.
32. Standing in the shoes of the hypothetical tenant at the AVD, looking at the receipts from 2011 to 2014 it would be apparent that there is no discernible trend over that period and that they are very sensitive to external factors which affect visitor numbers. The 2012 figures show that the impact of poor summer weather can be dramatic for an outdoor attraction and that would carry serious weight in the mind of the hypothetical tenant. The uplift in receipts for 2014 would suggest that engagement with a scheme such as Groupon can be beneficial, although the value of ticket sales achieved in 2014 is not as high as in 2011 when there was no Groupon scheme in operation. It may therefore be too speculative to assume that the Groupon scheme was solely responsible for the higher level of receipts in 2014.
33. We would expect the hypothetical tenant to exercise caution in his budget for receipts. We therefore prefer Mr Hunter's approach and adopt his figure of £755,000 for receipts.

(ii) Cost of sales

34. Cost of sales is a figure which relates to the level of receipts from food, drink and merchandise. Mr Hunter took a rounded down figure of £130,000 for the cost of sales in 2013 and applied an increase of 2.34% for inflation between November 2013 and April 2015 to reach a figure of £133,000. Mr Cox adopted a figure of £140,000, using the actual costs of sales in the 2013 accounts, increased by 3% in line with his uplift for visitor numbers plus a further 2% for inflation. Mr Hunter's approach is logical, and we adopt it as consistent with our adoption of his figure for receipts.

(iii) Repairs

35. The rating hypothesis requires that the hereditament is considered to be in a state of reasonable repair at the commencement of the hypothetical tenancy. The AVD of 1 April sits close to the seasonal opening date of the attraction, at Easter, at which date it would be expected that the attraction would in reality have been in a good state of repair. The amount to be included for repairs in an R&E valuation should reflect likely expenditure by a tenant to maintain the state of repair, but not improve on it.
36. The accounts which would be available to the hypothetical tenant at the AVD show the amounts spent in each year on repairs and we present those in the table below, shown also as a percentage of turnover (total receipts):

Trading year:	2011	2012	2013	2014
Total receipts	£749,745	£637,420	£760,166	£825,464
Repairs	£55,675	£60,460	£65,653	£137,990
% of receipts	7.43%	9.49%	8.64%	16.72%

37. The exceptionally large expenditure on repairs in 2014 included ‘repairs/changes’, and probably some renewal, to scare attractions used for Spooky World. Mr Fryer also explained that the Groupon scheme in 2014 attracted more groups of 17- to 24-year-olds, who were less respectful of the property than families and caused a need for more repairs to be done. Much attention was paid by the parties to the list of itemised repairs for 2013 and 2014, but they could not provide any helpful conclusion on a split between repair and replacement in those years. We are confident that the hypothetical tenant would recognise that 2014 was an exceptional year in many respects and not one to be relied on in preparing a budget for rent.
38. Mr Hunter chose to ignore the 2014 figures for that reason and adopted a figure of £75,000 for repairs, on the assumption that the annual increase of £5,000 per year from 2011 through to 2013 was a trend which would continue through 2014 into 2015. Such an increase could, he said, be accounted for by increases in the cost of labour and materials, albeit that an increase of 14.2% over that period well exceeded the level of inflation at 2.34%.
39. It was Mr Cox’s opinion that the evidence within the accounts did not allow sufficient differentiation between repair and replacement to provide helpful figures for the rating hypothesis. Mr Cox therefore chose to refer to his benchmarking exercise using 31 rural/farm visitor attractions for which the VOA had received statutory forms of return (FOR) as at the AVD. 19 of the 31 had a turnover of less than £1.3 million and seven were part exempt. Each attraction was analysed to show different expenses as a percentage of turnover. Average percentages across the set of attractions were then assessed after removing figures at the top and bottom for each category of expense as potential outliers. For repairs, the resulting average percentage of turnover was 5.99% across the whole set and 6.72% across those with a turnover of £1.3 million or less.
40. Using 5.99% of his figure for gross receipts of £780,000 Mr Cox assessed repairs at £46,722. In an alternative approach he had adjusted the 2013 repairs figure, removing £5,650 spent on security systems to get £60,033 and then increasing this for inflation at 2% to get £61,234. By way of compromise, he settled on a figure of £55,000 for repairs representing 7.05% of gross receipts.
41. We accept that it would not be easy for the hypothetical tenant to assess at the AVD what a realistic allowance for annual repairs should be, particularly as the actual costs will inevitably fluctuate from year to year. Moreover, the semi-permanent nature of many of the structures at the attraction means that the cost of repairs and replacements will overlap to varying degrees. Doing the best we can, based on the evidence available and taking account of the different approaches of the two experts, we adopt a figure of £70,000. This reflects the level of expenditure incurred in 2013, with an increase of £4,347, or 6.6%, to

the AVD. This is still an increase which exceeds inflation but seems to us more appropriate than Mr Hunter’s generous allowance of £75,000.

(iv) Advertising and promotion

42. The largest difference between the experts in their R&E valuations arises over the amount to be allowed for advertising and promotion, with Mr Hunter adopting £96,000 and Mr Cox adopting £46,800. The table below shows receipts from 2011 to 2014, together with the figures for expenditure on advertising and promotion, also shown as a percentage of receipts for each year.

Trading year:	2011	2012	2013	2014
Total receipts:	£749,745	£637,420	£760,166	£825,464
Advertising and promotion	£81,252	£87,002	£111,488	£36,949
% of receipts	10.84%	13.65%	14.67%	4.48%

43. The attraction is located within a 45 minute drive of Greater Manchester, Liverpool, Chester, Warrington and Stoke-on-Trent, and so is within easy reach of a large customer base. Mr Fryer told us that as he had been running the attraction since the mid-2000s, and working in it on a daily basis, his experience of the market and what advertising was required to attract people was sufficient that external marketing expertise no longer added value to the business. Advertising was originally focused on Google, with a ‘pay per click’ cost. In more recent years, before the Groupon experiment, he had paid for radio and television advertising as he could not rely on repeat business and needed to re-energise his market each year. However, he was fully conscious of cost and knew when enough had been spent in a year.
44. Mr Glover submitted that the Fryers exemplify the reasonably efficient operator (“REO”), who does not have to be the perfect operator. Therefore the actual expenditure on advertising and promotion shown in the accounts provides the best evidence for the hypothetical tenant. The fact that the Fryers tested the Groupon arrangement for a single year only, in 2014, is simply an example of what the REO might do. Advertising and promotion in that year were primarily undertaken by Groupon, who took their commission as a share of ticket receipts, resulting in a conspicuously low spend on advertising in the 2014 accounts.
45. Mr Flanagan submitted that the levels of expenditure on advertising and promotion at the attraction from 2011 to 2013 were not those of a REO. Although Mr Flanagan made submissions on advertising by reference to the much smaller amounts spent in the post-AVD years, we do not give those figures any weight as they would not have been available to the hypothetical tenant.
46. In his first report Mr Hunter adopted a figure of £90,000, sitting just above the 2012 figure of £87,000 and well below the 2013 figure of £111,488 which he viewed as excessive. In his supplemental report he revised this up to £96,000, to have regard to the link between the spend on marketing and the level of receipts, for which he had assumed an increase at the AVD.

47. By contrast, Mr Cox gave little weight to the actual expenses incurred and preferred to rely on comparisons with other farm attractions, using his benchmarking exercise, explained earlier. For the complete set of attractions, excluding outliers, the average amount spent on advertising and promotion was 5.08% of turnover. For the subset with a turnover less than £1.3 million, the average was 6.17% of turnover. These figures were so far below the level of spend shown in the accounts that it was his opinion a REO would 'sharpen his pencil' and adopt a different approach. Mr Cox therefore adopted a figure of £46,800 for advertising and promotion based on 6% of his budget for receipts at £780,000.
48. Mr Glover submitted that no insights could be taken from the benchmarking material without analysis by a marketing expert of the relationships between costs and revenue.
49. We think that both parties make relevant points and acknowledge that for the hypothetical tenant, deciding what sum would be appropriate to allow for advertising and marketing would be problematic. We know that he will be primarily a farm tenant but we cannot hypothesise how much marketing expertise would be available to that tenant from his past experience, or from within his family, and we think it quite possible that he would see advantages in continuing with the Groupon scheme. But he would be unwise to budget forward using only the 2014 figures for income and associated reduced advertising.
50. On balance we think that the REO would see scope for reducing the high expenditure on advertising in 2013, which barely increased the receipts over those of 2011 when the spend was at 10.84% of receipts. The budget we have adopted for receipts at the AVD is £755,000 and we consider that a budget of no more than 10% of that figure would be prudent. We therefore adopt a figure of £75,500 for advertising and receipts.

(v) Business rates

51. The two experts adopted positions at opposite ends of the spectrum when it came to the question of what level of rates would be envisaged by the hypothetical tenant. Mr Hunter told us that the correct approach was to be cautious and adopt what he described as the 'best worse-case scenario'. He put the figure at £14,297 while Mr Cox initially adopted £3,207 but in his supplemental report adjusted the figure to £4,062. Under cross examination he referred to an amount in the range £4000 to £5000.
52. Before we examine the parties' arguments it is helpful to set out the history of the assessments:

2005 List – 1 April 2005 to 31 March 2010 – Rateable Value £3,200

2010 List - 1 April 2010 to 13 November 2010 - Rateable Value £35,000

2010 List – 14 November 2010 to 31 March 2017 - Rateable Value £23,700

The VOA issued a certificate of value for transitional purposes increasing the value as at 31 March 2017 to Rateable Value £29,000. This followed a VTE decision in the 2010 List where the correct value as at 14 November 2010 was

identified as being Rateable Value £29,000 (and higher than the assessment under appeal).

53. Mr Hunter's approach acknowledged that changes had been made to the property prior to the end of the 2005 List and that it would be appropriate for the VOA to review the assessment and issue a certificate of value for transitional purposes increasing the value as at 31 March 2010.
54. The relevance of the certificate is that the value certified is the starting point for the calculation of liability in the 2010 List. It is not necessary for us to set out the machinations of the transitional scheme for the 2010 List, but the practical effect of the certified value is that it would potentially have brought forward the point in time for the removal of relief and would therefore have influenced the amount payable. In addition, Mr. Hunter considered that the reinstatement of the shop by the AVD for the 2017 List (1 April 2015) meant that the VO might have considered the existing assessment was insufficient and could have reinstated Rateable Value £35,000. He contended that the hypothetical tenant would be mindful of these potential changes and would take account of the worst-case scenario in his bid. Using a 2005 List certified value of more than Rateable Value £9,750 would have removed all of the transitional relief in the 2010 List.
55. In calculating liability Mr. Hunter did not however use the original 2010 List assessment (with the shop included at Rateable Value £35,000) but took the decision of the VTE where it dismissed the appeal and found that the assessment should have been Rateable Value £29,000. The material date for that appeal was 14 November 2010. Mr Hunter's adopted liability is simply the product of multiplying the VTE's notional valuation of Rateable Value £29,000 by the relevant poundage of £0.493.
56. Mr Cox on the other hand took the view that the actual rates payable at the AVD should be the figure to be included in the R & E valuation. In support of this position, he referred to the decision of HHJ Marder QC in *Thomason v Roland (VO)* [1995] RA 255 where he said:

“And I believe that the rates in fact paid should be shown as a working expense, as the valuation officer asserted.”

The assertion by the VO was that:

“As to the rates, the actual rate paid should be deducted as one of the working expenses. What was described as the traditional method had been superseded by the advent of an AVD and by transitional phasing arrangements.”

Mr Cox also referred to the Rating Forum guidance which states that:

“Following the introduction of an AVD which fixes all economic circumstances, including levels of national and local taxation as they stand at the AVD, it is considered that the actual rates payable as at the AVD should be deducted as a working expense.”

57. Mr Cox thought it likely that a hypothetical tenant would undertake due diligence and recognise that the VOA might amend the 2010 List and simultaneously issue a certificate of value for transitional purposes increasing the 2005 List assessment of Rateable Value £3,200.
58. He considered that the hypothetical tenant would know that at the AVD there was an outstanding appeal which sought a reduction in the assessment of rateable value £23,700 with effect from 14 November 2010. He noted that the appeal was not heard by the VTE until 30 April 2018 and the decision was issued three weeks later. He thought it impossible to speculate how optimistic the hypothetical tenant would have been of achieving a reduction at the Tribunal. He noted that the VOA had issued a certificate for transitional purposes in relation to the 2010 List during July 2019 and this certificate was subsequently appealed by the appellant. The VTE issued a decision in October 2021 dismissing the appeal. Mr Cox concluded that having regard to the principles laid down in case law and the Rating Forum guidance note it was appropriate to utilise the actual rates payable and to reflect the potential for any increases in his calculation of the tenant's share.
59. We take the view that a prudent hypothetical tenant would be aware of the possibility of action by the VOA to adjust the assessment but would be unable to quantify the risk. It cannot be assumed, as Mr Hunter did, that the VOA would issue a certificate of value for transitional purposes increasing the value as at 31st March 2010. The VOA had already reviewed the assessment in late 2010 when they reduced the 2010 List entry from Rateable Value £35,000 to Rateable Value £23,700. Having not taken steps to adjust the 2005 List assessment at that point, there is no reason, in our view, to conclude that they would have had cause to revisit it thereafter. Mr Hunter's adoption of the VTE's decision of May 2018 in which they identified an assessment of Rateable Value £29,000, is also flawed. The hypothetical tenant could not have anticipated this outcome at the AVD.
60. We would therefore adopt Mr Cox's proposition of using the actual rates payable and account for the risk of any alteration by the VOA within the tenant's share.

(vi) Allowance for costs of a manager or whether this should form part of the tenant's share.

61. In paragraph 16 we identified the time spent throughout the year by Mr and Mrs Fryer in running the attraction. Mr Hunter drew attention to paragraph 5.29 of the Rating Forum guidance which states:

“Where the expenditure takes the form of director's remuneration by way of salary contributions to pension schemes or other rewards it is necessary to consider the nature of that remuneration to ensure 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 remunerations solely in the tenant's share”.

62. Mr Hunter considered that the actual occupiers of Apple Jacks are a partnership who spend significant proportions of their time working in the business, but this work related to the daily operation of the business and not in a director's role. Mr Hunter thought that

a hypothetical tenant might take the same approach but given the level of time recorded by Mrs and Mrs Fryer this would be more than an individual could cope with without assistance. In his view it was preferable to separate the two elements by adopting an expense for the non-directorial work of the partners separately to the calculation of the tenant's share which does not reflect on time spent working in the business.

63. As Mr Glover put it, the hypothetical tenant would require recompense for his or a manager's day-to-day work 'in' the business, which would be separate from the recompense for his directorial work 'on' the business. In terms of quantification of the cost of a manager, Mr Hunter adopted £30,000 p.a. but adjusted this sum to take account of employers' national insurance and pension contribution bringing the total staffing cost to £35,400 p.a.
64. Mr Cox also placed reliance on paragraph 5.29 of the Rating Forum guidance, and it was his view that a visitor attraction such as Apple Jacks would be operated by an individual or possibly by a family and they themselves would not be providing the type of advice that would be provided by in-house professional directors. He distinguished Apple Jacks from larger visitor attractions where the tenant's share calculation would be approached on a very different basis. It would be normal practice to include directors' remuneration within the expenses for running the business such as HR, legal or finance. He considered that companies running such attractions employed directors with an underlying purpose to provide a return to the shareholders. Mr Cox drew support for his position from two decisions of the Tribunal, firstly *Holden Vale (Conference Centre) Limited v Whitehead VO* [2014] RA 10 where Mr P R Francis FRICS agreed with the Valuation Officer's opinion that the director's remuneration should not be reflected in the working expenses. Secondly, in *Redrose v Thomas (VO)* [2014] UKUT 0311 (LC) Mr N J Rose FRICS stated:

"I have adopted Ms Thomas' approach to directors' salaries. I have excluded them from total expenses on the grounds that the tenants remuneration would be accounted for in the tenant's share".
65. This position was also taken in the decision of the VTE where it was stated "the partner's pay reflected what Mr and Mrs Fryer had chosen to pay themselves. The panel considered that it was normal to allow for this within the tenant's share as to do otherwise would be confusing and counter intuitive".
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.

Divisible balance, tenant's capital and the tenant's share

67. The result of adopting our own figures for the disputed matters in the valuation is to produce a divisible balance after management of £47,138. This compares with Mr Hunter's figure of £11,403 after management and Mr Cox's figure of £144,238 before management – which he says should be included in the tenant's share.
68. The experts differ fundamentally in their assessment of the tenant's share, so we consider it helpful to reiterate the Rating Forum guidance:

“5.46 The tenant's share may be regarded as the first call upon the divisible balance. This 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 the tenant's capital. The amount of the deduction is a matter of judgement in the circumstances relating to the enterprise carried on at the property.

...

5.47 The calculation of the amount will depend upon the nature of the enterprise and is generally based upon one of the following:

- (a) a percentage of tenant's capital;
- (b) a percentage of the gross receipts;
- (c) a percentage of the divisible balance;
- (d) an amount in keeping with the gross receipts, the amount of the tenant's capital and the divisible balance, i.e. a 'spot' figure.

Although the tenant's share may be regarded as a first charge on the divisible balance, the valuation must properly reflect the strengths and weaknesses of the hypothetical landlord and tenant, given their assumed willingness to reach agreement.

5.48 ... Whichever of the three principal methods ... is adopted as the primary approach, it will be necessary to stand back and consider whether the answer looks reasonable, having regard to the motives for occupation when compared with each of:

- (a) the amount of tenant's capital required;
- (b) the turnover;
- (c) the divisible balance.”

69. Tenant's capital has two components: the replacement value of non-rateable assets and working capital. It was helpful that the experts had agreed the replacement value of non-rateable assets used in the attraction at a round figure of £500,000. In their assessment of working capital, they agreed that a period of seven weeks should be covered and that depreciation should be excluded. Mr Hunter's figure of £91,350 included cost of sales (stock) but excluded bank charges. Mr Cox's figure of £60,066 excluded cost of sales but

included bank charges. It is the return on these figures that must be considered in the tenant's share, so the effect of the difference is less significant in that context.

70. We note that the Rating Forum guidance states in paragraph 5.50 (c):

“With regard to working capital, this may include not only cash in hand for day-to-day requirements, but also cash held on deposit for the purchase of stock...”

71. We therefore adopt Mr Hunter's figure for working capital at £91,350 and for total tenant's capital at £591,350.

72. Mr Cox's approach to assessing tenant's share was a hybrid of methods (a) and (c) from paragraph 5.47 of the Rating Forum guidance. He adopted a 2% rate of return on total capital of £560,066, amounting to £11,201, which he deducted as a first charge from his divisible balance of £144,238, leaving £133,037 to be apportioned between the tenant's share and rent. Mr Cox allowed 70% (£93,126) for the tenant's share, to cover profit and risk, which left a balance of £39,911 available for rent. This supported the rateable value entered in the list at £35,000.

73. Mr Hunter pointed out that Mr Cox's 2% rate of return is lower than the 2.5% rate of return on gilts in Q1 2015 and takes no account of the likelihood that the hypothetical tenant would need to borrow capital, at a rate in the region of 6%. However, in his own assessment of tenant's share, Mr Hunter did not make a separate deduction for return on capital. He trialled all four methods in paragraph 5.47 of the Rating Forum guidance and concluded that the only method which would produce a positive figure for rent would be an assessment of tenant's share using a percentage of the divisible balance. But his small divisible balance meant that even a split of 75% for tenant's share would be insufficient to entice a tenant to invest in the attraction. He concluded that, since the rating hypothesis requires a letting to be assumed, the rent could be no more than £1.

74. We will return to the treatment of return on tenant's capital and the tenant's share in our conclusion on the rateable value to be assessed using the R & E method. Before doing so we review briefly the alternative evidence-based approaches to assessment of rateable value referred to by the experts in their reports.

Rental evidence

75. The experts' joint statement referred to five arms-length rented properties. However, it was agreed that there was insufficient rental evidence to allow direct comparison methods to be applied and none of the comparables provided any means by which a market rent could be derived for the attraction.

76. Mr Hunter acknowledged there to be some evidence of a link between receipts and rent for three of those properties, where elements of rent were calculated by reference to turnover. However, at only one of the properties was the rent related to gross receipts and that rent also covered the exempt part of the hereditament as well as some fixings and fittings. It

seems to us, given these difficulties it would be inappropriate for us to place any weight on the rental evidence.

Settled 2017 List assessments and the shortened method (% of gross receipts)

77. Mr Glover pointed out that the VOA's Rating Manual instructions regarding farm diversification, and its content relating to the shortened method, underpinned the valuation approach used by VOs in relation to visitor attractions on farms. In fact, he suggested that all such assessments for the 2017 Rating List appeared to have been compiled by use of this methodology. The manual advises that "for the vast majority of premises the percentage range will generally be between 6% for the lower value properties with higher overheads to 9% of gross receipts for the best".
78. Mr Cox stopped short of an emphatic endorsement of this stance, referring to the Tribunal's decision in *Hughes (VO) v York Museums and Gallery Trust* [2017] UKUT 0200 (LC):
- "128. We mention in passing the shortened receipts approach which seeks to determine the rent at which a hereditament would be expected to let by basing the assessment on a percentage of turnover, rather than a full appraisal of both receipts and expenditure. Where, in respect of a particular mode of occupation, a consistent relationship can be demonstrated between the turnover of businesses of that type and the level of profit they generate, a shortened approach can be useful".
79. Whilst Mr Cox had used this approach in valuing many visitor attractions, he was unable to turn to a 'mirror image' of Apple Jacks and in the alternative drew our attention to a number of agreements based on the shortened method relating to visitor attractions, some of which had evolved from farm diversification. As far as these related to the 2017 List, there were 10 in total of which two were described as 'Farm Park and Premises', one as 'Farm Park' and one as a 'Farm Visitor Attraction and Premises'. Three of the four were part exempt. Two of these sites were agreed by the VO finding that the 'Check' (the initial stage of making a proposal) submitted by the occupier was 'well founded'. The other two were agreed at the 'Challenge' stage and as such it is unclear as to the extent of the discussions in the majority of the cases. For the record, the fair maintainable trade varied between £400,000 and £2,210,000, whilst the percentages ranged from 5% to 7.92%. By way of comparison the VO's assessment for the attraction analysed to 4.5%.
80. Mr Hunter acknowledged that there would be little difficulty in deriving the fair maintainable trade for the attraction, it being the same as the gross receipts determined for the R&E valuation. The difficulty he saw was in determining the appropriate percentage to be adopted. He also noted for any comparative method of valuation there must be a body of evidence from which the comparisons can be derived and that the evidence must be sufficiently well understood to enable the appropriate percentage to be ascertained. In support of this position, he drew attention to paragraph 7.4 of the Rating Forum guidance which states:

"The amount of this return is generally based on the rental evidence available, either directly where the evidence relates to properties similar in all respects to the

property under consideration, or by interpolating that evidence to allow for any differences”.

81. Mr Hunter’s conclusion was that there was no body of evidence from which the percentage could be derived. He did concede however that it might be possible to derive the percentage were there to be a number of agreed assessments where the parties have agreed the value on the basis of a percentage of fair maintainable trade. However, with regard to farm attractions he considered that no such evidence existed. He had discussed some of the agreed cases with the agents involved and thought it likely that they were based on full R&E valuations, with the results then interpreted on a shortened method basis.
82. We take the view that the use of the shortened method is ill-advised in the absence of rental evidence or full R & E valuations on which to base the selection of the appropriate percentage. We have already noted a lack of reliable rental evidence in this case and neither party has adduced any R & E valuations of comparable properties in support of their case. We therefore attach little weight to Mr Cox’s comparables or to the use of the shortened method in this instance.

Discussion and Determination

83. Apple Jacks Adventure Farm (and Spooky World) is an unusual property. Firstly, it is a component in a much larger entity which, with the exception of Apple Jacks, is exempt from rating. It is also a seasonal operation and subject to planning constraints. It suffers from a lack of mains services, difficult ground conditions and is located in a part of the country that is notable for the amount of precipitation it receives. The operation is at the mercy of the weather, perhaps to a greater extent than most attractions of this type as so much of the activity takes place outdoors. It might be said that the cards are stacked against it succeeding.
84. Mr and Mrs Fryer have, however, managed to generate significant business at the site. Mr Cox acknowledged that the Fryers exemplify the reasonably efficient operator and the experts are agreed that the R & E valuation should be informed to a large extent by the figures generated in the business.
85. To a significant degree, this case comes down to a judgement about the percentage to be adopted for the tenant’s share. According to the Rating Forum guidance the tenant’s share must properly reflect the strengths and weaknesses of the hypothetical landlord and tenant, and it should look reasonable, having regard to the motives for occupation, compared with the amount of tenant’s capital, the turnover and the divisible balance.
86. With that context in mind, we do not accept Mr Hunter’s proposition that that the rent can be no more than £1. The hypothetical farm tenant would offer a rent to reflect the opportunity that the attraction provides to make profit from an additional enterprise at the farm, and the accounts do show that profit was made by running the attraction, even in the difficult wet year of 2012.
87. We have assessed the divisible balance at £47,138 and do not think it appropriate to deduct from that figure a first charge for return on tenant’s capital before assessing the tenant’s

share. So, the tenant's share must cover profit, together with an allowance for various risks and also a return on tenant's capital. Mr Hunter refers to, but does not adopt, a split of 75% to the tenant, while Mr Cox adopts 70%, but after a deduction for return on tenant's capital. Striking a balance between landlord and tenant that acknowledges the risks involved in running this particular enterprise leads us to the conclusion that the tenant's share should be 75% of our divisible balance (£35,354), leaving £11,784 for rent.

88. Our valuation is rounded to rateable value £11,750 and the appeal therefore succeeds, although not to the full extent sought by the appellant. The detailed valuation is appended to this decision.

Mark Higgin FRICS FIRR
Member

Diane Martin MRICS FAAV
Member

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.

Appendix

R & E Valuation for Apple Jacks Adventure Park at 1 April 2015

Receipts		
Admissions	£580,000	
Food and drink	£140,000	
Merchandise	£35,000	
GROSS RECEIPTS		£755,000
Cost of sales incl direct costs		£133,000
GROSS PROFIT		£622,000
EXPENDITURE		
Employee costs	£237,000	
Rates	£4,062	
Premises costs	£26,750	
Repairs	£70,000	
General admin	£5,000	
Insurance	£18,000	
Motor	£16,250	
Advertising and promotion	£75,500	
Legal and professional	£10,500	
Depreciation	£50,000	
Bank and other charges	£15,000	
Other expenses	£6,400	
CROSS SUBSIDY:		
Tractor and farm vehicles	£5,000	
Manager	£35,400	
TOTAL EXPENDITURE		£574,862
DIVISIBLE BALANCE / NET PROFIT		£47,138
Tenant's share @ 75%		£35,354
Avaiable for rent		£11,784
Rateable value		£11,750