LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPEAL

VR/9/1985

BETWEEN

McKEOWN VINTNERS LIMITED - APPELLANT

AND

THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND - RESPONDENT

Lands Tribunal for Northern Ireland - The President, Judge Peter Gibson QC

Belfast - 6th and 7th December 1990, 25th January, 1st March, 26th March and 5th April 1991

This appeal concerns the net annual value of certain off-licensed premises at No 22 Shaftesbury Square, Belfast (hereinafter called the "appeal hereditament").

At first sight this would appear to be a straightforward issue, but as the case progressed it became clear that matters quite fundamental to rating law in Northern Ireland were in issue. Accordingly it might be helpful if the Tribunal were to give a guideline decision.

The Rating History of the Hereditament

At the last General Revaluation in 1976 the net annual value of the appeal hereditament was assessed at £2,350. Following an application for revision by the then ratepayer to the District Valuer the entry in the valuation list was reduced to £2,150. This remained the position until June 1978 when the District Valuer increased the assessment to £2,500. On 15th March 1983 the Appellant applied to the District Valuer for a revision of the assessment. The District Valuer, by certificate dated 2nd July 1984 decided to make no change. An appeal dated 25th July 1984 to the Respondent Commissioner (hereinafter called "the Commissioner") resulted in a Notice of Dismissal on the grounds that "in the absence of any contrary evidence being produced the valuation must be assumed correct" (the Tribunal's underlining). As a result of that Notice of Dismissal an appeal to the Lands Tribunal was made on 22nd February 1985.

The Factual History of the Hereditament

Mr John Diver and Mr Robert Bridget, directors in the Appellant Company, (hereinafter called "the Ratepayer") and Mr Oliver Corrigan an accountant and a partner in the firm of Messrs Cooper, Lybrand and Deloitte, gave evidence to the following effect -

(i) The appeal hereditament was a single storey building situate at 22 Shaftesbury Square, Belfast. It was common case that it had a ground floor internal area of 99 square metres together with mezzanine storage of 21 square metres. At all material times it was occupied as an off-licence.

(ii) The Appellant Company was formed in 1981 to acquire off-licensed premises. Eight premises formerly owned by James Joseph Tohill were acquired. Two by assignment of existing leases, and the remaining six by direct lease to the Ratepayer. The licences, and the goodwill attaching to all the premises, were acquired by the Company for a capital sum of £100,000, and the stock for £240,000.

(iii) The lease for the premises (including the appeal hereditament) is dated 26th April 1981. It is for a term of 21 years from 1st March 1980 with the tenant responsible for all repairs and insurance costs. The Third Schedule to the lease contains a provision for rent reviews on 1st March 1985, 1st March 1990, 1st March 1995 and 1st March 2000. The revision carried out on 1st March 1985 resulted in a rent of £5,300 per annum. The rent review clause reads:-

> "With the object and intent that the full current rent (which shall mean such rent as would be obtainable on a Rent Review date as herein defined for the demised premises let as a whole without premium upon the open market between a willing landlord and a willing tenant on the assumption of a letting with vacant possession for a term equal to the original length of the said term on the basis that all covenants and conditions in this lease have been fully complied with and upon all covenants of this lease other than that as to the original rent but including this present clause but disregarding any effect on rent of the fact that the Tenant has been in occupation of the demised premises and of any goodwill attaching to the demised premises by reason of the Tenant having carried on business in the demised premises and further disregarding any effect on rent of any improvement to the demised premises carried out by the Tenant otherwise than in pursuance of an obligation arising under this

lease) for the letting of the demised premises (at the option of the Landlord) for the then existing use shall be payable during the term hereby granted the rent payable hereunder shall be increased in accordance with the requirements and conditions hereinafter set out on the following dates:-"

(iv) No actual accounts could be provided in relation to the appeal hereditament. All figures referred to in evidence, with the exception of turnover and rent paid, were estimated from a central account for all of the off-licensed premises in the McKeown group. In particular this applied to the operating profit/loss figures. Those figures, for the period 1st March 1980 to 28th February 1986, were as follows -

(a) A profit of £5,071 (on a turnover of £156,485)
(b) A profit of £4,784 (on a turnover of £139,221)
(c) A loss of £5,477 (on a turnover of £77,887)
(d) A loss of £7,296 (on a turnover of £73,477)
(e) A loss of £6,693 (on a turnover of £89,697)
(f) A loss of £8,975 (on a turnover of £138,783)

For the 17 months to 31st July 1987, a loss of £6,558 on a turnover of £253,819 and for the year ending 31st July 1988 a loss of £1,959 on a turnover of £139,133. It was thus argued that the appeal hereditament was being run at a loss. This was despite good management. The losses were such that the Ratepayer had allegedly attempted to sell the hereditament some nine months ago. This attempt had been unsuccessful, or so it was claimed. It now owns, however, some thirteen off-licences in all.

The Tribunal now turns to the evidence called by the Commissioner and by the Ratepayer on the particular issue in question in this appeal, namely the correct net annual value of the appeal hereditament. Normally the burden of disproving the entry in the valuation list lies upon the ratepayer and the Tribunal invariably deals first with the evidence of the ratepayer, and subsequently with that of the Commissioner. In the case in hand, however, the entry in the valuation list for the appeal hereditament is £2,500. The Commissioner did not, however, seek to defend this figure, and his statement of evidence conceded that the entry of £2,500 was incorrect, by indicating that -

> "The figure which will be spoken to on behalf of the commissioner is ... £2,150."

The Tribunal ruled that this concession reversed the normal burden of proof, and placed it upon the Commissioner to establish that the correct figure was as he contended, namely £2,150. The Tribunal therefore proposes to deal first with the evidence of the Commissioner, and then with that of the Ratepayer.

<u>The Commissioner's Assessment of Net Annual Value</u>

Mr Ian Haines, a Senior Valuer in the Valuation and Lands Office gave evidence as to the method whereby the Commissioner had assessed the net annual value of the appeal hereditament. That evidence may be summarised as follows.

(i) The figure of £2,150 which the Commissioner contended was the correct assessment of the net annual value for the appeal hereditament was calculated on the basis of, first, its value as an ordinary unlicensed shop (by applying appropriate zonal rates), namely -

Zone A	22 square metres @ £19.00 per square metre =	£ 418.00
Zone B	27 square metres @ £ 9.50 per square metre =	£ 256.00
Stores	50 square metres @ £ 3.00 per square metre =	£ 150.00
Mezzanine	21 square metres @ £ 1.50 per square metre =	£ 31.00
		£ 855.00

(This element of the valuation was agreed.)

To this figure was added a further sum to reflect the value of the existence of the off-licence attached to the appeal hereditament. This was assessed as follows -

Shop Value (Apply a 2% enhancement factor)	£ 855.00
Estimated gross turnover at 1976 levels, £65,000	£1,300.00
Value of the premises with a licence	£2,155.00
<u>Total Net Annual Value</u> (rounded down)	£2,150.00

(ii) This assessment was supported by five alleged comparables, namely -

(a) <u>No 1 India Street</u> (an off-licence) Net Annual Value £1,740; Analysed as follows:-

Shop Value		£ 740.00
Estimated Turnover at 1976 levels £50,000 @ 2%		£1,000.00
Net Annual Value		£1,740.00

(b) No 32 Botanic Avenue (an off-licence) Net Annual Value £1,160. Analysed as follows:-

Shop Value		£ 560.00
Estimated Turnover at 1976 levels £30,000 @ 2%		£ 600.00
Net Annual Value		£1,160.00

(c) No 33 Bradbury Place (an off-licence) Net Annual Value £3,150. Analysed as follows:-

Shop Value		£1,150.00
Estimated Turnover at 1976 levels £100,000 @ 2%		£2,000.00
Net Annual Value		£3,150.00

This off-licence was first assessed at £2,750 in 1982. That figure was based on a shop value of £1,000 and an estimated Turnover in 1976 of £87,500 @ 2%. It has recently been extended, resulting in an increase in the Net Annual Value to £3,150 (above).

(d) No 147 Ormeau Road (an off-licence) Net Annual Value £1,745. Analysed as follows:-

Shop Value		£ 445.00
Estimated Turnover at 1976 levels £65,000 @ 2%		£1,300.00
Net Annual Value		£1,745.00

(e) No 192 Donegall Road (an off-licence) Net Annual Value £1,300. Analysed as follows:-

Shop Value		£ 430.00
Estimated Turnover at 1976 levels £44,000 @ 2%		£ 880.00
Net Annual Value	say	£1,300.00

This off-licence was originally assessed at £1,185. That figure was based on a shop value of £385 and an estimated Turnover of £40,000 @ 2%. It was extended in 1988 resulting in an increase in the Net Annual Value to £1,300.

(ii) These comparables were all within a radius of half a mile from the appeal hereditament and were in general terms considered by Mr Haines to be comparables which were in the same state and circumstances as the hereditament. When questioned, however, Mr Haines conceded that little regard had been paid to matters which the Tribunal considers fundamental to the proper analysis of comparables, for example the different types of product sold in the appeal hereditament or in the comparables and, further, that little, if any, reference had been made to "the hinterland" - that is the area from which each drew its trade, the nature of that hinterland, or to a proper analysis and the weight to be paid to the locality of the appeal hereditament or of the comparables.

(iii) The practice adopted by the Commissioner in assessing the net annual value of off-licensed premises had altered quite fundamentally as a result of the Commissioner's interpretation of the decision of the Lands Tribunal in Lofty Inns Limited v The Commissioner of Valuation for Northern Ireland (VR/31/1986). Prior to that decision the practice of assessing such net annual values derived from research carried out by the Commissioner and his staff for the purposes of the last General Revaluation in 1976. No evidence of actual rents for off-licensed premises was available. This research revealed that the minimum net annual value to be attributed in any instance was that of the premises unlicensed, and that there had to be added an additional amount to reflect the value of the existence of the licence. The research showed further that the fairest method of reflecting this extra value was to apply a percentage of gross turnover, considered to fall within a narrow band of around 2%. It therefore became the practice to value an off-licensed hereditament on the basis of an ordinary retail shop (what might be termed an ordinary "bricks and mortar" valuation) and then to add 2% of estimated 1976 turnover. As time passed, however, turnover was increased by the effects of inflation. It thus became unfair to adhere to a 2% enhancement factor, and accordingly this percentage had been gradually reduced over the years. This was to maintain relativity and fairness in the valuation list. The method of assessment described was essentially a matter of valuation practice and was often described as a "shorthand accounts" method of valuation.

(iv) This practice was, however, said to result in figures which were at odds with the "tone of the list". It was considered, therefore, that the decision in the Lofty Inns case had made the tone of the list the vital, if not the only, factor. In the absence of any evidence relating to actual rents paid for off-licensed premises (that is rental evidence for premises with an off-licence attached), the current approach by the Commissioner, and the one adopted in this case, was to return to a 1976 tonal base, that is to return to estimated 1976 turnover levels and to apply a percentage of 2%. In essence 1976 was the crucial date, and Mr Haines at one stage of his evidence stated that any change in state or circumstances after that date was irrelevant, for example the opening of a new off-licence nearby. If regard had to be paid to post 1976 state and circumstances, he conceded that the Commissioner's evidence did not address that question at all. The Tribunal must pause at this stage and indicate that this is so patently incorrect that Mr Haines could not have meant what he in fact said. The Tribunal is more interested in his central theme, namely that net annual value figures should, after the Lofty case, be assessed on the basis of a straightforward tonal assessment, by comparison with existing comparable properties within the 1976 list - and that accordingly 1976 levels should be applied.

(v) It was further contended that Paragraph 4 of Part 1 of Schedule 12 of the Rates (NI) Order 1977, which governs the situation where the probable volume or quantity of trade is taken into account in assessing net annual value, did not apply at all to off-licensed premises. If Paragraph 4 were used (to apply a percentage to an up-to-date estimate of turnover) there was a danger of "tone slippage" or disparity creeping into the valuation list. The present case was a return to 1976 levels, and the comparables were 1976 comparables. This gave what was termed a "purer result", and a "purer" tone of the list.

(vi) The essence of the approach outlined in paragraphs (iv) and (v) above was that since the decision in Lofty Inns, off-licensed hereditaments have been valued under Paragraph 1 and Paragraph 2(1) of Schedule 12 of the 1977 Order, and that Paragraph 4 has been ignored. When asked by the Tribunal how he would assess a new off-licensed hereditament opening for trade as at today's date his answer was to estimate the bricks and mortar element by applying 1976 zonal figures and then adding 2% of estimated 1976 turnover to represent the "enhancement" value of the licence. When the Tribunal further inquired as to the precise role of Paragraph 4 the answer was none. Moreover it was contended that this paragraph did not apply to off-licensed (or on-licensed) premises at all and, was confined to mines and quarries.

This concept may be summarised by saying that the "tone of the list" meant using 1976 levels. This meant that Paragraph 4 could not be applied to the instant case.

(vii) The comparables were true comparables, as one had to compare "like with like". It was simply not possible to compare an ordinary retail shop with off-licensed premises. It was conceded, however, that in reality the only common feature of the comparables relied upon was the existence, in each case, of an off-licence, although at a later stage he said that two other matters were of importance. One was that all the comparables had been valued on the same basis, and the second was that the premises were all in the same locality.

(viii) In any event off-licences themselves had a considerable value in the open market. Apart from the capital sum paid for the licences in the instant case, licences were being bought and sold in today's market at figures ranging between £30,000 and £35,000. Accordingly there must be an element of enhancement.

Further evidence was given on behalf of the Commissioner by Mr O'Hara FRICS, by Mr Hill, the present Assistant Commissioner of Valuation and by Mr Shiels, a former Commissioner of Valuation. This may be summarised as follows -

(i) Mr O'Hara dealt with one specific point. In the decision of the Tribunal in <u>Rosemary Wine Markets Limited v The Commissioner of Valuation for Northern Ireland</u> (Ref VR/52/1985) which was given on 16th April 1987, Sir Douglas Frank QC, sitting on his own, had stated, at page 5 of his judgment -

> "I ... find it surprising that although Mr O'Hara accepted that half the off-licences are rented no evidence was produced to relate actual rents to his basis of valuation."

If this statement were correct then the present Tribunal would find it equally puzzling as to why actual rental values had not been produced in evidence, if only as a tool of comparison. Mr O'Hara stated however that Sir Douglas Frank was either mistaken as to the meaning of his evidence, or had somehow misunderstood that he had been speaking of rental values of premises <u>without</u> the advantage of an off-licence. He had not said what he is alleged to have said. On the contrary, despite the most careful of researches, he had <u>not</u> been able to find any evidence of actual rental values of off-licensed premises, that is actual rents paid for off-licensed premises together with the advantage of an off-licence.

The Tribunal asked Mr O'Hara for his views on Paragraph 4. He replied that the Commissioner's present approach to off-licensed premises meant that it had no part to play in the assessment of net annual values as it required the use of up to date turnover figures and the Commissioner's present practice was to apply estimated 1976 figures. The two were simply incompatible.

(ii) Mr Hill's evidence was on more general matters. He expressed his views, in a most persuasive manner, on a number of matters of general importance to rating, including the concept of the "tone of the list" and its significance in ensuring that the ultimate rates burden was both fair and uniform. His central proposition was that the tone of the list related the estimates of net annual values to a particular "base-year". As the last General Revaluation came into effect in 1976, it was 1976 levels that were important. The concept of the tone of the list was thus to ensure that uniform (1976) levels were applied - either directly or for the purposes of comparison - until the next General Revaluation had been carried out. In essence the tone of the list should survive throughout the life of the list. He then commented upon the Tribunal's decision in the Lofty Inns case, and said that until this decision the approach of the Commissioner of Valuation had been fundamentally different, and had been based on discounting the 2% enhancement figure and then applying the discounted percentage to up to date (or current) estimated gross turn-over figures. This allowed paragraph 2(1) and paragraph 4 of Schedule 12 to the Rates (Northern Ireland) Order 1977 to interact, and for each to play a part. However he considered that the decision in the Lofty case destroyed this approach, and further that it directed the Commissioner to apply a straightforward 1976 tonal assessment to a hereditament under appeal, by comparing the appeal hereditament with the net annual values of comparable hereditaments which were already in the 1976 valuation list. The fundamental requirement was fairness. This required uniformity, and in turn uniformity required a return to a 1976 tonal base. In plain words the Commissioner no longer applied a discounted percentage figure to current levels of gross turnover, and (since Lofty) now applied a straight 2% figure to 1976 estimated levels of turnover. This was not only in accord with the Tribunals decision in Lofty, but gave a "purer" result. When the Tribunal pointed out to Mr Hill that this interpretation rendered paragraph 4 of Schedule 12 to the 1977 Rates Order obsolete (at least in the case of off and on licensed premises) his answer was that paragraph 4 applied only to "wasting assets".

When asked to give examples of such wasting assets the only example he could think of was quarries (or mines). He could not explain, however, why a general rule such as paragraph 4 should be confined to mines and quarries, when they were dealt with specifically in Schedule 12, Class 5 Part IX of the 1977 Order. Mr Hill was in an unfortunate position. On his understanding of the Lofty case he could not take paragraph 4 into account and, at the same time, maintain his central approach as to how off-licensed hereditaments should be assessed.

(iii) The evidence of Mr Shiels was even more far-reaching. He had been the Commissioner of Valuation until retirement in 1988. Mr Shiels began by stating that at the Third General Revaluation in 1976 he had then been a District Valuer. He had been concerned in the research to which reference has already been made, into the correct approach as to the rating of licensed premises, including off-licences, on-licences, hotels and the like. He stated that a view had been taken that as there was no direct rental evidence available relating to off-licensed hereditaments the fundamental problem was to find a correct method of assessing the rental values of such hereditaments. This was done by first obtaining actual accounts from two districts in Belfast, and six districts outside Belfast, which were, in his view, representative of off-licensed hereditaments generally. These were obtained for a period of three years. They were then analysed. He detailed this analysis at some length, but, in essence, it was an analysis carried out on a full accounts basis. The Tribunal notes that this basis is normally applied to on-licensed premises, and is used, for such premises, to arrive at a rent which a tenant can afford to pay on the volume of trade being carried out in the hereditament. He indicated that the conclusion reached, as a result of this analysis, was that off-licensed hereditaments were properly valued by first working out the net annual value for the bricks and mortar, and then adding a figure of approximately 2% of gross turnover. This was, he stressed, merely a guide, which was applied by each District Valuer depending upon the circumstances of each particular case. Mr Shiels was then cross-examined. From the outset it had been obvious, from the manner in which the Ratepayer's case had been conducted, that his evidence was contentious. Accordingly the cross-examination, and the points made therein, deserve elaboration. These points were -

(a) He was first asked what had happened to the documentary evidence which had come into existence as a result of the exercise he had described. His answer was that, so far as he was aware, this had been destroyed, in accordance with normal Civil Service practice, at the end of a period of five years. Again to his knowledge there were no records whatsoever in existence, even guideline notes to District Valuers. He added that these records would have been destroyed in or around 1980/81, and he was then asked, by the Tribunal, why these records would have been destroyed at that time, when another General Revaluation was contemplated in 1982. He again answered that the destruction of these documents was normal Civil Service practice.

(b) Mr Smith then pressed Mr Shiels on the question of how representative the analysis of off-licensed hereditaments had been, and how thorough the research was. He replied that in the eight Districts to which resort had been had there were some 200 off-licensed outlets in all but that he did not know how many accounts had been analysed. Nor did he see a list of the results, but merely knew the conclusion.

(c) When asked about the conclusion he admitted that the band was not a fairly narrow band of around 2%, but that indeed it varied between 1½% to 2½% and, further, also admitted that several of the results gave a "very low" figure. He denied, however, that some of the results gave a nil figure.

(d) He was then asked how the appropriate percentage should be applied, and readily accepted that it would require adjustment according to the matters inherent in each case. The fundamental exercise was to find the rent which a hypothetical tenant would pay for each particular hereditament, and whilst off-licensed hereditaments were considered to be in a distinct group of their own, nevertheless he conceded that each District Valuer should have taken into account such matters as locality, the type of trade being carried on, and the hinterland relevant to each hereditament.

(e) He was further asked about the alleged 2% "enhancement", to which reference has already been made. He again emphasised that off-licences had been treated as a separate group, and that the analysis to which he had referred showed that there was an enhancement of approximately 2%. When asked how one could have an enhancement when there was nothing against which to compare off-licences, he could not give an answer which the Tribunal found acceptable, <u>except</u> that he maintained that there was no evidence of actual rents available (that is rental evidence of off-licence premises <u>together</u> with the off-licence), and that accordingly the analysis and research which had been carried out was merely a method of finding a rule of thumb to calculate the rental values of such off-licence premises. As Mr Shiels stated "it was done this way because there was no better way of doing it". The fundamental admission, however, was that there was no comparison with other types of retail business.

(f) Mr Shiels was also asked about the correlation between gross turnover and net profits, and it was put to him that there was no such correlation. He said, in reply, that this had not been his experience when the research and analysis to which he had referred had been carried out. In effect his evidence was that there was a correlation, over a number of years, between gross turnover and net profits, but that this was not a fixed relationship, in the sense that it could not always be expressed as a precise percentage figure.

(g) He was then questioned as to how he would assess a new hereditament, opening as at todays date. His reply was that he would first select comparable off-licensed premises; then ascertain or estimate the gross turnover and thus make a comparison based on an analysis of turnover. In other words he would apply Paragraph 2(1) and Paragraph 4 of Schedule 12 to the 1977 Order. This was, of course, in direct contrast with the evidence already given by Mr Haines, and Mr Hill and when re-examined upon this point he stated that it was not possible to return to 1976 levels.

The Ratepayer's Assessment of Net Annual Value

The evidence of Mr Crothers FRICS FRVA ACI was that an assessment of £855 Net Annual Value was correct. His evidence was based essentially on a comparison with the net annual values of other ordinary (unlicensed) retail shops, and was as follows -

Zone A	22 square metres @ £19.00 per square metre	=	£418.00
Zone B	27 square metres @ £ 9.50 per square metre	=	£256.00
Store	50 square metres @ £ 3.00 per square metre	=	£150.00
Mezzanine store	21 square metres @ £ 1.50 per square metre	=	£ 31.00
Total Net Annual Value			£855.00

If this were the proper approach then it was agreed that his assessment of the net annual value of the hereditament as an ordinary retail shop at £855 was correct. However this left the central issue unanswered, namely whether the existence of an off-licence should be taken into account and, if so, to what extent? On this central issue Mr Crothers' evidence was -

(i) He conceded that it was an established principle of rating law and practice that the <u>existence</u> of an off-licence must be taken into account. That, however, did <u>not</u> mean that the value of the premises must automatically be enhanced. He thus took issue with the basis of valuation of off-licensed premises which has been applied for many years throughout Northern Ireland, namely to value the hereditament on a similar basis to other comparable retail shops by the application of the relevant zonal rates to the hereditament, and to the resultant figure add a sum (based on a percentage of estimated gross annual turnover of the hereditament) to reflect the enhancement in value arising out of the existence of the licence.

(ii) If the value of the hereditament were enhanced by the existence of the off-licence, it could not be quantified by the application of a percentage of gross turnover (at whatever levels). That approach presupposed that every off-licensed hereditament in Northern Ireland was more valuable than an adjoining comparable retail shop. He considered such an argument to be flawed. There was, in his view, no link between a fixed percentage of turnover and the rent which a hypothetical tenant of an off-licensed hereditament would pay for the premises.

(iii) As a matter of commercial practice the rent paid for off-licensed premises was fixed (whether at first letting or at rent reviews) by comparison with rents paid for comparable ordinary retail shops; not by applying a percentage of turnover.

(iv) Any assessment of off-licensed premises at a level above that of other retail shops assumed that an off-licencee will outbid all other hypothetical tenants in the market. Such an assumption was based on the fallacy that the tenant could derive greater profits than other retail trades. This could not be correct. In particular there was no evidence to show that the hereditament had attracted a higher rental than adjoining retail shops.

(v) The number of off-licences in Northern Ireland had increased since the early 1970s, and there was no longer the same degree of monopoly. As a general proposition off-licences do not enjoy any greater protection from competition than that enjoyed by many other retailers.

(vi) The licensed trade is now more complex than other retail businesses because of (inter alia) the responsibility to comply with legislative requirements. Opening hours tend to be longer than other retail businesses and there are risks of theft and breakages. Moreover legislation strictly controls the range of goods which may be sold.

(vii) The rent actually passing under the lease for the premises does not exceed the level of rents paid for adjoining comparable shop premises.

Mr Crothers supported his arguments with the following analysis of the appeal hereditament, and also of a "comparable" hereditament -

Actual rent of the appeal hereditament from 1st March 1985 was £5,300 per annum. This was broken down as follows -

Zone A	22 square metres @ £117.62 per square metre	= £2,588.00
Zone B	27 square metres @ £ 58.81 per square metre	= £1,588.00
Store	50 square metres @ £ 18.58 per square metre	= £ 929.00
Mezzanine	21 square metres @ £ 9.29 per square metre	= £ 195.00
Total rent paid		£5,300.00

The "Comparable" was analysed as follows -

Rent of Nos 18/19 Shaftesbury Square (which was an "ordinary" retail shop) from 1st November 1984 was £6,500 per annum. This was broken down as follows -

Zone A	29 square metres @ £119.92 per square metre	= £3,478.00
Zone B	23 square metres @ £ 59.96 per square metre	= £1,379.00
Store	31 square metres @ £ 18.94 per square metre	= £ 587.00
First Floor	85 square metres @ £ 9.47 per square metre	= £ 804.00
Second Floor	53 square metres @ £ 4.73 per square metre	= £ 250.00
Total Rental		£6,498.00

say £6,500.00

His conclusion, therefore, was that actual rental figures showed that the "ordinary" retail shops were attracting the same, or higher, rentals and that accordingly, it was wholly artificial to attribute an automatic "enhancement" to off-licensed premises, merely because of the existence of an off-licence.

Mr Crothers made several other points of more general import. These were -

(i) The Commissioners approach at the last General Revaluation in 1976 in relation to off-licensed premises began with the premise that off-licenced premises had automatically (by reason of the "monopoly" position created by the existence of the licence) an enhanced potential for profitability. This was reflected by adding to the figure assessed as the correct net annual value for ordinary shop premises an "enhancement value" of 2% of estimated gross annual turnover of the subject hereditament. Thus off-licences were treated as a specific category. This was incorrect. They should not, and could not, have been treated as a separate category at the last general revaluation. The only category into which they fell was that of "ordinary retail shops". In particular the Commissioners approach was incorrect in that, to begin with, off-licences did not earn higher profits than ordinary retail outlets, and moreover, that one could not simply apply a 2% "global" enhancement to every off-licensed hereditament. He stated, when cross-examined, that it would have to be demonstrated that all off-licensed premises had their value enhanced by the existence of a licence before such a category would exist.

(ii) As the other off-licensed hereditaments in the valuation list contained an automatic 2% enhancement they could not be true comparables in the same state and circumstances.

(iii) What should be looked at is the hereditament itself. In assessing the rent a hypothetical tenant would pay, it was of particular importance to apply actual rental figures of comparable ordinary retail premises. They were "comparable" because they had no 2% enhancement built into the net annual values. Moreover it was equally important to look at the profitability of the subject hereditament. As he had no rental figures or trading accounts available to him he could not comment on the Commissioners comparables, but he considered that the only similarity between them was that each had an off-licence.

(iv) Far from having an enhanced profitability his experience was that off-licensed premises had in general a level of profits which showed no such enhanced profitability, and in many instances showed lower profit figures than other forms of retail outlets.

(v) The only role that Paragraph 2(1) of Schedule 12, Part 1, of the 1977 Order had to play in assessing the net annual value of a hereditament was to establish the value of the "bricks and mortar". To establish the extra value (if any) which the existence of an off-licence might add it was quite incorrect to add a percentage of estimated turnover, or indeed to add any figure which was based on a generalisation. Every hereditament had to be treated in its own right and therefore actual rents (of the subject hereditament and of other comparable ordinary retail premises) had to be used, together with the actual profit (or loss) figures relating to the subject hereditament. In essence Paragraph 2(1) of the 1977 Order did not, with the exception of the bricks and mortar element, apply at all to the estimate of net annual values of off-licensed premises.

Mr J J Harbinson FCA BSc (Econ) also gave evidence reinforcing the views of Mr Crothers. He was a chartered accountant, and a senior manager employed by Price Waterhouse. He specialised particularly in small businesses and was the head of the small business unit in Price Waterhouse. His evidence may be summarised as follows -

(i) He disagreed fundamentally with the Commissioner's approach at the last General Revaluation in 1976. It was based on research which showed that off-licences had a built-in profitability because of the existence of the licence, and that this was then reflected in an enhancement of rental values. However this treated off-licences as one group and assumed that this group earned additional profits above the general level of ordinary retail outlets. This argument was fallacious. Off-licences did not earn additional profits when compared with other forms of retail outlets.

(ii) Even if an increase in net annual values had to be made by reason of the existence of an off-licence, the Commissioner's approach to the assessment of this extra value was flawed. The fundamental error was in attempting to determine profitability, and therefore value, by applying a percentage to sales. That approach implied that there was a direct correlation between total sales and net profits, and ignored the existence of overhead costs which did not vary with the level of sales. Any suggestion that there was a direct or significant link between the level of sales and net profits in retail businesses was insupportable.

(iii) In every retail business there was a certain level of sales, known as the "break even point", below which the business would inevitably incur losses. In the case of the appeal hereditament he had calculated this at £122,500 for the year 1988. If the Commissioner's approach - the "shorthand accounts method" - was applied to this level of sales the net annual value, whether of £2,500 or £2,150, should be considerably increased. It was thus effectively a tax on profits which did not exist. The Tribunal notes however that the actual turnover figure for the year ending 31st July 1988 was almost £140,000, and yet a loss of almost £2,000 had been incurred. It is difficult to reconcile the actual evidence with the views of Mr Harbinson.

(iv) Off-licensed premises generally did not enjoy a higher level of profitability than other retail businesses. The success or otherwise of a retail business depended more on factors such as management ability, trading location and level of competition, than the particular trade which was being carried on. Further for some years the off-licensed trade had encountered a prolonged "price war" with what were termed "multiples" (that is a company or a firm with a number of outlets) being prepared to sustain losses in order to increase their share of the market. The Ratepayer was such a multiple, which, despite enjoying notably higher than average gross profit margins in the off-licensed trade, was nevertheless losing money in the appeal hereditament. He accepted, however, that multiples might well be prepared to lose money in the short term for the expectation of profits in the longer.

(v) Whilst the existence of an off-licence should be taken into account, the only sensible means of valuing its existence was by looking at what profits were actually earned in a particular hereditament and on that basis estimating a commercial rent. Mr Harbinson conceded however that he was not aware of the statutory duties of the Commissioner of Valuation and his staff. Nor did he know how the valuation list was completed at a General Revaluation or the concepts that were applied upon a subsequent revision. He was applying considerations which were essentially commercial.

The Commissioner's submissions

Mr Kerr QC, who appeared with Mr Shaw, for the Commissioner, made the following submissions -

(i) It had been acknowledged, by Mr Crothers on behalf of the Ratepayer, that the existence of a licence must be taken into account. This was, however, merely an aspect of two more fundamental principles, being, first, that every intrinsic quality which tended to affect the value of a hereditament, whether upwards or downwards, must be taken into consideration and, further, that the value arrived at in relation to a hereditament should represent the figure at which the hypothetical landlord and tenant would "come to terms as a result of bargaining for that hereditament in the light of competition, or its absence, in both demand and supply as a result of the higgling of the market". In this respect Mr Kerr referred to Ryde on Rating, 13th Edition, pages 442 and 443, and to the judgment of Scott LJ in Robinson (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee [1937] 2KB 445.

(ii) Accordingly, at General Revaluation stage, the Commissioner had to give effect to these principles, and it was therefore incumbent upon him to ascertain whether an off-licence was an "intrinsic circumstance", which should be taken into account in the assessment of the net annual value, and hence the rates to be paid in relation to that hereditament. If it were such an intrinsic circumstance then it should be taken into account.

(iii) Once however the existence of the licence had been taken into account, by whatever method, then that ended the matter. In essence there could not, under existing legislation, be an attack upon the principles used by the Commissioner at General Revaluation stage, at least in the Lands Tribunal. To begin with Article 54(2) of the 1977 Order deemed the entries made in the list to be correct and secondly the jurisdiction of the Tribunal was confined, under Article 54(1), to revision cases. Thus the Tribunal had no jurisdiciton to allow an appeal which was in essence an appeal against the principles used at General Revaluation. Accordingly Mr Kerr described the instant case as an "at best an unwitting masquerade", in the sense that if allowed it was a direct attack on the principles used by the Commissioner at General Revaluation and, further, that in reality it was also an attempt to persuade the Tribunal to ignore completely the existence of an off-licence when assessing the correct net annual value of a hereditament which had the advantage of the existence of such a licence.

(iv) At General Revaluation the approach of the Commissioner had been to establish off-licensed hereditaments as one particular group. In this manner the Commissioner had created a tone of the list for all off-licensed hereditaments, and the attack by Mr Crothers, based on considerations of locality, should not be countenanced by the Tribunal as it in essence was an attack on the principles established at General Revaluation. Mr Kerr did, however, concede that whilst in England, under Section 20 of the General Rate Act 1967, the application of the tone of the list was direct, in Northern Ireland it was "somewhat oblique". In essence it depended on Paragraph 2(1) and Article 54(2). In practice this meant that at a revision case the Commissioner could rely on all other entries relating to off-licensed hereditaments as being correct, and no challenge to their correctness could be mounted by a ratepayer.

(v) He further contended that the tone of the list consisted in the level of comparable hereditaments and, further, that the tone fixed at General Revaluation should survive throughout the life of the list. This tone, in the case of off-licensed hereditaments, had been fixed by a common enhancement factor. The survival of the relativity which had been created in the list did not depend upon the historical preservation of rental values. Moreover it had to be remembered that the tone of the list for off-licensed hereditaments had been set in 1976. Thus the <u>basis</u> upon which off-licensed hereditaments had been assessed had been established in 1976 and could not be challenged by way of revision procedure. It thus followed that if economic circumstances changed in the case of any particular hereditament, and this resulted in the apparent destruction of any enhancement factor, then that could not be taken into account at revision stage, as it was, in effect, an attack upon the very basis upon which the tone had been set at General Revaluation. Thus the validity of the tone of the list did not depend on the continued existence of an enhancement factor, as the tone had been set in 1976, and was deemed correct under Article 54(2). Its consistency was maintained by the application of comparables, under Paragraph 2(1) of Schedule 12 to the 1977 Order. If alterations had to be made because of changes in economic circumstances then chaos would ensue, and the Commissioner would be faced with a stream of applications based solely on economic considerations, namely whether a retailer, or a group of retailers, were, or were not, making profits. When stripped to its essentials the Ratepayer's case depended upon a change in economic circumstances, but the Commissioner's reply was that this was a matter for General Revaluation, and could not affect existing relative rating positions.

(vi) Mr Kerr then turned to the alleged comparables in the case, upon which Mr Haines had given evidence. His contention was that the substance of the evidence given was that the comparables were in the same locality and had a similar trading pattern.

Even if, however, the evidence did not go that far he submitted that the comparables were still comparables in the same state and circumstances (within the meaning of Paragraph 2(1)) simply because they were in the same group of off-licensed premises. They had been valued in the same way, namely by, first, a bricks and mortar valuation at 1976 levels, to which had been added a 2% enhancement figure of gross turnover, as at 1976 levels, to reflect the existence of the licence.

(vii) When asked by the Tribunal what then happened to Paragraph 4 of Schedule 12 Mr Kerr stated that it did not apply <u>at all</u> to a revision case, and he referred to the words, in Schedule 12, Part 1, "Basis of valuation". Paragraph 4 was thus a general rule to be applied at General Revaluation stage. He added that at revision stage the Tribunal was not concerned with the basis of valuation which had already been established at General Revaluation. Mr Kerr was thus arguing that although Paragraph 2(1) (which fell under the same heading) did apply at revision stage Paragraph 4 did not and, further, that Paragraph 4 had no nexus with the Commissioner of Valuations use of turnover, even by way of comparison. The only basis upon which they were comparable was by virtue of their presence in the same group of hereditaments, and this had been established at General Revaluation, and for which a common basis had been laid down by the Commissioner. That basis could not, at this stage, be challenged. <u>By virtue of that fact alone</u>, namely that off-licensed hereditaments were in the same group, they were also in the same state and circumstances, within the meaning of Paragraph 2(1) of Schedule 12.

(viii) The Tribunal pressed Mr Kerr upon the correct role of Paragraph 4, and pointed out, for example, that both Mr Hill, the Assistant Commissioner of Valuaton, and Mr Haines, a Senior Valuer, considered that Paragraph 4 did in fact have a role that was confined to wasting assets such as mines and quarries. That interpretation was, however, based upon <u>their</u> analysis of the decision of the Tribunal in the <u>Lofty Inns</u> case, and this could be contrasted with the views of Mr Shiels, a former Commissioner of Valuation, that Paragraph 2(1) interacted with Paragraph 4 in assessing the net annual value of any hereditament. Mr Kerr stated that, in essence, the actual turnover figures used in 1976, and the estimates of turnover made as a result of them, were only a means of comparison. Thus net annual values of off-licensed hereditaments had not been "fixed" by the volume of trade, and in this respect he pointed to the wording of Paragraph 4. The 2% enhancement factor was merely a guide to express the relative positions of off-licensed hereditaments. Turnover did not in itself "fix" the net annual value. It was merely used to assess how much more valuable an off-licence was. Accordingly Paragraph 4 could play no part at a revision stage and applied only to a General Revaluation. Mr Kerr supplemented this submission by arguing that the Commissioner of Valuation himself had decided to use this method of assessing the net annual values of off-licensed hereditaments. It was merely one method and he could, for example, have used a simple "flat rate increase". If he had then Paragraph 4 would have no possible application and he should not, therefore, be held to have "saddled" himself with Paragraph 4 by use of turnover figures, for comparison purposes, in 1976. Further he contended that Paragraph 4 did not apply at revision stage because it contemplated using actual volume of turnover to fix the net annual value of a hereditament.

The Ratepayer's Submissions

Mr Smith QC who appeared with Mr Malcolm for the Ratepayer made the following submissions -

(i) The starting point in the present case was the assessment of the correct net annual value of the appeal hereditament. It was clear that the present entry in the valuation list was wrong, and indeed this had been conceded by the Commissioner who had spoken to a figure of £2,150, and not the existing valuation entry of £2,500. The only remaining question, therefore, was the correct figure and on this issue Mr Smith pointed out that the burden of proof rested upon the Commissioner. This meant that the Commissioner had to prove that the figure of £2,150 was correct. If he failed there was no "fallback" figure and accordingly the correct entry was that for the bricks and mortar, namely £855.

(ii) This immediately called into question the Commissioner's use of an automatic enhancement figure of 2%. Mr Smith questioned the application of such a figure in two main respects. First whether it had any inherent logic in itself and secondly, if it had, whether it was applicable in the present case.

(iii) The first question was of general import and called into issue the use of an automatic enhancement figure at the last General Revaluation. It was submitted that there was no basis whatsoever upon which this figure could properly have been reached. There was, for example, no comparison with other hereditaments or groups of hereditaments, used for different retail purposes, and with which a proper or any comparison could be, or had been, carried out. If the Commissioner wished to rely upon a 2% enhancement figure then there must be something <u>against which</u> off-licences could be compared. If there was not, an enhancement figure simply could not exist. Thus the approach of the Commissioner at the last General Revaluation in 1976 was seriously flawed.

(iv) Moreover the Commissioner's approach, at General Revaluation, contained a fundamental error. In determining a percentage multiplier he had applied a global enhancement factor of 2%, whilst on the evidence of Mr Shiels, who had been directly concerned in the research and analysis which gave rise to the enhancement factor of 2%, the percentages varied between 1½ and 2½. Again Mr Smith submitted that on these grounds alone the approach of the Commissioner at the 1976 General Revaluation was so flawed that it could not stand, and that this affected not only the appeal hereditament but also all hereditaments which had been placed in the category of off-licensed hereditaments. In effect there was no such category either on the evidence, or as a logical proposition. Thus all the entries made at the 1976 General Revaluation, in relation to off-licensed premises "may well" be incorrect - depending, of course, upon the merits of each case - but could not on any view be deemed to be correct. Mr Smith thus challenged the dividing line between a General Revaluation and a revision case, and maintained that at a revision case a ratepayer could challenge the principles used in completing the list at a general revaluation and could also challenge entries in the valuation list relating to hereditaments other than the one under appeal and, if necessary, prove them incorrect. In this respect he relied upon the decision of the Court of Appeal in England in <u>Barratt v Gravesend Assessment Committee</u> [1941] 2KB 107, particularly at 114.

(v) Mr Smith went further and pointed out, or so he submitted, several other flaws in the approach used by the Commissioner at General Revaluation. For example the application of an automatic enhancement figure, whatever that figure may be, meant that there was no evidence of a nexus or link between the resultant figure for net annual value and that which a hypothetical tenant would pay. Put into the context of the 1977 Order there was no nexus between the figure reached under Paragraph 2(1) and Paragraph 1 of Schedule 12.

(vi) Mr Smith agreed with the submissions made by Mr Kerr in relation to Paragraph 4 of Schedule 12 Part 1 of the 1977 Order. In essence Paragraph 4, or so he contended, had no relevance to the assessment of net annual values at revision stage, and this applied particularly to off-licences, the net annual value of which were not "fixed" by reference to turnover or the volume of trade. The Tribunal pauses to say that it does not find this argument at all surprising, bearing in mind that the main thrust of the ratepayer's case was that as a matter of practice he was losing money in the hereditament, and that, accordingly, <u>profits</u> (or losses) should be used in assessing net annual value, not turnover.

(vii) It was also submitted that the fact that an off-licence existed, and that an appeal hereditament had the advantage of the existence of such a licence was merely one factor to be taken into account and only then if it meant that an occupier of the hereditament had an added capacity to earn profits.

(viii) Even if, at General Revaluation, there was a logical basis for applying a 2% or indeed any enhancement factor in assessing the net annual values of off-licence premises, that approach could not be used in the present case. The evidence revealed that no proper adjustment had been made, in relation to the appeal hereditament or the comparable hereditaments, for such matters as the hinterland, the quality or nature of the trade carried on, and the locality and the nature thereof. On any view the evidence did not establish that the comparables were in the same state and circumstances. Mr Smith was in effect making two points. First he rejected Mr Kerr's argument that because comparables lay in the same group, namely off-licensed hereditaments, they were, ipso facto, in the same state and circumstances. Secondly that there were no comparables within the group of off-licensed hereditaments, and that accordingly the <u>only</u> comparables available were ordinary retail premises. Mr Crothers had already referred to a comparable ordinary retail hereditament, almost adjoining the appeal hereditament.

(ix) Mr Smith also challenged the Commissioner's authority to fix a tone, at General Revaluation, for <u>any</u> group of hereditaments, whether off-licensed hereditaments or otherwise. He thus submitted that the Commissioner had failed to prove that any enhancement figure should be applied to the appeal hereditament.

(x) Finally Mr Smith argued that there was no evidence upon which the Tribunal could base a figure for net annual value in relation to the appeal hereditament. He agreed that there was evidence such as turnover figures, the value of a licence and actual rental figures, but submitted that these had not been properly analysed nor applied in terms of net annual value. They were, therefore, of no assistance to the Tribunal, even if the off-licence did lead to the addition of an amount to the bricks and mortar valuation. That amount was simply unquantifiable on the evidence.

In reply for the Commissioner

Mr Shaw submitted that -

(i) The Barratt case was of no assistance to the interpretation of the legislation in Northern Ireland. Moreover it had to be placed in its proper context, and this was set out in Ryde on Rating, 13th Edition, at page 466.

(ii) Whilst there may be no comparables on one view of the evidence nevertheless the Tribunal did have the advantage of the expertise of a skilled valuer, indeed a senior valuer, Mr Haines. It should therefore be slow to find that there was no enhancement on account of the existence of the off-licence.

(iii) In any event there was ample evidence to show that there was an enhancement in value by reason of the existence of the off-licence, namely the turnover figures adduced in evidence by the Ratepayer's own witnesses, the fact that off-licences in general were at present fetching sums in the region of £30,000/£35,000, the fact that the present off-licence was one of eight purchased, together with the goodwill, for a composite sum of £100,000 and, finally, that the actual rent fixed at the rent review which took place in 1985, was £5,300. Mr Shaw thus submitted that there must be an enhancement by reason of the existence of the licence, and that, accordingly, the Commissioner had discharged the burden of proof upon him. When asked by the Tribunal how these matters might be translated into terms of net annual value he was unable to suggest a formula.

DECISION OF THE TRIBUNAL

The Tribunal has concluded that the substance of the case put forward on behalf of both parties was based on quite fundamental misconceptions of the meaning and underlying rationale of the Rates (Northern Ireland) Order 1977. This may well have resulted from the somewhat infelicitous wording of certain parts of that Order. Equally it may have resulted from the nature of the case which each side advanced. Whatever the reason, it has compelled the Tribunal to embark upon a detailed consideration of those parts of the Order which are relevant, and further to lay down guidelines as to the rating of all off-licensed premises in Northern Ireland. The Tribunal does not intend to discuss every point made by the Ratepayer or the Commissioner. This would tend to blur what are meant to be clear guideline principles. All these points have however been taken into consideration.

The relevant portions of the 1977 Order are as follows:-

<u>Article 39</u>

"(1) For the purposes of this Order every hereditament shall be valued upon an estimate of its net annual value.

(2) Without prejudice to any other statutory provision, Schedule 12 shall have effect for the purpose of providing for the manner in which the net annual value of a hereditament is to be, or may be, estimated, and the other provisions of that Schedule shall have effect."

<u>Article 54(1)</u>

"Any person ... who is aggrieved by the decision of the Commissioner on an appeal under Article 51 or by an alteration made by him in the valuation list in consequence of such a decision may appeal to the Lands Tribunal, and the Lands Tribunal may make any decision that the Commissioner might have made and, if any alteration in the valuation list is necessary to give effect to the decision, may direct that the valuation list be altered accordingly."

<u>Article 54(2)</u>

"On an appeal under this Article, the valuation shown in the valuation list with respect to a hereditament shall be deemed to be correct until the contrary is shown."

<u>Schedule 12, Part 1</u>

"BASIS OF VALUATION

PART I

GENERAL RULE

1. Subject to the provisions of this Schedule, for the purposes of this Order the net annual value of a hereditament shall be the rent for which, one year with another, the hereditament might, in its actual state, be reasonably expected to let from year to year, the probable average annual cost of repairs, insurance and other expenses (if any) necessary to maintain the hereditament in its actual state, and all rates, taxes or public charges (if any), being paid by the tenant.

2. (1) Subject to sub-paragraph (2), in estimating the net annual value of a hereditament for the purposes of any revision of the valuation list, regard shall be had to the net annual values in the valuation list of comparable hereditaments which are in the same state and circumstances as the hereditament whose net annual value is being revised.

(2) Sub-paragraph (1) shall not apply to any hereditament for whose valuation special provision is made by or under Part IV or any of the succeeding Parts of this Schedule, or to any hereditament whose net annual value falls to be ascertained by reference to the profits of the undertaking or business carried on therein.

4. Where the net annual value of a hereditament is fixed, wholly or partly, having regard to the volume of trade carried on at the hereditament or the quantity of minerals or other substances extracted from it, the volume or quantity to be taken into account for the purposes of a valuation shall be the probable volume or quantity for the first year with respect to which that valuation will be in force."

The Ratepayer's first point of general import was that there was no distinction between the <u>principles</u> applicable at a general revaluation and those applicable at revision stage. That argument was divided into a number of separate headings, set out in full earlier and to which the Tribunal refers. In essence the foundation of the Ratepayer's case was two-fold. First that at revision stage it was open to the Ratepayer to prove not only that the entry for the net annual value of the appeal hereditament was wrong, but that he could also show that the other entries in the list relating to off-licensed hereditaments were incorrect in that <u>the basis</u> of their initial assessment at the last general revaluation in 1976 was so flawed (by, for example, applying an automatic enhancement figure of 2%) that they could not be used at a subsequent revision stage. This, it was submitted, meant disregarding all other off-licensed hereditaments, and relying upon ordinary retail premises as comparables. Secondly, it was argued that if, between general revaluations, economic circumstances altered so that a hereditament or a group of hereditaments was making less or even nothing by way of profits, that was a ground in itself which should be applied not only at revision stage but which also destroyed the principles upon which the last general revaluation had been based. Tacked onto these submissions was the allegation that the Commissioner had no authority, whether under the 1977 Order or otherwise, to fix a tone of the list for a particular group, whether off-licensed hereditaments or for any other class of hereditament.

For his part the Commissioner maintained that at a general revaluation he had to apply certain fundamental rating principles. Once this has been done the list was completed and a tone of the list thus came into being. The basis on which that general revaluation list had been completed could not be challenged. There was no statutory appeal against a general revaluation, and accordingly the tone of the list, for example for a specific group such as off-licensed hereditaments, continued during the life of that list. The essence of the tone of the list was comparability, and this was underpinned by a combination of Article 54(2) and Paragraph 2(1) of Schedule 12 Part 1. The only means by which a ratepayer could challenge the list was by challenging a specific entry in the list, and the only means by which that could be done was by way of revision procedure. The Commissioner's arguments have been set out in full earlier, and again the Tribunal refers to them.

Thus the first point for decision is whether there is a distinction between the principles applicable at a general revaluation, and those applicable to a revision of an entry in the list between general revaluations. In the view of the Tribunal there is a clear and obvious distinction between the principles applicable to a general revaluation and those applicable to a subsequent revision. That distinction flows naturally from the very concept of a general revaluation, which will be elaborated upon at a later stage. Suffice to say that if the Ratepayer is correct then every revision case could challenge the <u>principles</u> applied at the last general revaluation. Such a result would be nothing less than an absurdity, and it is equally absurd to argue that a change in economic or trading conditions can be used at revision stage to attack, or even demolish, <u>principles</u> which were applied at general revaluation stage. The Tribunal does agree however that at revision stage any <u>individual</u> entry, whether relating to the hereditament under revision or not, can be challenged and shown to be incorrect, but this is a very different matter from an attack on the <u>principles</u> applied at a general revaluation. There is no machinery for challenging the validity of the principles in the Lands Tribunal. If, as the Ratepayer contends, they are fundamentally flawed then it may well be that his remedy lies elsewhere.

In the Tribunal's mind it is clear beyond peradventure that the provisions of the 1977 Order set out at the beginning of this decision lay down two quite separate and distinct methods of ascertaining net annual values for the purposes of the valuation list. The first applies to a general revaluation: the second to <u>revisions</u> of entries in the list between general revaluations.

Because of the Ratepayers challenge to this matter the Tribunal feels that it may be of assistance if it were to set out its views in some detail on the principles applicable to a general revaluation and to subsequent revisions. Paragraph 1 applies to both situations, and in essence sets out the formula for assessing net annual values which has appeared in all Rating and Valuation Acts since the Valuation (Ireland) Act 1852, which is of course based upon an <u>estimate</u> of rent. This concept is well understood, standing as it does at the heart of rating law in Northern Ireland, but nevertheless a few words by way of background may be appropriate. When a general revaluation list is being prepared all hereditaments are assessed upon an estimate of rental values at a fixed date. There are no entries of net annual value in a general revaluation list <u>until</u> all hereditaments have been assessed, and there are thus <u>no</u> net annual values of comparable hereditaments in the list. At this stage, therefore, Paragraph 2(1), (which is of course based upon the concept of comparables), cannot play any part in the assessment process, and the only information available <u>at this stage</u> upon which the necessary estimates can be based are such matters as actual turnover figures. This information is applied directly, and <u>not by way of comparison</u>. This is a distinction which has always to be borne in mind, and one particular example is to be found in the use of turnover figures. As will be seen these play a different role at general revaluation and revision stages. They are of course covered by paragraph 4 of Schedule 12 which at general revaluation stage provides (inter alia) that when a figure for the net annual value of a hereditament is fixed wholly or partly having regard to the volume of trade carried on at that hereditament then the volume of trade to be taken into account shall be "the probable volume ... for the first year with respect to which that valuation shall be in force". It follows that if the best valuation evidence available (whether on its own or in conjunction with other evidence) upon which an assessment of the rent which a hypothetical tenant would pay for the premises is to be made is that of the turnover of the subject hereditament, then this is applied directly. As has already been pointed out there are no comparables available and thus, where turnover figures are considered appropriate, it is paragraph 1 and paragraph 4 which interact. Paragraph 2(1) does not, and cannot, play any part whatsoever.

When, however, a <u>revision</u> of an entry in a valuation list is under consideration different principles come into play; in particular paragraph 2(1) and the concept of comparable hereditaments. The reason is simple. The very completion of the list, at general revaluation, by itself creates comparables, and paragraph 2(1) can begin to play its role. That role is this. There can, as the Tribunal has already stated, be no challenge to the principles applied at general revaluation. Any challenge before the Lands Tribunal must be by way of an application for revision of an entry already in the list. As time progresses, if actual rental levels and turnover figures were used for the revision of a particular entry in the valuation list, it would inevitably result in that entry being increased to a level significantly higher than other entries in the list. There must therefore be a limiting factor, and this is provided by paragraph 2(1) which, in essence, produces what is often termed a "tone of the list", and which ensures fairness and uniformity. It does this by providing that at revision stage regard "shall be had" to the net annual values in the valuation list of comparable hereditaments. Its role will be discussed in greater detail later. Suffice to say that the significance of this role increases with the passage of time; indeed to the extent that considerable strain has been placed upon the concept of the tone of the list. In turn this has led to difficulties in applying paragraph 2(1) in the manner originally envisaged. It is a limiting factor designed to maintain uniformity over intervals of five years. However the Second General Revaluation in Northern Ireland took place in 1956, and the last General Revaluation in 1976. The Tribunal can only but express sympathy with expert valuers who currently have to apply the concepts contained within paragraph 2(1).

This problem of ensuring fairness and uniformity in the valuation list is not new to Northern Ireland, nor indeed to England, and it may be illustrative to look at two attempts to tackle it.

The first is found in the (now repealed) Valuation Acts (Amendment) Act (Northern Ireland) 1946, which provided that -

> "... the estimate of net annual value for the purposes of section 11 of the Valuation (Ireland) Act 1852, is to be made as if such annual revision were being carried out in the year ended on the thirty-first day of March, nineteen hundred and thirty-nine, and as if such tenements and hereditaments had in the last-mentioned year been in the actual state and circumstances in which they are at the time of carrying out such annual revision."

This solution was so unreal and artificial that eventually it had to be abandoned. It is noteworthy however that it is analogous to the arguments advanced by the Commissioner in the present appeal. In England the nature of the problem was highlighted by the Court of Appeal's decision in Ladies Hosiery and Underwear Ltd v West Middlesex Assessment Committee [1932] 2KB 679, the essence of which was that any assessment of value at revision stage had to have regard to full rental values, and not to lower tone values that might exist in the list. In words more appropriate to the position in Northern Ireland the Court was of the view that paragraph 1 considerations were the only considerations to be applied. This led to considerable confusion as, in England, there was then no equivalent to the present paragraph 2(1) in Northern Ireland. There was thus no modifying influence to ensure that there was an overall tone of the list. The result was that as time passed the Ladies Hosiery case came to be ignored as a matter of valuation practice, and this practice was eventually given statutory force by the enactment of the General Rate Act 1967, which directs, in section 20, that such valuations shall be made "according to the tone of the list" (the Tribunal's emphasis).

One further matter of general import requires mention. Reference has already been made as to the method by which entries in the valuation list may be altered, namely by mounting a challenge by way of revision procedure. However Article 54(2) of the Order needs elaboration. It provides that the burden of proving that an entry in the list is incorrect rests upon the ratepayer, and it has been construed as meaning that all entries in the valuation list are deemed to be correct unless the contrary is shown. The importance of this is that the combination of paragraph 2(1) and Article 54(2), underpins the tone of the list, and the Commissioner can thus rely at revision stage on comparables which are deemed to be correct unless shown otherwise. The Tribunal points out, however, that it makes no difference to the position which would prevail in practice, where the Commissioner, on a revision hearing, must still have proper regard to comparables of which the net annual values are contained in the list.

This explanation is by way of general background. Hopefully it may be of some assistance, and equally hopefully it may have illustrated the importance of paragraph 2(1) and the role it plays at revisions between general revaluations. The precise nature of that role has however been questioned in the instant appeal and accordingly the Tribunal must now deal with paragraph 2(1) in greater detail. Its precise wording therefore bears repetition -

> "Subject to sub-paragraph (2) in estimating the net annual value of a hereditament for the purposes of any revision of the valuation list, regard shall be had to the net annual values in the valuation list of comparable hereditaments which are in the same state and circumstances as the hereditament whose net annual value is being revised." (The Tribunal's underlining.)

At one point in the proceedings it was suggested by the Ratepayer that the words "regard shall be had ..." were among the "weakest known to the law". The Tribunal cannot agree. As has already been pointed out rental values, between general revaluations, will inevitably alter with the passage of time. To take account of these changes paragraph 2(1) directs that regard shall be had to assessments of comparable hereditaments, and thus maintains a tone of the list. This, however, is merely a starting point and does not mean that comparable net annual values are to be followed slavishly. They are a guideline in carrying out the primary exercise of making a skilled estimate of a hypothetical figure, being of course the rent for which, one year with another, the hereditament might reasonably be expected to let from year to year. Nor does it prevent proper regard being paid to other factors, if those factors are relevant. This, of course, leads the Tribunal to paragraph 4. Its role at general revaluation stage has already been considered, and it may now be helpful to outline its role at revision stage. This is particularly so as both the Commissioner and the Ratepayer took the view that paragraph 4 had no part to play at revision stage, and that its role was confined to a general revaluation, in spite of the fact that for a considerable number of years off-licensed premises have been assessed on the basis of turnover. The one common feature in this appeal was that both sides wished to abandon the concept of turnover. The Tribunal ignores the other views put forward by the Commissioner's witnesses (Mr Hill, the Assistant Commissioner and Mr Haines, a Senior Valuer, to the effect that it applied only to mines and quarries, and Mr Shiels a former Commissioner of Valuation that it interacted with paragraph 2(1)). The Tribunal is of the clear view that paragraph 4 was intended to, and does, have a fundamentally important role to play at revision stage. As the Tribunal has observed it suited both parties to ignore paragraph 4; the Commissioner because a return to 1976 levels made a nonsense of paragraph 4, and the Ratepayer because of his efforts to escape from the traditional use of turnover figures in the estimate of net annual value for off-licensed premises and his attempts to rely on economic conditions and actual profits or losses. Whether it suited the parties or not is quite irrelevant. It is the task of the Tribunal to apply the law as it sees it. It thus rejects the arguments advanced by both parties as to the role paragraph 4 should play at revision stage, and forms its own conclusions, which are these. To begin with two distinct situations can arise; the first where there are comparables within the meaning of paragraph 2(1), and the second where there are no such comparables, or where the evidence relating to such comparables is simply not acceptable. If there are true comparables, then paragraph 4 provides a tool of comparison which enables the expert valuer to analyse the comparables either wholly or partly by reference to turnover of the appeal hereditament and to the turnover figures of the comparables. By the very wording of paragraph 4 this means using it at values current to the case under consideration, which in the instant appeal is 1984/1985. In this situation the principles set out in paragraph 2(1) and paragraph 4 interact either on their own or with other evidence of comparison. In the second situation, however, where there are no comparables, or no acceptable evidence of comparables, paragraph 2(1) cannot play a role. In this instance the expert valuer can use paragraph 4, not as a method of comparison but as a direct method of estimating a rental figure. He can therefore use turnover figures on their own, or in conjunction with other evidence, or alternatively as a check on a figure which he has estimated by other means. In the first instance turnover is a tool of comparison; whilst in the second it is applied directly, as a means of estimating the rental figure. Its normal role at revision stage, however, is as a tool of comparison as in the usual case true comparables should be available. The Tribunal is driven to saying that throughout this case there was marked confusion between evidence of comparison and evidence which had to be applied directly.

Another fundamental matter which the Ratepayer questioned was the meaning of the words "... the same state and circumstances as the hereditament whose net annual value is being revised". It was, for instance, contended that the Commissioner's approach at the last general revaluation was so flawed that off-licensed hereditaments should not have been treated as a separate category in the valuation list. They should, or so it was argued, have been treated within the broad category of ordinary retail shops. It was further submitted that it was incorrect to apply an automatic enhancement figure of 2% of estimated gross turnover in respect of each off-licensed hereditament to reflect an alleged "monopoly" position enjoyed by such premises. For these and the other reasons set out earlier the Ratepayer argued that the principles applied to the assessment of off-licensed premises at general revaluation stage were so fundamentally flawed that the resulting net annual values could not be used as comparables, and, further, that the correct approach was to look at ordinary retail shops. Moreover it was also contended that the Commissioner had no power at general revaluation to treat off-licensed hereditaments as being in a group of their own.

The Tribunal has already rejected these arguments, but further points out that what is required, under paragraph 2(1), is a comparison of "like with like". It would thus seem entirely inappropriate to compare off-licensed premises with, for example, a newsagents, a chemists or a clothing or footwear retailer. The obvious comparable to an off-licensed hereditament is another off-licensed hereditament. The Ratepayer's primary submissions were of course an attack upon the principles used by the Commissioner at general revaluation stage and, to that extent, the case was an appeal against those principles. As the Tribunal has indicated such an approach is misconceived. There is no right of appeal against an assessment made at general revaluation under the 1977 Order. If a ratepayer disagrees with such an assessment his only remedy, under that Order, is to challenge it by way of revision procedure. That being so he is bound by those provisions of the Order which apply to revision cases, and, in particular, paragraph 2(1) of Schedule 12. The Ratepayer's case was also an attempt to avoid the application of the net annual values of comparable off-licensed hereditaments. The Ratepayer thus paid what the Tribunal regrettably has to describe as lip-service to the principle that the existence of an off-licence should be taken into account, and in reality based his case on the contention that such off-licences should be ignored completely. Again the Tribunal rejects this approach. Not only does it ignore common sense but it also seeks to ignore the decision of the House of Lords in Cartwright v Sculcoates Union [1900] AC 150, which was followed and applied by the Kings Bench Division and Court of Appeal in Ireland in Armstrong v The Commissioner of Valuation [1905] 2IR 448 and 497. Although the latter involved the rating of a public house the principle is the same and was set out by Lord O'Brien L C J in the following words, at page 484 -

> "In valuing a public house under the Irish Valuation Act ... is regard to be had to the license which authorises the sale of spirituous liquor therein ... Is the enhanced or added value of the premises ... to be excluded from the rateable value?"

The answer to the first question was yes, and to the second no. This case was expressly commented upon by Lord Lowry in a lecture delivered at Queens University in 1966, reported in the Northern Ireland Legal Quarterly (Vol 17, No 2), to the effect that it

> "... illustrates the fact that value must be attached to the existence of the licence, and [that] our ... laws create a situation where there is a monopoly value."

The Ratepayer further sought, as has been indicated, to base its case upon economic considerations and also attempted, on the same grounds, to undermine the Commissioners approach to off-licensed hereditaments at the last general revaluation. The Tribunal has already rejected such an argument as a matter of general principle, but more specifically, when considering the evidence, it is driven to saying that the Ratepayer's experts approached the matter with what can only be termed "commercial considerations", namely that it should use actual rental values of comparable (unlicensed) retail shops, and should also look at the actual profits made in the appeal hereditament, when estimating the rent which a hypothetical tenant would pay. Such arguments also ignore legal authority. Lord Davey in Cartwright v Sculcoates Union [1900] AC 150 at 159 stated that "It is not that you rate the profits ..." and further Lord Brampton said, at page 162 "... the profits in this house cannot themselves be assessed ...". As a matter of law what must be valued is the hereditament and not the business. Thus a valuer cannot value the profits. He can, however, use the capacity to earn profits as a tool in estimating rental values. Any approach based purely on commercial concepts ignores the provisions of the 1977 Order which govern the correct valuation approach to a revision of an existing net annual value in the list. The Tribunal thus rejects the evidence of Mr Harbinson and points out in passing that the relevant date for the purposes of this case is that of the district valuer's certificate (2 July 1984). The actual rent of the hereditament as at the 1985 review was £5,300. If the actual rent were used in the assessment of the net annual value at the material time it would result in a figure far in excess of the one under appeal. The present case is therefore a striking example of a situation where it is very much in the interests of the Ratepayer to ignore the views of his own expert witness.

It is therefore clear that the primary guideline to which the Tribunal must have regard, on a revision case, is the net annual values of comparable hereditaments which are in the same state and circumstances as the appeal hereditament. As the Tribunal has indicated this does not mean a slavish application of such net annual values, nor does it preclude the use of other checks or guidelines. Moreover the comparables relied upon must be in the same state and circumstances as the appeal hereditament. The Tribunal has already considered, and rejected, the Ratepayer's arguments on this issue but it was at this point that the Commissioner's own case ran into difficulties. It was conceded by Mr Haines, for example, that the only similarity between the "comparables" was that each was an off-licensed hereditament. This falls far short of using comparables which are in the same state and circumstances. On these grounds alone the Tribunal cannot accept the alleged comparables. Mr Haines did say at a later stage that two other matters were of significance. First that all the comparables had been valued on the same basis, and secondly that all were in the same locality. The Tribunal considers, with respect, that the first contention is almost meaningless, in that, in substance, it is merely a repetition of the fact that all of the comparables have the advantage of an off-licence. They are thus "comparable" in that they belong to the same group or class of hereditament, but that is not to say that on the evidence they can be considered to be in the same state and circumstances. The second point has more weight but the concessions made by Mr Haines, were such that the Tribunal has concluded that, on the evidence before it, none of the comparables could safely be relied upon as being in the same state and circumstances. The Tribunal therefore emphasises that if comparable net annual values are to be used they must be closely and carefully analysed. Such matters as their position, size, quality of buildings, state of repair and the kind of trade and hinterland are of singular importance. It may well have been the weaknesses inherent in the evidence of Mr Haines on this issue which led Mr Kerr to submit, on behalf of the Commissioner, that any off-licensed hereditament was in the same state and circumstances as any other, simply because the last general revaluation in 1976 had created a group or category of a particular type of hereditament, and as such "each is an example of the tone of the list as it was at first constituted" (to use Mr Kerr's words). They were thus, ipso facto, in the same state and circumstances. Such a submission does not bear scrutiny. It is so clearly wrong that it does not require further discussion.

This conclusion in relation to the alleged comparables by itself would in the Tribunal's view be sufficient to determine the instant appeal, but there was a more important matter raised by the Commissioner. This indeed is so fundamental that the Tribunal considers it imperative to deal with it in specific terms. The matter arose in this way. As has been pointed out, Mr Haines and Mr Hill stated that prior to the decision of the Tribunal in Lofty Inns Ltd v The Commissioner of Valuation for Northern Ireland (VR/31/1986) the net annual values of off-licensed premises had been assessed by applying a discounted percentage figure to current turnover for the subject premises. This allowed both paragraph 2(1) and paragraph 4 of Schedule 12 to interact and play a part in the assessment process. They considered however that the decision in the Lofty Case undermined this approach and, further, that it meant applying 1976 levels, and using a 2% multiplier. As has already been pointed out paragraph 4 thus had to be ignored and both witnesses considered that it applied only to wasting assets, such as mines and quarries. This interpretation is patently incorrect, and it may thus be helpful to look at the decision in the Lofty case in more detail. The question at issue in that case is set out on page 1 of the Tribunal's decision, and reads:-

> "Whether in estimating the net annual value of the subject hereditament regard is to be had to the net annual values in the valuation list of comparable hereditaments which are in the same state and circumstances as the subject hereditament."

The Tribunal set out a reasoned and definitive review of the law as it saw it. It should of course be pointed out that the Commissioner was attempting in the Lofty Case to challenge his own practice of assessing the net annual values of public houses. Prior to that case the Commissioner had always used comparables, or, put more succinctly, had applied paragraph 2(1). Indeed this practice had existed for many years, both for on and off licensed premises. In the Lofty Case he sought, for the first time, to question his own practice and to argue that the -

> "net annual value of public houses is found by using the profits method because there is an absence of rental evidence and rental comparables" (see page 5 of the decision).

> In effect the Commissioner was attempting to jettison paragraph 2(1), and apply paragraph 2(2) of Schedule 12. The Tribunal held that this was incorrect, and that paragraph 2(2) applied only to hereditaments where a rental value simply could not be estimated - for example public utility undertakings - and where the Order required as a matter of law that the profits method of valuation be applied. The net annual value of

public houses is fixed by an <u>estimate</u> of rental value. It followed from this that paragraph 2(1) and paragraph 4 had to play their proper role at revision stage. Thus the decision in the <u>Lofty</u> case did no more than decide <u>that a percentage of current turnover (actual or estimated) was a method of comparison and not a direct tool of valuation</u>. In the present case the Tribunal is, therefore, somewhat surprised at the Commissioner's analysis of the <u>Lofty</u> Case, and his views on paragraph 4. That paragraph is described in Schedule 12 as a "general" rule. It cannot be confined, nor apply solely, to wasting assets (of which the only examples given were mines and quarries and which are expressly covered by Part IX of Schedule 12, Class 5). The Tribunal is forced to point out that the Commissioner failed in the <u>Lofty</u> case to get rid of paragraph 2(1), but is now seeking to emasculate that paragraph by disposing of paragraph 4.

The Tribunal thus rejects the Commissioner's analysis of the decision in <u>Lofty Inns</u>, and hence the principles he has applied in the present case. There are thus no comparables which are acceptable to the Tribunal as being in the same state and circumstances. For example no estimates of 1984/85 turnover were submitted to enable <u>proper</u> regard to be paid to the net annual value of the comparables. It is also surprising that <u>exactly 2%</u> of the estimated 1976 turnover would apply in <u>each</u> case. This flies in the face of proper valuation adjustment necessary for position, quantity and quality of trade done. To have proper regard to the net annual value of the comparables adequate estimates of turnover must be used. With careful analysis the correct valuation adjustments could have been made to enable the net annual value of the appeal hereditament to be estimated. This process is based on <u>principles of comparison</u> and it is these principles which, unfortunately, have been largely ignored in the instant appeal.

As the Tribunal is considering general principles the next matter that must be looked at is the question of estimating, at revision stage, the net annual value of a hereditament where <u>no comparables in the same state and circumstances can be found, or where the evidence as to alleged comparables is incapable of rational analysis or application, or is simply not acceptable</u>. This situation indeed arises in the present case where the Tribunal has rejected the analysis of the Commissioners comparables as being misconceived, and has further concluded that on the evidence before it those comparables could not be said to be in the same state and circumstances as the appeal hereditament. How then is a proper estimate of net annual value to be made? The <u>general</u> answer can be expressed briefly. Any accepted valuation guideline can be applied <u>IF</u> there is some form of nexus between the resultant figure and the rent which a hypothetical tenant would pay on the assumptions set out in Schedule 12, paragraph 1.

As the Tribunal is giving a guideline decision it might, at this stage, be helpful if it referred to two of its decisions by way of illustration of the general principles which have been outlined. The first is that in Flanigan v The Commissioner of Valuation for Northern Ireland (VR/71/1984). It concerned the same question as in the present case, namely the assessment of net annual value at revision stage of an off-licensed hereditament. Both parties agreed that the correct approach was to take the net annual value of the hereditament unlicensed (the "bricks and mortar" valuation) and to add to that figure an amount which represented the increased value arising by reason of the existence of the licence. The Tribunal had a complex task. Evidence of alleged comparables was given by the Commissioner, but it was difficult to comprehend, and even more difficult to apply. The Tribunal had two choices: either to reject the evidence of the comparables, or to attempt to make its own analysis. It preferred the latter, clearly because it was satisfied that in the circumstances of that case the comparables, when correctly analysed, gave an estimate for the net annual value which was in line with the tone of the list, and that there was a link between that estimate and the rent which a hypothetical tenant would pay on the assumptions set out in paragraph 1 of Schedule 12. The result was that to reflect the value of the existence of the licence the Tribunal applied a percentage of .91% to the then current gross turnover of the appeal hereditament, and added this to the bricks and mortar valuation. This decision is often cited as establishing as a matter of law that off-licensed premises have, ipso facto, an increased net annual value. This is incorrect, as the decision was not based on a proposition of law, but on a method of valuation by comparison. It is, however, an example of the application of the net annual values of comparable hereditaments which were considered to be in the same state and circumstances as the subject hereditament. It is therefore an example of how proper regard is to be paid to Schedule 12, paragraph 2(1) and paragraph 4 as a matter of skilled valuation practice.

The second decision is that in Rosemary Wine Markets Limited v The Commissioner of Valuation for Northern Ireland (VR/52/1985). This is an example of a particular type of valuation approach where the evidence before the Tribunal as to comparable off-licensed premises was not accepted. Again it was a revision case, and again it involved the assessment of the net annual value of an off-licensed hereditament. The Commissioner had used the "shorthand accounts method" of valuation. For its part the ratepayer gave evidence of actual rental figures both of the appeal hereditament and of a comparable retail shop. The Tribunal preferred the latter. The decision is interesting for a number of reasons. To begin with it provides an example of a valuation approach where, on the evidence, no regard was paid to the net annual values of comparable hereditaments. However it is also of interest because of several more general matters. Of the Commissioner's "shorthand accounts method" of assessment the Tribunal said -

"... notwithstanding the absence of express statutory or judicial authority, there is no objection in principle to that method <u>provided</u> that there is a nexus between the resultant figure and the rent which an off-licencee would pay on the assumptions in paragraph I of Schedule 12."

It is also of some significance to note that whilst it was common case as between the parties that "the principle that the existence of the licence must be taken into account ... ", an important part of the decision lies in the appellant's submission that this did not necessarily mean that the value of the premises was thereby automatically enhanced. The Tribunal said, when dealing with this point:-

> "... the application of a percentage of gross turnover presupposes that every off-licence is more valuable than its adjoining comparable retail shops; no matter how little trade an off-licence conducts its valuation will always be uplifted by a percentage of turnover. That proposition also presupposes that the profits from an off-licence always exceeds the profits which may be obtained by any other shop use. Those submissions seem to be unarguable ..."

After a careful review of the evidence the Tribunal determined that the ratepayer had succeeded in establishing that the notional rent of the appeal premises did not exceed that of the adjoining premises, and that they should be treated on the same basis as ordinary retail premises. It must be noted, however, that the essence of the Tribunal's approach is contained in the sentence "<u>what matters is the rental value of the premises with the benefit of the licence</u>". This is undoubtedly correct. The case is often quoted as authority for the proposition that in estimating the net annual value of an off-licensed hereditament the off-licence should be entirely ignored. Such a construction is unwarranted, and is not supported by the reasoning of the Tribunal. What matters is the rental value of the premises with the benefit of the existence of the licence.

The Tribunal has been at pains to discuss general principles and to attempt to set them out in as coherent a manner as is possible in what is undoubtedly a difficult area of rating law and practice. It may therefore be of assistance to summarise the matters already discussed. To ascertain the Net Annual Value of any hereditament occupied as an off-licence:-

1. The hereditament must be valued upon an <u>estimate</u> of its <u>net annual value</u>.

2. The net annual value is "the rent for which, one year with another, the hereditament might in its actual state be reasonably expected to let from year to year ...". In short what would a hypothetical tenant pay, on the suppositions set out in paragraph 1, Schedule 12?

3. At a General Revaluation it is upon this principle, and this principle alone, that the net annual value of the hereditament is assessed. Accordingly at this stage evidence of, for example, actual turnover figures are essential to arrive at the correct estimated net annual value. This evidence is applied directly (albeit by way of a guide), and not by comparison, because it is a new valuation list that is being produced, and accordingly there are no comparables.

4. At any revision between General Revaluations, however, a different principle, by virtue of Schedule 12 Part I paragraph 2(1), comes into play. This provides that in estimating the net annual value of a subject hereditament for the purposes of any revision of the valuation list proper regard shall be paid to the net annual values in the valuation list of comparable hereditaments. It is this provision, coupled with Article 54(2) of the 1977 Order, which gives what is frequently termed the "tone of the list" and which ensures, for example, that current rental values are not applied directly at any revision. If they were then the assessment of the net annual value of any individual hereditament would result in an unconscionably high figure in comparison with other entries. It must be appreciated that at this stage such matters as turnover figures are used only for the purposes of comparison. Moreover paragraph 2(1) is merely a guideline and there must be some form of nexus between the estimated figure and the rent which a hypothetical tenant would pay on the assumptions set out in Schedule 12, paragraph 1. It is of singular importance to appreciate that when paragraph 4 is applied at revision stage the result is that a percentage of current turnover (actual or estimated) is used as a method of comparison and not as a direct tool of valuation.

5. If, however, at revision stage, there is no, (or no acceptable) evidence of comparable hereditaments in the same state and circumstances, the estimate of Net Annual Value must be made by the best means available, for example turnover, contractor's method and so on. Again, however, there must be a nexus between the estimated figure and the rent which a hypothetical tenant would pay. This is obviously an exceptional case. In the usual case, if a proper valuation exercise is carried out, true comparables (properly analysed) should be found without difficulty.

6. In assessing the net annual value of licensed premises what matters is the rental value of the premises with the benefit of the existence of the licence. <u>To this extent</u> every case depends essentially upon its own facts, and there is no automatic enhancement of value merely because the premises have the benefit of the existence of a licence. <u>Thus the figure to reflect the existence of the licence will vary from nil upwards</u>.

The Tribunal has attempted to lay down guideline principles for the assessment of the net annual values of off-licensed hereditaments at revision stage. Hopefully this will be of some assistance to the rating authorities and to ratepayers generally.

The Tribunal now turns specifically to the instant appeal, and takes it as common case between the parties that the existence of the licence must be taken into account. That was, in effect, conceded by the Ratepayer (at least on paper) and the Tribunal refers to its earlier comments on this issue. The central question is, therefore, how it should be taken into account and, in particular, how it should be reflected, in quantitative terms, in the estimate of the net annual value of the appeal hereditament.

The Tribunal has already expressed the view that in the present case none of the expert witnesses correctly approached the question of assessing the net annual value of the appeal hereditament at revision stage. It has rejected the evidence of the Commissioner and that of the Ratepayer on the central issues in the case, and it has ruled that the burden of proof lies upon the Commissioner. Wherever the burden of proof lies, however, is quite irrelevant. All that the Tribunal is left with is the following -

(i) An agreed figure of £855 on the assumption that the hereditament was an ordinary retail shop with no licence attached (the "bricks and mortar" valuation).

(ii) Turnover figures provided by the Ratepayer. These have been set out in full under the heading "The factual history of the hereditament", but for rating purposes they are relevant only up to the year ending 28th February 1985. Regrettably no analysis of any sort has been carried out and thus they are of no direct use in estimating the correct net annual value. Nor are they of use as tools of comparison as there is nothing with which they can properly be compared.

(iii) Rental evidence for the hereditament which shows that an annual payment of £5,300 was agreed between the landlord and the tenant of the hereditament at the rent review stage in 1985. However the terms of the rent review clause in the Third Schedule to the lease governing the hereditament (set out earlier) show -

(a) That the rent does not include any element for the licence which was purchased in 1981 for the appeal hereditament (together with seven other licences and the good-will attached to all of the premises) for a composite sum of £100,000; and

(b) That the rent for the bricks and mortar would require major adjustment to put it in terms of net annual value.

Unfortunately no real attempt was made to analyse this rental evidence or to arrive at the rental value (in terms of net annual value) of the hereditament as an off-licensed hereditament. The Tribunal emphasises however that if the Ratepayers approach were adopted, and the net annual value fixed at the date of the district valuer's certificate of 2nd July 1984, by using actual rental values, a figure of over £6,000 would ensue. This is obviously not within the tone of the list, and shows not only that the Ratepayers approach is misconceived, but that

paragraph 2(1) of Schedule 12 plays a quite fundamental modifying role which is to the advantage of all ratepayers.

(iv) The fact that an unquantified capital sum was paid for the off-licence attached to the appeal hereditament, and further that it was the Commissioner's unchallenged evidence that off-licences were in today's market changing hands at sums up to £30,000 to £35,000. This shows clearly that the relevant off-licence <u>has</u> a value, but when one comes to <u>establishing</u> that value, the evidence is of no assistance whatsoever.

In essence the Tribunal is satisfied that there is an "enhancement", namely a sum to be added to the bricks and mortar valuation, <u>but that on the evidence before it, the value of such an enhancement (in terms of net annual value) simply cannot be quantified</u>.

The Tribunal therefore has to conclude in relation to the hereditament -

<u>Agreed net annual value as a retail shop</u>	£855

Add for the existence of the licence (cannot be quantified)	£ 0
Net annual value	£855

As conceded during the hearing the Respondent will pay the costs of the Appellant, to be taxed by the Registrar of the Lands Tribunal on the High Court scale in default of agreement.

ORDERS ACCORDINGLY

5th April 1991 **The President, Judge Peter Gibson QC**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:-

Mr Smith QC and Mr Malcolm (instructed by Francis Crilly LLB,) for the Appellant.

Mr Kerr QC and Mr Shaw (instructed by the Crown Solicitor) for the Respondent.