THE VALUATION TRIBUNAL FOR ENGLAND

Non-Domestic Rating Appeal; Distribution Warehouse and Premises; new hereditament; Proposal challenging VO notice of alteration; Avison Young v Jackson (VO) and Moore (VO) v Great Bear [2021] EWCA Civ 969; Porter (VO) v Trustees of Gladman Sipps [2011] UKUT 204 (LC); appeal allowed.

Re: J Sainsbury Plc, Brassey Way, Drift, Northampton CV23 8BQ

APPEAL NUMBER: 281027240395/541N10

BETWEEN:	J Sainsbury Plc	(Appellant)
	and	
	Jo Moore	(Respondent)
	(Valuation Officer)	

BEFORE: Gary Garland (President)

CLERK: David Slater (Registrar and Chief Clerk)

REMOTE HEARING HELD ON Wednesday 28 June 2023

PARTIES PRESENT;
Mr Richard Williamson and Dennis Broughton from G L Hearn (Appellant's representatives)
Mr Matthew Donmall from 1 Crown Office Row (Respondent's Counsel)

Summary of decision

1. The appeal property's entry was reduced to £2,330,000 Rateable Value and this determination was only effective for the period 1 February 2015 to 16 September 2015, as I determined that it was appropriate for the tribunal to exercise its discretionary power under Regulation 38(7) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009.

Introduction

2. The appellant's representative(s) Dennis Broughton and Richard Williamson informed me that they were under client's instructions to seek a determination of £2,330,000 Rateable Value with effect from 1 February 2015 and to abstain from any engagement regarding the application of Regulation 38 (7). The respondent was represented by Mr Donmall. Neither party called any witnesses as all factual matters were by and large agreed.

3. The appeal property was a newly built distribution warehouse. Construction began in 2014 and the appellant ratepayer took up occupation on 1 February 2015. This being the material date for the appeal.

4. When the Valuation Officer altered the 2010 Rating List retrospectively to value the appeal property as a new hereditament, the assessment placed on it was £4,870,000 Rateable Value with effect from 1 February 2015. The Valuation Officer's notice of alteration giving effect to the assessment was dated 21 January 2016.

5. On 10 June 2016 G L Hearn, on behalf of the appellant, served a proposal on the Valuation Officer challenging the Valuation Officer's notice of alteration. The proposal was therefore made under Regulation 4 (1) (d) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009. The grounds of the proposal as stated were as follows;

> Reduction in assessment to Rateable Value £1 with effect from 8 February 2015. The alteration made by the Valuation Officer on 21 January 2016 is incorrect, excessive and bad in law. Without prejudice

to the generality of the foregoing the effective date of the Valuation Officer's alteration is incorrect and should be amended.

6. The Valuation Officer treated the proposal as not well founded and this was duly transmitted to the tribunal as an appeal.

7. The appeal has been previously scheduled to be heard by the tribunal on at least three previous occasions. The evidence bundle provided to me showed it was previously due to be heard by a panel on 17 July 2019 but the hearing was postponed. It was then due to be heard on 30 October 2019 and again postponed. The final listing, prior to today, was due to take place on 3 April 2023 but the clerk postponed the hearing as she believed her panel had no jurisdiction to make an Order that the respondent was seeking, as she believed it was outside the tribunal's jurisdiction. The Order that the respondent sought was for the agreed assessment of £2,330,000 RV to be limited to the period 1 February 2015 to 16 September 2015 inclusive. Had the Order been granted this would have had the effect of reinstating the Valuation Officer's existing assessment of £4,870,000 with effect from 17 September 2015, despite both parties accepting that this assessment was excessive.

8. The reason why it was not possible for the parties to settle this appeal by a post appeal agreement was the fact that neither the appellant's representatives nor the Valuation Officer were aware that J Sainsbury Plc were not in occupation of either the bonded high bay warehouse or the railhead when the new hereditament came into existence. On the material date 1 February 2015, part of the appeal site which would later form part of the hereditament was still in the control of the developer and had yet to be handed over. It was not in dispute that J Sainsbury Plc was in rateable occupation of the extended hereditament with effect from 17 September 2015.

9. By the time it came to light that the bonded high bay warehouse and the railhead were not in the appellant's rateable occupation on the material day, the 2010 Rating List was closed and the respondent was unable to alter the list entry to reflect the value of the extended hereditament.

10. Both parties accepted that the tribunal had no jurisdiction to value the extended hereditament with effect from 17 September 2015. Given the potential Rateable Value loss of £2.54 million, the respondent contended that an Order under Regulation 38 (7) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 was appropriate. The respondent contended that the circumstances in this case were similar to those in *Moore (VO) v Great Bear* [2021] EWCA Civ 969 where the Court of Appeal held that an Order under Regulation 38 (7) was appropriate for a temporary deletion of the entry.

11. The clerk who postponed the appeal, before the scheduled hearing on 3 April 2023, did not agree with the respondent's view that the Sainsbury appeal was similar to *Great Bear* and therefore the matter was referred to me as a complex case.

12. This hearing was conducted remotely via Microsoft Teams.

13. This decision document is not and does not purport to be a full verbatim record of proceedings.

Issues in dispute

14. Are there circumstances arising from the proposal, that gave rise to this appeal, which justify the tribunal exercising its discretionary power to make an Order under Regulation 38 (7) to restrict the period during which the parties' agreed assessment will apply.

Decision and reasons

15. The starting point in my deliberations was the proposal that gave rise to the appeal. As learned Counsel for the respondent had acknowledged, the tribunal's jurisdiction was limited to the scope of the proposal. That proposal challenged the alteration undertaken by the Valuation Officer to insert a new assessment in the 2010 Rating List.

16. In *Avison Young v Jackson (VO) and Moore (VO) v Great* Bear [2021] EWCA Civ 969, Lord Justice Arnold explained the correct approach to the use of Regulation 38 (7) in paragraph 47 of the Court of Appeal's judgment:

> 47. The starting point in considering this contention is the language of regulation 38(7) itself. This states that where "circumstances giving arise to an alteration … have ceased to exist", the order may require the alteration to be made "in respect of such period as appears … to reflect the duration of those circumstances". On the face of it, this language is perfectly apt to apply to the present cases. In both cases the properties were subject to building works which meant that they were incapable of beneficial occupation for a period of time, meaning that they did not qualify as hereditaments during that period. Accordingly, at the beginning of that period gave rise to an alteration in the list, in one case a reduction in the rateable value to a nominal amount and in the other a removal of the property from the list, and at the end of that period those circumstances ceased to exist.

17. In *Great Bear* and *Avison* the Court of Appeal decided that the works that were ongoing on the respective material day(s) were the "circumstances". In both cases, the ratepayer sought to avoid any exposure to rate liability as their respective properties were incapable of beneficial occupation. No valuation considerations were raised by the proposal(s), giving rise to the appeals, so the only issue raised by the proposal(s) was whether or not a hereditament existed at the material date. In both cases it was agreed that no hereditament existed, as neither property was capable of beneficial occupation. With regard to the "circumstances", the Court of Appeal viewed the ongoing works as a single set of circumstances.

18. On behalf of the Valuation Officer, Mr Donmall argued that the facts in the Sainsbury appeal before me were similar to those in *Great Bear.* In both appeals that were heard together by the Court of Appeal, it was accepted that the appeal properties were incapable of beneficial occupation for a temporary period, due to an ongoing programme of works. He argued that the circumstances, arising from the appeal before me were similar because part of the hereditament was incapable of beneficial occupation for a limited period. Whilst he argued that it was unusual to look at factual matters beyond the material day, Regulation 38 (7) required me to do just that to some extent.

19. I had difficulty accepting this line of argument because the identification of a hereditament was inextricably linked with the concept of rateable occupation. On 17 September 2015, the hereditament effectively consisted of 2 adjacent warehouses and surrounding land. On the material date 1 February 2015, the appellant was in occupation of the smaller warehouse. The larger warehouse was in the process of being built and was still in the hands of the developer. Therefore, I failed to see how I could legitimately apply Regulation 38 (7) in this case, given that the proposal challenged the valuation of a new hereditament and the Valuation Officer had reflected in the initial assessment the value of an extension that was not there on the material day. I was conscious of the Upper Tribunal's judgment *in Porter (VO) v Trustees of Gladman SIPPS* [2011] RA 337 where it was held that a new building was not rateable unless it was ready for occupation, unless a completion notice had been served.

20. *Porter* concerned a newly constructed office building which had been included as a new hereditament in the rating list before the installation of partitioning and other fitting out, and without the service of a completion notice. Having reviewed the relevant authorities, the Tribunal (Mr George Bartlett QC, President and Mr N J Rose FRICS) provided the following summary of their effect, at paragraph 66:

> "66. The authorities, in our judgment, establish the following. A building is only a hereditament if it is ready for occupation, and whether it is ready for occupation is to be assessed in the light of the purpose for which it is designed to be occupied. If the building lacks features which will have to be provided before it can be occupied for that purpose and when provided will form part of the occupied hereditament and form the basis of its valuation it does not constitute a hereditament and so does not fall to be shown in the rating list. There is in consequence no scope for including in the list a building which is nearly, even very nearly, ready for occupation unless the completion notice procedure has been followed."

21. With the above in mind, I was not convinced that it was appropriate to make an Order under Regulation 38 (7) to reflect the valuation of an extension which was not there on the material day. The correct approach, having regard to the Court of Appeal's judgment in *Great Bear* was to establish the tribunal's jurisdiction in relation to the issues raised by the proposal. In this case, it was the valuation of a

new hereditament and the effective date for the list entry. Once that jurisdiction was established, then you had to look at the circumstances which justify the use of Regulation 38 (7). This is clear from what Lord Justice Arnold stated in paragraph 57;

> Secondly, counsel for AY pointed out that the VTE only had jurisdiction where the ratepayer had made a proposal and that the VTE's jurisdiction was limited to the issues raised by the proposal: see Hughes v York Museums and Galleries Trust [2017] UKUT 200 (LC), [2017] RA 3002 at [81]. He submitted that it followed that the VTE's power under regulation 38(7) had to be exercised within the limits of the jurisdiction so conferred upon it. I have no difficulty in accepting this, but I do not consider that it bears upon the scope of the VTE's power under regulation 38(7) in a way that is relevant to these appeals. It supports the proposition that one must identify with precision the "circumstances" which justify alteration of the list, but for the reasons explained above that does not assist AY and GBD.

22. I was not convinced that it was possible to stretch the circumstances to include the building of an extension which was still in the hands of the developer, on the material day. Mr Donmall stated that the appeal property's curtilage had not altered between the material day and 16 September 2015.

23. The difficulty I had was that an extension to an existing hereditament was a separate material change event not a continuation of existing circumstances. After a brief adjournment, Mr Donmall put it to me that as the appeal hereditament included some surrounding land and the works were ongoing within the confines of that land, it therefore brought it more in line with *Great Bear.* I was not prepared to accept this argument as, to reflect the valuation of an extension, a separate list alteration was required. The danger of the tribunal using its power under Regulation 38 (7) too liberally could effectively open a Pandora's Box into the world of rating which would mean that potentially the tribunal's jurisdiction could be wrongly extended beyond the scope of the proposal and circumstances arising from same merely to protect the failure of the parties to properly identify and value the appeal hereditament at the material day.

24. With this in mind, in my judgment, the tribunal should only utilise its power under regulation 38 (7) if it was justified looking at all of the circumstances of the case having regard to its jurisdiction arising from the issues raised in the proposal.

25. Having said all of that, I did find one of Mr Donmall's arguments highly persuasive. The appeal site was inspected by Mr Tim Jenks, on behalf of the Valuation Officer, late in 2015. At the time of the inspection, the appellant was in occupation of both warehouses. Both Mr Jenks and the surveyor, who inspected on behalf of the appellant, Mr Graham Duncan, understood that the appellant had been in occupation of the whole site, including the bonded high bay warehouse and railhead, since 1 February 2015. It was based on this understanding that the Valuation Officer arrived at the initial assessment of £4,870,000 Rateable Value.

26. Moreover, when the appeal was scheduled to be heard by a tribunal panel on 17 July 2019, the main issue in dispute between the parties was the value to be attributable to the rateable plant and machinery. Had the scheduled hearing gone ahead, Mr Duncan who intended to appear for the appellant would have asked the lay panel to determine a revised valuation for the property of £4,680,000 Rateable Value with effect from 1 February 2015.

27. It was therefore not on either the appellant's representative's or the Valuation Officer's radar, the fact that the bonded high bay warehouse was not in the appellant's occupation on the material day. By the time when a revised hearing bundle was prepared for the next scheduled hearing, which was due to be held on 30 October 2019, Mr Duncan had been advised by his client of the factual position as at the material day. By this time, the 2010 Rating List was closed, and the Valuation Officer was not empowered to alter the list of his own volition.

28. Given the seismic rateable value difference between the agreed entry of £2,330,000 Rateable Value that should be effective from 1 February 2015 against the existing entry of £4,870,000 Rateable Value in the Rating List, in my judgment, this constituted special circumstances to justify me making an Order under Regulation 38 (7). The fact that the appellant had given its representative(s) instructions not to make submissions challenging the Valuation Officer's request was surprising.

29. Given the passage of time that has elapsed since the appeal site was inspected and valued for rating purposes, I saw no point in apportioning blame regarding how the extent of the ratepayer's occupation and therefore the correct

identification of the hereditament at the material date was not properly established. However, to my mind, it would have been a gross injustice if the appellant benefitted from a financial windfall of such magnitude merely because both its representative(s) and the Valuation Officer were kept in the dark regarding the state of affairs at the material day. These therefore constitute special circumstances arising from the initial list alteration and the proposal challenging same which means that the tribunal's power under Regulation 38 (7) can become engaged. As the tribunal's power under Regulation 38 (7) was discretionary, as I have tried to explain earlier in this judgment, it should not be used too liberally to cure failings in the system or lack of due diligence by the parties. However, in this instance, the exercise of such discretion appears fully justified and appropriate given the circumstances of this case.

30. I therefore acceded to the Valuation Officer's request and determined that the existing list entry be reduced to £2,330,000 Rateable Value and that reduced entry was applicable for the period 1 February 2015 to 16 September 2015 inclusive.

Order

31. In accordance with regulation 38(4), (7) and (9) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, the Valuation Officer is ordered to amend the entry for the appeal property in 2010 Rating List to £2,330,000 Rateable Value for the period 1 February 2015 to 16 September 2015 inclusive.

32. The Valuation Officer must comply with this Order within two weeks of its making.

President

Date: 4 July 2023

Appeal number: 281027240395/541N10

Right of further appeal

Any party who is aggrieved by the Tribunal's decision, and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this decision notice.