VALUATION TRIBUNAL FOR ENGLAND

Non Domestic Rating appeals; 2010 Rating List; Waste Recycling Plant and Premises; First Appellant's proposal challenging the Valuation Officer's notice of alteration inserting a new entry in the Rating List; Deletion of entry or nominal assessment sought; Second Appellant's proposal sought a new entry in the Rating List; Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 1581 (TCC); Newbigin v Monk [2017] 1 WLR 851; David Jackson (VO) v Canary Wharf Ltd [2019] UKUT 136 (LC); Scottish & Newcastle Retail Ltd and Another v Williams (VO) [2001] EWCA Civ 185; appeals dismissed.

RE: UBB Mechanical Biological Treatment Facility, Courtauld Road, Basildon, Essex SS13 1FL

APPEAL NUMBERS: 150530761950/285N10 and 150529151244/538N10

BETWEEN:	UBB (Essex) Construction JV	First Appellant
	and	
	Basildon Council	Second Appellant
	and	
	Roger Teagle (Valuation Officer)	Respondent

BEFORE: Alf Clark (Vice President sitting alone)

CLERK: David Slater (Registrar and Chief Clerk)

ON: Monday 27 February 2023

APPEARANCES: Luke Wilcox from Landmark Chambers (First Appellant's Counsel)
Mark Banton from Gerald Eve (First Appellant's expert witness)

Iain Dewar from Wilks Head and Eve (Second Appellant's representative)
Stephanie O'Neill (Second Appellant's expert witness)
Guy Williams from Landmark Chambers (Respondent's Counsel)
Roger Teagle (Respondent Valuation Officer)

Summary of decision

1. The appeals were dismissed as I determined that the appeal property was a hereditament and the first Appellant was in rateable occupation. I also determined that the Valuation Officer's existing entry of £890,000 rateable value (RV) with effect from 30 November 2015 was not excessive.

Introduction

2. With the agreement of the parties, the two appeals relating to the appeal property were consolidated and heard together. Both appeals arose from proposals to alter the 2010 Rating List. The first appeal received by the Tribunal arose from a proposal served on behalf of Basildon Council by Wilks Head and Eve. This proposal was served on the Valuation Officer on 30 March 2017 and sought the insertion of a new entry in the 2010 Rating List for the appeal property, on the basis that it was a new hereditament, with effect from 24 March 2016. The proposed valuation was £1,290,000 RV as the billing authority believed that the property was fully operational on 24 March 2016.

3. This proposal was deemed necessary, in order to protect the billing authority's interests, as it was unable to persuade the Valuation Officer to assess the appeal property as a rateable hereditament before 31 March 2017. I was informed that the Valuation Officer had refused to action completion notice(s) that had been served upon the First Appellant.

4. It was not until 5 March 2018 when the Valuation Officer decided to retrospectively alter the Rating List and create a new entry for the appeal property with an assessment of £890,000 RV with effect from 30 November 2015. This alteration was subsequently challenged by way of a proposal served on the Valuation Officer on 31 May 2018. The proposal was made by Gerald Eve, on behalf of the first Appellant UBB (Essex) Construction JV. The proposal sought either a deletion of the offending entry or a nominal assessment of £1 RV, if it was determined that the appeal property was a hereditament. If the latter applied, its proposed

description in the Rating List was to be that of an office with a construction site.

5. UBB (Essex) Construction JV (UBB) was an unincorporated joint venture between Urbaser Limited and Balfour Beatty Construction Scottish and Southern Limited, as agent for Balfour Beatty Group Limited.

6. The Valuation Officer had described the appeal property in the Rating List as a Waste Recycling Plant and Premises.

7. The material day for the Basildon Council appeal was 24 March 2016 whilst the material day for the UBB appeal was 30 November 2015. It was agreed that the facts were unchanged between the two respective material dates.

8. The first Appellant was represented by Luke Wilcox (of Counsel – Landmark Chambers). He called upon Mark Banton of Gerald Eve to give evidence as expert witness.

9. The second Appellant, Basildon Council, was represented by Iain Dewar from Wilks Head and Eve. He called upon Stephanie O'Neill to give evidence as expert witness.

10. Both Mr Banton and Ms O'Neill confirmed that neither they nor their respective employers were entitled to receive any success related fee(s), if their respective appeals were successful.

11. The Respondent Valuation Officer's representative was Guy Williams (of Counsel – Landmark Chambers). He called upon Roger Teagle to give evidence as expert witness.

12. The Tribunal decided that a remote hearing was appropriate for this appeal and it has been treated as complex in accordance with PS3 of the Tribunal's Consolidated Practice Statement.

13. The hearing was conducted via Microsoft Teams.

14. In accordance with the Tribunal's Business Arrangements, as a Vice President, I was authorised to hear this appeal sitting alone.

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

Agreed facts

16. On 31 May 2012, Essex County Council entered into a 25 year contract with UBB (Essex) Limited for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological treatment plant (the appeal property) in Basildon so as to process the county's household waste.

17. Under the contract, there were several commissioning tests (referred to as Acceptance tests) that the facility was required to meet before Essex County Council was prepared to accept it as commissioned and completed.

18. The performance levels that the facility was required to meet to pass the Acceptance tests were set out in paragraph 118 of the High Court's judgment in *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC).

19. The first test was the Throughput test. The facility was required to achieve a flowrate of at least 5.128 tonnes in each fortnight of the six weekly duration periods. Performance guarantees were required to be achieved for 2 of the 3 fortnightly periods in a consecutive six weeks' period.

20. The second test was the recovery of treatable contract waste. Whilst it was in bio-stabilisation mode, the facility was required to provide a recovery rate of at least 47.85% and if it was in solid recovered fuel (SRF) mode it was required to hit 100%.

21. The third test was the percentage Biodegradable Municipal Waste (BMW) reduction of treatable contract waste. Whilst it was in bio-stabilisation mode, it was required to achieve a reduction of at least 84.2%. In SRF mode, it was expected to achieve 100%.

22. To meet the fourth test, the facility was required to recover at least 14.45% of recyclable materials from the treatable contract waste.

23. The fifth and final test was the quality of the Solid Recovered Fuel (SRF) the facility produced. It was accepted that the facility produced SRF to the required standard.

24. It was expected that the facility would have passed the Acceptance Tests by 12 July 2015 but owing to flaws in how the facility was designed, it failed to meet the initial timeline. Following discussions between UBB and

Essex County Council, the commissioning period was extended to 12 January 2017, the Acceptance Long Stop date.

25. However, the facility still failed to pass the tests. Essex County Council therefore sought to terminate the contract with UBB as, in its opinion, the latter was in default. However, UBB contended that the fault lay with the authority as the composition of waste was much lighter than it envisaged. Following a lengthy hearing before the Honourable Mr Justice Pepperall in the High Court, he held that UBB had breached its contract and Essex County Council was entitled to terminate the contact. The County Council was also awarded £9 million in compensation.

26. In concluding his lengthy judgment, Mr Justice Pepperall was scathing in his criticism of UBB in paragraph 452 in which he stated;

> Standing back from the trees, the shape of the wood can be clearly seen:
> 452.1 The fundamental problem with this project was that UBB made a number of serious design errors:
> a) Its density assumptions were based on little more than calculations on the back of the proverbial fag pack such that the biohalls were seriously undersized and incapable of processing the guaranteed tonnage of waste.
> b) Its bid in respect of BMW reduction was inadequately researched, ambitious and set with a view to scoring well in the procurement exercise. It has not been achievable.
> c) Its confidence that it could accept the composition risk and meet the performance guarantees notwithstanding significant variations in the waste proved to be misplaced.
> 452.2 UBB therefore designed and built a facility that simply could not pass the Acceptance Tests.
> 452.3 The QSRF Line was not introduced to add additional functionality but in an attempt to get around the density problem.
> 452.4 It is true to say that the facility produces good quality SRF and that it has succeeded in diverting very significant tonnages of waste away from landfill. That said:
> a) It does not process the guaranteed tonnage of waste.
> b) It produces rather more SRF and QSRF than it would if it met the performance guarantees for Recovery and Recyclates
> c) It fails to meet the key environmental standard for BMW reduction such that, if the facility were ever switched to Bio-Stabilisation Mode, the SOM produced would not meet the contractual standard.
> 452.5 Once UBB's failings became clear in late 2015, it is hopeless to suggest that the Authority was under a contractual obligation to agree fundamental changes to the contract and the Acceptance Tests in order to keep the project on track.
> 452.6 The Authority explored radical proposals including the mass diversion of waste and the acceptance of QSRF as an alternative

output, substitution of BMc for an alternative method of testing and even the complete removal of the BMW reduction requirement. Ultimately, however, the Authority's hands were tied by DEFRA's stance in respect of WIC funding and a perfectly reasonable political direction that officers should not compromise on environmental standards.

452.7 Whatever the changes in the financial and political landscape since the Authority initially procured the facility, it is nonsense to suggest that termination on the basis of UBB's failure to pass the Acceptance Tests would be termination for convenience dressed up as termination for Contractor Default. The allegations that the Authority failed to act in good faith in its attempts to negotiate a solution and in its approach to termination are without foundation.

452.8 The dispute became complicated when UBB seized on the lower levels of BMW putrescible waste recorded in the first two quarters of 2016. Any Composition Issue did not, however, arise until at least Q4 2016 and there was no contractual basis for the Impact & Remedy Reports issued in March and June 2016. Therefore, the Authority was not in breach of contract in failing to participate in an Options Review in 2016, there was no Compensation Event in respect of such failure or the Authority's conduct of the Options Review and, in any event, there was no direct causal link between any alleged Compensation Event and UBB's failure to achieve Service Commencement.

452.9 The Authority accepted the contractual risk of interruption to the supply of waste to the facility. There was therefore a Compensation Event in early 2017 when waste deliveries were suspended during the asbestos scare.

27. Following the release of the High Court's judgment in June 2020, UBB Waste (Essex) Ltd went into administered receivership. All waste was removed from the appeal site and all operations at the facility ceased. It therefore became unoccupied and was awaiting demolition.

Issues in dispute

28. The first issue in dispute between the parties was whether or not the appeal property constituted a hereditament. If I found in UBB's favour that no hereditament existed, the case would begin and end there with the UBB appeal being allowed and the Basildon appeal being dismissed.

29. If, however, a hereditament did exist, the secondary issue in dispute would need to be determined which was the substantive valuation issue. Mr Wilcox, on behalf of UBB, sought a nominal assessment of £1 RV, whilst the Valuation Officer sought a retention of the existing entry of £890,000 RV with effect from 30 November 2015. In his expert evidence, Mr Teagle had produced a valuation of £1,150,000 RV but as the list was

closed he was not seeking an increased entry, merely the dismissal of both appeals.

30. At the outset of proceedings, Mr Dewar indicated that Basildon Council would not be seeking an increased entry, even though its expert Ms O'Neill had proposed a valuation of £1,290,000 RV. However, in closing submissions, he invited me to uphold and give effect to Mr Teagle's proposed valuation of £1,150,000 RV.

Evidence and submissions

31. I had before me a sizeable evidence bundle of just under 400 pages and I was also provided with an authorities' bundle produced by the clerks from Landmark Chambers. The evidence bundle included;
    (a) A statement of agreed facts;
    (b) Copies of the proposals giving rise to the appeals;
    (c) UBB's statement of case;
    (d) Mark Banton's expert witness report;
    (e) David Silva of Urbaser Ltd's witness statement which was taken as read;
    (f) Basildon Council's statement of case;
    (g) Stephanie O'Neill's expert witness report;
    (h) Valuation Officer's statement of case;
    (i) Roger Teagle's expert witness report;
    (j) Photographs of the appeal property and layout plans;
    (k) Extracts from the Valuation Officer's Rating Manual;
    (l) The planning application;
    (m) Comparable properties

32. The following authorities were referred to;
    (a) *Newbigin v Monk* [2017] 1 WLR 851*;*
    (b) *David Jackson (VO) v Canary Wharf Ltd* [2019] UKUT 136 (LC)*;*
    (c) *Scottish & Newcastle Retail Ltd and Another v Williams (VO)* [2001] EWCA Civ 185
    (d) Porter (VO) v Gladman Sipps *[2011] RA 337*
    (e) Hewitt (VO) v Telereal Trillium *[2019] 1 WLR 3262*
    (f) BNPPDS Ltd v Ricketts (VO) *[2022] UKUT 129 (LC)*
    (g) SSE Plc v Moore (VO) *[2023] UKUT 24 (LC)*

The relevant law

33. The statutory hypothesis is contained in paragraph 2 of Schedule 6 to the Local Government Finance Act 1988. The statutory definition of rateable value is as follows;

> 2
>
> (1) The rateable value of a non-domestic hereditament none of which consists of domestic property and none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions—
>
> > (a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
> > (b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;
> > (c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above.

34. Although the rateable value is determined having regard to the antecedent valuation date of 1 April 2008, the valuation must reflect physical facts relating to the property and its locality as at the time the date the assessment is made or amended (called the material day). Paragraph 2 (6) and 2(7) of Schedule 6 to the Local Government Finance 1988 set out the matters which are relevant for this appeal:

> (6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.
>
> (6A) For the purposes of sub-paragraph (6) above the material day shall be such day as is determined in accordance with rules prescribed by regulations made by the Secretary of State.
>
> (7) The matters are—

(a) matters affecting the physical state or physical enjoyment of the hereditament,

(b) the mode or category of occupation of the hereditament,

(c) ……,

(cc)…**……,**

(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and

(e) the use or occupation of other premises situated in the locality of the hereditament.

Decision and reasons

35. It was common ground that the Honourable Mr Justice Pepperall's judgment clearly set out the facts in relation to the appeal property, so I was not required to speculate, because the factual background and why the facility failed to pass the Acceptance tests was clear for all to see.

THE HEREDITAMENT TEST

36. Mr Wilcox argued that the appeal property did not pass the hereditament test because it had never been completed. At all material times, it was occupied by a construction company and the process of getting it ready was not rateable. He stressed the importance of the purpose of the commissioning (Acceptance) tests. The appeal property would have only passed them if it had been properly constructed. He contended that it was incomplete, not because it was missing an element, but because of the way it was built, it could not fulfil the purpose for which it was constructed. It was intended to be an operational site but never was. In support of his argument, he referred to paragraph 66 of the Upper Tribunal's judgment in *Porter (VO) v Gladman Sipps.*

> 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.

37. Mr Wilcox said any contention that the hypothetical tenant would not be bound by the same contract as UBB should be rejected as an irrelevant consideration. He said before a hypothetical tenancy could be envisaged, there was a prior stage, the subject property had to be a hereditament. He referred me to the Supreme Court's judgment in *Monk* and in particular paragraph 23;

> 23. How does a valuation officer ascertain that premises are undergoing reconstruction rather than simply being in a state of disrepair? The subjective intentions of the freehold owner of a property are not relevant to the reality principle. The matter must be assessed objectively. But, in carrying out that objective assessment of the physical state of the property on the material day, the valuation officer can have regard to the programme of works which is in fact being undertaken on the property. It is clear on the UT's findings of fact, which I have summarised in para 4 above, that on 6 January 2012 the premises had been largely stripped out in the course of a redevelopment and an outline of the future development (the communal lavatory facilities) had been created. The premises were incapable of beneficial occupation, because, as an objective fact, they were in the process of redevelopment and no part of them was capable of beneficial use. If the works are objectively assessed as involving such redevelopment, there is no basis for applying the assumption in para 2(1)(b) to override the reality principle and to create a hypothetical tenancy of the previously existing premises in a reasonable state of repair. This is both because a building under redevelopment, like a building under construction, is incapable of beneficial occupation and, in any event, the hypothetical landlord of a building undergoing redevelopment would normally not consider it economic to restore it to its prior use.

38. He also referred me to the three stage test in paragraph 22 of *Monk,* in which the Supreme Court endorsed the approach advocated by the Rating Surveyors' Association;

> In a helpful intervention, the Rating Surveyors' Association and the British Property Federation submitted that, where works were being carried out on an existing building, the correct approach was to proceed in this order:
> (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament,
> (ii) if the property is a hereditament, to determine the mode or category of occupation and then
> (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category.
> The first two stages of that process involve the application of the reality principle. At the third stage the valuation officer applies the statutory assumption in paragraph 2(1)(b) if the reality is otherwise. In my view, this is a helpful approach where a building is undergoing redevelopment. But it is subject to the useful practice, which I discuss in para 31 below, of reducing the rateable value of a building, which is incapable of rateable occupation because of such temporary works, to a nominal figure rather than removing it from the rating list altogether.

39. Mr Wilcox also referred me to paragraph 40 of the Upper Tribunal's judgment in *Canary Wharf* in stressing that what was important was the reality of what occurred rather than hypothetical assumptions.

> Mr Singh's submission that the actions of the respondent itself must be ignored because only the behaviour of a hypothetical landlord can be taken into account is wrong in principle. The question whether a building is incapable of beneficial occupation as a result of a programme of refurbishment is a matter of objective fact featuring no hypothetical characters and requiring no counterfactual assumptions.

40. In Mr Wilcox's opinion, the appeal property was incapable of beneficial occupation because it was never in a position to meet the Acceptance tests within the contract between UBB and Essex County Council.

41. On behalf of the billing authority, Mr Dewar contended that the appeal property was a hereditament because the four tests of rateability were met. Throughout the period it was occupied, the facility processed a considerable volume of waste and reduced the amount that went to landfill, following the removal of recyclables.

42. Mr Dewar argued that all of the mechanical processes within the facility worked well. It was the bio halls that were the problem because they were too small.

43. Mr Dewar disagreed with Mr Wilcox about the relevance of the contract that UBB entered into because, in his opinion, it would not be binding on the hypothetical tenant.

44. In response, on behalf of the Valuation Officer, Mr Williams argued that UBB was in rateable occupation of the appeal property, so the hereditament test was clearly met. Its occupation was clearly beneficial. It was accepted that there was no physical difference between the facts in play on 30 November 2015 and those as at 24 March 2016. The property was capable of being occupied and was occupied

45. Mr Williams reminded me that, during cross examination, Mr Banton was unable to identify any missing feature from the appeal property. The reason for that was that it was occupied and UBB was processing large amounts of waste at the facility.

46. The facility was constructed and ready for occupation on 25 November 2014. Since then, it had processed large amounts of waste, producing good quality SRF and was successful in diverting large amounts of waste away from landfill.

47. The flaw in UBB's argument was that it was focussing on business matters not whether the property could have been used.

48. Even if the appeal property was vacant and to let and any waste related material was removed, the appeal property's mode or category of occupation would still be a waste recycling plant. He referred to the Upper Tribunal's judgment in SSE Plc v Moore (VO) *[2023] UKUT 24 (LC)* in support of his argument. In paragraphs 91 to 93, the Upper Tribunal stated;

> 91. We agree with Mr Williams that the approach of the Upper Tribunal in *Hughes*, at [205], is a reflection of the approach in *Fir Mill*. The object of the exercise, as it emerges from these authorities, is to identify the broad purpose to which the relevant property may be put, consistent with its actual occupation and without requiring more than minor works.
>
> 92. Further support for this approach can be found in another decision of the Upper Tribunal in a rating case, which we drew to the attention of the parties, prior to the hearing, so that it could be addressed in the oral submissions. In *Wigan Football Club Ltd v Wayne Cox (Valuation Officer)*

[2019] UKUT 0389 (LC) the owner of Wigan Athletic's stadium sought an alteration of the rating list on the basis of a material change of circumstances. The material change of circumstances relied upon was Wigan's relegation from the Premier League, via the Championship, to League One. Wigan's relegation to League One had a substantial adverse effect upon attendance at the stadium and upon the club's revenues, in particular in terms of broadcasting revenue.

93. As part of their decision the Upper Tribunal considered the question of whether the change in league status constituted a change in the MCO of the stadium. The Upper Tribunal answered this question in the negative, at [50-51]:

> *"50. The differences in the conduct of the business of professional football between leagues are matters of degree. The league makes a difference, but it does not change the fact that the stadium is occupied for the purpose of playing football commercially. The idea of a league as a category is of course selective because it is easy to spot, and clearly labelled. Ms Wigley argued that because there is a limited number of relegations and promotions each season there is no danger of floodgates effect; but the argument for regarding a league as a category would itself require groups of clubs within the league, or even single clubs, to be regarded as different categories because the earning power of, for example, Manchester United is likely to be greater than that of, for example, Bournemouth AFC. On that basis the number of modes or categories is not limited to the four leagues but is unpredictably wide, which goes against the principle that the rating system uses broad categories of use rather than the use of the individual occupier. In Williams the Lands Tribunal [2000] RA 119 said at paragraph 111:*
>
> > *"….it is thus the principal characteristics of the actual use that are relevant – those features that reflect the general purpose of the use – rather than the particular occupations of the individual occupier."*
>
> *51. We have to agree with the VTE's pithy summary: football is football. A league is not a mode or category of occupation."*

49. In *SSE,* the decision to mothball Keadby Power Station was a business decision that did not change the hereditament's mode or category of occupation. In paragraphs 100 and 101, the Upper Tribunal stated;

> 100. Returning briefly to *Scottish & Newcastle* we repeat, for ease of reference, what was said by Robert Walker LJ at [71]:

> *"71. It may be useful to note some situations in which the second limb of the rule, understood in this way, does not assist a ratepayer in obtaining a lower valuation. It does not assist a ratepayer who leaves half of his business premises empty, or otherwise runs his business in an half-hearted or inefficient manner; that does not go to the category of the business occupation, but to the way the particular business is run. Nor does it cast any doubt whatsoever on the decision in Robinson Brothers (Brewers) [1937] 2 KB 445, that a brewer interested in acquiring a tied house should be regarded as in the market for an hypothetical tenancy of a free house; again, that goes not to the category of business for which the premises are occupied, but to the way the business is run."*

> 101. This paragraph seems to us to be apt in the present case. In the present case the mothballing of the Power Station from time to time, whether short term or long term, reflects the way this particular business (electricity generation) is run. The way the business is run means that actual electricity generation is not continuous. Sometimes the pauses in actual electricity generation may be short. Sometimes the pauses in actual electricity generation may be long. As Robert Walker LJ explained, the way a particular business is run does not assist a ratepayer in obtaining a lower valuation.

50. In view of the above, Mr Williams argued that the business of the hypothetical tenant was not tied to UBB's contractual position. Whilst he agreed with Mr Wilcox that planning restrictions should be taken into account, the only relevant issue was that the facility was restricted to processing waste from Essex and Southend.

51. Having considered carefully the competing arguments put forward by the parties, it was quite clear to me that a hereditament existed on the material day 30 November 2015. By this time, the facility had already passed the cold commissioning test, having been certified as passing the readiness test on 25 November 2014. By passing the readiness test, the property was ready for occupation for the purpose for which it was built.

52. I therefore had some difficulty with the credibility of Mr Wilcox's argument that the hereditament test was not met. There was no dispute that his client was in actual occupation on the material day 30 November 2015 and remained so until June 2020. There was no dispute nor could there have been that this period of occupation was too transient. It was

accepted that UBB's occupation was exclusive for its purpose. The only test in dispute was whether that occupation was beneficial. Both Mr Wilcox and his expert witness were guilty of linking beneficial occupation with profitable occupation, however, it was trite law that occupation could be beneficial even if the occupation was not profitable. There were numerous examples for instance the recent Museum cases heard by the Upper Tribunal spring to mind.

53. Mr Wilcox's reliance on *Porter* was misplaced because in that case Miller Court was a speculative office development which was not ready for occupation. The units were missing essential features that a tenant would require, before it could be occupied for office purposes and which would form part of the hereditament and form the basis of its valuation. Without such essential features, the hereditament test was not met. That was not the case with the appeals before me.

54. The property cost some £100 million or so to build. It was certified ready for occupation a year before the first material date. I was not impressed by Mr Banton and found his evidence to be unreliable as he appeared to be promoting his client's case. When answering questions from Mr Williams, some of his answers were not objective, especially with regard to whether or not the appeal property was occupied on the material day. In any event, Mr Banton was unable to identify any missing feature(s) which would form part of the facility and it was difficult to see how he could have, as it was occupied and processing waste. Therefore, Mr Wilcox's reliance on the Upper Tribunal's judgment in *Canary Wharf* was similarly misplaced. I was not dealing here with part of a building, previously occupied as offices, which had been stripped back to its shell. I was dealing with a Waste Recycling Plant in full working order, fully manned by UBB's staff and processing waste.

55. The problem as, Mr Dewar highlighted, was that UBB's lead designer had erred in the design of the facility. In order for UBB to meet the output levels, under its contract with Essex County Council, the bio halls needed to be twice the size that they were. Mistakes were also made regarding the density of the waste, which was much lighter than UBB expected.

56. Although the bio halls were half the required size to process the contracted tonnage of waste, the appeal property was still a hereditament. Its mode or category of occupation was that of a waste recycling plant. That was the purpose for which it was built and for the purpose that it was occupied. The facility was indeed processing large tonnages of waste and receiving payments for it. However, the payments received were significant lower, in comparison to what UBB would have

received if the facility was operating in line with acceptable levels agreed under its contract. Short of rebuilding the facility, UBB sought a work around solution. This resulted in the installation of a Quick SRF line to divert the waste stream away from the bio halls. Technically, this was a planning breach but I understand no enforcement action was taken to remove it. In paragraph 214 of the High Court judgment, it was stated;

> The need for such a solution was the genesis for the development of the QSRF Line. These design modifications introduced a further output, described by the parties as Quick SRF or QSRF. The essential difference is that while SRF is the output from the facility after biostabilisation in the bio-halls, the QSRF Line bypasses the bio-halls entirely. Waste in this stream is simply shredded, passed through an electromagnet to extract ferrous metals and then diverted away from the facility into 40-yard containers. It is not further processed in order to remove other recyclates or aggregates. Nor is any biodegradable waste in this stream stabilised through the bio-halls. QSRF is not, therefore, a stabilised output.

57. Another work around solution was to reduce the amount of time the waste spent in the bio halls from seven to six weeks. However, if the bio stabilisation period was reduced, whilst it would free up space in the bio halls, it would be reliant on very high and unrealistic biological degradation results to operate successfully.

58. I also noted from the High Court Judgment that UBB tried to persuade Essex County Council to abandon or reduce the Acceptance tests but the latter was unable to agree to this, as without DEFRA approval, which would not be forthcoming, funding of £100.9 million would be put at risk. Paragraphs 283 and 284 of the judgment set out the position;

> 283. Nevertheless, and lest I am wrong to dismiss the argument so lightly, I am in any event satisfied that there was nothing commercially unacceptable in the Authority's response to UBB's request to renegotiate the contract. Indeed, the position was complicated by the terms and conditions imposed by DEFRA upon the grant of WIC funding. The WIC letters provided:
> "2. DEFRA will have the right to review the grant payment if the project facilities fail to deliver the BMW diversion set out in the [Final Business Case] ...
> 4. The Authority must not, without DEFRA's prior written approval, agree to or make any material changes to the terms of the Contract or any other changes which represent a departure

> from the approved Final Business Case. Any plans for any such changes must be reported to DEFRA and approved by DEFRA before the changes are agreed with the Contractor or implemented. The Authority must, if so required by DEFRA, submit a Variation Business Case to DEFRA and must not proceed with such changes until DEFRA's approval to those changes has been given. Approval to such changes would be given by way of a further Waste Infrastructure Credit Letter... DEFRA has a right has a right to review progress of this project at 3 yearly intervals (commencing at the date of issue of this Waste Infrastructure Credit Letter) to ensure that the project remains in line with the approved Final Business Case and the Waste Infrastructure credits."
> 284. Accordingly, the Authority could not simply agree either to abandon the BMW reduction test or to accept changes to the Acceptance Tests without DEFRA's approval since it would otherwise be putting funding of £100.9 million at risk.

59. Ultimately, when looking at all of the facts, it is quite clear that UBB was hoisted by its own petard. When tendering for the contract with Essex County Council, UBB's tender was successful because it made promises and agreed to performance criteria against which it simply could not deliver. The facility was, I understand, the largest Mechanical Biological Treatment facility in the country when it was built. However, owing to the designer's failure to exercise the necessary due diligence at the planning stage, the facility that was built was never in a position to meet UBB's contractual performance targets. However, it was still a facility that was capable of occupation and had proved itself by showing it had the ability to process vast amounts of waste. The problem was the amount of waste that the facility could handle was never enough to pass the Acceptance tests but that did not mean it was not a hereditament.

60. In cross examination, Mr Banton had used an unfortunate analogy, in so far as his client was concerned. He said if he hired a car to take his family away on holiday but what he was provided with did not have enough seats, for his family members, the car would be of no value to him. However, the point was it was still a car and whilst Mr Banton would not be prepared to pay a hire charge to use it, that car would still have a value to someone else. Applying Mr Banton's own analogy to this case, the appeal property was still a waste recycling plant and premises whatever its output. The next question, having regard to the Lands Tribunal's judgment in *Scottish & Newcastle Retail Ltd and Another v Williams (VO)* [2000 119 which was endorsed by the Court of Appeal [2001] EWCA Civ 185 what was the value of that use to the occupier? In paragraph 152 of the Lands Tribunal's judgment it said;

The conclusions that we have come to can be stated shortly. The rebus sic stantibus rule identifies for the purpose of valuation the hereditament, the physical changes which may be made to it, and the mode or category of occupation. The rule rests on the concept that what has to be determined in rating is the value to the occupier of his occupation of the hereditament, measured by the rent on an assumed yearly tenancy. In carrying out a valuation under the rating hypothesis the following assumptions are to be made of the hereditament:

(a) That the hereditament was in the same physical state on the material day. Alterations which the hypothetical tenant might make to the hereditament may be taken into account, if taken overall, they are minor. All other prospective alterations to the hereditament are to be ignored.

(b) That the hereditament can only be occupied for a purpose within the same mode or category of purpose as that for which it was occupied on the material day. Any prospective change of use outside that mode or category is to be ignored. In determining to what mode or category a particular use belongs it is the principal characteristics of the use and the methods of valuation commonly applied by rating surveyors to which regard must be had; and shops, offices and factories serve as examples. Some uses may not fall within any such broad category, however, and are regarded as sui generis.

61. I therefore rejected UBB's primary argument that the facility was not a hereditament. It clearly was. So the next issue I needed to determine was what was its value, having regard to its mode or category of occupation/use as a waste recycling plant.

The Valuation Exercise

62. Mr Wilcox said if I found against him on the hereditament test, the appeal property should have a nominal value. Having regard to its planning permission, any hypothetical tenant would be restricted to processing waste from the Essex and Southend on Sea areas. As a result, it would be dependent on Essex County Council as its only potential customer. As the High Court's judgment had shown, the facility was unable to process the amount of waste that Essex County Council required which meant that the facility was economically obsolete from the outset. No potential hypothetical tenant would therefore ever be able to make a profit out of its occupation. Consequently, no potential tenant would ever make a positive bid. Moreover, following the vacation of UBB, Essex County

Council has taken its custom elsewhere and the facility was awaiting demolition.

63. On behalf of the Valuation Officer, Mr Williams argued that any hypothetical tenant would not have been bound by the contract entered into between UBB and Essex County Council. It was the terms of the contract which rendered UBB's occupation unprofitable. However, that was not the relevant test. Mr Williams referred me to Mr Teagle's expert witness report which showed a number of Mechanical Biological Waste treatment facilities which physically existed on the first material day, 30 November 2015 and antecedent valuation date of 1 April 2008 which were being occupied. This was at a time when a Mechanical Biological Waste treatment facility was classed as cutting edge technology. However, in recent years, with the growth of household kerbside recycling schemes, demand for these facilities has dropped off.

64. UBB's contractual position arose from the tendering process that began before the facility was built. Seven potential parties were interested in winning the contract but UBB's bid was successful. As the High Court judgment showed, the facility did process large amounts of waste and did reduce considerably the amount of waste going to landfill. It also produced good quality solid recovered fuel. Mr Williams contended that it would be wrong to base my valuation on the fact that UBB's occupation was not profitable. Instead, he argued that the correct approach was to value the appeal property at the material day with economic factors taken as they stood on the antecedent valuation date.

65. Mr Dewar endorsed Mr Williams' arguments. UBB's contractual terms were not relevant to the hypothetical tenant. He accepted that the technology had changed and that the UBB Mechanical Biological Treatment facility would not be built today, with the emphasis on kerbside recycling. However, it should still be valued as a waste recycling plant and premises. That was its mode or category of occupation and on behalf of the billing authority, he invited me to determine a valuation of £1,150,000 RV.

66. In terms of the valuation exercise I had to undertake, I had little difficulty rejecting Mr Wilcox's argument that a nominal assessment should apply, on the basis that UBB's occupation was unprofitable. I have already referred to the fact that UBB was hoisted by its own petard. Here we have a facility that cost some £100 million to construct. If we took a sense check here, was it reasonable to assume that a hypothetical landlord would build a facility for some £100 million and then be prepared to accept next to nothing in return?

67. Although the contractors' basis assumes that, because certain types of property cannot be acquired in the rental market, a tenant will borrow capital or use his money to build the property, a realistic virtual rent/rateable value still needs to be identified. Unrealistic valuation judgments were often made when one only considers matters from the ratepayer's or actual occupier's point of view, instead of also taking into account the landlord's expectations. LJ Scott's authoritative guidance given in *Robinson Brothers (Brewers) Limited v Houghton and Chester le Street Assessment Committee* [1937] 2 KB 445 was recently endorsed by Lord Carnwath in the Supreme Court's judgment in *Hewitt (VO) v Telereal Trillium* [2019] 1 WLR.

68. A summary of the principles stated by Scott LJ at [1937] 2 KB at pp. 469-484 is as follows: -

(i) The rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the Tribunal, 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". This is the true rent because it corresponds to real value;

(ii) The totality of the opposing forces of demand and supply must be assessed and weighed in order to arrive at the point at which the hypothetical parties would reach agreement;

(iii) The valuation must take into account every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down "to see the resultant figure on the dial at which the pointer finally rests";

(iv) Every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant and is, therefore, admissible evidence.

(v) While the letting on a yearly tenancy is hypothetical, the hereditament to be valued is actual, with all its actualities. All its intrinsic advantages and disadvantages must be taken into account. It is just that particular hereditament which is assumed to be in the market, with all its attractions for potential tenants (to whatever kind of human emotion or interest or sense of duty they may appeal – e.g. economic, social, aesthetic, political or statutory duty) and all its imperfections and drawbacks which deter or reduce competition for it;

(vi) The exercise is more difficult where hereditaments are not in practice let and so indirect methods of valuation have to be used. But the factors which would be taken into account in the higgling in the market over a real tenancy must still be taken into account in arriving at the rent under the hypothetical letting;

(vii) Even where the occupation of a property could not achieve any pecuniary profit, as for example where a public authority is in

occupation for the purpose of performing a statutory or public duty, that still represents a real demand for which a real value would be payable, but not any arbitrary sum higher or lower than that real value. In such cases, the whole of the circumstances and conditions under which the actual owner has become the occupier of the premises must be taken into consideration, and no higher rental value must be assessed than "the owner would really be willing to pay for the occupation of the premises" – the real value criterion (see *R v School Board for London (1886)* 17 QBD 738; *London County Council v Erith and West Ham Churchwardens and Overseers* [1893] AC 562, 591, 593).

(viii) The determination of the rateable value of a property is a question of fact, not law. There is no rule of law which determines the valuation method by which that value is to be ascertained.

69. Having rejected the first Appellant's valuation, I quickly rejected Ms O'Neill's valuation. Her valuation was based on the comparative method by having regard to the assessments of similar waste treatment sites and their throughput in terms of average tonnages. However, Ms O'Neill admitted she had never visited any of the sites she had identified as comparable.

70. The Valuation Officer had valued the appeal property using the contractors' basis. Although this method of valuation was only used as a method of last resort, I was satisfied that because of the unique nature of the appeal property, the largest Mechanical Biological Treatment facility in the country which had only recently been purpose built, it was the only viable method of valuation to adopt.

71. In his valuation, Mr Teagle adopted a basis of £3.50 per m^2 for the land element, which was supported by comparable assessment evidence. He placed little weight on the actual site rent as the head lease was created post the antecedent valuation date and the analysed bare rent was well above the tone of value adopted for similar sites. His valuation of the land element was £297,500 (85,000m^2 x £3.50).

72. With regard to the valuation of the buildings, plant and machinery, both Mr Teagle and his predecessor, Mr Martin, had a value of £985,000 for this element, the accuracy of which was not challenged by the other parties. Adding in the value of the land element, resulted in a sub-total of £1,282,500 RV. Mr Teagle's predecessor had arrived at an assessment of £890,000 RV by applying an end allowance of 30%.

73. Mr Teagle explained that his predecessor had been advised that the biological part of the process within the appeal facility was not working correctly but this was to be remedied by the installation of a QSRF plant. He, therefore, conceded what was supposed to be a temporary end allowance of 30%. Having read the High Court judgment, inspected the appeal site, and having regard to the tonnages of waste processed, Mr Teagle was satisfied that the facility did work properly. He had therefore removed the 30% end allowance from his valuation. He did, however, apply a 10% end allowance in his own valuation to reflect the layout disadvantage of adding a QSRF plant, which was installed prior to 30 November 2015. This was in line with similar allowances conceded elsewhere.

74. With regard to the effective date for his valuation, 30 November 2015, although the QSRF plant was installed before then and the facility was processing waste earlier, as the recorded tonnage output achieved in 2015, 126,243 tonnes, could not have been achieved in the month of December alone. He, therefore, argued that the effective date of his valuation was reasonable.

75. Even though Mr Teagle's valuation of £1,150,000 RV was in excess of the existing entry in the list, the Valuation Officer did not seek an increased assessment, merely a dismissal of the two appeals. With regard to the Basildon appeal, Ms O'Neill agreed with Mr Wilcox that the only way its appeal could succeed if there was a material change of circumstances event that justified a deletion of the existing entry and the creation of a new hereditament with effect from 24 March 2016. As it was accepted that there was no difference in the facts between 30 November 2015 and 24 March 2016, the scope of Basildon's proposal precluded an alteration to the list.

76. As previously stated, the contractors' basis was the appropriate method of valuation for properties for which their mode or category of occupation was a waste recycling plant. This mode or category of occupation was not restricted to Mechanical Biological Treatment plants but other recycling and processing plants employing different methods.

77. In appendix 2 of his report, Mr Teagle provided some examples of Mechanical Biological Treatment plants elsewhere in England to substantiate the respondent's argument that there was a market for this type of facility. Amongst the examples were the following;

    (a) Ameycespa facility in Waterbeach, Cambridgeshire
    (b) Biffa facility in Leicester

(c) New Earth Solutions facility in Cotesbach, Leicestershire
(d) Shanks Facility at Frog Island and Jenkins lane, East London
(e) Global Renewables Facility in Farington, Lancashire
(f) Viridor Laing facilities in Bredbury Parkway, Stockport and Reliance Street, Manchester
(g) Veolia Facility in Southwark, London

78. In appendix 4 of his report, Mr Teagle provided the valuation assessment(s) for some of the above facilities. He explained that the difference(s) in valuation was often attributable to the assessment of their respective buildings and rateable plant and machinery.

79. The appeal property had an average waste tonnage throughput of 201,100 tonnes in 2015 and 2016. In comparison the Farington facility's average throughput was 1,95,968 (its RV of £1,690,000 was never challenged), Frog Island 246,112 tonnes (its RV of £497,500 was never challenged), Waterbeach 231,673 tonnes (its RV of £785,000 was never challenged), Bredbury Parkway 179,062 tonnes (agreed £625,000 RV) and Reliance Street 81,966 tonnes (£365,000 RV agreed).

80. In view of the foregoing, there was no valuation evidence before me to indicate that the Valuation Officer's existing assessment of £890,000 RV was unfair or excessive. Although Mr Teagle's valuation showed that, in his expert opinion, the property had been under assessed, I was not empowered to increase the assessment because of Regulation 38 (5) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. I therefore decided to simply dismiss the appeals.

Date: 13 March 2023

Appeal numbers: 150530761950/285N10 and 150529151244/538N10

A V Clark - Vice President

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.