VALUATION TRIBUNAL FOR ENGLAND

Non Domestic Rating appeal; warehouse and premises; proposal seeking a deletion of assessment; programme of works; Newbigin (VO) v Monk [2017] UKSC 14; Jackson (VO) v Canary Wharf Ltd [2019] RA 411; *McDougall v Easington District Council [1989] EG11; appeal dismissed.*

RE: Unit 7 Boyatt Wood Industrial Estate, Goodwood Road, Eastleigh SO50 4NT

APPEAL NUMBER: CHG100345300

BETWEEN:	Aviva Investors and Dawn Bunyan (Valuation Officer)	Appellants Respondent

BEFORE: Gary Garland (President) sitting alone

CLERK: David Slater (Acting Registrar)

ON: Friday 27 May 2022

APPEARANCES: Luke Wilcox from Landmark Chambers (Appellants' Counsel)
Allan Phillips from Altus (Appellants' expert witness)
Paul Reynolds from 1 Crown Office Row (Respondent's Counsel)
David Alford (Valuation Officer's expert witness)

Summary of decision

1. The appeal was dismissed as I found that the property was capable of beneficial occupation on the material day and therefore it remained a hereditament.

Introduction

2. The appeal property was a mid-terrace industrial warehouse unit with office accommodation. It was situated on the Boyatt Wood Industrial Estate on Goodwood Road. Goodwood Road adjoined Woodside Avenue which provided easy access to the M3 motorway.

3. The proposal to which this appeal relates was made under Regulation 4 (1) (h) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 and sought a deletion of the appeal property's entry from the 2017 Rating List with effect from 23 September 2019.

4. The proposal was served on the Valuation Officer on 13 July 2020. The challenge period came to an end when the Valuation Officer issued her final decision on 16 April 2021. The Valuation Officer refused to alter the list and deemed the proposal to be not well founded. The Appellants subsequently appealed to the tribunal on 7 July 2021. The grounds for the appeal were that the list is inaccurate in relation to the hereditament (other than in relation to the valuation).

5. The existing entry for the appeal property was £60,000 Rateable Value with effect from 1 April 2017.

6. The dispute between the parties related to a programme of works which took place between 23 September 2019 and 13 December 2019. During the period of the works, the Appellants were of the opinion that the appeal property was incapable of beneficial occupation, therefore no hereditament existed, and a deletion of the existing entry was appropriate. Whilst the Valuation Officer accepted that a schedule of works began on 23 September 2019, she was of the opinion that the works undertaken were in the nature of repairs as opposed to reconstruction or redevelopment of the property.

7. The appeal property was subsequently let to Howdens Joinery Properties Ltd with effect from 20 February 2020.

8. Prior to the hearing, it was agreed that the material day was 23 September 2019. In the event that the appeal was successful that would also be the effective date for any deletion.

9. Mr Phillips appeared for the appellants as an expert witness and declared that he was on a contingency based fee. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v Jackson (VO)* [2018] UKUT 0253 (LC). He accepted that his duty to the tribunal as an expert witness overrides any duty to those instructing him. I accepted his expert witness evidence on this basis as to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the tribunal's Procedure Regulations and was allowable due to the tribunal's rules on the admissibility of evidence (regulation 17 (2)) (a) where the tribunal can admit evidence whether or not it would be admissible in a civil trial in England.

10. This is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the submissions presented by counsel were fully considered by me before coming to a decision. Consequently, the absence of a reference to any statement should not be construed as it having been overlooked.

Agreed facts

11. The appeal property was a warehouse and premises built in 1976. The warehouse area comprised 88% of the accommodation. It was of steel portal frame construction.

12. As part of the works, a perimeter fence and gate were installed around the yard at the front of the property. The cost of the fencing works was around £33,953 but the cost was shared with units 5 and 6. The dilapidations report indicated that the concrete apron frontage to the appeal property was heavily soiled. The area was cleaned, and the line markings replenished as part of the works.

13. The agreed areas were as follows;

Warehouse	926m²

Ground Floor office and ancillary	61m²
Total Ground Floor area	987m²
First Floor office	61m²
Total Floor area	1,048m²

14. The total cost of the works undertaken internally was around £69,764 but around £55,000 of this was covered by the previous tenant's dilapidations settlement.

15. The works to the warehouse area included the cleaning of the floor, walls and underneath the roof; the removal of the previous tenant's compressed air system, security system and dust extraction system; the previous tenant's small power was removed back to the distribution board; block walls, frame, pipes, joinery and doors were re-decorated; all electrical and maintenance systems were tested; the previous tenant's metal halide lighting that suited its racking layout was removed and was replaced with more energy efficient LED lighting to suit an open plan layout. The new lighting was required by the new tenants and conformed to market requirements. There was some internal leaking, so repairs were undertaken to the roof, roof sheets were cleaned, and gutters emptied.

16. The works to the offices involved the removal of the previous tenant's partitions, fixtures and fittings including security systems and wiring whilst it was converted to open plan. New carpets were laid, and the walls and joinery were re-decorated. It was accepted that small power to the offices remained throughout the works.

17. The small kitchenette area circa 4m² was stripped back as the fittings were dated and soiled; they were replaced with new units. Similarly, the toilet areas were stripped back to a shell and new sanitary fittings/toilets were installed.

18. The floor was damaged as were the ceiling tiles in the entrance lobby and these were repaired, the access system, installed by the previous tenant, was removed and the area re-decorated.

19. Although the period of the works was agreed, what was not agreed was when the individual works were undertaken. For instance, whilst it was accepted that the kitchenette and the toilet areas were fully stripped out and ultimately reinstated, the period when these areas were incapable of use was unknown. Evidence in the form of email correspondence from David Bassett, who had managed the programme of works for the Appellants, indicated that the stripping out "*would"* have been done near the start of the works and any installation work "*would"* have been undertaken towards the end of the works.

Evidence and submissions

20. The Appellants produced and extensive bundle which contained each party's respective skeleton arguments, the expert witness reports from both Allan Phillips and David Alford, email correspondence from David Bassett, a marketing brochure, evidence exchanged during Challenge, a scheduled costing of the works by Causeway Estimating, photographs, correspondence between the parties, rate bills and comparable evidence showing similar works that had been undertaken in other industrial type units.

Summary of Appellants' case

21. On behalf of the Appellants, Mr Wilcox contended that the appeal property was incapable of beneficial occupation during the programmed works. As the appeal property was incapable of beneficial occupation, it was not a hereditament on the material day and therefore its entry should be deleted from the Rating List. Such a deletion would conform with the Supreme Court's judgment in *Newbigin (VO) v Monk* [2017] UKSC 14. The correct approach in *Monk* had been followed by the Upper Tribunal in its judgments in *Jackson (VO) v Canary Wharf Ltd* [2019] RA 411 and in *Colour Weddings v Roberts (VO)* [2019] UKUT 385 (LC) and by a lay VTE panel in *Orchard Street Investment LLP v VO* [2020] CHG100074320.

22. Mr Wilcox argued that the Valuation Officer's Rating Manual was out of date because the Valuation Officer was only prepared to accept that *Monk* was applicable to buildings undergoing redevelopment or reconstruction. In cases

such as the appeal under consideration, the Valuation Officer continues to apply the repairing assumption in pre-*Monk* fashion. However, if a property was in disrepair and was incapable of beneficial occupation, there was no hereditament to value. It was the touchstone of valuation. A hereditament could only exist if it was capable of beneficial occupation and a property only had value if it was capable of use.

23. Mr Wilcox stated that even if I found that the warehouse element was only subject to minor repairs, the fact that the kitchenette and toilet areas were stripped out for a period was sufficient for me to uphold the appellants' case. Without any sanitation or toilet facilities, Mr Wilcox contended that the whole property was incapable of beneficial occupation and therefore not a hereditament. He argued that it did not matter if only a small part of the property was stripped as case law had shown that if a property lacks a feature that is normally required before it was capable of use it cannot be rated. He referred to the Upper Tribunal's judgments in *Porter (VO) v Trustees of Gladman Sipps* [2011] RA 337 and *Aviva v Whitby (VO)* [2011] RA 337 arguing that the hereditament test was the same whether you were seeking to value a newly built or existing property.

Summary of respondent's case

24. On behalf of the respondent, Mr Reynolds also referred to *Monk* to support the Valuation Officer's case. He argued that there was a distinction in law between repairs and works that went beyond repairs. He accepted that where a building was undergoing re-development, a deletion would be appropriate. However, it was important to look at what the works entailed because if the works were in the form of repairs to preserve the hereditament, the statutory repair assumptions would bite.

25. In paragraph 39 of the Upper Tribunal's judgment in *Canary Wharf* there was reference to a building having no electrical wiring or copper plumbing because they have been stolen or stripped out to make way for new, enhanced facilities. He asked rhetorically why was that important, was it to establish if it was repairs or something going beyond it?

26. Mr Reynolds also relied on the Upper Tribunal's judgment in *Colour Weddings* where the works undertaken by the ratepayer were detailed in stages. Some works were categorised as repairs whilst other works went beyond repair and ultimately persuaded the Upper Tribunal to delete the assessment. He also referred to the Court of Appeal's judgment in *Camden LBC v Langford* [1980] RA 369 to show the distinction between repair works and works that go well beyond repair.

27. In the case under consideration, the Valuation Officer believed that the works to the appeal property were repairs as evidenced by the fact that post completion of the works the footprint and the internal lay out of the premises was unaltered. The property's valuation for rating purposes was not affected by repairs. He also referred to the Upper Tribunal's judgment in *Thomas & Davies v Denly (VO)* [2014] UKUT 0146 (LC) in which Lord Denning's repair test from the Court of Appeal's judgment *Morcom v Campbell-Johnson* [1956] 1 QB and Mustill LJ's three stage test in the Court of Appeal's judgment in *McDougall v Easington District Council* [1989] EG11 were applied

The relevant law

28. The statutory definition of a hereditament was contained in section 64 of the Local Government Finance Act 1988. A hereditament was anything which, by virtue of the definition of hereditament in section 115(1) of the General Rate Act 1967 would have been a hereditament for the purposes of that Act had this Act not been passed.

29. 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;

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> (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.

30. Although the rateable value is determined having regard to the antecedent valuation date 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.

(8)…….

(8A) For the purposes of this paragraph the state of repair of a hereditament at any time relevant for the purposes of a list shall be assumed to be the state of repair in which, under sub-paragraph (1) above, it is assumed to be immediately before the assumed tenancy begins.

Decision and reasons

31. This appeal raises an interesting point of law. Does a programme of repair works, only part of which involve a strip out of the kitchenette and toilet facilities bring it within the scope of *Monk* or is it to be assumed that the hypothetical landlord would undertake these works prior to the commencement of the hypothetical tenancy, in accordance with the statutory repairing assumptions in paragraph 2 of Schedule 6 to the 1988 Act?

32. Prior to *Monk*, it was accepted that even if a property was in disrepair, following the vacation of a tenant, it would have no effect on a property's value, unless those repair works were uneconomical for the landlord to undertake. The statutory assumptions relating to the landlord's and the tenant's obligations are to be found in paragraph 2 of Schedule 6 to the 1988 Act.

33. There were numerous authorities which showed how the Lands Tribunal, Upper Tribunal and Court of Appeal had dealt with the question of repair and what effect, if any, it had on rateable value. I was also referred to the following authorities by the parties;

Murphy (VO) v Courtenay Plc [1999] RA1
Thomas & Davies v Denly (VO) [2014] UKUT 0146 (LC)
R3 Products v Salt (VO) [2014] UKUT 0333 (LC)

34. Unless the repair works were uneconomic for the landlord to undertake, the rating assessment would remain unaltered. If the repair works were uneconomic for the landlord to undertake but the premises were still capable of beneficial occupation, the rating hypothesis would assume that the landlord would be prepared to accept a lower rent in *lieu* of undertaking the repairs or in

extreme cases if the extent of disrepair could not be rectified economically and the property was incapable of beneficial occupation the rating list entry would qualify for deletion.

35. The economic reasonableness test can be traced back to the Court of Appeal's judgment in *Saunders v Maltby (VO)* [1976] 2 EGLR 84 where Lord Denning stated;

> Turning now back to the present case, it seems to me that the member of the tribunal fell into error. He only asked himself whether the defects were capable of remedy. He did not go on to inquire, "How much is it going to cost?" If the expenditure was such that it would be out of all sense to do the repairs, then a hypothetical landlord would let it at a low rent. That fits in exactly with the statute, which says it has got to be in such a state of repair as to command that rent. So far as the other points are concerned, the member was perfectly right in saying that the Rent Act has no bearing on the problem. So far as the proposed redevelopment is concerned, or the proposed school, I think it may be a legitimate ground for a lower assessment. That seems to follow from *Almond v Ash Brothers & Heaton* [1969] AC 366 when the House of Lords held that if it is likely that the house may be demolished within the near future, it will affect the hypothetical tenant's hypothetical rent. In the circumstances, I think that the case should be remitted to the Lands Tribunal for reconsideration in the light of the principles which I have endeavoured to state. I would allow the appeal accordingly.

36. Sometimes, there is a dispute over whether the works that were undertaken comprise repair works or improvement works. In the Court of Appeal's judgment in *Morcom v Campbell-Johnson* [1956] 1 QB at page 115 Lord Denning clarified the difference between the two;

> It seems to me that the test, so far as one can give any test in these matters, is this: if the work done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs.

37. It was worth recalling that paragraph 2 of Schedule 6 to the 1988 Act was amended by the Rating (Valuation) Act 1999 in order to reverse the effect of the Lands Tribunal's judgment in *Benjamin (VO) v Anston Properties Ltd* [1998] 2 EGLR 147. Before the *Anston* judgment, it was assumed that any disrepair issues relating to a property would have no impact upon a rating valuation, regardless of whether the landlord or the tenant was liable for repairs.

38. In *Anston* the Lands Tribunal held that, because how paragraph 2 of Schedule 6 was originally drafted, it was the hypothetical tenant's responsibility to do all of the repairs, therefore when taking on a property in disrepair the tenant's rental bid and in turn the property's rental value would have to reflect the extent of disrepair. The 1999 Act therefore sought to reinstate the law as it was widely thought to apply before the Lands Tribunal judgment. The Act therefore sought to reaffirm and apply principles analogous to those decided in the leading authorities like *Wexler v Playle* [1960] 1 QB 217, *Saunders v Maltby (VO)* [1976] 2 EGLR 84 and *Camden LBC v Langford (VO)* [1980] RA 369

39. Following the 1999 Act amendments, the statutory assumptions assumed that before a tenancy began, the landlord would ensure that the property was in a reasonable state of repair for an incoming tenant. This repairing obligation could only be excluded if the repair works were uneconomical for the landlord to undertake. Once a tenant was found who was willing to pay a rent for the property, under the rating hypothesis, the tenant was then responsible for all rates and taxes, repairs, insurance and other expenses necessary to maintain the property in a state to command the level of rent set.

40. As explained in paragraph 20 in *Monk,* although the 1999 Act introduced the assumption of reasonable repair at the outset of the hypothetical tenancy, it did not address the logical prior question about whether the premises were capable of beneficial occupation as can be seen below;

> The 1999 Act can thus be seen as applying principles analogous to those in Wexler, Camden London Borough Council and Saunders

> (para 16 above) to a hypothetical lease in which the tenant bore the obligation to put the hereditament in repair. In my view the Court of Appeal goes too far in interpreting the 1999 Act as completely displacing the reality principle in relation to both the physical state and the mode of occupation of a hereditament which is undergoing redevelopment. The 1999 Act, by introducing the assumption of reasonable repair at the outset of the hypothetical tenancy ("the repair assumption"), is not addressing the question of whether the premises were capable of beneficial occupation, which, in the context of a building undergoing redevelopment, is a logically prior question. Thus the repair assumption (para 2(1)(b)) applies to matters affecting the physical state of the hereditament (para 2(7)(a)) but not to the mode or category of occupation of the hereditament (para 2(7)(b)).

41. The *Monk* case was a watershed moment in the world of rating. The Supreme Court held that the Valuation Officer had gone too far in disregarding the principle of reality. It held that before the statutory assumptions could be applied, there had to be a hereditament to begin with. As the offices in *Monk* had been stripped back, it was held that no hereditament existed. In paragraph 22 of its judgment, the Supreme Court endorsed the three stage 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 para 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.

42. As the *Monk* case related to a property in transition that was undergoing conversion works, the Valuation Office Agency did not believe that *Monk* was applicable to properties which were not undergoing a programme of works.

However, in *Jackson (VO) v Canary Wharf Ltd* [2019] RA 411, offices within One Canada Square on the Canary Wharf Estate had been stripped back to a shell and would not be re-fitted out until a new tenant was found. The VTE had applied *Monk* and reduced the assessment(s) to a nominal £1 and the Valuation Officer appealed the decision. The Upper Tribunal robustly dismissed the Valuation Officer's appeal. Once the Valuation Officer had accepted that the property was incapable of beneficial occupation that was the beginning and end of the appeal. I found paragraphs 42 to 44 of the Upper Tribunal's judgment helpful;

> 42.We therefore reject Mr Singh's submission that, absent an actual programme of works, it could not be ascertained that the appeal property was undergoing reconstruction. The most cursory investigation by the VO would, and did, readily reveal that refurbishment was inevitable. For this purpose we do not differentiate between basic and bespoke works. To achieve even the basic standard of fit out, office floors in One Canada Square are first stripped back then refurbished in accordance with a recognised programme. The programme of refurbishment in this case may have been open ended, with no contract in place at the start showing how and when the floors would be refurbished, but an informed and objective observer would easily be satisfied that the space would in due course be brought back into a condition in which it would, once again, be capable of beneficial occupation.
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> 43. It is clear that in this case what Mr Singh called "deconstruction works" were not damage, capable of being repaired. The property was stripped back to its shell so that substantial reconstruction and improvement work could be carried out. As the Parliamentary material referred to by Lord Hodge in Monk makes clear, in such cases it was the intent of the 1999 Act that the property would be considered in its actual state on the material day and if it is incapable of beneficial use, would be removed from the rating list.
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> 44. Mr Singh confirmed that, had the respondent entered into a contract to refurbish the appeal property before the material day, with work not to take place until some point in the future, perhaps not for two years or more, the VO would treat the appeal property as being under reconstruction. That is an illogical approach, and substitutes a requirement for evidence of a specific type for a proper assessment of all the known facts. The suggestion in the VO's Rating Manual that for premises to be under reconstruction there must be a single programme of works in which stripping out is followed immediately by a reconstruction project is also, in our judgment, mistaken if it is intended

to identify an indispensable condition. That is to pick out one relevant feature of what may be a complex factual situation and to make it a positive requirement. That is not a permissible approach.

43. In the appeal before me, it was a hybrid situation, the vast majority of the appeal property, the warehouse element, was in minor disrepair and normally the statutory repair assumptions would apply. This was because the outstanding repair works were capable of being easily remedied. It was trite law that the valuation of a property would not alter following a vacation of a tenant. Any minor repair works, which are usually required before a property can be let are disregarded. However, in this case, some of the accommodation was stripped out and the question for me to decide was did that take the property into the realms of *Monk* and *Canary Wharf* or were the Appellants pushing the boundaries too far to justify a deletion? This was certainly the Valuation Officer's view. Had there been no elements of stripping out, I would have applied the three stage approach of the Court of Appeal in *McDougall v Easington District Council* [1989] EG11 where Mustill LJ examined various authorities on the subject of repair. In a landlord and tenant context he discussed three tests, which may be applied separately or concurrently as the circumstance of the individual case may demand, but they were all to be approached in the light of the nature and age of the premises. The tests were:

    (i) whether the alterations went to the whole or substantially the whole of the structure or only a subsidiary part;

    (ii) whether the effect of the alterations was to produce a building of a wholly different character from that which had been let;

    (iii) what was the cost of the works in relation to the previous value of the building and what was the effect on the value and life span of the building.

44. It was accepted that, after the completion of the works, apart from the installation of the perimeter fence to the frontage, all of the works involved were those of repair, albeit that the installation of LED lighting, new kitchenette units and new toilet facilities was replacement with a modern equivalent.

45. The repair works in this case were clearly economic for the appellants to undertake and the cost of same was largely met by the dilapidations settlement with the outgoing tenant. The repairs were also necessary to attract a new tenant and to protect the appellants' investment. The landlord would soon recover the cost of his investment once the property was let. In this case, the property was successfully re-let to Howdens Joinery Properties Ltd. In November 2020, according to the agreed statement of facts, the new tenant added a mezzanine floor and a second roller shutter door to the front elevation. These alterations had the effect of increasing the rateable value to £63,500 but these later alterations were not relevant to this appeal.

46. On behalf of the appellants, Mr Wilcox said he felt like he was constantly re-living Groundhog Day as the main reason for the Valuation Officer resisting appeals like this was that they had an issue with rates avoidance. However, as stated in *Monk* if rates avoidance was a major concern, the matter could be quickly addressed as Section 66A of the 1988 Act permitted the Secretary of State to make regulations to disregard the state of an unoccupied hereditament.

47. As this appeal sought a deletion, I did not need to concern myself with any valuation considerations. My sole focus and jurisdiction was restricted to whether or not a hereditament existed on the agreed material day, 23 September 2019. Whilst the material day was agreed by the parties before the hearing, a major flaw in the appellants' case was that there was no timeline or chronology of when any of the works were physically carried out. All that was known was that the whole programme was undertaken between 23 September 2019 and 13 December 2019; the evidence surrounding exactly what had happened and what work was carried out and when, was weak.

48. The proposal/challenge was not submitted until well after the programme of works was completed and the appellants' expert witness, Mr Phillips, did not inspect the property until after the event. No photographs or GANTT chart showing a timeline of the works could be produced. Instead, the appellants were largely reliant on David Bassett's recollections which were contained in

email correspondence that was exchanged with Mr Phillips. Mr Bassett was involved in management of the project to refresh the property, in readiness for a re-letting. That evidence though interesting was not particularly compelling because of its vagueness and lack of factual corroboration.

49. In *Monk,* the situation at the material day was described in paragraph 4 of the Supreme Court's judgment;

> After entering into the building contract and until at least 6 January 2012 SJJM had the premises marketed as available for rental either as three separate office suites or as a whole. On 6 January 2012, which is the relevant date for assessing the facts and applying the statutory assumptions discussed below when determining the rateable value of the premises on an application to alter the rating list ("the material day"), the premises were vacant. Contractors had removed the majority of the ceiling tiles and the suspended ceiling grid and light fittings and also 50% of the raised floor. They had also removed the cooling system and the sanitary fittings, demolished the block walls of the lavatories and stripped out the electrical wiring. The contractors had erected and plastered plasterboard partitions to form the outline of the proposed communal lavatories and had erected and plastered a partition across the floor at the east side of the premises. They had completed first fix electrical installations to the lavatory area and had altered the drainage to accommodate the new location of the lavatories.

50. In *Canary Wharf,* it was accepted that at the material day in that appeal 16 January 2013, the appeal property was fully stripped out to a concrete shell and was incapable of beneficial occupation as an office. The stripping out works were undertaken between 14 February 2011, when the property was marketed to find a new tenant, and 11 September 2011. The nature of the works was described in detail in paragraph 11 of the Upper Tribunal's judgment;

> The previous occupier of floors 44, 45 and 46 surrendered its lease on 17 February 2011. The floors had not been comprehensively refurbished for 20 years and, in anticipation of the space becoming vacant, CWCL was instructed on 20 January 2011 to strip out the floors to a shell and core condition. The works were carried out between 14 February and 18 September 2011, and involved the removal of raised flooring, suspended ceilings, partition walls, and mechanical and electrical services, at a cost of £740,254. Additional expenditure of

> £42,852 was incurred in stripping out the common parts of the three floors, comprising lift lobbies and wc's. As part of the work, new fire-detection systems and sprinklers were installed. The opportunity was also taken to introduce an element of future-proofing, in the form of a new riser which was added to the core to accommodate any additional mechanical or electrical infrastructure that might be required in the future.

51. In contrast, the situation at the material day with regard to the appeal property was unknown. Had an overt act even taken place? In his response to the Valuation Officer's questions, on 20 October 2021, Mr Bassett said that the toilets were removed at the start of the project and the contractor used portaloos during the duration of the works. He said there was a long lead in time for new toilet panels and vanity units to be delivered, so the new toilets would not have been installed until towards the end of the project. The kitchen units were also removed at the start of the works and the new kitchen units would have been amongst the last items to be reinstated. As Mr Bassett had changed employer, he no longer had access to the relevant files, so he was reliant on his memory and recollection of events. Unfortunately, in my view, the vagueness of the evidence Mr Bassett could give left more questions than it assisted with and was of little assistance to me, in determining the reality of the matter.

52. Whilst Mr Wilcox readily accepted that the appellants could not prove if any stripping works had occurred on the material day, he argued that that did not matter because under Regulation 3 (4) (a) of the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 where a hereditament has ceased to exist, the material day was the day on which the circumstances giving rise to the alteration occurred. With this in mind, Mr Wilcox said that if I found that no overt act had taken place on 23 September 2019 to justify a deletion, I could order the deletion of the list entry from a later date to coincide with when I determined the stripping out would have occurred.

53. In open tribunal, the clerk raised concerns about the material day being a moveable feast. He advised me that the material day regulations had to be read in conjunction with the proposal otherwise a banal statement of affairs

could result if crystal ball gazing was permissible. For instance, if the appellant made a proposal seeking a deletion but the hereditament still existed on the effective date sought for the deletion and continued to exist after the proposal was served on the Valuation Officer. As the hereditament had not ceased to exist at the point of challenge, one would expect the proposal to be not well founded by the Valuation Officer and any resultant appeal to be unsuccessful. It would, however, be open to the Valuation Officer, if they were persuaded that the hereditament ceased to exist on a much later date than that referred to in the challenge to delete the entry of his own volition. However, as far as an appeal arising from the challenge was concerned it would be prejudiced by the scope of the proposal. The tribunal's jurisdiction being restricted to the scope and wording of the proposal see *Shaw v Hughes (VO)* [1991] RVR 96 and *Courtney Plc v Murphy* [1998] RA 77.

54. I share the clerk's concerns over Mr Wilcox's argument that the material day in deletion cases can be flexible, especially given the changes to the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009, and the introduction of the check, challenge and appeal process for the 2017 Rating List. When making a proposal to alter the Rating List the proposal must include under regulation 6(4) details of the proposed alteration, the date from which the proposer asserts the proposed alteration should have effect and the proposer is required to provide the evidence and a statement as to how the evidence supports the grounds of the proposal.

55. In order for the check, challenge and appeal system to work how Parliament intended, in my opinion, a ratepayer cannot rely upon the material day regulations to ride to their rescue in the manner Mr Wilcox suggests. Otherwise, you could get a situation where a ratepayer could succeed in his appeal, even in a case where the hereditament only ceased to exist, after the challenge stage had been concluded, which would be bizarre and not the intention of Parliament.

56. Putting all academic arguments about the material day to one side, in appeals of this nature where there is an ongoing programme of works, there is a higher

bar for the appellant to overcome if the challenge is made on the basis of a deletion as opposed to on the grounds of a material change of circumstances. The reason being that to succeed in seeking a deletion, it has to be shown that no part (my emphasis) of the building was capable of beneficial occupation. This appears to be clear from *Monk.* In paragraph 23*,* Lord Hodge stated (my emphasis added);

> 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.

57. I found it significant that the warehouse area of the building which it was agreed comprised around 88% of the accommodation was only subject to minor repairs. It was not stripped back like the situation in *Monk* and *Canary Wharf.* In both of the latter cases, the properties were stripped back, so they could not be occupied for use as offices. In contrast, the warehouse area at the appeal property was capable of beneficial occupation. As previously explained, the vacation of the tenant would not have any impact upon the valuation of this area and any minor repairing issues that could easily be remedied fell to be disregarded, as it had to assumed that the landlord would do the necessary repairs before re-letting it.

58. Nevertheless, Mr Wilcox still argued that the warehouse area was incapable of beneficial occupation because without any kitchenette or toilet facilities, you would not be able to have any people working there. I rejected this argument because it was possible for toilet and kitchen areas to be stripped back and replaced whilst the tenants remained in occupation and making use of the warehouse. Normally such replacement works would take a short period of time, maybe a fortnight or a month at most. Even if I accept the appellants' contention that the toilets and the kitchenette areas were stripped back for a period just over two months, that does not justify a deletion of the whole assessment because the hereditament continues to exist.

59. The lack of any toilet facilities was not as Mr Wilcox would have me to believe justification for deleting the whole assessment. Whilst I accept that a warehouse without any staff toilets would have a lower rental value, in comparison to one with those facilities, the property was not incapable of being used for storage. Its mode or category of use remained a warehouse with or without toilets. The facts in this appeal were different to those in *Monk* and *Canary Wharf* where it was accepted that no part of the premises was capable of beneficial use as offices. The lesson from *Monk* was that if the premises were stripped out you could not value what was not there. In this case, the Warehouse area remained intact. I therefore upheld the Valuation Officer's argument that Mr Wilcox was creatively attempting to push the boundaries too far. In my opinion, whilst a well argued and interesting proposition, it would be a nonsensical situation if in order a secure a deletion of the list entry or a nominal assessment, all the owner had to do on the vacation of a tenant was to remove the toilet facilities.

60. Had the challenge that ultimately gave rise to this appeal been made on the grounds of a material change of circumstances and had the appellants satisfied the evidential burden of proof by providing factual evidence which confirmed when the stripping out works took place and when the new units were installed, I would have given consideration to whether it was appropriate to reduce the assessment to reflect the fact that a minor part of the property

was temporarily incapable of beneficial use. However, as the challenge sought a deletion of the whole assessment, this course of action was not open to me.

61. During his submissions, Mr Wilcox argued that if a building lacked a facility, it was incomplete and referred me to *Porter (VO) v Trustees of Gladman Sipps* [2011] RA 337 and *Aviva v Whitby (VO)* [2011] RA 337 to try and substantiate his arguments. In those cases, the Valuation Officer had entered the unoccupied new buildings into the Rating List but the Upper Tribunal held that there was no scope for including in a rating list a new building which was nearly, or very nearly ready for occupation unless the completion notice procedure had been followed because a building was only a hereditament if it was ready for occupation. In *Porter* essentially all that was missing were tea points in some of the units, small power (a ring main and power points) and some full height partitioning. As the Upper Tribunal explained had the billing authority served completion notices the problem of rateability would have been overcome: a totally different situation.

62. I understood the point Mr Wilcox was making but, it appeared to me that, the lesson to be learned from *Porter* and *Aviva* was that unless an unoccupied new building was one hundred per cent complete and ready for occupation, unless a completion notice was served it could not be rated. However, as the earlier case authorities have shown after a building has been tenanted, following the vacation of that tenant, there is inevitably some wear and tear. The rateable values of such properties are not normally reduced to reflect this wear and tear as the statutory repair assumptions then come into play. Unless it can be shown that the repair works were uneconomic to undertake, it had to be assumed that the landlord would put the property in a reasonable state of repair before the property was re-let.

63. I therefore did not find *Porter* or *Aviva* to be helpful to the appellants' case because he was trying to stretch the principle of reality too far. Unless you had a *Monk* type situation where a property was incapable of beneficial occupation for its mode or category of use the statutory repair assumptions had to be applied.

64. Mr Wilcox also invited me to follow an earlier lay panel decision which had allowed an appeal where it was contended the facts were very similar to the present case. The decision in question was *Orchard Street Investment LLP v VO* [2020] CHG100074320. Whilst that decision was binding on the parties, it was not binding on the tribunal. However, earlier tribunal decisions can often be persuasive. In the event, I did not find the earlier panel's decision helpful because it was silent on the material day, the grounds upon which the proposal was made and there was a lack of specific detail to describe the works that were undertaken. Although the respondent contended that the lay panel had not correctly decided the earlier appeal, it was not appealed. Without a detailed understanding of the facts in that case, which I cannot derive from the panel's decision, I am not in position to say whether the appeal was correctly decided or not.

65. I am, however, satisfied for the reasons I have already explained that a deletion of the assessment is inappropriate in this appeal which is therefore dismissed.

Date of release: 7 June 2022

President