



VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 list appeal; Warehouse and Premises; Local Government Finance Act 1988; Statutory Assumptions; Economic Repair; Material Day; The Rating (Material Day for List Alterations) Regulations 1992 (S.I. 1992 No. 556); The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (S.I. 2009 No. 2268); Jackson (VO) v Canary Wharf Ltd [2019] RA 411; Newbigin (Valuation Officer) (Respondent) v S J & J Monk (a firm) (Appellant) [2017] UKSC 14; Aviva Investors v Dawn Bunyan (VO) (2022) ; Decision: dismissed.

APPEAL NUMBER: CHG100974913

RE: 15, BROUGH PARK WAY, NEWCASTLE UPON TYNE, NE6 2YF
(the "appeal property")

BETWEEN: BNPPDSJ Ltd and BC) Ltd as Trustees of the BRIT Appellant
and
Amanda Hitchings BA (Hons) MRICS Respondent
(Valuation Officer)

SITTING: *remotely using Microsoft Teams*

ON: Thursday 2 May 2024

BEFORE: Mrs R Heald, Senior Member
Mr AN Backway, Member

CLERK: Miss K Hendry IRRV(Tech)

APPEARANCES: Mr L Wilcox from Landmark Chambers (Appellants Counsel)
Mr A Phillips from Altus Group (Appellant expert witness)
Mr O Ridley, representative for the Valuation Officer

DECISION AND STATEMENT OF REASONS

Decision

1. The appeal is dismissed.
2. The panel found that the appeal property was capable of beneficial occupation on the material day and should remain in the 2017 rating list.

Introduction

3. This is a 2017 rating list appeal. 15 Brought Park Way, Newcastle Upon Tyne, NE6 2YF (the appeal property) had been entered in the 2017 rating list as 'warehouse and premises' at a RV of £31,250 with effect from 1 April 2017.
4. The challenge proposal was submitted by Altus Group on behalf of BNPPDSJ Ltd and BC) Ltd as Trustees of the BRIT and was received by the Valuation Officer (VO) on 21 March 2023. It had been made on the grounds that the appeal property was incapable of beneficial occupation and should be deleted from the rating list with effect from 15 December 2022.
5. The VO issued a challenge case decision notice on 7 September 2023 which disagreed with the proposed alteration of the list and stated that the rating list entry was reasonable based on the evidence and information available.
6. In accordance with regulation 13A of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009, the appeal to this Tribunal has been made on the grounds that the valuation for the hereditament is not reasonable. The appeal was lodged by Altus Group on behalf of the appellant and received by the Tribunal on 14 December 2023.
7. Mr Philips appeared on behalf of the appellant as both advocate and expert witness. Therefore, it was important to ascertain if there was a success related fee involved and if so whether its existence was compatible with his obligations to the tribunal as an expert. This question was raised in view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC). Mr Moore confirmed that he was instructed under a contingency basis fee and he declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and that he would comply with this as well as the requirements of his professional body, regardless of whether or not the evidence supported his client's case.
8. The panel accepted this expert witness evidence on the above basis as the appeal was not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations and was allowable due to the Tribunal's rules on admissibility of evidence (regulation 17(2)(a) where the Tribunal can admit evidence whether or not it would be admissible in a civil trial).
9. The panel therefore considered the expert evidence and attached such weight to it as it saw fit.
10. The appeal property is described in the list as a warehouse and premises. Included in the assessment was the warehouse space with a mezzanine floor, area under supported floor, offices and forecourt.
11. Following the vacation of the tenant, a programme of works began. The appellant sought deletion of the entry in the list with effect from 15 December 2022, on the basis that the works meant that the subject property was no longer capable of beneficial occupation. The VO disagreed with this position and considered the entry in the list should remain.

This statement of reasons is not and does not purport to be a full verbatim record of the proceedings.

Background

12. The issue in dispute before the panel was whether the appeal property should be deleted from the 2017 rating list with effect from 15 December 2022, this being the material day.

Relevant law

13. The statutory definition of a hereditament is contained within section 64 of the Local Government Finance Act 1988. A hereditament is, by virtue of Section 115(1) of the (now repealed) General Rate Act 1967 a "...property which is or may become liable to a rate, being a unit of such property which is or would fall to be, shown as a separate item in the valuation list"
14. Paragraph 2 of Schedule 6 to the Local Government Finance Act 1988 contained the statutory hypothesis for determining the rateable value of a non-domestic hereditament. This provides that provides that:
- (1) The rateable value of a non-domestic hereditament property, 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 based 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.
15. Whilst the rateable value is determined having regard to the antecedent valuation date (1 April 2015), the valuation must reflect the physical facts relating to the subject property and its locality on the date the determination is made or amended (the material day). In this appeal the material day was 15 December 2022, this being the date the Appellant had sought the deletion of the subject property from the valuation list. Paragraphs 2(6), 2(7) and 2(8) of Schedule 6 of the Local Government Finance Act 1988 are relevant:
- (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.
 - (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.

(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.

Discussion

16. The appellant's representative provided a bundle of evidence which included the parties' respective cases.
17. The parties also relied upon the following case law:
 - *Valuation Officer v Orchard Street Investment Management LLP* (CHG100074320) (known as "the Griffin case")
 - *Jackson (VO) v Canary Wharf Ltd* [2019] RA 411
 - *Newbigin (VO) v Monk* [2017] UKSC 14
 - *Aviva Investors Property Developments Ltd v Whitby (VO) & Ors* [2013] UKUT 430 (LC)
 - *Aegon UK Property Fund v Valuation Officer* (CHG100880426)
 - *Aviva Investors v Bunyan (VO)* [2021] (appeal CHG100345300)
18. The appellant was of the opinion that a scheme for the comprehensive redevelopment of the hereditament which commenced on 28 November 2022 for a period of ten weeks meant that the appeal property was not capable of beneficial occupation and should be deleted from the list. The works involved the stripping out of the existing space which had been fitted out by the previous occupier. It included the isolation of services, removal of the mezzanine, removal and replacement of all lighting, removal of all secondary small power supply, removal and replacement of all roof lights and roof sheets, removal and replacement of all cladding and removal and upgrading of the roller shutter door.
19. In support of his argument, Mr Wilcox argued that repair is not the same as refurbishment. He stated the government in passing the repair assumption assured Parliament that refurbishment schemes would not be treated as if they were works of repair. Mr Wilcox argued that the VO was doing exactly what government had told Parliament would not happen.
20. Mr Wilcox then referred to the Upper Tribunal's judgement in *Whitby* which related to a warehouse and premises, which included some office space. The question was in the absence of a completion notice, at what stage of its construction does a newly constructed building become capable of beneficial occupation. There was a lack of small power distribution and lighting which was sufficient to render the appeal property incapable of beneficial occupation. He argued that had the panel being aware of the *Whitby* case when determining *Aegon UK Property Fund* and the President's decision of *Aviva Investors*, the outcome of the decision's would have been different.

21. Mr Wilcox referred to the marketing particulars which described the appeal property as having to “undergo extensive refurbishment”. He stated that there was a scheme of refurbishment which usually happens at the end of a lease to make it ready for a new incoming tenant. He drew the panels attention to a site inspection report which was conducted on 15 December 2022 which contained photographs of the appeal property at that time. The period of works was as detailed;
- Removal of office lighting.
 - Installation of temporary lighting.
 - Window and doors are being manufactured.
 - Scaffolding erection date agreed.
22. Mr Wilcox placed great weight on the *Whitby* case and argued that as the appeal property did not have small power or lighting then it could not be capable of beneficial occupation.
23. The panel applied little weight to the *Whitby* case as this was in relation to a property which was newly built and had never been occupied unlike the appeal property. Therefore, the VO was not empowered to assess them unless they were ready for occupation, in the absence of a completion notice.
24. The respondent contended that the VO were required to first objectively assess a) whether the property is undergoing reconstruction or redevelopment at the material day and then ask b) in the context of said development, are the premises incapable of occupation. After having regard to the list of works provided, he was not satisfied that a reasonable person would classify the works as reconstruction, redevelopment and radical alterations. The works that had been undertaken were no different to what would normally be undertaken at the end of an FRI lease and do not extend to the significant works envisaged in *Canary Wharf*. He stated that the ten-week programme of work also provided evidence to show that this would be normal repairs carried out following the vacation of the previous tenant, to make the property ready to be re-let. The VO considered the works should be disregarded under the repair assumptions set out in Schedule 6 to the Local Government Finance Act 1988.
25. In further support of his case, Mr Ridley referred to a VTE decision from the President, *Aviva Investors*. This appeal concerned a warehouse which underwent a programme of works between 23 September 2019 and 13 December 2019. The President considered whether the works in that case were within the scope of *Monk* or if they were works that the hypothetical landlord would undertake prior to the commencement of a new tenancy under Schedule 6 to the 1998 Act. The case was fact sensitive and there was no detailed timetable of the works or any witness who could speak with authority to confirm when each stage was completed or the position on the material day.
26. In the *Aviva Investors* judgment, the President stated that no part of the building could be capable of beneficial occupation for a deletion to be considered. In that case, he was not persuaded that the situation on the material day was such that the entire building could not be occupied and found that the majority of the building was not stripped back and was subject to minor repairs. In the President’s opinion, the warehouse remained capable of beneficial occupation regardless of a temporary lack of kitchen or toilet facilities.
27. In the appeal property, there was a clear timeline for the programme of works. The panel found that *Monk* and *Canary Wharf* confirmed that the correct test was to first establish if a

hereditament existed. However, those appeals differed from the subject property as they were offices and clearly incapable of occupation for that use. The panel considered that there were different standards of fit out required for offices to warehouses, which are predominantly used for storage of goods. While it was accepted that the appeal property also contained office space, the primary description was as a warehouse. The panel found the President's decision in *Aviva Investors* to be useful as there were similarities with the subject appeal.

28. From the programme of works, the panel noted that on the material day of 15 December 2022, very little works had commenced. At some point the electric had been isolated in order to allow for the removal of the lighting from the office. Temporary lighting had been installed in the warehouse. From looking at the photographs provided with the report on 15 December 2022, the mezzanine remained, and the property very much still looked like a warehouse, albeit with a pile of ripped out lighting stored against the wall.
29. Considering the President's view that the entire building must be incapable of beneficial occupation for a deletion to be considered, the panel was not persuaded that the hereditament had ceased to exist on the material day.
30. The burden lay with the appellant in this appeal to persuade the panel that the appeal should be allowed. It found that there was insufficient evidence to demonstrate that the entire building was incapable of beneficial occupation on the material day of 15 December 2022. Therefore, a hereditament existed on that day and the panel concluded that the works must be disregarded under the repair assumptions. The appeal was therefore dismissed.

Disposal

31. In view of the above findings, the panel concluded that it had not been demonstrated that the present RV of £31,250 was unreasonable and therefore the appeal was dismissed.

Date issued to parties: 24 May 2024

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.
