



VALUATION TRIBUNAL FOR ENGLAND

Non-Domestic Rating appeal; Restaurant and premises; Proposal seeking a deletion of the assessment; Newbiggin v Monk [2017] UKSC 14; Jackson (VO) v Canary Wharf Ltd [2019] RA 411; Aviva Investors and Bunyan (CHG100345300); Appeal dismissed.

APPEAL NUMBER: CHG101070212

RE: Frankie & Benny's, Unit 7 Stafford, ST16 2HQ
(the 'subject property')

BETWEEN:	The Restaurant Group	Appellant
	and	
	Lucy Formela-Osborne (Valuation Officer)	Respondent

SITTING: Remotely using Microsoft Teams

ON: 8 May 2024

BEFORE: Mr M Smith (Presiding Senior Member)
Mr W Read (Senior Member)

CLERK: Mr A Johnson IRRV(Tech)

APPEARANCES:

Mr L Wilcox of Landmark Chambers (Appellant's counsel)
Mr E Gutt of Colliers International (Appellant's expert witness)
Mr M Donmall of 1 Crown Office Row Chambers (Respondent's counsel)
Mr T Simango (Respondent's expert witness)

DECISION AND STATEMENT OF REASONS

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

Introduction and background

2. This decision statement is not a contemporaneous or verbatim record of the proceedings and it must not be read in such a manner.
3. The subject property was a 'restaurant and premises' located within the Riverside Retail and Waterfront Leisure development in Stafford. It had been let to the Appellant on a twenty five year lease which had commenced on 21 September 2016 with a rent of £120,000 per annum. The subject property has since closed and has been marketed for disposal (although the position with regard to the marketing was unknown at the time of the remote hearing).
4. The subject property entered the 2017 Rating List with effect from 1 April 2017 with a rateable value of £109,000. A proposal was submitted to the Valuation Officer in accordance with regulation 4(1)(h) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 which sought its deletion with effect from 1 September 2022 (the 'material day'). This was, according to the challenge document, on the grounds that the subject property had undergone reconstruction works which had rendered it incapable of beneficial occupation.
5. Mr Gutt appeared on behalf of the Appellant as an expert witness and he declared that his employer, Colliers International, had been engaged on an incentivised fee basis. Mr Gutt also confirmed that he understood and accepted that when presenting evidence as an expert witness his duty was to the Tribunal regardless of whether or not his evidence supported the Appellant's arguments.
6. Mindful of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT (LC), the panel accepted the expert witness evidence on this basis as the appeal was not considered to be complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions - general) of the Procedure Regulations. Furthermore, it was allowable due to the Tribunal's rules concerning 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. It was for the panel to consider the expert evidence and assess what weight, if any, to give it in the context of the issues before it.
7. During the remote hearing the clerk unexpectedly lost connection with the remote hearing room on two occasions. The first occurred at 11:50, which necessitated a pause in the proceedings of approximately twenty five minutes and the second occurred at 13:30, which necessitated a further pause in the proceedings, this time for approximately twenty minutes. Whilst the delays were unforeseen, no prejudice was claimed by either party upon the resumption of the remote hearing and there were no other connectivity issues.

Relevant law

8. 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"
9. 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.
10. 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 1 September 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.

11. The panel was also provided with a bundle of authorities. These were:

- *Dawkins v Ash* [1969] 2 AC 366
- *Porter (VO) v Gladman Sipps* [2011] UKUT 2004 (LC)
- *Hewitt (VO) v Telereal Trillium Ltd* [2019] UKSC 23
- *Williams (VO) v Scottish and Newcastle Retail* [2001] EWCA Civ 185
- *Codexe Ltd v Lamb (VO)* [2018] UKUT 70 (LC)
- *Reeves (VO) v Valuation Tribunal for England* [2015] RA 241
- *Rossendale BC v Hurstwood Properties* [2022] AC 690
- *Newbiggin (VO) v SJ & J Monk (a Firm)* [2017] UKSC 14
- *Jackson (VO) v Canary Wharf Ltd* [2019] UKUT (LC) 136
- *Aviva Investors v Bunyan (VO)* [VTE CHG100345300]

Evidence and submissions

12. The panel had been provided with a consolidated evidence bundle which contained, amongst other things, a copy of the Appellant's challenge submission, a copy of the Valuation Officer's decision, extracts from legislation, extracts from case law, a large number of photographs and a statement of agreed facts. The panel had also been provided with each party's skeleton arguments and a bundle of authorities.

Brief summary of the Appellant's case

13. On behalf of the Appellant, Mr Wilcox argued that the subject property had, as a consequence of a scheme of works (which, according to Mr Gutt, had taken somewhere between ten and fourteen days to complete), become incapable of beneficial occupation. Therefore, it should be removed from the 2017 rating list because it was no longer a hereditament. This, in particular, was because the works had included the removal of sanitary fittings and lighting/lighting circuitry (which, it was said, had been partially removed and cut from the main circuit board). This, it was argued, follows the Supreme Court's judgment in *Newbiggin (VO) v Monk* [2017] UKSC 14 and the Upper Tribunal's judgment in *Jackson (VO) v Canary Wharf Ltd* [2019] UKUT 136 (LC).

14. Mr Wilcox also argued that the panel had a degree of flexibility when determining the effective date for the deletion of the subject property, adding that it was open to the panel to delete the subject property from a date later than 1 September 2022 if the evidence was found to support this.

Brief summary of the Respondent's case

15. Whilst Mr Donmall, on behalf of the Respondent, did not raise any significant objection with Mr Gutt's submission concerning the length of time the works had taken, he did argue that the subject property had merely undergone a programme of soft stripping. Referring to the removal of the toilets and the lighting/lighting circuitry, Mr Donmall asserted that their reinstatement represented minor works and that the subject property was plainly capable of beneficial occupation in accordance with the statutory repairs assumption.

Discussion

16. The subject property had, due to financial and operation reasons, ceased to operate as a restaurant, although the exact date of closure was unknown. In order to assist with the disposal of the lease, a scheme of works had been undertaken and these commenced on 1 September 2022 and took somewhere between ten and fourteen days to complete. The intention of the works was to make the subject property more marketable to prospective tenants because, it was said, any new tenant would prefer to find the restaurant in a stripped out/blank canvas state rather than have to undertake the works themselves. Whilst the exact date when the sanitary ware and lighting were removed within the ten to fourteen day window was unclear (as was the timing of the alleged cutting of the circuitry), it was the Appellant's position that the subject property's assessment should be deleted from the 2017 rating list from the date the works commenced as this was the Valuation Officer's usual approach.
17. It was the Valuation Officer's position that the actual date for deletion was a moot point because, at no time had the subject property ceased to be a hereditament as the works were nothing more than soft stripping.
18. It had broadly been accepted prior to *Monk* that if a property became unoccupied and was in a state of disrepair then (unless the repairs were uneconomic for the landlord to undertake) there would be no effect on value. Following *Monk*, the issue was whether the programme of works was enough for it to be deleted from the rating list or whether it was, in reality, capable of repair by a reasonable landlord in accordance with the statutory repairing assumptions contained within paragraph 2 of Schedule 6 to the Local Government Finance Act 1988.
19. Therefore, in order for this appeal to succeed, the panel must be satisfied that the physical condition of the subject property had, following the programme of works, become incapable of beneficial occupation and ceased to be a hereditament. On the other hand, if the subject property remained a hereditament, albeit in a state of disrepair (for which the statutory assumption as to reasonable repair would apply), then this appeal must be dismissed.

20. The question of whether a property is capable of economic repair was considered by Lord Denning in the Court of Appeal in *Saunders v Maltby* (VO) [1976] 2 EGLR 84, where it was 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.”*

21. The panel found that paragraph 15 of *Monk* clearly set out the position of the Supreme Court:

“The decision appealed against interprets Schedule 6 to the 1988 Act as entailing a major departure from the reality principle by requiring that the hereditament be assumed to be in a reasonable state of repair for the mode of occupation listed in the rating list, namely as “offices and premises”. I do not agree with that approach. In my view, the legislative history shows that the repairing assumption which para 2(1) of Schedule 6 introduced did not supplant the reality principle to that degree.”

22. Paragraph 20 expands as follows:

*“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)).”*

23. In *Monk* the Supreme Court had clearly distinguished between a state of disrepair (which had no impact upon value because of the landlord's obligation to undertake reasonable repairs) and redevelopment works which renders a building incapable of beneficial occupation. As *Monk* makes clear, this is an objective judgement on the material day.
24. Authorities such as *Porter (VO) v Gladman Sippys* [2011] UKUT 2004 (LC), *Aviva Investors v Whitby (VO)* [2013] UKUT 430 (LC) and *Spears Brothers (a firm) v Rushmoor Borough Council* [2006] RA 86 were not found to be of assistance because they concerned properties which were yet to be entered into the rating list until they were capable of occupation for their intended use or purpose. The subject property was, in contrast, established in the rating list and had, before closure, been occupied as a restaurant.
25. A previous decision of this Tribunal in *Aviva Investors v Bunyan (VO)* [VTE CHG100345300] was found to be of assistance. Whilst it was not binding upon the panel it was nevertheless a decision of this Tribunal's President, Mr G Garland, and it provided the panel with useful guidance.
26. The scope of the works undertaken was appended to a letter from the Appellant's contractor dated 14 November 2022 and it was apparent to the panel that the parties were in broad agreement with regard to the majority of what had been undertaken (and this was largely self-evident from the photographs that had been submitted). The areas of contention concerned the removal of sanitary ware, the removal of some lighting (with the exception of emergency lighting) and the alleged cutting of the electricity supply from the main circuit board.
27. Turning firstly to the removal of sanitary ware, the panel found that the subject property had not been stripped to anything like a shell state (as was the case in *Jackson (VO) Canary Wharf*. The stalls remained in place, as did the bespoke tiling, flooring and mirrors. Furthermore, the water supply had not been removed, instead the pipework had merely been capped. The panel concluded that the removal of sanitary ware did not render the subject property as being incapable of beneficial occupation. The sanitary ware had been removed as part of a programme of soft stripping, which, by Mr Gutt's own admission, was intended to make the subject property more marketable to a future tenant (which, in itself, suggested that a hereditament remained after the works had been completed). Any new tenant would fully remove the Frankie & Benny's fittings in their entirety before installing their own flooring, tiling, and sanitary ware in a relatively short space of time and apply their own decorative branding. The panel held that if it was possible to render a property incapable of occupation solely by removing the sanitary ware then it would defeat the purpose of the repairing assumption.
28. Turning secondly to the dispute regarding the lack of lighting and the alleged cutting of the circuitry from the main board, the panel found that it had not been presented with any compelling evidence to show that this had actually occurred. Mr Gutt had referred to a conversation between himself and an electrician, but, with all due respect to Mr Gutt, this was hearsay evidence and no compelling documentary evidence had been provided. Furthermore, the

relevant photographs were not found to show that this had occurred. The panel concluded that even if it had, this would have been part of the soft stripping and the work required to return the electrics to good working order represented disrepair which a reasonable landlord would be expected to undertake.

29. The panel concluded that the argument put forward by Mr Wilcox exceeded the boundaries of *Monk*. If Mr Wilcox was correct then the statutory assumption as to reasonable repair would seldom, if ever, be engaged. Any tenant will, when vacating a property, invariably leave behind a degree of damage. Whilst a prospective tenant will be reluctant to occupy a property which is in need of repair, it does not mean that a hereditament has ceased to exist.
30. The panel considered Mr Wilcox's submission that it had a degree of flexibility when determining the date for the deletion of the subject property. However, this was something of a moot point because the panel found no compelling evidence to necessitate the deletion of the subject property from the 2017 rating list on 1 September 2022 or from any date thereafter.

Disposal

31. The panel, having found that the subject property was a hereditament, dismissed this appeal.

Date issued to parties: 17 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.