VALUATION TRIBUNAL FOR ENGLAND

Council Tax Valuation Appeal; Proposal seeking a deletion; hereditament test; Bunyan v Patel [2022] EWHC 1143 (admin); Newbigin (Valuation Officer) (Respondent) v *S J & J Monk (a firm) (Appellant) [2017] UKSC 14*; *Jackson (VO) v Canary Wharf Limited [2019] UKUT 136 (LC); Wilson v Coll (LO) [2011] EWHC 2824 Admin; Appeal dismissed.*

RE: 17 Mill Ridge, Edgware, Middlesex HA8 7PE

APPEAL NUMBER: VT00003935

BETWEEN:	Mrs Laxmi Patel	Appellant
	and	
	Ms Dawn Bunyan (Listing Officer)	Respondent

BEFORE: Gary Garland (President)

CLERK: David Slater (Acting Registrar)

ON: Thursday 14 July 2022

APPEARANCES: Umesh Patel (Appellant's son and representative)
Isabel McArdle from 1 Crown Office Row (Respondent's Counsel)
Emmanuel Cromwell (Listing Officer's witness of fact)

Summary of decision

1. The appeal was dismissed as I was satisfied that the appeal property remained capable of beneficial occupation and therefore a dwelling on 28 August 2019.

Introduction

2. This was a re-hearing of Mrs Patel's appeal which was originally heard by one of my Vice Presidents, Alf Clark, by way of an earlier remote hearing that was held on 10 September 2021. Mr Clark allowed the appeal and in so doing ordered the Listing Officer to delete the appeal dwelling's council tax band E entry from the Valuation List with effect from 28 August 2019.

3. Following the release of Mr Clark's decision to the parties, the Listing Officer made a statutory appeal under regulation 43 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 on a point of law. Due to concerns about the possible cost implications, the appellant did not engage in the High Court proceedings.

4. Upon being notified of the Listing Officer's statutory appeal, in an unprecedented move, the then Registrar, Jon Bestow, contacted the Administrative Court Office on 27 October 2021 and requested that consideration be given to the appointment of an amicus curiae/Advocate to the Court. Mr Bestow was concerned that the Listing Officer had failed to refer to the Supreme Court's judgment in *Newbigin (Valuation Officer) (Respondent)* v *S J & J Monk (a firm) (Appellant)* [2017] UKSC 14 in her Appellant's Notice. Mr Bestow stated that the starting point was whether a hereditament existed at the relevant date. If no hereditament existed, the statutory assumptions were not engaged. Moreover, the Listing Officer was disregarding *Monk* in favour of the High Court's judgment in *Wilson v Coll (LO)* [2011] EWHC 2824 Admin.

5. Mr Bestow's request was not opposed by the Listing Officer, who took a neutral stance. However, Mr Bestow's request was rejected by the Honourable Mr Justice Bourne in an Order dated 14 December 2021. In the Order, the Judge commented as follows;

> In this case the issue on the appeal is the test to be applied by the VTE when deciding whether a dwelling/hereditament existed. The Appellant is represented by experienced counsel whose skeleton argument relies on Wilson v Coll but also cites Newbigin (VO) v Monk.
>
> It seems to me that the proposal, and this order, should be sufficient to highlight any question of whether the right questions have been asked and the right authorities cited, and that counsel can be relied on to draw attention to any authority adverse to her case.

6. The Listing Officer's statutory appeal was ultimately heard by Mrs Justice Lang DBE. She decided to allow the appeal and remitted the case back to the tribunal for re-determination by a freshly constituted tribunal. In paragraph 35 of her judgment, Mrs Justice Lang stated;

> In my judgment, the Tribunal in this case erred in not applying the test set out in Wilson v Coll. Instead, it applied a less stringent test, namely, whether "the property required major works to remedy the problems and make it fit for occupation as a dwelling" (at [25]). I consider that, if the Tribunal had followed Wilson v Coll, as it was bound to do, it might well have reached a different conclusion on the facts of this case, given the nature and extent of the works described in the survey dated 15 October 2019.

7. Mrs Justice Lang also referred to the Valuation Office Agency's Council Tax Manual Practice Note 4 which was updated on 9 February 2022. In her judgment its guidance was consistent with the legal principles set out by the Supreme Court in *Monk.* However, the Practice Note reflected the VOA's view that *Monk* should only be considered if there was a scheme of works. The Practice Note made no reference to the Upper Tribunal's judgment in *Jackson (VO) v Canary Wharf Limited* [2019] UKUT 136 (LC) which had held that a scheme of ongoing works was unnecessary for *Monk* to apply.

8. This re- hearing was conducted via Microsoft Teams.

9. This appeal initially began with a proposal that was served by Mrs Patel on the Listing Officer on 22 July 2020. The proposal sought a deletion of the appeal dwelling from the Valuation List with effect from 28 August 2019. The Listing Officer deemed Mrs Patel's proposal to be not well founded and issued a decision notice to that effect on 18 August 2020. Two days later on 20 August 2020, Mrs Patel appealed to the tribunal.

10. The relevant date for the purposes of this appeal was 28 August 2019, being the effective date proposed by the appellant for the deletion of the entry. This was the day after her tenants had been evicted from the property for non-payment of the rent.

11. For the appellant to succeed in her appeal, I needed to be satisfied that the property ceased to be a hereditament and therefore was no longer a dwelling for the purposes of section 3 of the Local Government Finance Act 1992 on 28 August 2019.

12. The appeal property was a three bedroom semi-detached dwelling that was built in the 1930's.

13. 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 the parties were fully considered before I came to my decision. Consequently, the absence of a reference to any statement should not be construed as it having been overlooked.

The Rentokil Survey report and ensuing works

14. The appeal property was inspected by Robert Bialek from Rentokil on 7 October 2019 who sent his survey report to the appellant's son on 15 October 2019. Mr Bialek's report contained the following;
    a. From his external survey, there was no damp proof course visible. Properties of this age should have an original damp proof course in the form of slate on mortar bed or bitumen layer, some 6 to 7 inches below floor level. It was not visible on inspection. The

external ground level may have been bridging the existing damp proof course.

b. From his internal ground floor survey, his instrumental readings indicated the existence of damp and wood rotting fungi as the moisture readings were quite high, albeit there was no visible damage to the skirting boards.

c. Because there were fitted cupboards, furniture and appliances in the way, only the exposed walls could be tested. However, there was visible evidence, confirmed by meter readings of rising damp. Plastered walls had deteriorated and were contaminated with salts as a result of moisture movement within the structure. The report recommended the removal of the plaster.

d. There was evidence of plaster fungus growing from the wall/floor joint in a rear room. The fungal growth indicated a plumbing leak, probably from a radiator pipe.

e. It was not possible to inspect the floors, as they were covered.

f. In one of the rear rooms on the first floor, external walls had been penetrated by damp caused by historic rainwater ingress. The plaster in the room had become contaminated with salts as a result of moisture movement.

15. The report recommended the removal and replacement of skirting boards, the removal of plastering and the application of a horizontal damp proofing system.

16. The Listing Officer accepted that three of the four external walls required a replacement damp proof course. The majority of the walls on the ground floor needed re-plastering as did an area on the first floor. Whilst the Listing Officer accepted that the appeal property was in a state of disrepair on 28 August 2019, her view was that it had not deteriorated beyond the point where it ceased to be a hereditament. Consequently, it remained a dwelling for the purposes of council tax.

17. Works commenced on 23 September 2020 and the respondent was prepared to accept that the property ceased to be a dwelling from this date.

18. Once the works began in earnest, the plaster was found to be contaminated in the walls behind the base kitchen units. A further Rentokil report dated 15 November 2020, following Mr Bialek's survey on 10 November 2020, recommended the removal of the kitchen units and affected plaster replaced with a specialist rendering system.

19. The works also included what the appellant described as a complete renovation with new kitchen, bathroom and toilet facilities installed. New electrical wiring, plug sockets and lights were also installed.

Decision and reasons

20. The Appellant's argument that the appeal property should be deleted from the list with effect from 28 August 2019 was undermined by the fact that it was occupied by resident tenants until they were evicted only the day before. If the property was capable of occupation on 27 August 2019, it was difficult to see what had changed within the next 24 hours which meant it ceased to be a hereditament. In paragraph 40 of his judgment in *Wilson v Coll (LO)* [2011], EWHC 2824 Admin Mr Justice Singh stated;

> I accept the respondent's submission as a general matter in that respect. I accept that as a general matter of law the crucial distinction for the purposes of deciding whether there is, or continues to be, a hereditament should focus upon whether a property is capable of being rendered suitable for occupation (in the present context occupation as a dwelling) by undertaking a reasonable amount of repair works. The distinction, which is correctly drawn by the respondent, in my view, is between a truly derelict property, which is incapable of being repaired to make it suitable for its intended purpose, and repair which would render it capable again of being occupied for the purposes for which it is intended.

21. To be fair to the Appellant, she did have an independent survey report to support her case. In contrast, as was often the case, in this type of dispute, the Listing Officer had never visited the property nor undertaken her own internal inspection. I therefore only had factual evidence from the Appellant regarding what was the likely state of disrepair on 28 August 2019.

22. Although the initial Rentokil report, following a survey undertaken within six weeks of the tenants being evicted, highlighted the presence of damp, water penetration and fungal growth, I was not convinced that the issues highlighted in the report had gone beyond what could be deemed to be a reasonable amount of repair works being required to render the property habitable as envisaged by Mr Justice Singh in *Wilson.*

23. I accept that when the repair works began on 23 September 2020, the issues relating to damp and fungal growth were worse than envisaged when the initial survey was undertaken on 7 October 2019. However, the likelihood was that issues relating to rising damp and fungal growth were bound to increase as the property was unoccupied for over 12 months before the works began.

24. In *Wilson* the claimant Mrs Wilson appeared in person, although the judgment records that she was ably assisted by her husband. In contrast, the respondent employed the services of learned Counsel who presented skilled advocacy. Mrs Wilson's case was not helped by the fact that she did not have any independent evidence from a surveyor's report to prove her argument that her property had ceased to be a hereditament. However, ultimately she did succeed in her appeal, because a tribunal panel wrongly dismissed her appeal on the basis that it had to assume that her property was in a state of reasonable repair, without first establishing whether it was a hereditament. This was evident from paragraph 39 of its decision;

> Because the assumption of reasonable repair in the legislation is so absolute, the Panel would only consider that a dwelling could be removed from the Valuation List if it had ceased to be a hereditament.

25. Mr Justice Singh commented on this clear error of law in paragraph 35 of his judgment as follows;

> Finally in the reasoning of the tribunal itself, it is troubling, in my view, that having referred to the statutory assumption at paragraph 39 it regarded that as being "so absolute". It clearly fell into error therefore, in my view, in regarding that statutory assumption as answering the question which was the question before it in this case. It is clear from

> the use of the word "because" at the beginning of paragraph 39 that the tribunal regarded that statutory assumption in regulation 6(2)(e) as being the answer to the question of law, which it had identified for itself in the present case.

26. Mr Justice Singh therefore remitted the appeal back for re-consideration by the tribunal, in accordance with the law. When the appeal was re-heard and dismissed by the tribunal on 27 March 2012, the outstanding repair issues in *Wilson* were recorded as follows;

    a. The whole property needed re-decorating.
    b. All windows needed rubbing down and repainting.
    c. The kitchen units needed replacing.
    d. One windowpane in the kitchen needed replacing.
    e. The bath needed replacing.
    f. A hole in the bathroom ceiling needed filling.
    g. A few tiles from the roof were missing and needed replacing.
    h. The hot water cylinder and copper piping (which had been stolen) needed replacing.
    i. Part of the kitchen floor and some of the joists needed replacing but the extent of the decay was unknown.

27. It was, however, accepted that Mrs Wilson's property did not require any significant re-construction work and the house was largely wind and watertight.

28. As can be seen, Mrs Wilson's property was clearly capable of being put back into good order with a reasonable amount of repair works.

29. Following *Wilson* Listing Officers would only contemplate deleting an entry from the Council Tax Valuation List if a property was truly derelict and incapable of repair, often relying on paragraph 40 of the judgment already referred to above.

30. Mrs Wilson also argued before Mr Justice Singh that it would be uneconomic for her to undertake the repairs and therefore what also came out of that

judgment was that there was no economic test in council tax, in contrast to non-domestic rating. This is clear from paragraph 41 of the judgment;

> The crucial distinction in that regard is not between repairs which would be economic to undertake or uneconomic to undertake. As I have already indicated that submission, and my conclusion in accepting it, draws force from the fact that the concept of the reasonable landlord considering something to be uneconomic is simply absent from the present legal regime, whereas it is present in the legal regime which governs non-domestic rating.

31. Following *Wilson* an extremely high bar has to be met before Listing Officers will even consider removing a domestic property from a list. Sometimes the bar has been set so high, it has defied all logic and common sense for instance in *Tewari v Virk (LO)* [2020] M0826076 the taxpayer's flat above a public house was completely destroyed by a fire. Whilst the Valuation Officer was prepared to delete the rating list entry relating to the public house, with his other hat on as the Listing Officer, he refused to delete the council tax valuation list entry for the flat. I allowed the appeal in that case and Mrs Lang commented that my analysis and conclusion, based on the facts, was consistent with a proper application of *Wilson* and confirmed by *Monk.*

32. However, Mrs Justice Lang was critical about some of the observations I had expressed in *Tewari* when I said the following;

> 33. Having regard to the present case, the Listing Officer has overlooked the fact that the council tax legislation was amended with effect from 1 April 2013. The Class A of the Exempt Dwellings Order 1992 which was referred to in paragraph 14 in Wilson was abolished. Now unoccupied dwellings that are in need of major repair works to render them capable of occupation are chargeable dwellings rather than exempt. Prior to 1 April 2013, for all intents and purposes, a number of former dwellings did cease to be hereditaments. The regulatory wording of what was Class A of the Council Tax (Exempt Dwellings) Order 1992 leaves no doubt that a dwelling requiring or undergoing major repair works to render it habitable was incapable of actual or beneficial occupation. However, no prejudice was suffered to the owner of such properties provided he carried out any repairs in a timely fashion, otherwise any exemption period afforded by Class A was lost.

> 34. The Listing Officer's current approach, for appeals of this nature, which appears to have been endorsed by earlier lay tribunal panel decisions is that if a property is in disrepair and even if the state of decay is such that it cannot be occupied as a dwelling, a hereditament still exists as long as it can be repaired, no matter what the cost of those works will be, because there is no economic test for council tax purposes. Such a robust approach without giving proper consideration to whether a property is capable of occupation at the relevant date or whether it is reasonable for the owner to undertake such works to render it habitable is flawed, and fails to appreciate the reality of the situation, with respect in my opinion that approach is wrong."

33. As the tribunal does not participate in statutory appeals before the High Court, in the absence any legal representative for the taxpayer, the Listing Officer effectively has a free hit to criticise the tribunal's approach to its decision making.

34. In paragraph 35 of her judgment Mrs Justice Lang stated;

> I accept the Appellant's submission that the President's observations, upon which the Tribunal in this case later relied, were based upon a mis-reading of *Wilson v Coll*.

35. Given the High Court judgments in both *Wilson* and *Bunyan v Patel* [2020] EWHC 1143 any taxpayer seeking a deletion would be wise to secure independent expert reports to show that the level of disrepair has resulted in their property ceasing to be a hereditament. The tribunal is aware that one such Appellant did successfully appeal to the High Court against a VTE panel decision to dismiss his appeal, on the basis of *Wilson.* The tribunal understands that the Listing Officer conceded the appeal part way through the High Court hearing. The appeal was then referred back to the VTE for re-determination by Order of Roger Ter Haar QC who was sitting as a Deputy Judge of the High Court. The appeal property in that case was Flat 10, Yellowhammer Court, 26 Eagle Drive, London NW9 5AJ. In *Yellowhammer*, the respondent agreed to concede the appeal on the basis that the VTE decision contained insufficient reasons as to why the Appellant's property could be rendered suitable for occupation with a reasonable amount of repair in the light of expert reports before it.

36. The appeal flat in *Yellowhammer* was not truly derelict but was badly affected by raw sewage coming in from broken drains and water penetrating it from other flats in the building. As a result, the property suffered from damp and smelt of sewage. According to the Appellant's proposal dated 22 December 2015 the flat had flooded on numerous occasions between 5 September 2007, his proposed effective date for the deletion of the band B entry, and 2014. The flat had never been cleaned, dried or fumigated and was covered in mould. A ceiling had collapsed, and water penetration meant that the electricity supply had had to be switched off. One of the Appellant's main arguments was that the cost of him undertaking the reinstatement works would exceed the value of his flat. As proceedings were aborted, it raised the question why the Listing Officer threw in the towel given Mr Justice Singh's earlier judgment in *Wilson*. After the appeal was remitted back to the VTE for re-determination, the Listing Officer agreed to delete the entry from the list with effect from 5 September 2007 which obviated the need for a re-hearing,

37. Unfortunately, Ms McArdle was unable to assist me and explain why the Listing Officer conceded the appeal in *Yellowhammer,* given the policy not to delete unless a property was truly derelict and incapable of repair, no matter what the cost may be. However, Ms McArdle did concede that there may be occasions where the state of disrepair may justify a deletion but the appeal before me was not such a case. I had to agree.

38. As previously mentioned, in Mrs Justice Lang's judgment, she endorsed sections of the Valuation Office Agency's Council Tax Manual Practice Note No 4 which stated;

> 2. **A hereditament must exist**
>
> It is important to understand that a dwelling must exist before repair assumptions can be invoked. Thus the 'hereditament test' must be applied and satisfied first, then the matter of valuation considered separately. The question posted by the hereditament test is "Having regard to the character of the property and a reasonable amount of repair works being undertaken could the premises be occupied as a dwelling?" Newbign (VO) v Monk adds a further consideration. Where a hereditament is vacant and undergoing a scheme of works, the

hereditament may cease to exist …. As a dwelling cannot exist without first identifying a hereditament, vacant domestic property evidenced as undergoing a scheme will be deleted from the CT list."

3. **Reasonable repair assumption**

In PN1 it is explained that if a dwelling exists, then the assumption that the dwelling is in a state of reasonable repair becomes valid. ……

4**. Scheme of works**

If a vacant property is shown to be undergoing a scheme of works, then the decision in Newbigin (VO) v Monk must be considered…..The Supreme Court examined a series of rating cases and found case law: 'distinguished between a mere lack of repair, which did not affect rateable value because of the hypothetical landlord's obligation to repair, and redevelopment works which made a building uninhabitable' (Monk, para. 17). The Supreme Court identified a 'logically prior question' that needed to be asked when a building was undergoing redevelopment: requiring the valuation officer to ascertain whether the premises were 'undergoing reconstruction rather. than simply being in a state of disrepair'. If so, the premises would be incapable of beneficial occupation and cease to be a hereditament. The same principle should be applied when considering a case for Council Tax. If a property is simply in poor repair, then LO's should follow Wilson v Coll. If there is a scheme of works, then LOs will need to consider the evidence and make a judgment if the works made a building uninhabitable. Clearly this will only apply to vacant property and generally where there is a major renovation and extension underway. It is not envisaged works to replace a kitchen or bathroom, which may temporarily render a property incapable of beneficial occupation will be sufficient to delete a property from the valuation list."

39. Whilst the Supreme Court's judgment in *Monk* is clearly relevant to council tax, when the question of a hereditament is being considered, the Valuation Office Agency's view that *Monk* is only applicable to properties undergoing a scheme of works was held to be incorrect by the Upper Tribunal in *Jackson (VO) v Canary Wharf Limited* [2019] UKUT 136 (LC). In paragraph 35 of its judgment, the Upper Tribunal stated.

The suggestion that in Monk the Supreme Court created "a building under reconstruction exception" to the repair assumption, as Mr Singh submitted and as the VO's Rating Manual implies, is a mistake. As is apparent from paragraph 20 of Lord Hodge's judgment, and from his adoption in paragraph 22 of the sequence of questions suggested by the RSA and the BPF in their intervention, before one comes to consider the effect of the repair assumption in the context of a building undergoing redevelopment, the logically prior question is whether the property is capable of beneficial occupation at all, and thus whether it is a hereditament at all.

40. The High Court judgments in *Wilson* and *Bunyan* are clearly binding upon the tribunal but so too are the Supreme Court's judgment in *Monk* and the Upper Tribunal's judgment in *Canary Wharf* when one has to give consideration to whether or not a property is a hereditament which is capable of beneficial occupation.

41. Unfortunately for the Appellant in this case, I am satisfied that her property was capable of beneficial occupation at the relevant date. The appeal is therefore dismissed.

President

Date: 19 July 2022

Appeal number: VT00003935

Right of appeal

Any party who is aggrieved by the Tribunal's decision has the right of appeal to the High Court on a question of law. Any such appeal should be made within four weeks of the date of this decision notice.