VALUATION TRIBUNAL FOR ENGLAND

Non Domestic Rating appeal; 2010 Rating List; Power Station and Premises; Mothballed site; mode or category of occupation; extent of the hereditament; Newbigin v Monk [2017] 1 WLR 851; David Jackson (VO) v Canary Wharf Ltd [2019] UKUT 136 (LC); Woolway v Mazars [2015] AC 1862; Williams (VO) v Scottish & Newcastle [2000] RA 119; Scottish & Newcastle Retail Ltd and Another v Williams (VO) [2001] EWCA Civ 185; UK Atomic Energy Authority v Assessor for Highland and Western Isles Valuation Joint Board [2006] RA 153; Cemex UK Operations Ltd v O'Dwyer (VO) [2019] UKUT 0106 (LC); *appeal dismissed.*

RE: Keadby Power Station, Trentside, Keadby, Scunthorpe DN17 3BE

APPEAL NUMBER: 200322757473/257N10

BETWEEN:	Scottish & Southern Energy Plc	Appellants
	and	
	Ms Jo Moore (Valuation Officer)	Respondent

BEFORE: Mr A. V. Clark (Vice President sitting alone)

CLERK: David Slater (Deputy Registrar)

ON: Tuesday 8 March 2022

APPEARANCES: Mr Luke Wilcox from Landmark Chambers (Appellants' Counsel)
Mr Keith Norman (Appellants' expert witness)
Mr Paul Goodson (Appellants' witness of fact)
Mr Guy Williams from Landmark Chambers (Respondent's Counsel)
Mr Mark Holliday (Respondent's expert witness)

Summary of decision

1. The appeal was dismissed as I decided that the mothballing of the appeal site did not constitute a change in the property's mode or category of use. I also determined that the concrete apron formed part of the appeal hereditament.

Introduction

2. The appeal arose from a proposal dated 7 June 2013 which was served upon the Valuation Officer in respect of an entry in the 2010 Rating List for Keadby Power Station, Trentside, Keadby, Scunthorpe DN17 3EF. The proposal was received on 11 June 2013, which was the agreed material day.

3. The original Rating List entry of £5,647,000 RV was subsequently reduced by agreement to £5,340,000 with effect from 1 April 2010, following an earlier proposal which challenged the accuracy of the compiled list entry.

4. The proposal, giving rise to the appeal before me, was made on the grounds that there had been a material change of circumstances effective from 1 April 2013 (the agreed effective date) which was identified on the proposal as follows;

   Physical works have been undertaken to the boilers and other rateable plant to place the station into a deep mothballed state. The station is no longer capable of operation and the assessment should be amended accordingly.

5. I expressed my gratitude to the parties to the appeal for all of their contributions in response to previously issued Directions and to Lauren Robertson from the HMRC Rating and Valuation Team who last week pulled all the paperwork together into a single indexed and paginated bundle. I am also grateful to the clerks at Landmark Chambers for putting the bundle of authorities together.

6. The Appellants were represented by Luke Wilcox (of Counsel – Landmark Chambers). He referred to a detailed factual report prepared by Paul Goodson, the Power Station's Site Manager, as well as expert witness and rebuttal reports prepared by Keith Norman of Gerald Eve LLP, Chartered Surveyors. Both witnesses were called to give evidence.

7. For his part, Mr Norman confirmed that he was not instructed under any conditional fee arrangement. He also confirmed that his employer, Gerald Eve, would not be entitled to an additional fee if the appeal was successful.

8. The Respondent Valuation Officer's representative was Guy Williams (of Counsel – Landmark Chambers). His expert witness was Mark Holliday who also had prepared a report of fact and opinion as well as a rebuttal report. Mr Holliday was also called to give evidence.

9. What I found extremely useful was the comprehensive statement of agreed facts dated 17 December 2021. This is largely reproduced later in this decision document.

10. In my opening statement, which I read out, I informed the parties that I had read through the prepared bundle. After reading it, what I had to adjudicate upon was whether, at the material day of 11 June 2013, the hereditament was or was not capable of beneficial occupation as a power station. The key to this being whether the condition of the cooling water pipes and culverts should be considered to be in repair, or whether the principle of reality applied and the silting up of the pipes and culverts should be reflected in the actual valuation.

11. In addition, I had to consider whether, at the material day, the physical state of the silting of the River Trent across the apron should be considered on the basis that it was within the locality and external to the hereditament. Alternatively, whether the area comprising the apron formed part of the hereditament and it too should be considered to be in repair.

12. In the event that I upheld the Valuation Officer’s arguments on the issues in dispute then I would simply dismiss the appeal with the rateable value remaining at £5,340,000 with effect from 1 April 2010. However, if I found for the Appellants then the appeal would be allowed to the extent that the rateable value would be reduced to an agreed figure of £534,000 with effect from 1 April 2013. However, as the Power Station was recommissioned and became fully operational on 9 November 2015, it would then be appropriate to utilise Regulation 38(7) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 so as to return the rateable value in the Rating List to £5,340,000, as the circumstances giving rise to the alteration being ordered had ceased to exist.

13. The President of the Valuation Tribunal for England (VTE) is required to make sure arrangements are in place and make such statements and Directions so as to ensure that business before the Tribunal is conducted in accordance with The Local Government Finance Act 1988, Schedule 11, Part 1, paragraph A17(1) and The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. By virtue of Part 2 regulation (5) (arrangement for appeals) and regulation (6)(3)(g) (appeal management powers) the VTE may determine the form of any hearing.

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

15. The hearing was conducted via Microsoft Teams. The commencement of the hearing was delayed by around 5 minutes, when the clerk's IT connection was interrupted. Once it was restored the hearing ran smoothly with all participants and interested observers following the Tribunal's remote hearing protocols

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

17. 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

18. The property comprises a Combined Cycle Gas Turbine (CCGT) power station (the "power station") which was commissioned in 1996. As of April 2017, it had a Transmission Entry Capacity (TEC) agreement with National Grid of 735 MW.

19. The power station is located at Keadby in North Lincolnshire to the west of Scunthorpe and adjacent to the River Trent. The surrounding area is mainly agricultural albeit Scottish and Southern Energy Plc (SSE) have developed and operate an onshore wind farm immediately adjacent to the power station and are constructing a second CCGT plant adjacent to the existing station which will be known as Keadby 2.

20. The station is supplied with gas from the National Transmission System (NTS) operated by National Grid and exports electricity into the 400 kV Transmission network operated by National Grid.

21. Cooling water is taken from the River Trent via a cooling water intake facility and pumphouse located on the western edge of the River Trent adjacent to the junction of the B1392 and Trent Road which is the access road to the power station. Cooling water pipes then run along the edge of Trent Road to the power station site.

22. The hereditament comprises land, buildings, and rateable plant within the power station boundary. External to the power station boundary are cooling water pipelines which run the length of Trent Road, up to the cooling water pumphouse at the junction with the B1392. There are 6 concrete culverts (of which 4 are operational) installed to the River Trent. These were originally constructed along with a concrete apron on the riverbed to serve a coal power station but adapted for delivering cooling water to the gas station when it opened in 1996. The powers to maintain the culverts and apron were granted under clause ii (1) of a Deed of Easement dated 15 May 1952 ("the Deed").

23. Under Clause 1 of the Deed, the Commissioners of Crown Lands (hereafter known as Crown Estate) and the Trent River Authority granted full right and authority to place and thereafter maintain the cooling water and outfall structures. Referred to as the 'works', this comprised the piled concrete outfall chamber with apron and 6 intake channels with sheet 'piled walls and apron on under or across the foreshore and bed of the river below high-water mark at Keadby'. This allows them to inspect, repair, renew and cleanse the outfall pipes and intake channels. Under clause ii (6) of the Deed, the Crown Estate retain full rights to use and occupy the site of the works provided that provision is made for securing the maintenance and efficiency of the works.

24. Only in the event of the 'works' ceasing to be used would the Commissioners or the Trent River Board require the works to be removed and the site and half tide wall restored to its former or proper condition [clause ii 4 of the Deed].

25. The cooling water pipelines, pumphouse, and concrete culverts leading into the River Trent form part of the power station hereditament. This includes the culverts beneath the B1392 and a fenced compound with river frontage. The compound incorporates a jetty with a gantry system for installing and removing the river gates from sluices.

26. The concrete apron extends from behind the sluice gates down into the River Trent below the mean low water spring (“MLWS”). The silt accumulation at the material day, which would have prevented the use of the cooling water system, did not extend beyond the concrete apron. The silt accumulated in the chambers and culverts beneath the pumphouse and road and on the apron in the River Trent.

27. The power station receives gas from the National Transmission System (NTS), operated by National Grid, into a reception facility located within the power station. It is agreed that the gas pipeline supplying the power station, and operated by National Grid, together with the gas reception compound occupied by National Grid, does not form part of the hereditament.

28. The National Grid 400kV sub station and transmission line exporting electricity from the power station does not form part of the hereditament.

29. The rateable elements within the hereditament comprise the following:
    i. Land
    ii. Buildings
    iii. Civils Works – concrete and steel structures, and concrete foundations
    iv. Site Infrastructure – roads, pavements, underground drainage, fire protection equipment and security equipment
    v. Heat Recovery Steam Generators (HRSG-Boilers)
    vi. Gas turbine enclosures
    vii. Tanks and vessels in excess of 400 cubic metres
    viii. Cooling water pipes from the power station boundary to the cooling water pumphouse.
    ix. Concrete culverts, pipelines and sluice gates forming part of the cooling water outfall to the River Trent.

30. The following plant and machinery on the property is not rateable and does not form part of the hereditament:
    i. Gas Turbines, generators, and associated equipment
    ii. Steam turbine, generator, condensers, and associated equipment
    iii. Control equipment, valves, and instrumentation
    iv. Process pipework within the power station boundary
    v. Other mechanical and electrical equipment

31. All property immediately external to the hereditament is comprised within the locality. This includes:

i. The River Trent (albeit Mr Holliday considers that this is only beyond the extent of the concrete apron to the cooling water intake structure).
ii. The National Grid 400 KV substation and transmission lines
iii. The National Grid gas pipeline

32. The mothballing process took place between April and September 2013 and this included the works detailed below. The durations also noted below are for recommissioning and were suggested by the Appellants during the site inspection carried out by the Respondent on 5 July 2017 and 9 September 2021.
    i. Draining of the HRSG's "boilers". Rateable item but work was non-structural in nature. Duration one day.
    ii. Chemically coating the external surfaces of the boiler tubes. Rateable item. The boiler tube bank upper sections are carbon steel, so these were spray painted with a corrosion inhibitor – lower levels are stainless steel which did not require painting. Duration one week to paint. To remove the chemical coating to the boilers the gas turbines were fired up and this eradicated the coating in a single firing.
    iii. Chemically conditioning the boilers. The works affected items such as drums which are not an integral part of the boiler so either are not rateable or were non-structural in nature. Duration two months to fit and two months to remove.
    iv. Drying out the storage vessels and installing dehumidifiers. Similarly, these did not affect rateable elements of the hereditament
    v. Opening the gas turbines and installing dehumidifiers. Non-rateable item. Duration two days.
    vi. Isolating the fuel systems and purging them of all products. Non-rateable item.
    vii. Decommissioning the water treatment plant, including removing agents and assets from site and disposing off site. Work was not structural. Duration estimated by appellant two months.
    viii. Draining the gas pipeline from the National Grid compound and purging the line with nitrogen as well as shutting off all valves within the compound. Work was non-structural.
    ix. Removing certain items of plant e.g., water extraction pumps to the steam turbine building. Non-rateable item.
    x. Draining the cooling water system and isolating the system. Work was non-structural.

33. By the material day, the chemical coating to the boiler was complete and the cooling water pipes and culverts were partially full of silt.

34. The River Trent was becoming silted with sand banks appearing by the material day.

35. The Appellants periodically dredged the River Trent to remove silt, and they did so without needing a licence from the Marine Maritime Organisation up to 6 April 2014, when a transition period from the Marine and Coastal Access Act 2009 expired. A licence was therefore required to support the recommissioning process.

36. The total cost associated with the silt removal from the cooling water system was £523,309.

37. The Transmission Entry Capacity of the Station was reduced to zero with effect from 1 April 2013 and that the TEC was at zero at the material day and remained at zero until the station returned to service in November 2015.

Facts in dispute

38. The extent of the hereditament was in dispute. The Appellants consider that the immediate surrounds of the culverts, including the riverbed and concrete apron area, do not comprise part of the hereditament as they are not in the exclusive occupation of the Appellants, and the Crown Estate retain full rights of occupation, subject to the terms of the Deed. The Appellants therefore considers this area part of the locality.

39. The Respondent on the other hand, considers that this area is within the exclusive occupation of the Appellants for the purpose which they occupy the area, namely proper maintenance of the ‘works’, and therefore forms part of the hereditament.

40. Whether, at the material day, the condition of the cooling water pipes and culverts should be considered to be in repair, or the principle of reality applies and the silting up of the pipes and culverts should be reflected in the valuation.

41. Whether, at the material day, the physical state of the silting of the River Trent across the apron should be considered on the basis that it is within the locality and external to the hereditament, or whether the area comprising the apron forms part of the hereditament and should be considered in repair.

Evidence and submissions

42. The consolidated hearing bundle contained a copy of the proposal, statement of agreed facts and issues, location and site plans, photographs, a copy of the Deed of grant from 1952, the Dredging Licence from 2014, the Appellants' statement of case, witness report from Paul Goodson, expert witness report from Keith Norman, Appellants' rebuttal report, the Respondent's statement of case, expert witness report from Mark Holliday and a plan of the hereditament showing the parties' respective boundary lines.

43. I was also provided with the skeleton legal arguments from Luke Wilcox for the Appellants and Guy Williams for the Respondent.

44. In addition, I was provided with a bundle of the authorities.

The relevant law

45. 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.

46. Although the rateable value is determined having regard to the antecedent valuation date of 1 April 2008, the valuation must reflect physical facts relating to the property and its locality as at the time the date the assessment is made or amended (called the material day). Paragraph 2

(6) and 2(7) of Schedule 6 to the Local Government Finance 1988 set out the matters which are relevant for this appeal:

> (6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.
>
> (6A) For the purposes of sub-paragraph (6) above the material day shall be such day as is determined in accordance with rules prescribed by regulations made by the Secretary of State.
>
> (7) The matters are—
>
> (a) matters affecting the physical state or physical enjoyment of the hereditament,
>
> (b) the mode or category of occupation of the hereditament,
>
> (c) …………,
>
> (cc)…**……….,**
>
> (d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and
>
> (e) the use or occupation of other premises situated in the locality of the hereditament.

Decision and reasons

47. As previously mentioned, the parties had greatly assisted me by identifying those facts that were agreed, what matters could not be agreed and had also agreed alternative valuations depending upon how I determined the legal points.

48. In the event that I determined that the mothballed state of the rateable assets and locality should be disregarded and the Hereditament assumed to be in repair, the appropriate valuation would remain at £5,340,000 RV and the appeal would be dismissed. However, if I upheld the Appellants' argument that the reality principle should apply and determined that the property should be valued in its mothballed state, the list entry would be reduced to £534,000 RV with effect from 1 April 2013.

49. On behalf of his client, Mr Wilcox stressed that the Appellants fully accepted that the power station was a hereditament and that the Appellants were in rateable occupation of it. The appeal premises were not vacant as a skeleton staff remained to look after and maintain it for future use. The question he posed was what was its purpose at the material day? It was common ground that the purpose of a power station was to generate power but the appeal property was incapable of generating power on the material day. The property had been mothballed and the period of mothballing was not transient, it was long term around two and a half years. The mode or category of use had changed and so too he argued was the value of that use to the occupier. In paragraph 152 of the Lands Tribunal's judgment in *Williams (VO) v Scottish & Newcastle* [2000] RA 119, it said;

> *The conclusions that we have come to can be stated shortly. The rebus sic stantibus rule identifies for the purpose of valuation the hereditament, the physical changes which may be made to it, and the mode or category of occupation. The rule rests on the concept that what has to be determined in rating is the value to the occupier of his occupation of the hereditament, measured by the rent on an assumed yearly tenancy. In carrying out a valuation under the rating hypothesis the following assumptions are to be made of the hereditament:*
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> *(a) That the hereditament was in the same physical state on the material day. Alterations which the hypothetical tenant might make to the hereditament may be taken into account, if taken overall, they are minor. All other prospective alterations to the hereditament are to be ignored.*
> *(b) That the hereditament can only be occupied for a purpose within the same mode or category of purpose as that for which it was occupied on the material day. Any prospective change of use outside that mode or category is to be ignored. In determining to what mode or category a particular use belongs it is the principal characteristics of the use and the methods of valuation commonly applied by rating surveyors to which regard must be had; and shops, offices and factories serve as examples. Some uses may not fall within any such broad category, however, and are regarded as sui generis.*

50. The Lands Tribunal's judgment in *Williams v Scottish & Newcastle* was subsequently upheld and endorsed by the Court of Appeal.

51. Whilst I understood why Mr Wilcox referred to *Williams v Scottish & Newcastle* the facts in that case were completely different to the appeal

before me. In *Williams v Scottish & Newcastle* two units within a central Milton Keynes shopping area were occupied as public houses which had a lower rateable value, in comparison to the neighbouring shops and restaurants, which were assessed on a different basis. The Valuation Officer unsuccessfully argued that the two units should be valued vacant and to let. On that basis, there would be potential shop or restaurant tenants in the market who would be prepared to pay a higher rent, if the premises were stripped back to a shell in readiness for alternative retail use. The Valuation Officer's argument was rejected because the works that were required to convert the public houses to retail use were not minor and therefore to value the public houses on a basis would offend the principle of *rebus sic stantibus.* In modern day parlance, it would offend reality.

52. However, *Williams v Scottish & Newcastle* sheds no light on whether the hypothetical landlord would be prepared to accept a significantly reduced rent from his tenant, who for the time being chooses not to use the property for the purpose for which it was built but still wishes to retain it for possible future use, as opposed to looking to find a new tenant who would be prepared to pay the open market rent to use it as a power station. Given these circumstances, I think it highly unlikely that the hypothetical landlord would accept a lower rent from the tenant to mothball his property, if it meant a significant reduction in his rental income and a lower return on his investment.

53. Both parties relied on the Supreme Court's judgment in *Newbigin v Monk* [2017] 1 WLR 851 their respective Counsel arguing that it supported their client's case.

54. On behalf of the Respondent, Mr Williams argued that it was accepted that a hereditament existed and no scheme of works was in progress. As the property had not undergone any form of physical change and the rateable elements had not altered, the statutory hypothesis meant that I was required to value the property on the assumption it was in repair. It being accepted that the works required to reverse the mothballing process and remove all of the silt from the pipes and the culverts were economic for the hypothetical landlord to undertake.

55. Mr Wilcox for the Appellants tried to persuade me that before the statutory repair assumption came into play, I had to determine what the mode or category of use of the hereditament was for the property that I was required to value. He criticised Mr Williams' submission contending that it was a re-run of the Valuation Officer's argument in *Jackson (VO) v Canary Wharf Ltd* [2019] RA 141 which the Upper Tribunal had rejected

out of hand. The *Monk* case had wider implications than the Valuation Officer was prepared to admit and it was not only applicable to buildings under re-development.

56. In paragraph 22 of *Monk,* 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 paragraph 2(1)(b) if the reality is otherwise. In my view, this is a helpful approach where a building is undergoing redevelopment. But it is subject to the useful practice, which I discuss in para 31 below, of reducing the rateable value of a building, which is incapable of rateable occupation because of such temporary works, to a nominal figure rather than removing it from the rating list altogether.

57. Mr Wilcox argued that if Mr Williams was right in his interpretation of *Monk* stage 2 in paragraph 22 did not need to be there.

58. Before I considered the mode or category of use, I thought it useful to refer to the Upper Tribunal's judgment in *David Jackson (VO) v Canary Wharf Ltd* [2019] UKUT 136 (LC) which followed the Supreme Court's judgment in *Newbigin v Monk* [2017] 1 WLR 851. In paragraphs 18 to 20 in *Canary Wharf* the Upper Tribunal outlined the background to *Monk*

> 18. Monk concerned an office building in Sunderland, known as Avalon House, which had previously been occupied by a single tenant. When the building became vacant the owners, S J & J Monk ("SJJM"), entered into a building contract for the renovation of Avalon House to make it suitable for use either as three separate office suites or as a building in single occupancy.

It was contended by the valuation officer that the building should be assumed to be in a state of complete repair. The Court of Appeal agreed with the VO and reversed the decision of the Tribunal (Mr A J Trott FRICS) which had been that the hereditament should be entered in the rating list at a rateable value of £1 with the description of “building undergoing reconstruction”.

19. In paragraphs 3 and 4 of the Supreme Court’s decision, Lord Hodge described the work comprised in the building contract. It involved the removal of all internal elements, except for the enclosure for the lift and staircase. The cooling system, lighting and power installations, fire alarm system, suspended ceiling, sanitary fittings and drainage connections, raised flooring, and existing masonry walls and metal stud partitions were all to be stripped out. The contract also provided for the construction of new common parts and new communal sanitary facilities. It then envisaged the construction of three new letting areas within the premises with three self-contained electrical distribution circuits and air conditioning and heating systems.

20. On the material day the premises were vacant. The contractors had removed the majority of the ceiling tiles and the suspended ceiling grid and light fittings as well as 50% of the raised floor. The cooling system, electrical wiring and sanitary fittings had been stripped out, and the block walls of the lavatories had been demolished. Plasterboard partitions to form the outline of the proposed communal lavatories and a partition across the floor at the east side of the premises had all been erected and plastered. First fix electrical installations had been completed in the lavatory area and the drainage had been altered to accommodate the new lavatories.

59. Ultimately, after applying the 3 stage test suggested by the Rating Surveyors’ Association, the Supreme Court held that a property that was incapable of beneficial occupation did not constitute a hereditament and therefore there was no basis for applying the repair assumption. Lord Hodge’s explanation was contained in paragraph 25 of the Upper Tribunal’s judgment in *Canary Wharf.*

25. Lord Hodge went on to explain that whether premises were undergoing reconstruction rather than simply being in a state of

disrepair must be assessed objectively. Although the subjective intentions of the owner of a property were not relevant, the valuation officer could have regard to the programme of works which was in fact being undertaken on the property. The facts showed that Avalon House 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." It followed: "… that 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."

60. My understanding was that the Valuation Officer pursued the *Canary Wharf* appeal before the Upper Tribunal because he sought clarification on whether the Supreme Court's judgment in *Monk* merely applied to properties in transition which were undergoing a scheme of works. In *Canary Wharf* the offices had been stripped back to a shell following the vacation of a tenant, so there was no ongoing programme of works. The Valuation Officer was of the opinion that *Monk* did not apply to properties that had been merely stripped in between tenancies.

61. This was evident from Mr Singh's submissions before the Upper Tribunal and his reference to the VOA Rating Manual which outlined the Valuation Officer's approach following *Monk* in paragraph 30.

30. Mr Singh referred to the Valuation Office's own Rating Manual (section 3, part 5, disrepair, practice note 1 - Rating (Valuation) Act 1999). This suggests, at paragraph 8.5, that in cases such as Monk the first question must always be

"*is there a programme of redevelopment /reconstruction underway?" The following proposition is then advanced at paragraph 9.8: "A programme of reconstruction works may include stripping out what was there before. The work undertaken by the building contractors in both stripping out what* *was there before and the new work will constitute the programme. However mere stripping out on its own does not of itself constitute or evidence a programme of reconstruction but rather simple damage, putting the hereditament in a state of disrepair*."

62. The Upper Tribunal, as Mr Wilcox correctly pointed out, completely rejected Mr Singh's arguments on behalf of the Valuation Officer. In paragraphs 34 to 37, the Valuation Officer's approach in *Canary Wharf* was heavily criticised;

> 34. We do not accept Mr Singh's submissions, as they are plainly contrary to the decision of the Supreme Court in Monk.
>
> 35. 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.
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> 36. If premises are not capable of beneficial occupation they are not a hereditament. The only basis on which they may then be included in the rating list is under the convention that allows property temporarily incapable of occupation to remain in the list at a nominal value as a matter of administrative convenience, rather than deleting the entry and creating a new entry when the property once again becomes capable of beneficial occupation.
>
> 37. The VO's acceptance in this case that the appeal property is not capable of beneficial occupation is therefore the beginning and end of the appeal.

63. It was therefore clear from the above that the Supreme Court's judgment in *Monk* had much wider implications than the Valuation Officer accepted. The starting point when a deletion of the entry or a nominal assessment was sought on the basis that the property was incapable of

beneficial occupation was did a hereditament exist? In both *Monk* and *Canary Wharf* the appeal properties could not be used as offices because the premises had been stripped back. The usual features that form part of an office hereditament were missing. Consequently, the Valuation Officer was unable to apply the repair assumptions to what was not there. He therefore had to value the premises having regard to reality principle based on what was there on the material day.

64. In the appeal under consideration, applying the 3 stage test referred to above, it was common ground that a hereditament existed. Therefore, moving on to stage 2, I was required to determine its mode or category of use.

65. The difficulty I had, with accepting Mr Wilcox's argument that the mode or category of occupation had changed, was that physically the power station had not been altered. In his evidence, Mr Goodson explained that he and his staff conducted a number of activities between April and September 2013 to ensure that the plant and equipment was stored for future use. Part of the mothballing process was the removal of all potentially hazardous materials and chemicals. In response to a question, he said that the main discernible difference between when the power station was operational and when it was shut down was the noise.

66. It was trite law that the mere vacation of a tenant leaving a property vacant did not constitute a material change of circumstances and a change in the mode or category of use. A vacant shop was still a shop, a vacant office was still an office. Normally an overt act like conversion works to put the property to alternative use was required to change the mode or category of occupation. For instance an office building converted to a hotel. It was, however, conceded by Mr Holliday that the Valuation Officer would value a former shop as a dwelling, if the existing occupier ceased trading and the whole of the former retail accommodation was used for purely domestic use. He, therefore, accepted that, in some cases, it was not necessary for physical changes to be made to a property before the Valuation Officer would consider valuing a property to reflect an alternative use.

67. To my mind there could be lots of properties where, following the vacation of a tenant, it was sensible to mothball premises whilst a new tenant was sought. Public houses sprang to mind, where I would expect all food and drink areas, including kitchens, to be thoroughly cleaned and any liquid pipes drained if the property was likely to be unoccupied

for several months or even years. If a property becomes unoccupied, the rating list entry would normally remain unaltered.

68. Whilst it was an agreed fact that the appeal property was incapable of generating power on the material day, that did not mean that the statutory repair assumptions were displaced by reality. Most modern offices had the benefit of air conditioning which was reflected by an uplift in the assessment to reflect the value of the air conditioning. If on the material day the air conditioning was not operational, the value attributable to the air conditioning would not be removed from the rating valuation, unless it could be shown that the air conditioning system was beyond economic repair.

69. In the appeal before me, it was accepted that any repair works to reverse the mothballing process and clear the silt from the pipes and culverts were economic to undertake. Had this been an issue in dispute, paragraphs 58 and 59 of the Upper Tribunal's judgment in *Cemex UK Operations Ltd v O'Dwyer (VO)* [2019] UKUT 0106 (LC) provided authoritative guidance on the matter;

> 58. Mr Flanagan submitted that the presence of solidified clinker in the building was disrepair, and we must assume under sub paragraph 2(1)(b) of Schedule 6, LGFA 1988 that the building would be put in repair by the landlord, since there was no evidence that to remove the clinker would be uneconomic. Mr Wilcox quite properly accepted that the presence of solidified clinker constituted disrepair, and that if we were not persuaded by his Kiln 2 argument, there was insufficient evidence to show that, in a 2-kiln scenario, the removal of the solidified clinker would not be economic.
>
> 59. Having rejected the appellant's argument on the material day issue it follows that the solidified clinker must be assumed to have been removed to put the building in a state of repair ready for letting. There is no reason to assume its capacity to be less than its agreed dimensions allow (although Mr O'Dwyer proposed an obsolescence allowance of 30% which we accept). We therefore find Mr Clarke's valuation unsustainable, and prefer Mr O'Dwyer's valuation for this element at £115,998 RV.

70. Another difficulty I had with Mr Wilcox's argument was that I failed to see any discernible difference in how a mothballed property, where a skeleton staff remained to preserve the premises for future use would be valued in comparison to the same type of property where it was simply

left vacant awaiting a new tenant. I was therefore not persuaded that the mothballing process constituted a change of use. Mr Wilcox was invited to provide some authorities to prove his argument and he referred me to the Lands Tribunal for Scotland's judgment in *UK Atomic Energy Authority v Assessor for Highland and Western Isles Valuation Joint Board* [2006] RA 153.

71. The appeal property in *UK Atomic* was the Dounreay Nuclear Research Installation which was predominantly a research facility although there was some energy production.

72. By the material day 1 January 2000, all processing and re-processing of fuel had ceased. This followed an incident on 7 May 1998 when an underground electricity power cable had been accidently severed by a digger. Before then, there had been concerns about the safety of the facility and this incident only served to substantiate those concerns. This was because there was a problem with the back-up electricity supply which caused an unacceptable delay before power could be restored.

73. Ultimately, this resulted in a chain of events which led to the shutting down of all Fuel Cycle Area facilities other than those which were required to maintain the safe condition of the installation. Decommissioning was a lengthy process because it involved the storage and management of nuclear waste. The process was expected to take around 50 years to demolish all of the buildings, except one or two which may be kept for museum purposes, and de-contaminate the land and clear the site for alternative brownfield use.

74. The Lands Tribunal for Scotland held that the ratepayer was not in rateable occupation of the contaminated buildings and therefore these should be zero rated and form no part of the assessment. It was in that context that the Tribunal commented that if the "contaminated" buildings were mothballed for future use (because they were not capable of any beneficial use in the meantime) as opposed to being in the course of demolition it would not affect the outcome.

75. That is why the Tribunal went on to say that there was a clear distinction in principle between redundant buildings which were of no value to the tenant, but it was required to keep them until they were safe to use again or demolish, and buildings which were still required to store the radioactive material. The latter constituted beneficial use and were rateable.

76. This authority does not help Mr Wilcox's argument as it formed no part of his client's case that some or all of the appeal hereditament was not in its rateable occupation. None of the buildings on site were contaminated or unsafe to use, they were merely preserved for future use when the economic climate improved.

77. In view of the above, I determined that there had been no change in the mode or category of use for the appeal property. The mere fact that the Appellants had decided to shut it down and mothball the premises, until the economic climate improved, did not constitute a change in the mode or category of use for the purposes of Paragraph 2 (7) (b) of Schedule 6 to the Local Government Finance Act 1988.

78. Having determined that there had been no change in the mode or category of occupation, it was not necessary for me to consider at stage 3 whether the appeal property was in a state of reasonable repair consistent with its use as a power station because it was accepted that any repair issues would be economic to undertake.

79. Even though Mr Wilcox had failed to convince me regarding the use of the property, his second line of attack was the extent of the hereditament. The parties were in agreement that if the concrete apron and the area above it was not within the hereditament, then the appeal property was incapable of beneficial occupation and therefore the entry would be reduced to £534,000 Rateable Value.

80. The disputed area was the area beyond the sluice gates. The Respondent argued that the Cooling Water Intake Structure (CWIS) was constructed as one structure which formed part of the power station hereditament. This included the culverts, sluice gates and removeable sectional river gates and the apron together with the ancillary components above it. The CWIS operated as a whole and self-contained system, and each part of the system was necessary for its proper functioning. The Apron was put in place to ensure that the various structures were protected and continued to be able to serve their function. There was absolutely nothing physical or geographical that isolated or disconnected the Apron from the remainder of the CWIS, and it was, frankly, impossible to see how applying *Mazars* the line on the map would be drawn to exclude this area from that area including the rest of the CWIS. The area was in fact clearly shown on the plans within the 1952 Deed and was reinforced by a set of bollards within it.

81. The purpose of the concrete Apron was to protect the river bed from scouring. All power stations rely on cooling water intake and without the

Apron the intake of cooling water could be inhibited if the river bed was disturbed.

82. On behalf of the Appellants, Mr Wilcox argued that it was not the Apron that I should be concerned with. The Apron itself was not obstructing the pipes or the culverts. The obstruction was the build up of silt and the sandbank which obstructed the pipes. The sandbank was located on top of the Apron. It was, therefore, the section of the river directly above the Apron, not the Apron itself that was in dispute. Mr Wilcox argued that his clients were not in rateable occupation of this area, because its occupation was not exclusive, as the land was owned by the Crown Estate who had reserve rights over it. In support of his argument, he referred to the Deed of grant dated 14 May 1952 which permitted the Appellants to place and maintain the Apron.

83. Under Clause 6 of the Deed the Crown Estate reserved the right *from time to time and at any time hereafter and without making any compensation to or obtaining any consent from [the Appellant] to use and occupy [the Apron] for such purposes and in all respects in such manner and to execute such works thereon or thereunder and to erect thereon such buildings as [they] shall think proper or expedient nevertheless making due provision for securing the maintenance and efficiency of the said works.*

84. The breadth of that clause, and the extent of the power retained to the Crown Estate under it, was such that the Appellants cannot be said to have exclusive occupation of the Apron. There was clearly a wide range of activities and works which could have taken place in the river above the apron, and whether or not those activities took place, and the nature of them if they did, was entirely a matter for the Crown Estate.

85. Mr Wilcox conceded that the Crown Estate cannot use the area of river in a way that reduces the efficiency of the pipes and culverts but argued that was not the point. There was no dispute that the pipes and culverts were rateably occupied by the Appellants. The issue was whether the river above the Apron was so occupied. The fact that the river had to be kept in a state to enable the pipes and culverts to operate did not mean that the Appellants were in exclusive occupation of the river. By analogy, the landlord of a shopping mall had to keep the concourses in a condition that allows customers to access the shops. However, the individual shopkeepers did not as a result become rateable occupiers of any part of the concourse.

86. The leading authority on the extent of the hereditament was *Woolway v Mazars* [2015] AC 1862. In paragraph 12 of the Supreme Court's judgment, Lord Sumption set out the relevant tests and made it clear that the primary test was geographical;

> I derive from these decisions three broad principles relevant to cases like this one where the question is whether distinct spaces under common occupation form a single hereditament. First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second Bank of Scotland case illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are separate hereditaments. If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed. Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately. Third, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it.

87. As the Apron formed part of the Cooling Water Intake Structure and it was constructed at the same time the geographic test was easily met. On behalf of the respondent, Mr Williams was critical of what he termed an imaginary line by which Mr Norman had divided the hereditament. He argued that the existence of the bollards highlighted the difficulty of drawing a line to exclude the area beyond the sluice gates.

88. Mr Wilcox, therefore, concentrated his line of attack on the basis that his client was not in exclusive occupation of the river above the Apron. Although there was no evidence to show that the Crown Estate had ever interfered with the Appellant's occupation, Mr Wilcox argued that what I should look at was what could happen as opposed to what did happen. He referred to the Court of Appeal's judgment in *Ludgate House Ltd v Ricketts (VO) and London Borough of Southwark* [2019] UKUT 278 (LC) and *Cardtronics UK Ltd v Sykes (VO)* [2020] 1 WLR 2184 which re-established the principle in *Holywell v Halkyn* in support.

89. In effect, Mr Wilcox contended that his client was no more than a lodger because the Crown Estate's occupation was paramount. It was an argument I quickly rejected. The Deed of grant had allowed the Appellants to construct and maintain the concrete Apron. The purpose of the Apron was as I have already said was to protect the river bed and assist the process of abstracting water from the river, for which a separate licence was required from the Environmental Agency. Whilst the responsibility for the maintenance of the Apron rested with the Appellants, the responsibility for river maintenance lay with other regulatory bodies. The abstraction of water was critical because without it, the power station could not function. The Appellants had the exclusive right to abstract water and had constructed the Cooling Water Intake Structure for this very purpose. In my judgment, the Appellants were clearly in rateable occupation of the concrete apron.

90. I, therefore, did not accept Mr Wilcox's argument that it was irrelevant that the Crown Estate had not interfered with the Appellants occupation of the apron. A person could be in rateable occupation of a mooring right and if they moor their houseboat there on a permanent basis, the houseboat would inevitably form part of the assessment. The fact that another regulatory body was responsible for maintaining the waterway on which the houseboat floated was immaterial. I therefore found Mr Wilcox's argument a red herring. In my judgment neither *Ludgate House* nor the *Cardtronics* judgments had any relevance in this appeal.

91. Having found against the Appellants on both the issues in dispute, I dismissed the appeal.

Date: 16 March 2022

Appeal number: 200322757473/257N10

A V Clark - Vice President