THE VALUATION TRIBUNAL FOR ENGLAND

Non Domestic 2010 Rating List appeal; Validity issue; Non Domestic (Alteration of Lists and Appeals) (England) Regulations 2009 SI 2009/2268; *Non-Domestic Rating (Alteration of Lists) and Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England) Regulations 2018 SI 2018/ 1193*; *Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018; Warehouse and Premises; Proposal Invalid.*

RE: Walkers Uk Ltd, Wharfdale Road, Birmingham, B11 2DF and Portfolio Resources UK Ltd, 40 Rushey Lane, Birmingham, B11 2BL

APPEAL NUMBER: 460533389689/285N10

BETWEEN:	Tenneco Walker Ltd	Appellant
	and	
	Mr Dal S Virk (Valuation Officer)	Respondent

PANEL: Mr M Heslop-Mullens (Chairman)
Mr M Nwosu

REMOTE HEARING: 9 December 2021
CLERK: Mr James Massey

APPEARANCES: Mr P Rabbette of Paul Rabbette Ltd representing Tenneco Walker Ltd (Appellant)
Mr T Jackson (Valuation Officer's Representative)

Summary of decision

1. The proposal was found to be invalid.

Introduction

2. This appeal has been brought in respect of the following: The proposal, submitted on 2 April 2019 was on the grounds that "*the properties should be shown as one or more different assessments"* and the detailed reasons were given that *'following the Rating (property in Common Occupation) Act 2018 these assessments should be merged'.*

The proposal requested that the following appeal hereditaments be merged to form a single assessment with Rateable Value (RV) of £440,000 with effect from 26 August 2016.

- Walkers Uk Ltd, Wharfdale Road, Birmingham, B11 2DF ("Walkers"); RV £312,500.
- Portfolio Resources UK Ltd, 40 Rushey Lane, Birmingham, B11 2BL ("Portfolio Resources"); RV £240,000.

3. 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 and 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.

4. Therefore, in pursuance of Regulation (6)(3)(g) the VTE has incorporated "remote hearings" as part of that definition and for the time being as the default option until it is safe to return to normal working. The Tribunal's Consolidated Practice Statement has been amended to reflect this. This hearing was conducted via video conference using Microsoft Teams and the panel was satisfied that both parties were fully able to participate in the hearing.

5. Mr Rabbette appeared on behalf of the Appellant as both Advocate and expert witness. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), Mr Rabbette's declaration of truth included a statement that he was not instructed under any conditional fee arrangement. Mr Rabbette declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and he would comply with this as well as the requirements of his professional body regardless of whether or not the evidence supported the client's case.

6. This document is not intended as a verbatim report of the proceedings nor is it proposed to reproduce in full all of the parties' evidence. The absence in this decision of a reference to any statement or item of evidence placed before me by the parties should not be construed as an indication that that statement or item of evidence has been overlooked by me.

Issue

7. Whilst the proposal was referred to the VTE as an appeal against his refusal to alter the list, the Valuation Officer (VO) has raised the validity of that proposal as a preliminary issue in his statement of case. The substantive issues raised in the appeal can only be dealt with should the panel find that the proposal was valid.

Evidence and submissions

8. Mr Rabbette stated that the Appellant had been in occupation of the site as a whole for around 30 years, during which time it had hived off parts of its premises, and re-occupied others. In August 2016, whilst already in occupation of the Walker premises, the Appellant

took up occupation of the adjoining Portfolio Resources premises. Due to delays in receiving a demand notice from the Billing Authority, and difficulties in identifying the Portfolio Resources premises in the Rating List, it was not possible to make a proposal to merge the two entries in the Rating List into a single entry prior to the closing of the 2010 List on 31 March 2017.

9. It was Mr Rabbette's contention that a further opportunity to make such a proposal has resulted from the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 (the "PICO Act"). He believed that the appeal hereditaments met the criteria of one of the additional types of hereditament defined by this amendment to Section 64 of the Local Government Finance Act 1988.

10. Mr Rabbette referred to an ariel view depicting the configuration of the two hereditaments. He stated that a proposal prior to the implementation of the PICO Act would have failed, as although the two hereditaments were contiguous, there was no internal interconnection between the two hereditaments. He stated that following the enactment of the PICO Act, the hereditaments satisfied the tests to be merged into one as there was no longer a requirement for there to be interconnection between the two hereditaments.

11. Although Mr Rabbette did not dispute the existence of a gate connecting the yards of the two hereditaments, he stated that neither he, nor the staff who had been on the site for around 30 years were aware of this gate, and it was not accessible or in use.

12. He did not consider that the proposal was, as argued by the Respondent, invalid as he considered that it was a 'Relevant Proposal' as defined by the Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England) Regulations 2018 (SI 2018/1193) (the "2018 Regulations").

13. The Respondent's representative, Mr Jackson had provided his statement of case to the Appellant and Tribunal, which contained a copy of the proposal which led to this appeal, and his submissions as to why he considers the proposal to be invalid. Mr Jackson contended that the assessments were interconnected by a gate in the fence which separated their yards. He had provided photographs of the yard taken from Rushey Lane in 2012, 2017 and 2018 which he considered showed that there was intercommunication between the two yards at the material day of 26 August 2016.

14. Whilst he stated that this access would be considered 'poor', it would have been sufficient to allow the merger of the two hereditaments prior to the amendments brought about by the PICO Act. He stated that the amendments to the Non-Domestic (Alteration of Lists and Appeals) (England) Regulations 2009 brought about by the 2018 Regulations provided an opportunity, until 1 January 2020, to seek a merger of hereditaments that are contiguous but not interconnecting and are in the same occupation by making a 'relevant' proposal. However, he argued that a 'relevant' proposal could only be made under these grounds as a result of the coming into force of section 64(3ZA) or 64(3ZB) of the Local Government

Finance Act 1988 and that a 2010 List proposal could not be made against hereditaments which could have been merged prior to the passing of the PICO Act.

Decision and reasons

15. From the submissions it was clear to the panel that the proposal was made on grounds that the subject hereditaments should be merged to form a single hereditament, and this would have been made on ground 4(1)(k) had the proposal been made before 1 April 2017.

16. The panel's understanding of the effect of the final ruling by the Supreme Court in *Mazars* is that unless the properties in common ownership were contiguous and interconnected, they would remain as separate entries in the Rating List.

17. To counter this effect the Non Domestic (Alteration of Lists and Appeals) (England) Regulations 2009 SI 2009/2268 had been amended by The Non-Domestic Rating (Alteration of Lists) and Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England) Regulations 2018 (SI 2018/1193) to allow those affected by the Act to make a proposal to seek a merger of properties that are contiguous but not interconnecting and are in the same occupation or if empty, are all owned by the same owner;

    4.Regulation 4 (circumstances in which proposals may be made) has effect as if—in paragraph (2) after "a proposal" there were inserted "(other than a relevant proposal)";

    after paragraph (2) there were inserted—

    "(2A) A relevant proposal may be made by a person who—

    has reason to believe that the ground set out in paragraph (1)(k) exists; and has reason to believe that the ground relates to any time during which the person was a ratepayer in relation to that hereditament."; and

    after paragraph (3)(a) there were inserted—

    by reference to more than one ground where the ground set out in paragraph (1)(k) is being relied on;".

    "relevant proposal" means a proposal—

    made by a ratepayer on the ground in regulation 4(1)(k) of the 2009 Regulations; which can only be made on that ground as a result of the coming into force of section 64(3ZA) or (3ZB) of the Local Government Finance Act 1988

18. Amendments were made to the regulations by the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 which amended Section 64 of the Local Government Finance Act 1988 to define an additional type of hereditament established by subsection (3) 3ZA-3ZD as follows:-

1 Hereditaments occupied or owned by the same person

(1) In Part 3 of the Local Government Finance Act 1988 (non-domestic rating), in section 64 (hereditaments), after subsection (3) insert—

"(3ZA) In relation to England, where—

(a) two or more hereditaments (whether in the same building or otherwise) are occupied by the same person,

(b) the hereditaments meet the contiguity condition (see subsection (3ZC)), and

(c) none of the hereditaments is used for a purpose which is wholly different from the purpose for which any of the other hereditaments is used, the hereditaments shall be treated as one hereditament.

(3ZB) In relation to England, where—

(a) two or more hereditaments (whether in the same building or otherwise) are—

(i) owned by the same person, and

(ii) unoccupied,

(b) the hereditaments—

(i) ceased to be occupied on the same day, and

(ii) have each remained unoccupied since that day,

(c) immediately before that day, the hereditaments were, or formed part of, a single hereditament by virtue of subsection (3ZA), and

(d) the hereditaments meet the contiguity condition (see subsection (3ZC)),the hereditaments shall be treated as one hereditament.

(3ZC) The hereditaments meet the contiguity condition if—

(a) at least two of the hereditaments are contiguous, and

(b) where not all of the hereditaments are contiguous with each other—

(i) one or more of the other hereditaments is contiguous with one or more of the hereditaments falling within paragraph (a), and

(ii) each of the remaining hereditaments (if any) is contiguous with at least one hereditament that falls within sub-paragraph (i) or this sub-paragraph.

(3ZD) For the purposes of subsection (3ZC) two hereditaments are contiguous if—

(a) some or all of a wall, fence or other means of enclosure of one hereditament forms all or part of a wall, fence or other means of enclosure of the other hereditament, or

(b) the hereditaments are on consecutive storeys of a building and some or all of the floor of one hereditament lies directly above all or part of the ceiling of the other hereditament, and hereditaments occupied or owned by the same person are not prevented from being contiguous under paragraph (a) or (b) merely because there is a space between them that is not occupied or owned by that person."

(2) The amendments made by subsection (1) have effect for financial years beginning on or after 1 April 2010.

19. In essence, the amended regulations removed the requirement for properties in common occupation which were contiguous to be interconnected in order to form a single entry in the List. The additional types of Hereditament created by the new regulations are defined by 3ZA and 3ZB detailed above, and Mr Rabbette argues that the current separate assessments met the criteria of 3ZA and should therefore form a single entry in the List.

20. There is no argument as to whether the hereditaments met the criteria to fall under 3ZA. At the material day of 26 August 2016 they were in the same occupation and used for the same purpose and were contiguous and they were interconnected, albeit with poor access. The crux of this appeal is whether the proposal falls into the definition of a Relevant proposal as described above, which would allow for a proposal under regulation 4(1)(k) of the 2009 Regulations to be made after the 2010 List had closed.

21. Mr Rabbette in his submission had referred to the leading authority regarding the validity of appeals made under the above regulations. The Upper Tribunal's judgment in *Libra Textiles Ltd T/A Boundary Mills Stores and Centric Assets Ltd v Ritchie Roberts and David Alford (Valuation Officers)* RA/47-48/2019 and RA50/2019 (the "Boundary Mills decision")

22. Mr Rabbette went on to state that at the material date, there was no internal interconnection between the two hereditaments, and the gate connecting their two yards would not have been sufficient to merge the two assessments prior to the reversal of *Mazars*. He referred to para 98 of the Boundary Mills decision, which stated that where there was uncertainty as to whether the ratepayer was affected by the decision in *Mazars*, and the new provisions, the point can be argued.

23. Mr Rabbette had also highlighted an email from Nick Cooper at the MHCLG which stated that

"There were various concerns as to whether ratepayers who had not made proposals pre-Mazars or withdrawn proposals in light of Mazars would be compromised. The regs do not have any link or test related to previous proposals so this is not a risk."

24. Having considered the evidence from both parties, the panel determined that the connection between the two yards, although it may not have previously been in use, was in existence at the material day, and therefore the two assessments could have been merged subsequent to the high court ruling in *Mazars.* As no proposal was made before 31 March 2017, the PICO legislation to make a proposal under reg 4(1)(k) after this date does not, in accordance with the Boundary Mills decision allow such a proposal. The assessments for which a merger was proposed, were unaffected by the *Mazars* judgment because there was

interconnection between the two hereditaments and the reversal of *Mazars* (PICO legislation) does not help the Appellant.

25. Whilst it noted the email from Mr Cooper at the MHCLG, the panel was bound by the Boundary Mills decision of the Upper Tribunal in determining whether the current proposal was a 'relevant' proposal and was therefore validly made.

26. As per the Boundary Mill decision (Paras 98 & 99) the panel concluded the proposal was not a 'relevant proposal' as such a proposal could have been made under ground 4(1)(k) of the 2009 Regulations. It therefore found the proposal had been made out of time and cannot benefit from the extended window offered by the amended 2009 regulations.

27. The appeal is therefore dismissed.

Date: 5 January 2022
Appeal Number: 460533389689/285N10