VALUATION TRIBUNAL FOR ENGLAND

2017 Rating List Appeal: Local Government Finance Act 1988; Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 [SI 1992 No 556]; the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 [SI 2009 No 2268]; Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 [SI 2009 No 2269]; Denton & Ors v TH White Ltd & Ors [2014] EWCA Civ 906; *Timothy Taylor v Mayfair House Corporation & Anor* [2016] EWHC 1075 (Ch); *Simpsons Malt Ltd v Jones & Ors (Valuation Officers)* [2017] UKUT 460 (LC); *Gardiner & Theobald LLP v Jackson (VO) [2018] UKUT 0253 (LC)*; *The valuation for the hereditament is not reasonable; disturbance allowance; material day; appeal dismissed.*

APPEAL NUMBER:	CHG100055747	
RE:	(Excl RR Grd Flr) Grd Flr 31-32 Bedford Street, London, WC2E 9ED (the “subject hereditament”)	
BETWEEN:	Pasta Brown Ltd	Appellant
	and	
	The Valuation Officer	Respondent
SITTING:	*Remotely via Microsoft Teams conference call*	
ON:	Tuesday 16 February 2021 at 10:00 hours	
BEFORE:	Mrs X Holt (Senior Member) Ms S Yousef	
CLERK:	Mr W Hamilton IRRV(Dip) A.Inst.Pa	
APPEARANCES:	Mr Austin Marshall of Conneely Tribe for the Appellant Mr Christopher Cates of the Valuation Office Agency for the Respondent	

DECISION and STATEMENT OF REASONS

Summary of Decision

1. The appeal is dismissed.

2. The Tribunal Panel is satisfied –

   (a) there is insufficient evidence to demonstrate any further allowance is warranted; and consequently

   (b) that the Respondent’s valuation of the subject hereditament is reasonable.

Introduction

3. This statement of reasons is not, and does not purport to be, a full verbatim record of proceedings. The Tribunal Panel gave proper judicial consideration to all the evidence and arguments put forward in the course of the proceedings whether or not it is fully set out in this statement of reasons.

<u>*Background*</u>

4. The subject hereditament is a restaurant and premises which was entered into the 2017 non-domestic rating list on compilation (on 1 April 2017) with a rateable value of £129,000.

5. On 9 May 2018, the Appellant submitted a “check” to the Respondent under Regulation 4A of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 [SI 2009 No 2268] (the “NDR Regulations”).

6. On 2 July 2018, the Respondent served notice upon the Appellant under Regulation 4F of the NDR Regulations confirming that the “check” had been completed. It noted that the factual information about the subject hereditament remained unchanged, but that there had been a change in the locality. No change to the subject hereditament’s rateable value was made.

7. On 7 November 2018, the Appellant served a proposal (also known as a “challenge”) upon the Respondent under Regulation 6 of the NDR Regulations. The Appellant’s proposal sought an alteration to the 2017 non-domestic rating list on the grounds that the rateable value for the subject hereditament is incorrect in consequence of disturbance caused by building works to another hereditament in the same building. The Appellant’s proposal seeks for a 25% end allowance, resulting in a rateable value of £97,000 from 16 June 2017 to 31 March 2019.

8. On 22 May 2020, the Respondent served a decision notice upon the Appellant pursuant to Regulation 13 of the NDR Regulations. The decision notice confirmed that the proposed alteration was not well-founded, however, the Respondent had decided to alter the list, otherwise than in accordance with the proposal. The Respondent considered that the rateable value was not reasonable and altered the 2017 non-domestic rating list to show the subject hereditament with a rateable value of £123,000 with effect from 16 June 2017. This represented a 5% allowance in connection with the disturbance caused by the nearby building works.

9. On 7 October 2020, the Appellant served a notice of appeal upon the Tribunal in accordance with Regulation 13A of the NDR Regulations. The Appellant’s appeal continues to contend that the Respondent’s valuation of the subject hereditament is not reasonable.

10. On 23 December 2020, the Tribunal issued to the parties a notice of hearing.

<u>*Remote hearing*</u>

11. On 29 July 2020, the President of the Tribunal issued the COVID-19 Variation of Practice Statement. In that statement, the President has determined, for the purposes of Regulation 6(3)(g) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 [SI 2009 No 2269] (the "Tribunal Procedure Regulations"), that the form of any hearings before the Tribunal would include “remote hearings”. Specifically, the President states that this is to include the use of Microsoft Teams conferencing software. Further, the

President directs that remote hearings would be the default until such time as it is safe for the Tribunal to return to normal practice.

12. In accordance with that Practice Statement, the Tribunal conducted the hearing of these appeals remotely via Microsoft Teams conference call by way of video/audio-link. For the avoidance of any doubt, the Tribunal Panel is satisfied that those present at the hearing were able to fully participate in the proceedings.

Mr Marshall as expert witness

13. Mr Marshall, a member of the Royal Institute of Chartered Surveyors and the Institute of Revenues, Rating and Valuation, appeared on behalf of the Appellant as expert witness. At the commencement of proceedings, Mr Marshall declared that he was instructed under a contingency based fee, a type of success-related fee arrangement. In his declaration, Mr Marshall stated that he understood and accepted that his duty was to the Tribunal in giving his evidence, that he would comply with this duty, and the requirements of his professional body, regardless of whether or not the evidence supported the Appellant's case.

14. Noting the Upper Tribunal's judgment in *Gardiner & Theobald LLP v Jackson (VO)* [2018] UKUT 0253 (LC), the Tribunal Panel nevertheless accepted this expert witness evidence on the above basis because –

    (a) the appeal was not complex;

    (b) to do otherwise would be contrary to the requirements to deal with cases proportionately, avoiding unnecessary formality and ensuring parties are able to participate in proceedings (provided by Regulation 3 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 [SI 2009 No 2269] (the "Tribunal Procedure Regulations")); and

    (c) was nevertheless permissible whether or not it would be admissible in a civil trial (provided by Regulation 17(2)(a) of the Tribunal Procedure Regulations).

15. The Panel therefore considered Mr Marshall's expert evidence and attached such weight to it as it saw fit.

Relevant Law

The non-domestic rate

16. Part III of the Local Government Finance Act 1988 (the "Act") makes provision for the payment of a non-domestic rate in respect of non-domestic hereditaments in England. The rateable value of a non-domestic hereditament, which is used to determine the amount of the rate payable, is defined at paragraph 2(1) of Schedule 6 to the Act (which is commonly referred to as the "rating hypothesis").

17. For these proceedings, it is not necessary to set out all the provisions but suffice it to say that the rateable value of any hereditament is to be taken to be the amount, determined in accordance with the statutory assumptions, equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year, on 1 April 2015 (the "antecedent valuation date").

The material day

18. Matters affecting the physical state or enjoyment of the hereditament and the mode and category of occupation are, amongst other things, taken to be as they were on the "material day". The Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 [SI 1992 No 556] (the "MD Regulations") provides for determining the material day. So far as is relevant for these proceedings, Regulation 3 of the MD Regulations provides –

> ***"3 Material day for list alterations***
>
> *(1) For the purposes of sub-paragraph (6) of paragraph 2 of Schedule 6 to the 1988 Act, the material day shall be determined in accordance with paragraphs (2) to (7) below.*
>
> *…*
>
> *(7) In any other case—*
>
> > *…*
> >
> > *(b) where the determination is with a view to making an alteration to a list compiled on or after 1st April 2005, the material day is—*
> >
> > > *(i) where the alteration is made in pursuance of a proposal, the date on which the VO received a confirmation under regulation 4C of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (as stated in an acknowledgement served by the VO under regulation 4D(1) of those Regulations);"*

<u>*Admissibility of new evidence*</u>

19. Regulation 17A of the Tribunal Procedure Regulations governs the admission of new evidence, which was not included with the notice of appeal. Regulation 17A provides –

> ***"17A Admission of new evidence on an NDR appeal***
>
> *(1) On a NDR appeal, the VTE may only admit evidence that was not included in the notice of appeal or any document accompanying the notice of appeal ("new evidence") if—*
>
> > *(a) that evidence–*
> >
> > > *(i) is provided by a party to the appeal;*
> > >
> > > *(ii) relates to the ground on which the proposal was made; and*
> > >
> > > *(iii) was not known to the part and could not reasonably have been acquired by the party before the proposal was determined under Part 2 of the NDR Regulations; or*
> >
> > *(b) all parties to the appeal agree in writing to the party providing the new evidence.*

20. Additionally, the standard directions applicable to this appeal place further requirements upon a party which seeks for the admission of new evidence. Paragraph 1 and 2 of the standard directions provide –

"Further evidence

1. *No later than* ***four weeks*** *before the date of the hearing, a party must make written application to the Tribunal (with a copy to the other parties) if it intends to include at the hearing any new evidence which:*

   (a) *was not included within the notice of appeal but which all parties have subsequently agreed in writing to include (together with a copy of the written agreement); or*

   (b) *relates to the ground on which the proposal was made, was not known to the party and could not reasonably have been acquired by the party before the proposal was determined under Part 2 of the NDR Regulations.*

2. *The application must specify the reasons for the late application and if under b) above set out:*

   - *Why the evidence was not available earlier;*
   - *When it came into the possession of the party."*

Preliminary issues

21. At the commencement of the hearing, the Clerk to the Tribunal informed the Tribunal Panel of two applications to introduce new evidence from the Appellant's representative; one made on 18 January 2021 and one made on 9 February 2021.

<u>*The 18 January 2021 application*</u>

22. On 18 January 2021 the Appellant's representative emailed the Tribunal additional documents. It contained emails between the Appellant's representative and the Respondent, additional photos, a letter regarding compensation for the works and some additional case law. The Tribunal Panel noted that the Respondent's representative replied on 19 January 2021 and sought for an additional decision of this Tribunal to be included in reply. He orally confirmed this was his agreement to the admission of those additional documents.

23. The Tribunal Panel was therefore satisfied that the Appellant's new evidence, and the Respondent's reply, was admissible under Regulation 17A(1)(b) of the Tribunal Procedure Regulations and allowed it into consideration.

<u>*The 9 February 2021 application*</u>

24. On 9 February 2021 the Appellant's representative emailed the Tribunal additional documents. These were reports showing the rating list entries of hereditaments within the same building as the subject hereditament. The Respondent's representative objected to the inclusion of this new evidence.

25. The Tribunal Panel enquired with the Appellant's representative as to the relevance of this new evidence and the reasons for serving only four days prior to the hearing. The Appellant's representative confirmed that the new evidence is corroborative of fact relating to the end date of the construction works, which are the subject of the appeal. He stated that these had only become available after the completion of the challenge stage as the entries in the list were only agreed later. He stated that he had only noticed these when preparing for the hearing and immediately sent them to the Tribunal and the Respondent. The Appellant's representative also referenced paragraph 263 of the Upper Tribunal's judgment in *Simpsons*

Malt Ltd v Jones & Ors (Valuation Officers) [2017] UKUT 460 (LC) stating that the Respondent should not be entitled to a "windfall" advantage because of a mistake.

26. The Clerk to the Tribunal referred the Tribunal Panel to Regulation 17A of the Tribunal Procedure Regulations, as set out at paragraph 19, above, and the Tribunal's standard directions, as set out at paragraph 20, above. The Clerk also advised the Tribunal Panel that it must have regard to the three-stage test set out in *Denton v TH White Ltd* [2014] 1 WLR 3926 before applying sanctions for any breach in the standard directions. Stage one requires the Tribunal to determine the significance and seriousness of the breach: if the breach is neither, then relief should usually be granted. At stage two the Tribunal must consider the reasons why the failure and default occurred: if the defaulting party has good reasons to explain what happened, relief should usually be granted. Finally, at the third stage, the Tribunal must have regard to all of the circumstances of the case, the need for litigation to be conducted efficiently and at proportionate costs, that the failure to grant relief may leave an incorrect liability and the need to enforce compliance with the rules, directions and orders of the Tribunal.

27. The Tribunal Panel briefly adjourned the hearing in order to consider the admissibility of the new evidence under Regulation 17A of the Tribunal Procedure Regulations and whether any breach of the standard direction had occurred, and if so, whether sanction was appropriate for the breach.

28. Firstly, the Tribunal Panel was satisfied that this new evidence was not available prior to the determination of the proposal under the NDR Regulations. Consequently, the Tribunal Panel concluded that the new evidence was admissible under Regulation 17A of the Tribunal Procedure Regulations.

29. However, the Tribunal Panel considered that the lateness in applying to admit this new evidence constituted a breach of the standard directions, which required such applications to be made at least four weeks prior to the hearing. In considering that breach, the Tribunal Panel considered that it was significant and serious in that it had given the Respondent little time to consider any necessary response. The Tribunal Panel was also not satisfied that the Appellant's representative had a good reason for failing to make the application earlier; the evidence was available to him more four weeks before the hearing and he had clearly been preparing for the hearing at that point as he had served new evidence in 18 January 2021 application. Finally, in considering stage three of the *Denton-test*, the Tribunal Panel did not consider that the Upper Tribunal's judgment in *Simpsons Malt* was a "get-out-of-jail-free-card" in relation to any potential breaches as the Appellant's representative seemed to be using it. But nevertheless, the Tribunal Panel considered that there was no deliberate attempt to wrong-foot the Respondent and that there was a limited volume of new material. Accordingly, the Tribunal Panel resolved to grant the Appellant relief from any sanction and admit the new evidence.

30. In consequence of the late admission of the new evidence, the Tribunal Panel afforded the Respondent's representative with the option of an adjournment to consider the evidence. However, this was declined. Therefore, the Tribunal Panel proceeded to hear the substantive case.

Discussion

<u>*The disturbance*</u>

31. The subject hereditament sits on the ground floor of a building, which mainly consisted of offices. The office parts of the building were subject of redevelopment works to convert it into

a hotel. Helpfully the parties agreed a chronology of key events orally at the hearing as follows:

24 December 2014	rent agreed for subject hereditament at £129,800 per annum
13 September 2016	planning permission granted for the conversion works
16 June 2017	works commenced, including erection of a scaffolding
31 July 2018	scaffolding surrounding the building was removed
6 November 2018	floors 2, 3 and 4 of the hotel were inserted into the rating list
1 April 2018	the remaining floors of the hotel were inserted into the rating list

32. The Appellant's representative contended that there was a significant disruption to the subject hereditament from the noise, dust and interruptions caused by the development works. This included the construction of a roof extension and the erection of scaffolding and hoarding which surrounded the subject hereditament. The scaffolding and hoarding had the effect of obscuring the subject hereditament from the street (although the photographs show that the hoarding was branded with the Appellant's logo, presumably in an effort to make it more visible to the passing public). The Appellant's representative also highlighted that loading and unloading for construction material and waste occurred directly in front of the subject hereditament.

33. The Appellant's representative contended that the starting point must be to consider the passing rent on the subject hereditament. He referred the Tribunal Panel to an agreement between the Appellant and the landlord in which a reduction of £110,000 was agreed to reflect the loss of quiet enjoyment and the reduced rental value of the subject hereditament. This represented a 48.4% reduction in the rent for the period of the works.

34. He accepted that the loss of quiet enjoyment was not relevant to determination of rateable value, but contended that, in conjunction with a reference to the High Court's judgment in *Timothy Taylor v Mayfair House Corporation & Anor* [2016] EWHC 1075 (Ch), that this represented a 28.4% reduction in rental value. *Timothy Taylor* was not a rating case, but a landlord and tenant dispute, in which the Court had awarded a reduction of 20% for loss of quiet enjoyment consequent to works similar to those experienced by the subject hereditament.

35. The Appellant's representative referred the Tribunal Panel to examples of other instances where end allowances for similar disturbances had been granted. In particular, the Tribunal Panel noted, the higher allowances granted at –

    (a) Bst-Grd Flr 376 Strand, London, WC2R 0LR, a restaurant and premises, was granted a 25% end allowance for refurbishment of the building surrounding it, including extensive scaffolding, hording and an external construction lift and loading and unloading took place on a side street; and

    (b) Bst Grd & Mezz Flrs 19 St James's Street, London, SW1A 1ES, a shop and premises, was granted an end allowance of 22.5% for construction works surrounding it.

36. The Appellant's representative invited the Tribunal Panel to consider the real-world compensation and the examples, which in his opinion demonstrated a 25% reduction for the disturbance was warranted. This would result in a reduction in rateable value to £97,212 (say £97,000) for the period of the works 16 June 2017 to 31 March 2019.

37. Contrary to the arguments of the Appellant's representative who was seeking an allowance based upon the overall scheme of works, the Respondent's representative stated that it was only open to the Tribunal Panel to consider the works which remain to be undertaken as at

the material day. The Respondent's representative considered that, by the material day, the works had been ongoing for 10 months and that the heavy lifting of the conversion had already been undertaken. He stated that at the point that the scaffolding was removed, it was plain that the structural alterations would have been completed and that all which remained would likely have been fitting out with the furnishings, such as carpets, beds and light fittings.

38. The Respondent's representative opined that in view of the reduced nature of the works (up to two months of scaffolding and basic fitting out) that the 5% allowance already granted was sufficient to reflect the reduced rental bid which would be brought by the hypothetical tenant.

The material day

39. During the course of the proceedings, it was necessary to clarify the material day. The Appellant had cited in his submissions that the material day was 22 May 2018, whereas the Respondent had stated 9 May 2018.

40. In accordance with his duty under PS9 of the Tribunal's Consolidated Practice Statement, the Clerk to the Tribunal referred the Tribunal Panel to the provisions of Regulation 3(7)(b)(i) of the MD Regulations (as set out at paragraph 18, above), which he read out in the hearing.

41. The Clerk noted that the only dates set out in evidence were the date the check was commenced, 9 May 2018, and the date the check was completed, 2 July 2018. The Clerk highlighted that neither party has identified the date on which the Respondent had received confirmation under Regulation 4C of the NDR Regulations, nor was there a copy of the Respondent's acknowledgement served under Regulation 4D of those Regulations. Consequently, the Clerk advised the material day must be some date between 9 May 2018 and 2 July 2018.

42. On the Clerk's advice, the Tribunal Panel invited the parties' comments on the Clerk's advice, noting that taking any date other than the date the check was commenced, 9 May 2018, would ultimately be a disadvantage to the Appellant's position.

43. Both the Appellant's representative and the Respondent's representative contended, in disagreement with the Clerk's advice, that the material day should be taken as the date the check was commenced. They both cited their professional understanding was that there had been no intention to change the fixing of the material date from that in previous rating lists and that to adopt the Clerk's interpretation would, ultimately, place the material day in the gift of the Respondent. In their opinion, that would be counter-intuitive and lead to perversity.

Decision

The material day

44. Notwithstanding the party's objections to the Clerk's advice, the Tribunal Panel, having reviewed Regulation 3(7)(b)(i) of the MD Regulations, finds that the Clerk's advice was in fact correct. Nevertheless, this leaves the question: what is the material day in this case?

45. For the reasons which become apparent later in this judgment, the Tribunal Panel on balance considered that there was unlikely to be a significant difference in the level of the disturbance between 9 May 2018 and 2 July 2018.

The disturbance

46. The Tribunal Panel agrees with the Respondent's representative that the correct approach is to consider the disturbance caused by works which remain to be undertaken as at the material day. This is what would be reflected in the rental bid by a hypothetical tenant coming fresh to the scene.

47. The Tribunal Panel found there is little evidence which demonstrates what works were actually undertaken after 9 May 2018. For example, there are no schedules of works which evidence the extent of the works which remained. The Tribunal Panel agrees with the Respondent's representative that it is more likely that most, if not all, of the structural works, which would have caused the significant disruption to the subject hereditament, would have been concluded. It is, however, accepted that the scaffolding remained in place until 31 July 2018 and that it was likely that some form of fitting out would have been occurring until the hotel floors were capable of beneficial occupation and entered into the rating list. But the Tribunal Panel is satisfied that this alone was likely to be a minimal disruption, and certainly not a disruption that would warrant and end allowance in the region of the comparable assessments cited at paragraph 35, above. The Tribunal Panel was satisfied that the 5% allowance already granted by the Respondent was a fair reflection of the remaining disruption.

48. In view of the lack of evidence of any significant level of ongoing disturbance after 9 May 2018, the Tribunal Panel is satisfied that the Respondent's valuation of the subject hereditament is reasonable.

49. Accordingly, the appeal fails and must be dismissed.

Appeal Number:	CHG100055747	**Issued:**	15 March 2021