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]; John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area [1949] 1 KB 344; *Scottish & Newcastle Retail Ltd v Williams* (VO) [2001] 1 EGLR 157; *Schofield (VO) v RBNB* [2008] RA 121; *Newbigin (VO) v SJ &J Monk* [2017] UKSC 14; *Jackson (VO) v Canary Wharf Limited* [2019] UKUT 136 (LC); *Colour Weddings Limited v Roberts (VO)* [2019] UKUT 0385 (LC); *The Valuation for the hereditament is not reasonable; beneficial occupation; strip out works; appeal allowed.*

APPEAL NUMBER:	CHG100066507	
RE:	J P D Financial, First Floor 1 Marlborugh Park, Harpenden, AL5 1NL (the "subject property")	
BETWEEN:	Vortex Designs Ltd	Appellant
	and	
	The Valuation Officer	Respondent
SITTING:	*remotely via Microsoft Teams conference call*	
ON:	Tuesday 16 February 2021 at 14:30	
BEFORE:	Mrs X Holt (Senior Member) Ms S Yousef	
CLERK:	Mr W Hamilton IRRV(Dip) A.Inst.Pa	
APPEARANCES:	Mr Stephen Mummery for the Appellant Mr Mike Tozer of the Appellant Mr David Walker of Valuation Office Agency for the Respondent	

DECISION, STATEMENT OF REASONS and ORDER

Summary of Decision

1. The appeal is allowed.

2. The Tribunal Panel is satisfied –

   (a) that the subject property is not capable of beneficial occupation with effect from 20 March 2018; and consequently

(b) that the Respondent's valuation of the subject property is unreasonable; and

(c) that the subject property must be shown in the 2017 non-domestic rating list from that date with a rateable value of £1.

Introduction

3. This statement of reasons is not, and does not purport to be, a full verbatim record of proceedings. The 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.

Background

4. This appeal has been brought pursuant to Regulation 13A of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 [SI 2009 No 2268] (the "ALA Regulations"). The appeal challenges the Respondent's decisions that the Appellants' proposal (also known as a "challenge" under the "check, challenge, appeal" framework) was not well-founded.

5. The Appellants' proposal sought an alteration to the 2017 non-domestic rating list on the grounds that the rateable value for the subject property is incorrect in consequence of a material change in its physical state on 20 March 2018. The change physical state was the commencement of works to strip out the subject property, ready for redevelopment into domestic accommodation.

Remote hearing

6. 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.

7. 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.

The Appellant's representative

8. At the commencement of the hearing, the Appellant's representative confirmed to the Tribunal that he is a retired chartered surveyor acting on behalf of the Appellant as a friend. He is acting 'pro bono' without any success related fee and was cognisant of his duty to the Tribunal.

Relevant Law

9. 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”).

Material Day

10. 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. Regulation 3(4) of the MD Regulations provides that the material day is the on which a hereditament ceases to exist. Regulation 3(7)(b)(i) of the MD Regulations provides, in relation to the 2017 rating list, that the material day is, when making an alteration in consequence of a proposal the date on which the Respondent received a confirmation under Regulation 4C of the ALA Regulations: this date has not been produced by the parties in evidence.

11. The substance of the Appellant’s argument turns on the subject property having ceased to be capable of beneficial occupation (and thus ceased to be a hereditament). However, the Appellant’s proposal made on the grounds that there was a change to the subject property, which made the rateable value incorrect, rather than that the hereditament had ceased to exist. The Tribunal Panel notes, that at the time of making the proposal, the Appellant was unrepresented and would not have appreciated the difference in the grounds.

12. But in any event, the Tribunal Panel was satisfied that there would have been no material difference in the physical state of the subject property between the date the Appellant contends the subject property became incapable of beneficial occupation, 20 March 2018 (which would be the material day if established under Regulation 3(4) of the MD Regulations), or any such later date before the making of his proposal on the 8 January 2019 (which would be the material day is established under Regulation 3(4)(b)(i) of the MD Regulations). Accordingly, this technical point appears moot.

Discussion

13. The Appellant’s representative commenced his submissions by referring the Tribunal Panel to the ingredients of rateable occupations established in the judgment of Tucker LJ in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344. Those ingredients are actual occupation, beneficial occupation, exclusive occupation and occupation which is not too transient. The Appellant’s representative conceded that the Appellant was in actual occupation of the subject property, had exclusive occupation of it and that his occupation was not transient. However, he challenged as to whether or not the Appellant had beneficial occupation of the subject property.

14. The subject property was located within an area where a general development order had been made permitting the Appellant to convert the subject property from a commercial property into a domestic one, without the need to apply for full planning permission. In February 2018 the Appellant applied for prior approval to undertake the conversion under the general development order, however, it required that works commenced prior to March 2018. Accordingly, the Appellant commenced stripping the subject property. The Appellant’s representative contended that, as a consequence of the works to strip out the subject property, it was no longer capable of beneficial occupation.

15. Included within the Appellant’s written evidence was a document produced by Clague Architects, which summarised the works undertaken at the subject property prior to the 22 March 2018 and provided some photographs. The “scope of the works” was described as:

“Commencement of conversion works at 1 Marlborough Park.

Works undertaken prior to the 22nd March 2018

Scope of works :

Removal of all loose office fixtures and fittings including blinds signage etc

Removal of all office partitions walls and sub divisions

Strip of our fall false ceilings

Removal of all office lighting

Removal of all floor finishes

Removal of kitchen facilities

Removal and capping off of electrical services

Retention of fire alarm and emergency lighting only"

The photographs on the same document showed some of the progress described.

16. The Appellant's representative relied upon the Supreme Court's judgment in *Newbigin (VO) v SJ &J Monk* [2017] UKSC 14. In particular, he drew the Tribunal Panel to paragraph 23 which states –

> *"23. How does a valuation officer ascertain that premises are undergoing reconstruction rather than simply being in a state of disrepair? The subjective intentions of the freehold owner of a property are not relevant to the reality principle. The matter must be assessed objectively. But, in carrying out that objective assessment of the physical state of the property on the material day, the valuation officer can have regard to the programme of works which is in fact being undertaken on the property. It is clear on the UT's findings of fact, which I have summarised in para 4 above, that on 6 January 2012 the premises 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. If the works are objectively assessed as involving such redevelopment, 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."*

17. The Appellant's representative also referred the Tribunal Panel to the Upper Tribunal's judgment in *Jackson (VO) v Canary Wharf Limited* [2019] UKUT 136 (LC). In that judgment, the Upper Tribunal concluded that it mattered not whether there was a scheme of works for the transition of the hereditament into something else, but that once the hereditament was incapable of beneficial occupation, it was no longer hereditament liable to a rate.

18. The Appellant's representative highlighted to the Tribunal Panel that, following the commencement of the works, there was no planning consent for the subject property to be used as an office. He referred the Tribunal Panel to the judgments in *Scottish & Newcastle*

Retail Ltd v Williams (VO) [2001] 1 EGLR 157 and *Colour Weddings Limited v Roberts (VO)* [2019] UKUT 0385 (LC), amongst others. These cases all drew on the thread that the subject property could no longer be occupied within the mode and category of an “office and premises” because of the loss of planning consent for that use.

19. The Respondent’s representative view of the works stripping out the subject property were minimal and only constituted a “soft strip”. He contended that the subject property could easily be put back into its use as an office, which wouldn’t be physically or financially prohibitive, citing that only ceiling tiles has been removed. He noted that an empty shop is still a shop, therefore and empty office, such as the subject property, should still valued as if it were an office.

20. The Respondent’s representative distinguished the circumstances of the subject property from that in *Jackson (VO) v Canary Wharf Limited* on the basis that the subject hereditament was not rendered incapable of beneficial occupation based upon his view of the extent of the works.

21. The Respondent’s representative also referred the Panel to the Lands Tribunal’s judgment in *Schofield (VO) v RBNB* [2008] RA 121. In that case, the loss of a licence to sell alcohol was not deemed to be sufficient to alter the mode and category of the hereditament. He equated that to the current case and the loss of planning permission to use the subject property as an office.

22. The Respondent’s representative invited the Tribunal Panel to examine the “real world” of what had occurred at the subject property. He stated that the subject property, being on the first floor of an office block, was “soft stripped” three years ago, the ground floor was still in occupation as an office. He questions how it would be fair and equitable to remove the subject property on this basis.

Decision

23. As was set out in the Supreme Court’s judgment in *Newbiggin v Monk*, and in the Upper Tribunal’s judgment in *Jackson (VO) v Canary Wharf Limited*, the question of beneficial occupation is not answered by considering how easily the hereditament may be put back into use. The correct question is, at the material day, is the hereditament capable of beneficial occupation? Notwithstanding the contentions regarding planning consents, the Tribunal Panel is satisfied this case turned on whether or not the works undertaken to the subject property were sufficient to make it incapable of beneficial occupation.

24. Noting the extent of the works undertaken, as described at paragraph 15, above, and in particular the capping off of the electrical supply, the Tribunal Panel was satisfied that the subject property was no longer capable of beneficial occupation following the commencement of the stripping out works. Based upon the at finding alone, the Tribunal Panel concluded that the appeal is successful and must be allowed.

25. The Respondent’s representative clearly found it inequitable that the subject property could be rendered incapable of beneficial occupation and left undeveloped for the length of time it has. However, the length of time a property is incapable of beneficial occupation is not a relevant consideration before Tribunal in determining.

Order

26. The Tribunal orders –

(a) the Respondent shall alter the subject property's entry in the 2017 non-domestic rating list to show it with a rateable value of £1 with effect from 20 March 2018; and

(b) the Respondent shall comply with this order within two weeks.

Appeal Number: CHG100066507 **Issued:** 15 March 2021

Appeal fee refund

Where an appeal is successful (either in part or in full) a refund of the fee paid in bringing the appeal will be arranged provided there is no application to the President of the Tribunal for a review of the Tribunal's decision. The refund will take around six weeks to process.