THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 list appeal; The valuation for the hereditament was not correct; Mode and Category of use; Base rate; Tone £m^2 ;comparable properties; Lotus and Delta v Culverwell (VO) and Leicester City Council [1976] RA 141; Appeal allowed.

Re: 17 – 23 Elizabeth Street, London SW1W 9RP

APPEAL NUMBER: CHG100100814

BETWEEN:	QOOT BC	Appellant
	and	
	Mr Andrew Ricketts (The Valuation Officer)	Respondent

BEFORE: Mr M Heslop-Mullens

CLERK:	Mr Duncan Adamson	
REMOTE HEARING 2	19 July 2021	
PARTIES PRESENT	Mr Tom Emlyn–Jones	Appellant's representative (Advocate and Expert Witness)
	Mr Chris Cates	Respondent's representative

Summary of decision

1. The appeal was allowed. I determined that the mode and category of the appeal property is a shop and the valuation should be determined as such.

Introduction

2. The Tribunal Business Arrangements provide that a hearing will normally take place before a panel of two Members of the Tribunal, including at least one Senior Member. However, the arrangements also provide that a Senior Member may sit alone to avoid a postponement of the hearing where a second Member of the Tribunal is unable to sit.

3. In respect of this hearing, another Member of the Tribunal was unable to sit. I am therefore satisfied that, in order to avoid a postponement of the hearing, I am authorised by the Tribunal Business Arrangements to hear and determine this appeal sitting alone.

4. The appeal was brought in respect of 17-23 Elizabeth Street, London SW1W 9RP (the appeal property). It is of masonry construction and set over three floors and located in Belgravia.

5. This is a 2017 Rating List appeal and the rateable value of the property is £151,000 with effect from 1 April 2017.

6. The appellant sought for the appeal property to be assessed in the mode and category of a shop and not as a restaurant as asserted by the Valuation Officer.

7. The challenge decision notice was dated 22 October 2020. The Notice stated that the challenge was not well founded as the rating list entry was considered reasonable and no alteration to the list was made.

8. 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.

9. 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.

10. Mr Emlyn-Jones appeared on behalf of the appellant in a dual role as advocate and as expert witness. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), his declaration of truth included a statement that he was instructed on a contingency fee basis. He 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.

11. I accepted this expert witness evidence on the above basis as the appeal was not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations and was allowable due to the Tribunal's rules on admissibility of evidence (regulation 17(2)(a) where the Tribunal can admit evidence whether or not it would be admissible in a civil trial). I therefore considered the expert evidence and attached such weight to it as I saw fit.

12. This is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the evidence presented was fully considered by me before coming to my decision. Consequently, the absence of a reference to any statement, or item of evidence, should not be construed as it having been overlooked.

Issue

13. Whether the appeal property should be valued in the mode and category of a restaurant or as a shop.

Evidence and submissions

14. The evidence bundle comprised all of the documents exchanged between the parties as part of the challenge process: Valuation Officer's challenge case decision notice; rental evidence summaries; appellant's challenge submission; photographs and location plans of the appeal property and comparable assessments and email exchanges between the parties.

15. The respondent stated that the original planning application in June 2016 to the City of Westminster described the premises as a restaurant and sought the extension of trading hours to 10pm as A3 use class i.e. as a restaurant. Further, that he was advised by the appellant that the rent had been set because the property had been marketed as a restaurant. A later planning application made in July 2018 also declared the use of the premises as A3.

16. The respondent also relied on photographs of the premises showing, in his opinion, that it was being used as a restaurant. Further, that he had made various assumptions that the rent free periods were to accommodate the fit out costs normally associated with a restaurant rather than a shop. For these reasons, the respondent contended that the property was indeed a restaurant and was therefore assessed in the correct mode and category.

17. Mr Emlyn-Jones, the appellant's representative, asserted that the premises had never been used as a restaurant but had always been used as a shop by the occupier, Mr Dominique Ansel, a patisserie baker. The premises were more in the mode of a coffee shop such as Costa. Further, the actual trading hours were 8am to 8pm and these were those of a shop and not a restaurant.

18. He submitted five examples throughout the country where a change in the mode and category of use had resulted in a substantial reduction in rateable value. This was to demonstrate, in his opinion, the importance of the correct mode and category being used.

Address	Use before	Use after	RV before	RV after
Unit LO52, Dartford	Shop and premises	Restaurant and premises	£450,000	£140,000
Units 6-9, Swindon	Office and premises	Kennel and premises	£18,250	£5,900
1A Pepper Road, Stockport	Gym and premises valued on an office basis	Gym and premises	£21,500	£11,000
26-28 Mount Row, London	Offices and premises	Car showroom and premises	£240,000	£100,000
56-58 Clerkenwell Road, London	Shop and premises	Workshop and premises	£30,000	£20,000

19. Mr Emlyn-Jones asserted that whatever the history of the property it was actually used as a shop and not a restaurant and therefore contended that the appeal property ought to be assessed at an unadjusted rate of £660m^2 rather than as a restaurant at £700m^2.

Decision and reasons

20. The main issue in dispute was the mode and category of the premises.

21. I was presented with evidence of the rent payable on the property at £700,000 per annum with effect from 1 April 2016. However, this was a stepped rent with the first year being rent free, year 2 at £170,000 and years 3 to 5 at £175,000 respectively. This analysed to £722m^2. This analysed rent level is more akin to that of a restaurant than a shop at current rates but this does not necessarily indicate the actual trading use of the premises.

22. The previous use of the premises was that of a shop, a restaurant and an office. However, again, I found that this does not necessarily indicate the actual trading use of the premises.

23. I found that it is not unreasonable for a new business such as Dominique Ansel to pay a rental amount above the shop market rate for his first business in the capital and the country. In fact, this may well have been a factor in the business eventually becoming overstretched and, subsequently, recently going into liquidation. The respondent submitted comparable rents in respect of Café Nero at Ground Floor 6-10, Elizabeth Street and 61, Elizabeth Street as at restaurant levels and that these were similar to that of the appeal property's rent levels. However, again, I found that this does not necessarily indicate the actual trading use of the properties.

24. I also found that the planning permission for part of the premises was A1, a shop, and part was A3, a restaurant. I did not find that this was a determining factor for the actual use of the property. Once planning permission is granted, I was satisfied that the landlord may well have wanted to keep the premises registered as A3 usage as this may have been more useful to him in the long term in the centre of London.

25. The respondent had stated that all properties are valued "vacant and to let", the actual use of the property by an occupier may not change the way it is valued and he would only look at alternative uses and values if a property had undergone significant alterations. However, the respondent had not inspected the premises and could not provide any evidence as to whether there had been any significant alterations made. I could not, therefore, attach any weight to this argument.

26. I was, however, persuaded by the appellants references to examples of the change of mode and category where it was clear that despite the class of use stated for a property it was apparent that it was trading under a different class of use and therefore required to be assessed under that new mode and category.

27. I was presented with evidence of the sales of the types of products on sale in the premises and found that the principal business was the selling of pastries and cakes. This accounted for 86% of sales and 94% of sale items. The remainder were items that may be considered more akin to sales in a restaurant but were not of sufficient volume for me to consider the premises as a restaurant. Restaurant type meals were clearly not being prepared or sold and I am aware that Dominique Ansel is renowned as a baker and not a restaurant owner. I found this to be compelling evidence that the property was trading as a shop.

28. I also considered the opening hours of the premises being between 8am and 8pm. I am satisfied that they are much more akin to those of a shop rather than as a restaurant. Restaurants do not normally open first thing in the morning, that would be indicative of a shop selling morning coffees and breakfast products. Restaurants do not normally remain open all day and restaurants do not normally close at 8pm, a time normally considered to be prime trading time for a restaurant.

29. In appeals of this nature the burden of proof rests on the appellant to prove his case for a reduction. I concluded that the appellant's representative had provided sufficient evidence to justify his claim that the premises were trading as a shop and not as a restaurant and that the mode and category of the assessment be regarded as such.

30. I was therefore satisfied that the property should be assessed in the mode and category of a shop.

Order

31. The Tribunal orders, pursuant to Regulation 38 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, S.I. No. 2269 2009, that the Valuation Officer, within two weeks of the date of this order, shall alter the 2017 list in respect of 17 – 23 Elizabeth Street, London SW1W 9RP to show the entry as a shop and not a restaurant with a rateable value of £88,000 with effect from 1 April 2017.

32. A refund of the paid fee will now be arranged (Regulation 13E of the NDR Alteration of Lists & Appeals Regs) provided there is no review of the Tribunal's decision. The refund will take around six weeks to process.

Date: 31 July 2021

Appeal number: CHG100100814