THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 list appeal; food kiosk; motorway service area; rental evidence; turnover rents; tone of the rating list; level of value; comparable properties; appeal dismissed.

Re: Kiosk 4 Beaconsfield Services, Windsor Road, Beaconsfield, Bucks, HP9 2SE

APPEAL NUMBER: CHG100109617

BETWEEN:	Movingfeast Ltd T/A El Mexicana (represented by Altus Group)	Appellant
	and	
	Ms D Bunyan (Valuation Officer)	Respondent

PANEL: Mr R White (Senior member)
Mrs F Higgin

CLERK: Mrs A Sloan

REMOTE HEARING: 10 June 2021

PARTIES PRESENT: Mr A Hair (Appellant's representative)
Ms N Johnson (Respondent's representative)

Summary of decision

1. The appeal was dismissed. The panel made no change to the appeal property's existing assessment of £56,000 rateable value (RV), effective from 1 April 2017.

Introduction

2. 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.

3. 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. The hearing was conducted via Microsoft Teams and the panel was satisfied that all parties were fully able to participate in the hearing.

4. Mr Hair appeared on behalf of the Appellant in a dual role of advocate and 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.

5. The panel 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). The panel therefore considered the expert evidence and attached such weight to it as it saw fit.

6. The appeal was brought in respect of Kiosk 4 Beaconsfield Services (the subject property). The subject property was a food kiosk located in the amenity building at Beaconsfield Services. The motorways service area (MSA) was opened in March 2009 and was the largest MSA in Europe at that time. The services are located at junction 2 of the M40 motorway, four miles from junction 16 of the M25. The services are operated by Extra.

7. This was a 2017 Rating List appeal challenging the compiled list entry. The proposal was submitted by the Appellant's representative on 27 June 2019, against the 2017 RV assessment of £56,000, seeking a reduction to RV £16,500. The challenge decision notice refusing a reduction was dated 22 December 2020.

8. The antecedent valuation date (AVD) for all 2017 list rating appeals is 1 April 2015. As this appeal concerned a challenge to the compiled list entry, the material day was 1 April 2017.

9. 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 the panel before coming to a decision. Consequently, the absence of a reference to any statement, or item of evidence, should not be construed as it having been overlooked.

Issue

10. The facts of the property and its measurements were not in dispute. The sole issue before the panel was the correct rate per m^2 for the subject property. Mr Hair sought a rate of £1000/m^2, Ms Johnson defended the existing rate of £3400/m^2.

Evidence and submissions

11. The evidence bundle provided to the panel comprised all of the submissions exchanged between the parties as part of the challenge process.

12. Mr Hair argued that the tone applied to the subject property was excessive and disputed that the passing rent on the kiosk and its neighbours was an open market rent on which the valuation could be based. He referred to kiosks located at Cobham MSA, a busy service area on the M25 also operated by Extra, and highlighted that the valuations there were

significantly lower despite the better location. He stated that in the 2010 rating list the kiosks and shops at Beaconsfield were valued on a similar basis but in the 2017 list the kiosks were valued on a much higher rate per m^2. He pointed out that this meant an increase of 119% between lists for the subject property.

13. Mr Hair also referred to assessments in Hale Leys shopping centre, where he argued that kiosks in this location are valued lower than shops, yet this position was reversed at Beaconsfield services. He stated that the Appellant rents kiosks at both Beaconsfield and Cobham services and referred the panel to the difference in tone applied in each area (£3400/m^2 at Beaconsfield and £1850/m^2 at Cobham).

14. Mr Hair stated that the rents on the subject property and its three neighbouring kiosks were out of kilter with the rest of the building and highlighted that a fifth kiosk was valued at £2000/m^2. He stated that the retail shops within the building were valued at between £650-£1000/m^2 and he felt that the best comparable on which to value the subject property was Unit 10a, a restaurant measuring 38m^2 and valued at £1000/m^2. He therefore asked the panel to reduce the subject property's RV to £16,500, based on £1000/m^2.

15. Prior to her submission, Ms Johnson addressed a preliminary point mentioned in the Appellant's evidence, although it had not been specifically referred to by Mr Hair in his presentation. Mr Hair had acknowledged the kiosk assessments at Cobham had been reviewed during the challenge stage of this dispute and the VO had provided further rental evidence to support the increase in tone applied there (£1850/m^2). He alleged that the VO had not advised him of his right to inspect this further evidence. Ms Johnson informed the panel that she had sent an email to Mr Hair providing details of the four kiosks at Cobham and the revised valuations. She stated that her email advised of the right to inspect and was acknowledged by Mr Hair with no request to inspect the rents. Mr Hair made no further comment on this issue.

16. Ms Johnson explained that the rent paid on each kiosk at Beaconsfield services comprised of an initial Base Rent and Turnover Rent provisions. Rent is payable at the higher level of the Base Rent for a specified percentage of sales, so the trigger for the Turnover Rent mechanism depends on the level of Base Rent specific to each kiosk and whether or not that level is exceeded by the Turnover Rent formula. She informed the panel that the Base Rent agreed on the subject property was £55,000 from November 2012 for a term of 15 years with no break clauses. The Turnover Rent had not been triggered since the lease began and therefore the rent paid at the AVD of 1 April 2015 was £55,000. The subject property measured 16.5m^2 and, based on the passing rent, the unit price of £3400/m^2 resulted in an RV of £56,000.

17. Ms Johnson confirmed that the four food kiosks in the same location as the subject property were also valued on the same tone and their rents were similar. All four kiosks were rented on a Turnover Rent basis, but none had triggered the Turnover mechanism in their lease. The subject property's lease and that of Kiosk 3 were agreed in November 2012. The rents for Kiosks 1 and 2 were agreed in September and February 2015 respectively.

18. Ms Johnson explained that retail units at Extra service areas were all let on the same Turnover Rent basis, so the situation was the same at Cobham services. As such there were no conventional leases to compare. She stated that the fifth kiosk at Beaconsfield, valued at £2000/m^2, referred to by Mr Hair was not located in the same part of the building as the subject property and kiosks 1-3, and it was a different type of occupier, so not directly comparable. Ms Johnson argued that rents on kiosks 1-4 at Beaconsfield all analysed to a

similar amount and therefore the same unit price had been used on all four valuations. She considered the passing rent at the AVD for the subject property was closely reflected in the existing valuation of £56,000 and asked the panel to dismiss the appeal.

Decision and reasons

19. In arriving at the rateable value of £56,000 Ms Johnson relied on the passing rent on kiosk 4 in 2015. Mr Hair did not consider that the rent was reliable since the rent was based on a turnover lease that meant that the rent was not an open market rent. Mr Hair had based his value on comparable properties and tone.

20. This fundamental difference between the parties was carefully considered by the panel. Regrettably neither Ms Johnson or Mr Hair had provided a detailed explanation setting out the legal and other reasons for their interpretation of using or not using the turnover rent and its reliability and limitations.

Panel's consideration of Mr Hair's proposed Rateable Value

21. Mr Hair did not consider that the base rent on the subject property was reliable evidence since the rent was not an open market rent. The panel's consideration of this issue is dealt with later in its decision.

22. Mr Hair's support for his proposed rate of £1,000/m^2 and a rateable value of £16,500 was based on his contention that the rate should reflect his view of the relationship of shop and kiosk rates together with tone both at Beaconsfield and Cobham MSAs. The evidence supporting his view was as follows:

23. *Evidence relating to the Hale Leys Shopping Centre* - The purpose of the Hale Leys shopping evidence was to demonstrate that kiosks are typically valued at a lower rate than shops. The panel accepts Ms Johnson's criticism that this evidence relates to a shopping centre and not a MSA, they are different and distinct and one cannot necessarily apply shopping centre evidence to a MSA.

24. *Tone evidence from Cobham MSA* - The Cobham MSA is close to the Beaconsfield MSA and both are operated by Extra who is the landlord for all the units, including the kiosks. All the leases at both Beaconsfield and Cobham are turnover leases.

25. Cobham is the busiest MSA in the UK, given its location on the M25 close to both Gatwick and Heathrow airports. All the kiosks there have turnover leases like the kiosks at Beaconsfield. Mr Hair considered that the highest kiosk rents would be at Cobham given it is the premier MSA in terms of size and activity, which meant that the Beaconsfield kiosk rents would be expected to be lower than those at Cobham.

26. Mr Hair said that the Cobham kiosks were valued at a tone of £1,850/m^2, having been uplifted from a lower rate of £1,150/m^2, whereas the Beaconsfield kiosks were valued at £3,400/m^2 i.e. 184% higher. He noted that Cobham kiosks and shops were valued at the same rate, unlike at Beaconsfield where kiosks were valued substantially higher than shops.

27. Ms Johnson explained that the Cobham kiosks were valued on the same basis as the Beaconsfield kiosks i.e. by reference to base rent, so the valuation basis was consistent and that comparison of value between the two MSA sites would be misleading. Having reviewed the evidence, the panel agreed with Ms Johnson's assessment. However, Ms Johnson did

not deny that Beaconsfield kiosks were valued substantially higher than Beaconsfield shops or that Cobham kiosks and shops were valued at similar values.

28. Mr Hair ‘s other evidence was that the rateable value for the appeal property had increased by 119% between the 2010 Rating List and the 2017 Rating List and this was not reflected in the general trend across MSA units including Cobham. The panel’s view is that each Rating List stands alone since they are separated in time and differences in valuation and other factors. The panel considered that the relative movement between the two Rating Lists was not relevant to determining rateable values for the 2017 Rating List.

29. *Comparison of kiosks 4 at Beaconsfield and Cobham MSAs* – The Appellant rents a kiosk at each service area and both are identified as Kiosk 4. The leases at both are turnover leases. The Beaconsfield lease was dated November 2012 and had an initial base rent of £55,000. The Cobham lease was dated October 2012 and had an initial base rent of £45,000.

30. Kiosk 4 at Beaconsfield had a rate of £3,400/m^2 and with an area of 16.5m^2 the rateable value was £56,000. Kiosk 4 at Cobham had a rate of £1,850/m^2 and with an area of 20.28m^2 the rateable value was £37,500.

31. The Beaconsfield base rent was £55,000 with an analysed rent of £3,333/m^2. The Cobham base rent was £68,768 with an analysed rent of £2,086/m^2, which seems to indicate that the turnover provisions applied.

32. The panel’s interpretation of this evidence was that the Appellant, in open market negotiations, agreed a higher initial base rent value at Beaconsfield, which seemed to contradict Mr Hair’s assertion that Beaconsfield would be less attractive than Cobham. The panel did note that the base rent at Cobham had increased whilst the Beaconsfield base rent had remained static.

33. *Stand Back and Look Review* - Mr Hair had adopted the valuer approach of stand back and look when considering the rateable value of the appeal property.

34. In his view the rateable value of £56,000 for kiosk 4 and the other kiosks valued at a rate of £3,400/m^2 seemed substantially out of line with other properties on the Beaconsfield MSA and did not seem to fit into the broad range and pattern of assessments in other MSA localities including Cobham.

35. For example, one Beaconsfield kiosk was valued at £2,000/m^2 and shops within the Beaconsfield MSA had values ranging from £650 to £1,100/m^2, these values were substantially lower than the rate of £3,400/m^2 for the other kiosks.

36. The panel accepted Mr Hair’s point might on the face of it appear valid, but it had to be remembered that the turnover leases and rents had been agreed in open market negotiations.

37. *Proposed Rate* - Mr Hair proposed a rate of £1,000/m^2 for Kiosk 4 that resulted in a rateable value of £16,500. He considered that the highest rate for a kiosk would apply at Cobham, as it was the busiest MSA. The rate applied at Cobham was £1,850/m^2. Mr Hair had based his valuation on the rate used for Unit 10a so as to be in line with shops at Beaconsfield and he

considered that an appropriate rate for kiosk 4 at Beaconsfield would be £1,000/m^2, a reduction of 46%.

38. The problem was that the starting point for this analysis was that the Cobham rate of £1,850/m^2 was based on the analysed rent using the base rent under turnover leases. If this approach was acceptable for Cobham values why should it not apply for Beaconsfield?

39. Whilst understanding that Mr Hair had sought to bring the kiosk rate into line with shop rates based on his assessment of the relationship between kiosks and shops, the kiosks were food kiosks, not retail shops or restaurants.

<u>Panel's consideration of Ms Johnson's proposed Rateable Value</u>

40. *The Kiosk 4 Rent* - Ms Johnson explained that kiosks 1 to 4 were all food kiosks with turnover leases. Neither Ms Johnson nor Mr Hair had submitted the lease or leases as evidence. The key rent details for kiosk 4 were stated to be:

- A 15-year lease from November 2012 with no break clauses.
- An initial base rent of £55,000 that increases annually to 75% of the previous year's total rent.
- Turnover rent is 15% less base rent.
- Total rent is base rent plus turnover rent.
- The turnover element is only triggered once an agreed level of turnover is reached, otherwise only the base rent is paid
- In 2015 £55,000 was paid.

41. *All Kiosks Rents* - All the kiosks are new lettings and the rent for all the kiosks is determined by base rent and turnover rent provisions. Rent is payable at the higher level of the base rent for a specified percentage of sales, so the trigger for the turnover rent mechanism depends upon the level of base rent specific to each kiosk and whether or not that is exceeded by the turnover rent formula. In no case has the initial base rent been increased since turnover additions have not been triggered. All the kiosks were in the same mode and category of occupation and were directly comparable.

42. *Proximity to AVD* - The AVD for the 2017 Rating List is 1 April 2015. Since the lease for kiosk 4 was dated November 2012 this was 29 months or nearly two and half years before the AVD. The economic and other factors between these two dates would have been very different. No evidence was presented as to why this rent should be given significant weight. The panel agreed that the kiosks rents agreed in 2015 could be given more weight given their proximity to AVD.

43. *Assumptions as to the hypothetical tenancy* - The term 'rateable value' is defined in paragraph 2(1), Schedule 6 to the Local Government Finance Act 1988 (as amended):

> *"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".*

44. *The hypothetical tenancy -* The rateable value is a notional annual rental value attributed to a property on the basis of certain assumptions. The valuer is required to determine the annual amount of rent which, if the property were vacant and available for letting on the open market, it would attract for a tenancy from year to year. The tenancy is a notional, or hypothetical one, not based on the actual characteristics of the landlord or the tenant (if there are a landlord and a tenant) or the terms of any tenancy to which the property may be subject.

45. *Relevant Case Law -* The Lands Tribunal judgment in *Lotus and Delta v Culverwell (VO)* LVC/376/1975 provides authoritative guidance on the weight to be attached to rental and assessment evidence. The rent on the subject property was considered to be the correct starting point but, where available, rents on similar properties were also to be taken into account. Assessments on other comparable properties may also be relevant. All of the evidence could then be weighted.

46. *The Turnover Lease -* The panel accepts that turnover rent is a form of rent in commercial leases. What needs to be decided is whether the passing rent under the turnover lease satisfies the statutory requirement that it is "*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*".

47. A turnover rent arrangement is clearly different to the usual commercial leases whereby a tenant will pay a fixed amount of rent for a fixed term. Assuming there are no other factors affecting the rent agreed by the landlord and tenant it would be considered an open market rent.

48. Neither party stated that the terms of the turnover lease required the tenant of kiosk 4 to pay an open market rent and an additional turnover rent, which seemed to make commercial sense to the panel since why would a tenant pay more than an open market rent? Instead the tenant pays a base rent plus a turnover rent. The initial base rent in this case is a fixed figure.

49. This seemed to establish that the base rent is not an open market rent and to indicate that the base rent would be lower than an open market rent. Whether the base rent represented some proportion of an open market rent was unclear. Turnover rent is not a fixed sum rent; it is based on an annual calculation. There is no expert valuation unlike a rent review and any revised rent would not necessarily represent an open market rent for the period. There seemed nothing in the lease to prevent the rent being in excess or below prevailing open market rate for the premises.

50. As the panel observed during the hearing, the kiosk turnover rents had the potential for being a self-sustaining level of value given the nature of the turnover leases, which was not

subject to any reality check in the open lettings market. Whilst the panel did not have sight of the lease it seemed likely that it contained provisions that would not normally be found in a fixed rent lease.

51. *Panel's Interpretation of the Statutory Basis* - The statutory basis on which the rateable value of an hereditament is to be determined is taken to be equal to the rent at which the hereditament might reasonably be expected to let from year to year on certain statutory assumptions. Rent is in the singular and suggests that the rent that the hereditament is to be let from year to year should be unvarying.

52. *Valuation Tribunal for England (VTE) Decision for 2010 rating List* – Ms Johnson had, in her exchanges with Mr Hair, introduced a VTE decision from 2017 on a group of hereditaments in the Beaconsfield Services (appeal numbers 041019821886/001N10, 041024656520/541N10 and 041025356538/541N10).

53. The decision of any VTE panel is not binding on another VTE panel. This panel does not have the benefit of all the evidence submitted at that hearing but had carefully read and considered the decision.

54. The key features of the decision could be summarised as follows. This case was a 2010 Rating List appeal concerning units 4 and 6 at Beaconsfield MSA as well as another property, a pub, not within the amenity building. The issue of whether the turnover lease rents on units 4 and 6 were open market rents was not argued by the Appellants or considered by the panel.

55. Unit 6 was a turnover lease and the Appellant's representative argued that the base rent should be used to value the property, which equated to a rate of approximately £650/m^2. The panel uplifted this base rent by 10% to reflect the rateable elements of a fitted unit. Having taken into account other factors the panel decided a rate of £750/m^2 was appropriate for unit 6.

56. On unit 4 the panel did not find the rental evidence passing on this unit useful in arriving at a decision because there were in effect two rents passing on this unit, one the rent under the turnover lease and the second the lease between the landlord and franchisor. The panel preferred to rely on settlement evidence and decided that a rate of £700/m^2 should apply that reflected the unit's size and position having taken account of the unit 3 rate of £600/m^2 and £750/m^2 for unit 6.

57. In the opinion of this panel, the previous panel found the base rent reliable and based their decision taking account of this evidence.

58. *Reliance on Passing Rent on Kiosk 4* - The panel's conclusions are:

- Two of the kiosk leases were agreed in 2012, including the lease for kiosk 4, and are considered too distant from the AVD so less weight could be given to them. Two of the kiosk leases, 1 and 2, were agreed in 2015, so in close proximity to AVD and could be given weight.
- All the kiosk leases had been agreed in open market negotiations.
- The initial passing rent and subsequent passing rents on all the kiosks were not open market rents and were not equivalent to the statutory basis for determining rateable value.

- Turnover rents were not open market rental transactions but were indicative of the value of occupation to the occupier.
- Since there were no open market rents at Beaconsfield, there was no test as to the reasonableness of the base rents in determining rateable value.
- The rating hypothesis did not state that it was imperative to rely upon open market evidence, but rating case law dictated that open market evidence was the best evidence.
- The courts have placed high regard on rents agreed in the open market that reflected the importance of the vacant and to let principle within the rating hypothesis
- It was accepted that these were rents and therefore regard could be had to them. However, their nature and the circumstances in which they came to be agreed meant that the issue was what weight should be attached to these rents?

59. *Panel's Decision* - The panel did not accept many of the points made by Mr Hair or Ms Johnson as evidenced above. The panel was disappointed that neither party had submitted a detailed explanation as to why weight and the amount of weight that should or should not be given to the passing base rent since it would have assisted the panel.

60. All the evidence related to MSA sites that are operated by Extra and all the leases are turnover leases. The panel would have expected that evidence from MSA sites where traditional fixed rent leases were adopted would have been presented. The lack of such evidence meant there was no comparison of turnover rents and fixed rents for similar units, which could have assisted in determining how turnover rents could be adjusted to the statutory basis. The Valuation Officer might consider that such evidence would not be of assistance, but the panel was not given an explanation as to why turnover rents alone are considered satisfactory when determining rateable value.

61. The panel was not persuaded by the approach adopted by Mr Hair in determining rateable value. There were rents both on the Beaconsfield kiosk 4 and the adjacent kiosks. The rents were turnover rents on the Beaconsfield kiosks in the same way as there are turnover rents on the Cobham kiosks. The panel could not understand why Cobham evidence should carry more weight than Beaconsfield evidence, the same applied to the tone evidence.

62. Ms Johnson's rateable value relied on the passing rent on kiosk 4 at Beaconsfield and the rents passing on the other adjacent kiosks. The panel may have misunderstood how Ms Johnson viewed the passing rent but the impression given was that the passing rent was effectively equivalent to rateable value and Ms Johnson seemed less concerned about how close the kiosks rents were agreed to the AVD and the weight that should be given to such evidence. It would have been beneficial if compelling evidence supporting this position had been presented. If the base rent is below the rateable value definition as the panel believes it would have expected to see a rental adjustment to convert the base rents to rateable values.

63. The panel does not consider that the passing turnover rent is equivalent to rateable value. Theoretically the base rent would seem to be below rateable value. The date the lease was agreed on kiosk 4 was too remote from the AVD to be given significant weight. However, the rents on the two kiosks agreed in 2015 could be given weight. The panel recognised that the 2012 rents and 2015 rents were broadly the same.

64. The difficulty for the panel given the evidence presented was in determining the rateable value of the appeal property. In the panel's opinion, whilst not the best rental evidence,

turnover rent is a basis for determining whether the rateable value is reasonable. Since there were no open market rents, turnover rents could not be tested. The panel's view was that the kiosk base rent was likely to be below open market value. The panel did not ignore this potential variance, but it had no evidence to enable it to assess what, if any, difference there was.

65. Whilst the panel was satisfied that the turnover rents were not the same as the rateable values, it concluded that in the absence of any other evidence a rateable value of £56,000 for kiosk 4 was reasonable. There was no evidence on which to base an adjustment of the turnover base rents to more accurately reflect rateable value.

66. The appeal is dismissed.

Date: 21 June 2021
Appeal number: CHG100109617