THE VALUATION TRIBUNAL FOR ENGLAND

2017 rating list appeal; preliminary issue on Respondent compliance; café and premises; material change in circumstances; material day; impact of nearby building works; end allowances; appeal allowed in part.

RE: 25 Huntriss Row, Scarborough, Yorkshire YO11 2ED ("the subject property")

APPEAL NUMBER: CHG100210946

BETWEEN:	Joseph and Allison Ferns (Trading as Le Café Jardin) and	Appellants
	Jo Moore (Valuation Officer)	Respondent

PANEL: Mr M Smith (Senior Member)
Mr S Hooberman

CLERK: Mrs A Sloan

HEARING: Remote hearing No.1 on 14 April 2022

APPEARANCES: Mr P Clarkson of Lambert Smith Hampton (for the Appellants)
Ms S D'Arcy (Respondent's representative)

Summary of decision

1. Appeal allowed in part. The panel reduced the entry in the rating list to £13,750 with effect from 13 March 2019.

Background and preliminary issue

2. This appeal was lodged on 9 November 2021, on the basis that, following the proposal made in relation to the material change in circumstances at the subject property on 5 May 2020, no decision was issued by the Valuation Officer (VO) within the prescribed 18 months. In such circumstances, an appeal can be lodged with no requirement to pay the usual fee.

3. Both parties were notified of the hearing date on 4 February 2022 and provided with the Tribunal's standard directions. The directions do not require any action from the parties regarding disclosure, unless either seek to introduce further evidence that was not shared during the Challenge stage following the proposal. Any new evidence must either be with the

agreement of the other party, or an application made no later than four weeks before the hearing for the matter to be given judicial consideration. On 29 March 2022 Mr Clarkson sent an email to the Tribunal providing copies of some email exchanges between him and Ms D'Arcy, some additional photographs, a copy of the Traffic Management Plan and a revised valuation. As this was considerably less than four weeks prior to the hearing, comments were sought from Ms D'Arcy who confirmed that she had no objection to the inclusion of these items in the hearing evidence bundle. The panel therefore accepted the late evidence.

4. Mr Clarkson raised a preliminary issue regarding the VO's status and ability to participate in proceedings. Following advice from the clerk that the VO was not barred from participating in the hearing, Mr Clarkson provided the panel with an extract from the VTE President's decision regarding evidence on the 2019 hearing of *Extra Mech (Services) Ltd v VO* [appeal number CHG10063118], where the VO was criticised for seeking to introduce further evidence. In that case, the VO had issued two decision notices, one to the ratepayer and one to the ratepayer's representative. The decision notice issued to the ratepayer contained additional information not included in the decision issued to the representative and the President found that the VO could not provide additional information not previously disclosed during the Challenge process in its decision notice. Mr Clarkson considered that, because the VO failed to issue a decision in the subject appeal, it could not be correct for Ms D'Arcy to be allowed to comment on the content of the Appellant's submissions.

5. Whilst the panel noted Mr Clarkson's issue, it did not find the *Extra Mech* decision of assistance in this matter as the VO was not seeking to introduce further evidence in the subject appeal. Ms D'Arcy explained that a decision notice was issued, slightly outside the prescribed 18-month timeframe, which she accepted was invalid and was not seeking to introduce it into these proceedings. Mr Clarkson had, in fact, sought to introduce a further email exchange along with other documents after the usual deadline set out in the Tribunal's standard directions but the VO had not objected and so there was no need to consider that application further.

6. The clerk explained that the panel had no jurisdiction over matters that occurred prior to the appeal being lodged and therefore could issue no sanctions for the VO's failure to serve a decision notice on time. The penalty for that failure was that the VO could not submit any evidence unless by agreement with the Appellant. The standard directions state at paragraph 10. "*Any appellant failing to comply with these Directions may find their appeal struck out. If the respondent fails to comply with these Directions, it may be barred."* The panel therefore concluded that it could only issue sanctions if a party had failed to comply with the Tribunal's directions and there was no breach of the directions put forward by either party in this case. The panel found that the VO was not barred and was entitled to comment on the evidence placed before the panel by the Appellant's representative. She could ask questions of him but could not introduce any new evidence of her own.

Issue

7. The issue before the panel was the impact on the subject property of adjoining building works concerning the redevelopment of the former Scarborough Constitutional Club and the end allowance to be applied.

Evidence and submissions

8. Mr Clarkson stated that he was appearing as both advocate and expert witness in these proceedings and he was appointed on a contingency fee basis. In giving expert evidence, 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 his client's case.

9. The panel accepted this expert witness evidence on the above basis as the appeal is not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 and is 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). It was therefore appropriate for the panel hearing the evidence to consider the 'expert' evidence and assess what weight, if any, to give it in the context of the matters at issue before it.

10. The panel was supplied with the evidence provided by Mr Clarkson to the VO during the challenge stage. As detailed earlier in this decision, some late documentation and a revised valuation were also provided. Mr Clarkson explained that he had made a separate proposal regarding the compiled list entry, which resulted in a reduction in Rateable Value (RV) to £15,500, and the rating list was altered after his challenge regarding the material change in circumstances (MCC) was lodged.

11. Ms D'Arcy stated that the current compiled list entry included a 5% end allowance to reflect the fact that the subject property is masked from the street. She had made an offer to increase the end allowance to 10%, reflecting both the masking and the further nuisance from scaffolding erected outside the neighbouring building resulting in an RV of £14,750.

12. Mr Clarkson's original valuation when making his challenge sought a reduction to £8,000 RV, including end allowances at 5% for masking plus 40% for noise, dust, scaffolding and disturbance from the nearby works. Following receipt of Ms D'Arcy's offer, he revised his valuation to £11,500, including 10% for masking and reducing his 40% allowance to a 20% allowance for the disturbance from the works.

Decision and reasons

13. Paragraph 7(b)(i) of the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 (SI1992/556) sets out the Material Day on which the physical situation at the property must be considered. It is not necessary to set out the full provisions here, but the Material Day is set as the date on which the VO received the Check, to confirm the accuracy of the information about the property, from the Appellant under regulation 4C of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009. Both parties were in agreement that the material day for this appeal was 19 March 2019. Mr Clarkson confirmed that the effective date for any reduction would be 13 March 2019.

14. The subject property is a café which operates during daytime hours and is located immediately adjacent to the former Scarborough Constitutional Club (SCC). Mr Clarkson explained that Premier Inn acquired the SCC with a view to creating a 90-bed extension to its site on Falconers Road. The panel understood that scaffolding was in place at the material day of 19 March 2019, covering the front of the former SCC, which had listed building status, and obscuring the subject property from view along the street. Mr Clarkson

acknowledged that the major works began in January 2020, when piling for foundations began and work to stabilise the party wall was required. However, he mentioned the VOA rating manual which he stated made reference to large projects having an 'ebb and flow' to the works and that the valuer should make a judgement at the beginning of the scheme as to the level of disruption. The relevant extract of the rating manual was not available to the panel in the evidence pack and Ms D'Arcy stated that valuers must be cautious not to look back with hindsight at the works. She pointed out that consideration must be given to what information was available to the hypothetical tenant and landlord on the material day when negotiating the rent.

15. During questioning, the panel established that on the material day of 19 March 2019 there had been no demolition work and the former SCC was in reasonable condition. The project began in March 2019 with scaffolding being erected but the piling works did not commence until January 2020. Mr Clarkson confirmed at the hearing that the project had not yet been completed, partly due to the restrictions in place during the COVID-19 pandemic and partly because the construction company went into administration in December 2021. The subject property was closed for a four-week period in January 2020 while the contractors carried out work inside the property to secure the party wall.

16. The panel could see from the photographs taken in March 2019 that the scaffolding on the former SCC clearly presented a nuisance to the subject property and obscured it from the street. Trading figures were provided for the period January 2016 to March 2020. When comparing January to March 2019 with the same months in earlier years, the panel noted a slight reduction in trade, but not a significant amount. January 2020 showed a much lower figure than in previous years but the panel appreciated that the subject property was closed for four weeks during that month. The total for all months of 2019 was just over £7,000 less than in the preceding year, representing less than 5% drop in trade.

17. Mr Clarkson had provided a number of examples where end allowances were given in both the 2010 and 2017 rating lists for disruption from development works. The amount of allowance varied from 10% to 50% but the panel noted that none of the assessments referred to were in Scarborough. Although the panel accepted the principle of awarding end allowances to reflect temporary disruption from nearby works, it was difficult to compare when the examples were in Leeds, Sunderland, East, South and West Yorkshire, Tyne and Wear and Newcastle Upon Tyne. There was some discussion during the hearing regarding one specific example of 40 Albion Street, Leeds, where a 25% allowance was granted for 'severe street works'. The parties agreed that this related to the works for the Trinity Shopping Centre where the Albion Street property was affected by the development for around eight months. Mr Clarkson contended that, although he accepted that the situation at Albion Street was probably more severe than at Huntriss Row, the Appellants in Scarborough had faced a far longer period of disruption.

18. The panel accepted Mr Clarkson's point that a judgement could be made at the start of the works as to how the subject property would be affected but found that it must consider the facts on the material day of 19 March 2019. Therefore, the panel must assess what facts would be known to the hypothetical tenant, fresh to the scene, and how that information may affect his rental bid for the subject property. There was no scheme of works provided for the panel to demonstrate the planned redevelopment but it was of the opinion that such a large project would have required planning permission and this would have been on public record. On the material day, there was scaffolding in place and it is likely that the landlord would have been aware of the nature of the project. The panel was aware that, although disruption

would clearly be experienced during the works, a new tenant may consider the end result of a 90-bed extension to the hotel to be of benefit to the locality in terms of increased footfall and trade. On the material day, the trade figures did not show a significant fall from earlier years and the panel found that it could only consider the information available to the hypothetical tenant on that date. While it is reasonable to expect the hypothetical tenant would be aware of a scheme of works nearby, no clear evidence was provided to the panel on what timetable for the works was intended, for the duration and level of disruption to be considered.

19. After considering the evidence available, the panel concluded that the hypothetical tenant, after seeing the extent of the scaffolding on the material day, would make reasonable enquiries as to the nature and duration of the planned works. Although the panel noted that Leeds was not the same locality as Scarborough, it accepted that the example at Albion Street demonstrated a 25% allowance for eight months of disruption from extensive building works. Neither party were able to provide further detail on this example, as it had not been disclosed at Challenge stage, so it was of limited use. The panel found that an end allowance was warranted at the subject property as it appeared that the project was intended to involve many months of work, with scaffolding in place on the material day and piling planned for January 2020. However, there was insufficient evidence before the panel to demonstrate the planned duration and the worst of the disruption to the subject property occurred many months after the material day on which the panel was required to assess the impact of the works. The panel determined that the 10% allowance for masking was correct and a further 5% allowance should be awarded to reflect the disturbance from scaffolding and slight fall in trade. This resulted in a revised RV of £13,750 and the appeal was allowed in part.

Line	Floor	Description	Area m²	£/m²	Value £
1	Ground	Retail Zone A	33.43	£261.25	£8,734
2	Ground	Retail Zone B	4.33	£130.63	£566
3	Ground	Retail Zone B	22.51	£111.04	£2,500
4	Ground	Café	29.59	£31.05	£919
5	Ground	Dish wash	17.19	£26.13	£449
6	Ground	Internal Storage	1.50	£26.13	£39
7	Ground	Internal Storage	2.04	£26.13	£53
8	Ground	Kitchen	25.31	£26.13	£661
9	Mezzanine	Public Toilets	11.02	£6.54	£72
10	Mezzanine	Public Toilets	11.35	£6.54	£74
11	Mezzanine	Café	15.40	£13.06	£201
12	First	Café	41.40	£26.13	£1,082
13	Second	Internal Storage	43.10	£10.45	£450
14	Third	Internal Storage	20.40	£5.23	£107
15 Ground Outdoor seating area			15.30	£32.66	£500
				Total	£16,407
				End Allowance – masking 10%	£1641
				End Allowance-Noise, dust, scaffolding, disturbance 5%	£820
					£13,946
				Say	£13,750

Order

20. In accordance with Regulation 38 (4) and (9) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, the Valuation Officer is ordered to amend the entry for 25 Huntriss Row, Scarborough, Yorkshire YO11 2ED in the 2017 Rating List to £13,750 effective from 13 March 2019.

    The Valuation Officer must comply with this Order within two weeks of its making.

Date: 4 May 2022
Appeal number: CHG100210946