THE VALUATION TRIBUNAL FOR ENGLAND

*2017 Rating list appeal – price per m² to be adopted – how rental evidence should be analysed – should rent free period be included in calculation or deducted – should up-lift be included in calculation – period to analyse rent to – weighting of evidence - appeal dismissed*

Re: Unit 22 Stadium Way, Rotherham, S60 1TG

APPEAL NUMBER: CHG100737616

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| BETWEEN: | Frankie and Benny's<br>and<br>Ms J Moore<br>(Valuation Officer) | Appellant<br><br>Respondent |

PANEL: Mr C Taylor (Presiding Senior Member)
Mr N De-Freitas (Senior Member)

CLERK: Mr A Jolly

REMOTE HEARING: Monday 29 January 2024

APPEARANCES: Mr A Dyson of Colliers International representing the appellant
Mr C Preston representing the respondent

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**Summary of decision**

1. Appeal dismissed. Rateable value (RV) confirmed at £139,000 based on a price per m² of £440.

**Introduction**

1. This appeal has been brought in respect of the following: An appeal was lodged by the Colliers International on behalf of the occupier on 12 July 2023 against the Valuation Officer's Challenge Decision Notice of 13 March 2023.

2. This tribunal decision document is not and does not purport to be a verbatim record of proceedings.

3. Mr Dyson appeared on behalf of the appellant as both Advocate and expert witness. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), Mr Dyson's declaration of truth included a statement that he was not instructed under any conditional fee arrangement. Mr Dyson 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.

4. Mr Preston was appearing on behalf of the valuation officer in the dual role of advocate and expert witness.

5. During the hearing the panel member lost audio connection and therefore the hearing was briefly adjourned to allow for the member to re-connect to Teams, upon which his audio connection was restored. The panel restarted the hearing from the point the member lost audio.

**Issues**

6. The issue before the panel concerned the price per m² to be adopted together with how the rental evidence should be analysed and in particular rent-free periods, the length of time for the rent to be analysed over and whether an uplift should be applied for fitting out.

7. The appeal hereditament was a single storey modern restaurant in a prominent position on the established Parkgate Shopping Centre in Rotherham. It was constructed in 2012 and is of steal portal frame construction with south elevation comprising a feature curved glazed wall. Other units occupied within the shopping centre were Nando's, Marks and Spencer's, River Island, Morrisons, Boots, H&M and Costa Coffee which occupied one of two 'drive thru' restaurants. It had been entered in the 2017 rating list at RV £139,0000 based on an overall price per m² of £440 and the appellant's representative was seeking a reduction to RV £119,000 based on an overall price per m² of £375.

**Evidence and submissions**

8. The bundle comprised all of the documents exchanged between the parties as part of the challenge process including the VO's case decision notice, rental evidence and assessment summaries, valuations and the appellant's challenge submission.

**Decision and reasons**

9. Mr Dyson considered the issue revolved around three points which were how to analyse the rent for Nando's from September 2015; how to analyse the September 2012 and September 2017 rents for the appeal hereditament and the differences in values between drive through restaurants and drive to restaurants between the different rating lists. He also stated that an appeal had been heard recently on the Costa Coffee hereditament and that a late application to appeal was being sought on the Nando's hereditament.

10. Mr Dyson stated that the respondent had analysed the Nando's 2015 rent to the break clause at 15 years and had only deducted six months of the nine month rent free period due to three months being the 'norm' for fitting out a unit. He considered that the rent should be analysed over ten years and, as the rent free period was an incentive, the whole nine months should be deducted. He did not consider it was standard practice to provide rent free period for fitting out and that the length of the rent free period depended upon the strengths and weaknesses of the rental market and also the persons negotiating.

11. In support of his contention Mr Dyson provided three different rental scenarios which included the rent set at £30,000 with no incentives; rent of £40,000 but with a £10,000 incentive and a rent of £40,000 but with a three month rent free period, which all ended with

a rent of £30,000 being paid.  He also considered the 10% uplift by the respondent was double counting although he accepted that where a shell unit was taken then additions may be required for fit out but that the additions should only be made on rateable items and not apply to any costs spent on the tenants own personal branding.

12. In his analysis of the Nando's rent over 10 years, amortising the full nine months rent free period, the price per m² was £374.73 and the average of the 2012 and 2017 analysed rents for the appeal hereditament was £373.62.

13. Mr Dyson stated that in the 2010 and the 2023 rating lists the price per m² adopted were higher for drive through restaurants in Parkgate but in the 2017 rating lists values were lower.  He could not understand why in the 2017 rating list drive to restaurants had a higher price per m² than the rating lists either side. He referred to another park where there was both drive through and drive to restaurants, where drive throughs had remained at a higher price per m² through all three rating lists.

14. Mr Dyson considered that £440 per m² was excessive and that the valuation officer had not stood back and viewed the circumstances and had relied upon his analysing of the rental evidence.  He considered that his analysed rents supported £375 per m² and requested the panel allow the appeal and confirm RV £119,000 with effect 1 April 2017.

15. In questions Mr Dyson accepted that one decision did not deduct for the rent free period but that it was only one case and that the Royal Institute of Chartered Surveyors Guidance and the Valuation Office Agency Rating Manual were for guidance. He also stated that fitting out did not always take three months and referred to Costa Coffee on the same development that took six weeks.

16. Mr Preston stated that he had inspected the appeal hereditament and the comparable on 16 November 2023.

17. Mr Preston referred to section 6 of the Local Government Finance Act 1988 which defines RV which 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…

18. Mr Preston referred to *Lotus and Delta* v *Culverwell (Valuation Officer) and Leicester City Council* [1976] RA 141 which provided a hierarchy for evidence with the starting point being the rent on the appeal hereditament and how much weight to place upon that rent followed by rents on similar properties.

19. In analysing the rental evidence, he referred to the Upper Tribunal decision of *Bunyan (VO* v *Acenden Ltd* [2023] UKUT 17 (LC) where it stated that the rent should be amortised over the term of the lease but where there was a break clause the rent agreed could only be guaranteed until the break clause date.  He therefore had analysed the rents on the appeal hereditament and the neighbouring Nando's up until the break clause and not until the rent review.

20. Mr Preston also referred to other case law in support of his method of weighting and analysing the rental evidence which included *Allen (VO)* v *Freemans PLC* [2009] UKUT 240 (LC); *Morrison E F (GP) ltd* v *Central Scotland Assessor* [2004] RA 76*; K Shoe Shops Ltd* v *Hardy (VO and Westminster City Council* [1983] RA 26; *Vines Ltd* v *De Mauny (VO)* RA/3/2008 and *Lamb* v *Minards (VO)* [1974] RA 153 and *Lamb (VO)* v *Go Oudoors Ltd*

[2015] UKUT 366. He also referred to the Valuation Office Agency Rating Manual and the Royal Institute of Chartered Surveyors Guidance documents.

21. Mr Preston stated that when considering a rent free period regard should be had if the rent free period was to allow for the fitting out of a property and stated a period of three months is the usual period for fitting out. If the rent free period was three months it should be ignored when analysing the rent as the tenant derives no benefit from the property whilst fitting out but anything in excess of three months may be deducted. As the property was an empty shell when the occupier took the lease then the rent free period was most likely to allow for fitting out of the unit.

22. Mr Preston also stated that it was standard practice for a 10% uplift to take account of the tenant's fitting out.

23. Mr Preston did not consider that drive through restaurants were comparable to a drive to restaurant as they had different markets and therefore different rental evidence. He confirmed that he had referred to both types of restaurants in a hearing of an appeal concerning Costa Coffee but only to say that they were not comparable.

24. Mr Preston asked for the appeal to be dismissed as he considered RV £139,000 to be reasonable based on his analysed rental evidence.

25. The panel had regard to case law when considering the issues in dispute.

26. The panel first considered the length to analyse the rent over. The appellant's representative had analysed the rent over a period of 10 years up to the second review whereas the respondent had analysed up to the break clause. The appellant's representative stated that his opinion was shared with the other agents representing Costa Coffee and Nando's. The panel noted that case law referred to analysing over the term of the lease or if a break clause is in place then analysed up to the break clause. The panel accepted that as a break clause is in place at 15 years then the rent should be analysed over the period up to the break clause and not up to the rent review, be that the first or second review.

27. As the appeal hereditament was a new building when the lease commenced in 2012 the panel considered there would be a period when the hereditament would be fitted out to the requirements of the appellant. The panel noted that a rent free period had been provided within the lease and accepted the respondent's contention that it was not unusual for a rent free period to be given to allow for the fitting out of a property. The panel considered the respondent not deducting the rent free period in his analysis for the appeal hereditament and only deducting six months of a nine month rent free period in his analysis of Nando's to be appropriate to allow for fitting out of the units.

28. The panel then considered the 10% uplift for fitting out. Whilst the appellant's representative considered this was double counting if the rent-free period had not been deducted when analysing the rent, he provided no compelling statement as to why the uplift should not be used in the calculation. The panel therefore was not persuaded by the appellant's representative that the 10% uplift should not be applied when analysing the rents.

29. The panel noted that a hearing had taken place on Costa Coffee which was a drive through restaurant the week before this hearing. The panel considered that there were different rental markets for drive through restaurants compared with drive to restaurants and therefore

they were not comparable. The panel did not consider comparisons between the two types of restaurants and different rating lists was of assistance. Also, although no decision had been issued at the time of this hearing for Costa Coffee, the panel was aware that another Valuation Tribunal decision was not binding on this panel.

30. The panel having considered the rent free period should not be deducted from the rental analyse, the 10% uplift should be applied for fitting out and that the rent should be analysed up to the break clause, considered the respondent's analyse of the rental evidence was not unreasonable and supported the £440 per m² applied. The panel therefore had not been persuaded by the appellant's representative that RV £139,000 was unreasonable. The panel therefore confirm RV £139,000 and dismiss the appeal.

**Date:** Monday 12 February 2024

**Appeal number:** CHG100737616

**Right of Appeal**

Any party who is aggrieved by the Tribunal's decision, and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this decision notice.