VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating appeals; 2017 rating list; Challenge against Compiled List entry; Warehouse and premises; accuracy of rateable value; disputes respondent's decision to amend effective date of split; appellant contends for a reduced main space rate and allowances for layout and shared facilities; Woolway v Mazars [2015] UKSC 53; *Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018; panel determined that subject property correctly split from a later date; Decision: Dismissed.*

RE: Adj Alistair Mackintosh Ltd, Bannerley Lane, Birmingham, B33 0SL

APPEAL NUMBER: CHG100757024

BETWEEN:	Alistair Mackintosh (Represented by Rabbette Chartered Surveyors)	Appellant
	and	
	Alexandra Morley (Valuation Officer)	Respondent

PANEL: Mrs X Holt (Senior Member)
Miss R Punia (Member)

CLERK: James Massey
REMOTE HEARING: 27 June 2023

APPEARANCES: Mr P Rabbette of Rabbette Chartered Surveyors - for the Appellant.
Mr K McAloon for the Valuation Officer.

Summary of decision

1. Appeal dismissed. The panel determined that Adj Alistair Mackintosh Ltd, Bannerley Lane, Birmingham, B33 0SL ("the subject property") had correctly been merged with Alistair Mackintosh Ltd, Bannerley Lane, Birmingham, B33 0SL ("AML") for the period 1 January 2019 to 22 March 2022.

Introduction

2. This was a 2017 Rating List appeal. The subject property had been entered in the 2017 Rating List as 'Warehouse and premises' at a RV of £52,000 with effect from 1 January 2019 as a result of a split from its neighbouring unit (AML). The material day for this appeal was 1 January 2019.

3. The challenge proposal was submitted by Rabbette Chartered Surveyors on behalf of the owners and was received by the Valuation Officer (VO) on 10 December 2021. It had been made on the grounds that the RV shown in the rating list on 1 January 2019 was wrong and proposed a revised RV of £29,000 with effect from 1 January 2019.

4. The VO issued a challenge case decision notice on 28 October 2022. The VO's decision was to treat appellant's challenge as not well-founded and proposed an alteration of the effective date of the entry of the subject property in the rating list to 23 March 2022 and a reduced RV of £40,500 from this date.

5. The appellant's representatives then appealed the VO's decision to the tribunal on 21 December 2022, on the grounds that the current valuation for the subject property was not reasonable, under Regulation 13A of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009.

6. The subject property is located on a large industrial estate in the Garretts Green area of Birmingham, approximately seven miles from the city centre and five miles from the city's airport. It is also located approximately three miles from the M6 motorway. It was originally part of a larger property known as Alistair Mackintosh Ltd, Bannerley Lane, Birmingham, B33 0SL but following a report from the BA, the respondent split this property to form two separate units, one of which was the appeal property and the other kept the name Alistair Mackintosh Ltd (AML). During the challenge process, the VO received information that caused it to reverse its decision that the original property should be split from 1 January 2019 and the VO subsequently reinstated the original property from this date, but split it again from 23 March 2022 when the subject property was sold.

7. Both parties appeared before the panel in a dual capacity 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), both Mr Rabbette's and Mr McAloon's declarations of truth included a statement that they were not instructed under any conditional fee arrangement. They declared that they understood and accepted that their duty was to the Tribunal in giving their evidence and they would comply with this as well as the requirements of their professional bodies regardless of whether or not the evidence supported the client's or the respondent's case.

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

Issue

9. The issue between the parties concerned the RV of the subject property. Mr Rabbette, for the appellant, considered that the VO's decision to merge the subject property with AML from 1 January 2019 was incorrect in law and that the two properties should remain split as originally determined by the respondent. In the event that the subject property remained split, he sought a reduction in the main space rate to £26.00 per m². He also considered that a 10% allowance was applicable for poor layout of the appeal property and a further 5% allowance for the shared use of its toilet facilities. He also disputed the relativity of 0.5

adopted for the area described by the respondent as a loading bay as he considered it was a canopy and as such should be valued at a relativity of 0.15 of the main space rate. The amendments he sought resulted in a reduced RV of £29,000 for the appeal property.

10. The respondent considered that the subject property should be split from Alistair Mackintosh Ltd but with an effective date of 23 March 2022 when it was sold. Prior to this date he considered the subject property did not exist as it remained part of the single larger unit which existed prior to the erroneous split. From the new effective date of the split, the respondent had adopted a reduced main space rate of £32 per m^2 and applied a 5% allowance for poor layout resulting in an RV of £40,500 with effect from 23 March 2022.

Evidence and Submissions

11. The evidence bundle before the panel comprised all of the evidence disclosed and exchanged during challenge which included rental evidence and its analysis, the parties' skeleton arguments, expert witness statements and photographs of the appeal property and other warehouses in the locality.

12. Mr Rabbette contended that the respondent had incorrectly determined that the subject property did not in effect exist until 23 March 2022. The appellant had made a decision to sell approximately half of its premises in 2018 and arranged for separate utility supplies and had blocked up internal doorways between the two halves of the premises. The billing authority was informed and it issued a report to the VO who subsequently split the premises to create the appeal property with effect from 1 January 2019. He stated the appeal property remained vacant from this date and was being marketed for sale, and a fence was erected in mid-2019 separating the yards of the two newly formed units.

13. Mr Rabbette considered that all pertinent information had been supplied to the respondent at the time when the subject property was split, and he could only assume that the VO had carried out due diligence in carrying out the split at that time. He referred to the Supreme Court decision in *Woolway v Mazars* [2015] UKSC 53, and considered that the subject property failed all three tests set out by Lord Sumption in that decision for identifying a hereditament. He also referred to the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 (The 'PICO Act'), which allowed the merger of non-interconnecting but contiguous units in limited circumstances after the list had been closed. He considered that the subject property did not meet the criteria set out in this Act to allow it to be merged by the VO.

14. With regard to the correct value for the subject property, Mr Rabbette contended that although constructed in the 1970's, it was of a building style more commonly associated with those constructed in the 1950's or 1960's. It had solid brick walls with a reinforced concrete lintel at eaves height, resulting in a fragmented layout and less flexible accommodation than that afforded by more modern steel portal frame construction. He considered that the rental evidence provided by the VO to support the revised tone of £32 per m^2 was for industrial units of a more modern flexible construction, and that the subject property should be valued in line with older buildings. To this end he had provided details of three industrial units which had been valued at £26 per m^2 and were similar in size and construction to the subject property.

15. Mr Rabbete had also referred to three comparable industrial units for which an allowance of 10% had been applied for disability caused by poor layout or fragmentation and considered that these demonstrated that the allowance of 5% proposed by the respondent was

insufficient. Further to the split of the subject property from the rest of the appellant's premises, Mr Rabbette confirmed that the only WC facilities in the whole building were located in the appeal property. He stated that the occupiers of the subject property are required to let staff from AML access to the building to use the WCs, which he considered meant that the occupiers of the subject property would not have exclusive occupation of the whole property. As a result, he considered that a 5% allowance was reasonable, and supported by his assessment evidence of four industrial units in the locality where a 10% allowance had been given for similar shared facilities.

16. Mr McAloon confirmed that Alistair Mackintosh Ltd had been split with effect from 1 January 2019 to form the subject property and AML as a result of a report from the billing authority, which included a plan provided by the appellant. This information was taken in good faith and was considered sufficient to carry out the split without inspecting the subject property. During the challenge process, it was agreed that a joint inspection of the subject property would be beneficial to confirm its construction. This was carried out on 14 September 2022 when it was confirmed that there was no internal communication between the subject property and AML. In an email on 29 September 2022, Mr Rabbette confirmed that the internal access had been bricked up on 23 March 2022 when the subject property was sold. He stated that the internal photograph provided by Mr Rabbette, which had been taken on 17 March 2020, clearly showed internal access between the two properties.

17. As a result of the new information provided during the challenge, Mr McAloon considered that on the material date, there was internal communication between the two properties, which were both owned by the appellant. He also considered that the subject property was being used by the appellant as staff from AML continued to use the WCs in the subject property. Taking account of the authority in *Woolway v Mazars* and the requirements of the PICO Act, he considered that there was nothing to suggest that the subject property and AML should have been created by splitting Alistair Mackintosh Ltd on the material date of 1 January 2019.

18. He considered that from the new effective date of the split, 23 March 2022, the subject property should be valued at a main space rate of £32 per m^2, and that this was supported by analysed rents and the assessment of six comparable industrial units located on the same industrial estate as the subject property or in close proximity. He considered that the subject property was of steel portal frame construction, with masonry cladding covering the steel frame, and he argued that this was demonstrated by the photographs of the interior of the warehouse space taken when he inspected the subject property. On this basis he considered that the appellant's comparable properties were older, and also located too far from the subject property to be comparable.

19. Mr McAloon considered that the layout of the subject property warranted an allowance of 5% as the disadvantages were less severe than those of the comparable properties supplied by the appellant. He did not consider that the 5% allowance sought for shared WCs was warranted, as the WCs were situated within the subject property and there was no evidence that the occupier was obliged to share this facility with the occupier of the adjacent unit. Notwithstanding this, from the revised effective date of the split, the subject property had been sold and had new occupiers. New WCs had been built in Alistair Mackintosh Ltd and there was therefore no shared facilities from this date.

Decision and reasons

20. The appeal property must be valued for the purpose of non-domestic rating on the basis of the rent at which it might reasonably be expected to let from year to year on a number of assumptions (see paragraph 2(1) of Schedule 6 of the Local Government Finance Act 1988). The date of the hypothetical rent was 1 April 2015 (antecedent valuation date or AVD). Matters that affect the physical state or enjoyment of the property or the locality were to be taken as at 1 January 2019 (material day) for this appeal. When assessing the RV of any property, rating law also requires that the property must be assumed to be 'vacant and to let', and in the state set out in Schedule 6 of paragraph 2(7) of the Act, in relation to both the physical nature of the property and its mode or category of use.

21. The panel was aware from the submissions that the first step was to consider whether the subject property existed at the material date for this appeal. If, as argued by the respondent, it did not exist until 23 March 2022, then the panel found that it would not be able to consider the valuation of the merged property, as this was not the subject of the appeal. It found that the appellant, having sold the subject property on the date it entered the rating list, would not be an interested party from this date, and therefore could not challenge its value. However, if the subject property did exist at the material date (ie the initial split with effect from 1 January 2019 was correct), then it was required to consider the correct valuation for the subject property from 1 January 2019 to 22 March 2022.

22. The panel considered the tests expounded by Lord Sumption in the *Mazars*;

"I derive from these decisions three broad principles relevant to cases like this one where the question is whether distinct spaces under common occupation form a single hereditament.

First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second Bank of Scotland case illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are separate hereditaments. If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed.

Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately.

Third, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects.

The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but *by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it.*

23. Mr Rabbette contended that at the material date, the subject property failed all three of the above tests. With regard to the first test, he considered that there was internal access via the corridor off which the WCs were located, however he considered that this area was a 'common part' and therefore access between the subject property and AML was not 'direct' as specified in the test above. The panel however did not consider that this area was a common part, and considered that at the material date, there was direct access between AML and the subject property. Notwithstanding this, it noted from the photograph of the rear of the subject property taken by Mr Rabbette during his inspection in March 2020, that there was no fence separating the yard at the rear of the building. This supported the panel's finding that at the material day, either unit could be accessed from the other without crossing via other property of which the common occupier was not in exclusive possession.

24. The geographical test in itself was sufficient to satisfy the panel that the subject property and AML at the material date, should remain merged. The wording of the judgement was clear that the second test could be used in certain circumstances where the two spaces were geographically distinct. In this case the panel had found that they were contiguous and also had direct internal and external communication. The functional test would only come into play, in the panel's opinion, where the two areas in the same occupation were not contiguous and interconnected, such as a golf course separated by a road.

25. Whilst the panel was aware that the subject property was essentially vacant at the material date, both it and AML were owned by the appellant and part the subject property was being used by the staff from AML. It considered that both properties were in the same occupation even though the subject property was available for let (or sale) at the material date.

26. The panel considered that the PICO act referred to by Mr Rabbette had been brought into force to allow appellants to make a proposal out of time (ie after the list had closed) seeking the merger of contiguous but non-interconnecting hereditaments. The panel did not consider that the respondent had used this legislation to merge the two properties, firstly as they were interconnecting, and secondly it was not done after the list had closed.

27. As a consequence of the above findings, the panel was satisfied that the respondent had correctly remerged the subject property and AML from 1 January 2019. The panel considered that it could not make a determination of the correct RV for the subject property for the period 1 January 2019 to 22 March 2022 as it effectively did not exist for this period, as it was part of a larger property. The appellant was also no longer an interested party in respect of the subject property from the date it had been re-entered in the rating list from the date it was sold, and therefore it could not make a determination regarding the correct rateable value from this date.

28. The appeal is therefore dismissed.

Date: 13 July 2023
Appeal number: CHG100757024

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.