THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating appeal; 2017 Rating List; offices; challenge seeking deletion from valuation list; Newbigin (VO) v Monk [2017] UKSC 14; Jackson (VO) v Canary Wharf Ltd [2019] RA 411, appeal dismissed.

RE:	4th Floor Cromwell House, 14 Fulwood Place, London WC1V 6HZ ("the subject hereditament")

APPEAL NUMBER: CHG100773739

BETWEEN:	De Groot Agency	Appellant
	and	
	Valuation Officer	Respondent

SITTING:	Remotely via Microsoft Teams Conference Call
ON:	9 January 2024
PANEL:	Mr K Everett (Presiding Senior Member) Mrs F Cortese (Senior Member)
CLERK:	Mr S Fletcher IRRV (Hons)
APPEARANCES:	Mr E Gutt, Colliers International (Appellant's representative) Mr C Cates (Respondent's representative)

DECISION and STATEMENT OF REASONS

Summary of decision

1. The appeal was dismissed as the panel determined that the subject hereditament was capable of beneficial occupation on the material day, and it therefore remained a hereditament.

Introduction

2. The appeal process began with a challenge made by the appellant's representative on 9 February 2022 in respect of the Valuation Officer's (VO)

2017 rating list entry of the subject hereditament. He proposed its deletion from the list with effect from 24 June 2021. The respondent issued a challenge case decision notice on 19 August 2022, which stated that on the basis of the evidence available, the proposal was not well-founded, and the rating list entry was reasonable. The appellant's representative appealed that decision to this Tribunal on 14 December 2022.

3. The subject hereditament was a fourth-floor office in a mixed-use commercial building.

4. Mr Gutt 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 Gutt declared that he was instructed under a conditional fee basis and 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. This decision document is not and does not purport to be a verbatim record of proceedings.

Issue

7. The issue for the panel to determine was whether the subject hereditament should be deleted from the 2017 rating list with effect from 24 June 2021.

Evidence and submissions

8. Evidence from both parties was provided which included evidence exchanged at challenge, photographs and a plan of the property, invoices for works, sections of the Valuation Office Agency (VOA) Rating Manual and various caselaw.

9. The appellant's representative contended that the appeal property should be deleted from the rating list with effect from 24 June 2021, as, in accordance with *Newbigin (VO) v Monk* [2017] UKSC 14 and *Jackson (VO) v Canary Wharf Ltd* [2019] RA 411, it was no longer a hereditament capable of beneficial occupation. He stated that it was common for landlords of Central London offices to modernise them following vacation of a tenant as they were usually left in a tired and unlettable condition. The subject hereditament was vacant since 24 June 2021 when the previous tenants terminated their lease.

He argued that the facts of the appeal for the subject hereditament were on all fours with *Monk* and *Canary Wharf*. Furthermore, the 2nd and 3rd floors in the same building were subject to similar works of refurbishment and had been deleted from the list.

10. The appellant's representative stated that the subject hereditament was subject to a Category B strip-out and refurbishment works to present the premises in a Category A specification, which amounted to reconstruction and commenced from the material day. He argued that the photographs demonstrated that the property had been stripped to a shell. A contractor's quotation for works dated 21 June 2021 was provided as well as photographs before and after refurbishment. Those works were described by the appellant's representative as:

- Stripping out and disposing of all partitioning
- Stripping out and disposing of all flooring
- Installation of new client supplied flooring
- Repairing and repainting ceiling
- Supplying all materials to decorate and repaint walls
- Painting skirting boards and windows
- Checking all lightbulbs and replacing as necessary
- Cleaning site of all rubbish

11. The appellant's representative argued that a property under reconstruction can take many forms. He referred to *Canary Wharf*, where a property was stripped back to a shell condition, and *Avison Young v Jackson (VO) and Moore (VO) v Great Bear Distribution Limited* [2021] EWCA Civ 969, in which he argued acknowledged that a property subject to redecoration was incapable of beneficial occupation. He also referred to *Porter (VO) v Trustees of Gladman Sipps* [2011] UKUT 204 (LC) and argued that an office could not be considered as a hereditament if it was missing features required to be described as an office, which was the case in the subject appeal at the material day.

12. The respondent's representative contended that the works undertaken to the subject hereditament were not works of reconstruction, and more akin to a cosmetic refresh usually undertaken when a tenant vacates an office. He argued that the property was in the same lettable and rateable condition and therefore fit for occupation by a tenant, with the use of heating, cooling, lighting and a floor both prior to the works and after the works. As such, and in accordance with the rating hypothesis, it was assumed that the property was in a reasonable state of repair and therefore remained a hereditament. He did not consider that the replacement of a floor constituted major works, and the facts of the subject appeal were not on all fours with those in *Monk* and *Canary Wharf*.

13. The respondent's representative argued that there was no evidence the subject hereditament was in a shell condition on the material day, as the offices were determined as on their respective material dates in *Monk* and *Canary Wharf*. The challenge was submitted circa eighteen months after

completion of the works and there was no evidence provided to demonstrate a schedule or timeline of the works. He argued that the subject hereditament underwent similar works to the property in the President of the Valuation Tribunal's decision in *Aviva Investors v Dawn Bunyan (VO)* (VTE: CHG100345300, 7 June 2022) which was dismissed. The respondent maintained that the subject hereditament should remain in the list.

Relevant law

14. The statutory definition of a hereditament was contained in section 64 of the Local Government Finance Act 1988. A hereditament was anything which, by virtue of the definition of hereditament in section 115(1) of the General Rate Act 1967 would have been a hereditament for the purposes of that Act had this Act not been passed.

15. The statutory hypothesis is contained in paragraph 2 of Schedule 6 to the Local Government Finance Act 1988. The statutory definition of rateable value is as follows:

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(1) 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.

16. Matters affecting the physical state or enjoyment of the hereditament and the mode and category of occupation are, amongst other things, taken to be as they were on the material day. The Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 [SI 1992 No 556] provides for determining the material day. Regulation 3(4) stipulates that where the determination is with a view to deleting any hereditament which has ceased to exist, the material day is the day on which the circumstances giving rise to the alteration occurred. In this appeal, that date is 24 June 2021, the day the appellant's

representative proposed that the property was deleted from the list due to works which he considered rendered it incapable of beneficial occupation.

Decision and reasons

17. In *Monk*, the Supreme Court determined that before the statutory assumption of repair can be applied, the valuer must first consider the "*logically prior*" question of whether the property is capable of beneficial use and whether there was a hereditament in existence at all. The repairing assumption had no role to play in addressing that question. Lord Hodge endorsed the following analytical framework (para 23):

"*In a helpful intervention, the Rating Surveyors' Association and the British Property Federation submitted that, where works were being carried out on an existing building, the correct approach was to proceed in this order: (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament, (ii) if the property is a hereditament, to determine the mode or category of occupation and then (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. The first two stages of that process involve the application of the reality principle. At the third stage the valuation officer applies the statutory assumption in para 2(1)(b) if the reality is otherwise. In my view, this is a helpful approach where a building is undergoing redevelopment. But it is subject to the useful practice, which I discuss in para 31 below, of reducing the rateable value of a building, which is incapable of rateable occupation because of such temporary works, to a nominal figure rather than removing it from the rating list altogether.*

When deciding whether a property is undergoing redevelopment, rather than being in disrepair, valuers can have regard to the programme of works which is being undertaken at the property. If it is assessed objectively on the material day that the property is undergoing redevelopment and no part of it is capable of beneficial use, then there is "*no basis*" for applying the repairing assumption to the property, which must be valued as it stands.

18. In *Canary Wharf*, the Upper Tribunal clarified the proper interpretation and application of *Monk* stating "*Before one considers the repair assumption in the context of a building undergoing redevelopment, the logically prior question is whether the property is capable of beneficial occupation at all, and thus a hereditament at all*" (para 35) and "*The question whether a building is incapable of beneficial occupation as a result of a programme of refurbishment is a matter of objective fact* (para 40)".

19. Applying *Monk* and *Canary Wharf*, the panel made an objective finding of fact and determined that, on the material day, the subject hereditament was capable of beneficial occupation and thus remained a hereditament. The tenants in situ at the material time vacated the subject hereditament on 24 June 2021, the same day the appellant's representative requested for its deletion from the list. The property was clearly capable of beneficial occupation the day prior to the tenant's vacation by definition of their

occupation. For the appeal to succeed, the panel must have been satisfied that an overt act on the material day had rendered the property incapable of beneficial occupation.

20. The panel found the state of the hereditaments at their respective material days in the judgments of *Monk* and *Canary Wharf* to be of valuable assistance in making its decision. At the material day in *Monk*, contractors had removed the majority of the ceiling tiles, the suspended ceiling grid and light fittings and 50% of the raised floor. They had also removed the cooling system and the sanitary fittings, demolished the block walls of the lavatories, and stripped out the electrical wiring. The contractors had erected and plastered plasterboard partitions to form the outline of the proposed communal lavatories and had erected and plastered a partition across the floor at the east side of the premises. They had also completed first fix electrical installations to the lavatory area and had altered the drainage to accommodate the new location of the lavatories. At the material day in *Canary Wharf*, raised flooring, suspended ceilings, partitioned walls and mechanical and electrical services had all been previously removed. In contrast, it was clear to the panel that the situation at the subject hereditament on the material day was significantly different to the hereditaments in those two appeals.

21. The panel determined that the appellant's representative's evidence to demonstrate that any such overt act to render the subject hereditament incapable of beneficial occupation on the material day was relatively weak. A photograph was provided which showed the office's condition on the material day, described as photos before refurbishment works. The panel did not consider that the property was incapable of beneficial occupation in its visual condition on that photograph. A photograph was provided showing works being undertaken to the floor, however, they were described as photos during refurbishment works with no specific date. No photographs or documentation was provided to substantiate that any programme of works had begun on the material day. The panel noted an invoice was provided for works to be completed which was dated three days prior to the material day, however, no satisfactory evidence was provided to demonstrate when works were due to start or what was happening in reality on the material day. The panel noted that the 2nd and 3rd floors of the building had been deleted for which, the appellant's representative described as similar refurbishment works to the subject hereditament, however no such evidence of their condition at their day of deletion was provided to make any such comparison.

22. The panel deemed there was a higher bar for appellants to overcome if their challenge was made on the basis of a deletion rather than a material change in circumstances. As per *Monk*, to succeed in a deletion, it must be shown that no part of a building was capable of beneficial occupation. A valuer cannot value what isn't there. The panel was not satisfied that it was demonstrated that no part of the subject hereditament was capable of beneficial occupation on the material day.

23. The appellant's representative had relied on *Porter* and *Avison Young & Great Bear* to support his contention that the subject hereditament should be

deleted. In *Porter*, the Valuation Officer had entered a building into the rating list, but the Upper Tribunal held there was no scope for entering a new building which was nearly or very nearly ready for occupation unless the completion notice procedure had been followed because a building was only a hereditament if it was ready for occupation. The appellant's representative argued that the subject hereditament could not be considered a hereditament as it lacked features pertinent to an office on the material day.

24. The panel did not find that those two cases were compelling evidence that the subject hereditament was no longer capable of beneficial occupation on the material day. The panel noted that Lord Justice Arnold had referred to redecorating works in *Avison Young & Great Bear*, however, it found that he stated that such works *may* render a property incapable of beneficial occupation for their duration, not that such works do definitively. The panel distinguished the subject appeal from *Porter* as the subject hereditament was not a new entry into the valuation list. For properties such as the subject hereditament, it was inevitable for their condition to naturally depreciate during a tenant's occupation given the passage of time. However, properties in a state of general wear and tear are not routinely removed from the rating list as they are not considered incapable of beneficial occupation solely on that basis.

25. In view of the foregoing, the appeal was dismissed.

Date: 25 January 2024

Appeal number: CHG100773739

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.
