THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 Rating List appeal; restaurant and premises; challenge seeking deletion of list entry; Newbigin (VO) v Monk [2017] UKSC 14; Jackson (VO) V Canary Wharf Ltd [2019] RA 411; statutory assumptions; were repair works economic; appeal dismissed.

RE: 32 Putney High Street, Putney, SW15 1SQ

APPEAL NUMBER: CHG100796207

BETWEEN:	Jessica Lynch-Rigby	Appellant
	and	
	Mr A Ricketts (Valuation Officer)	Respondent

PANEL:	Mr SP Wood (Senior Member)
	Mrs N Crawshaw
CLERK:	Ms N Shepherd
REMOTE HEARING 1:	Tuesday 14 February 2023
APPEARANCES:	Ms J Lynch-Rigby, the appellant
	Mr J Ivers, representing the Valuation Officer

Summary of decision

1. Appeal dismissed. The panel found that the appeal property was capable of beneficial occupation on the material day and that it therefore remained a hereditament.

Introduction

2. The appeal property comprised of a building providing restaurant accommodation on the basement, ground, first and second floors. It was located on Putney High Street, close to the junction with Lower Richmond Road.

3. The proposal to which this appeal relates was made under Regulation 4 (1)(h) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 and sought a deletion of the appeal property's entry from the 2017 Rating List with effect from 25 September 2020 to 24 March 2021.

4. The proposal was served on the Valuation Officer (VO) on 18 April 2022. The challenge period came to an end when the VO issued his final decision on 1 July 2022. The VO refused to alter the list and deemed the proposal to be not well founded. The appellant subsequently appealed to the tribunal on 10 May 2022. The grounds for the appeal were that the appeal property was incapable of beneficial occupation.

5. In order to assist the appellant, who expressed a wish to present their evidence second, the panel varied its model procedure and invited the respondent's representative to begin.

6. This tribunal 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 property should be removed from the list with effect from 25 September 2020.

Evidence and submissions

8. The evidence bundle comprised all of the documents exchanged between the parties as part of the challenge process: Valuation Officer's challenge case decision notice; appellant's challenge submission; photograph and location plan of the appeal property. Reference was also made to the following caselaw:

   - *Newbigin (VO) v SJ &J Monk* [2017] UKSC 14
   - *Jackson (VO) V Canary Wharf Limited* [2019] UKUT 136 (LC)

9. The appellant contended that the appeal property became incapable of beneficial occupation on 25 September 2020. Prior to this date the appeal property had been occupied by tenants, however no rental payments had been received by the appellant since February, as a result of COVID 19. Following the departure of the tenants on 25 September 2020 the appellant was then unable to rent the property out again due to its poor state of repair.

10. The appellant explained that as a result of COVID 19 she did not receive the keys back from the previous tenants until late October 2020 and then struggled to obtain a contractor to carry out the required building works at the property. Once a contractor had been found, repairs were then further delayed due to some of the work not being able to be completed during the winter months.

11. The appeal property was unsafe to let out until all the repairs had been completed, which they were on 25 March 2021. As the appeal property was incapable of beneficial occupation on the material day, the appellant contended it was not a hereditament and therefore its entry should be deleted from the Rating List.

12. Mr Ivers submitted that at the material day, whilst the property was in a state of disrepair this did not constitute redevelopment. From the evidence submitted with the challenge he had concluded that the works required to render it capable of beneficial occupation constituted repair and that were no elements of improvement.

13. Evidence of the repairs were provided by way of an invoice totalling £46,277 for the works undertaken. Mr Ivers submitted that in relation to the location, tenant demand and likely length of lease that it was his view these repairs were economic to undertake. He cited the previous Valuation Tribunal decision of *Princes St Ltd (Ipswich) v Bond (VO)* [2002] in support of this.

Decision and reasons

14. In arriving at its decision, the panel was governed by rating legislation laid down by Parliament where Schedule 6 to the Local Government Finance Act 1988 as amended by the Rating (Valuation) Act 1999, provided that:
“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 –
the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
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;
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.

15. The central issue for the panel to determine was the date on which the premises should be valued by having regard to their physical condition as opposed to the reasonable repair assumption. For the appeal to succeed, the appellant needed to establish that the Supreme Court decision in *Newbigin v*

Monk applied at the material day for this appeal. This case examined the principle of reality in detail and its relationship to the statutory repair assumption. Throughout there are references to a building undergoing redevelopment and/or reconstruction.

16. Paragraph 15 sets out the position of the Supreme Court:
The decision appealed against interprets Schedule 6 to the 1988 Act as entailing a major departure from the reality principle by requiring that the hereditament be assumed to be in a reasonable state of repair for the mode of occupation listed in the rating list, namely as "offices and premises". I do not agree with that approach. In my view, the legislative history shows that the repairing assumption which para 2(1) of Schedule 6 introduced did not supplant the reality principle to that degree.

17. Paragraph 20 expands on the issue:
The 1999 Act can thus be seen as applying principles analogous to those in Wexler, Camden London Borough Council and Saunders (para 16 above) to a hypothetical lease in which the tenant bore the obligation to put the hereditament in repair. In my view the Court of Appeal goes too far in interpreting the 1999 Act as completely displacing the reality principle in relation to both the physical state and the mode of occupation of a hereditament which is undergoing redevelopment. The 1999 Act, by introducing the assumption of reasonable repair at the outset of the hypothetical tenancy ("the repair assumption"), is not addressing the question of whether the premises were capable of beneficial occupation, which, in the context of a building undergoing redevelopment, is a logically prior question. Thus the repair assumption (para 2(1)(b)) applies to matters affecting the physical state of the hereditament (para 2(7)(a)) but not to the mode or category of occupation of the hereditament (para 2(7)(b)).

18. The panel established that this authority distinguished between mere lack of repair, which did not affect rateable value because of the hypothetical landlord's obligation to repair, and redevelopment works that made a building uninhabitable. If the hereditament is not capable of beneficial occupation as a result of redevelopment works, the reality principle applies such that the repair assumption in Schedule 6 2 (1) (b) does not apply.

19. As the judgment makes clear, the matter must be considered with the aim of making an objective assessment of the property on the material day. The material day in this appeal is the effective date of the deletion sought by the appellant, namely 25 September 2020.

20. The appellant had referred to works being done at the property due to water damage as a result of the roof needing repair. The water damage had caused a great deal of mould, damage to plaster and damp throughout the property from the ground floor to the top level of the property.

21. The panel noted that in *Canary Wharf*, it was accepted that at the material day in that appeal of 16 January 2013, the appeal property was fully stripped out to a concrete shell and was incapable of beneficial occupation as an office.

The stripping out works were undertaken between 14 February 2011, when the property was marketed to find a new tenant, and 11 September 2011. The nature of the works was described in detail in paragraph 11 of the Upper Tribunal's judgment;
The previous occupier of floors 44, 45 and 46 surrendered its lease on 17 February 2011. The floors had not been comprehensively refurbished for 20 years and, in anticipation of the space becoming vacant, CWCL was instructed on 20 January 2011 to strip out the floors to a shell and core condition. The works were carried out between 14 February and 18 September 2011, and involved the removal of raised flooring, suspended ceilings, partition walls, and mechanical and electrical services, at a cost of £740,254.

22. The panel considered that the situation at the appeal property was very different. It considered that the appeal property was at the material day, an empty restaurant. Whilst it may have been in a state of disrepair there was no evidence before the panel that it had been fully stripped out to anything like the extent of the property in *Canary Wharf*.

23. Having considered the extent of the stripping out of the appeal property at the material day the panel therefore concluded that it was a property in disrepair and the statutory repair assumptions had to be applied.

24. Having regard to the repair statutory assumption the panel considered as to whether the repairs would be considered uneconomic by a reasonable landlord. Whilst the panel appreciated that the cost of the works undertaken was substantial, it was aware that the location of the property and likely future rental flow were such as to deem them economic. Considering that the invoice for the repairs was almost half of the rateable value for the property it made economic sense for them to be carried out. The panel also noted that within two months of the repair work being completed, that the property had been successfully let, further demonstrating that the repair works were economical. Therefore, the panel found that a reasonable landlord would consider the repairs economic to undertake.

25. The panel could understand the appellant's reasons for appealing, the property was in a state of disrepair, and she was unable to let it out until these repairs had been done, which were then further delayed as a result of COVID 19. The panel was aware that due to COVID 19 the situation was not within her control and was sympathetic to her situation. However, it ultimately found that based upon the evidence that at the material date the property was capable of beneficial occupation.

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

Date 20 March 2023

Appeal Number CHG100796207

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.