THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 list appeal; gymnasium and Premises; Local Government Finance Act 1988; Statutory Assumptions; Economic Repair; Material Day; The Rating (Material Day for List Alterations) Regulations 1992 (S.I. 1992 No. 556); The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (S.I. 2009 No. 2268); Jackson (VO) v Canary Wharf Ltd [2019] RA 411; Newbigin (Valuation Officer) (Respondent) v S J & J Monk (a firm) (Appellant) [2017] UKSC 14; Decision: dismissed.

RE: F45 Gym, 7 Avon Street, Bath BA1 1UN (the "appeal property")

APPEAL NUMBER: CHG100807886

BETWEEN:	Jonathan Haskell	Appellant
	(Represented by Whitestone Commercial Ltd)	
	And Alexandra Morley (Valuation Officer)	Respondent

PANEL:	Mr A Backway (Presiding Senior Member) Mr W Read, Senior Member
CLERK:	Ms R Muller
HEARING:	Remote Hearing No. 1 on 14 July 2023
APPEARANCES:	Mr C Lambert, from Whitestone Commercial Ltd, representative for the Appellant Mr J Haskell, the Appellant Mr J Stamper, representative for the Valuation Officer.

Summary of decision

1. The appeal was dismissed as the panel found that the subject property was capable of beneficial occupation on the material day.

Introduction

2. The subject property was a gymnasium situated on the lower ground floor of a building within a central position in Bath city centre. It was situated fronting Avon Street with a café located next door. In order to access the subject property, you had to enter from road level, down a flight of steps to the lower ground level.

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 subject property's entry from the 2017 Rating List or reduced to a nominal figure of £1 with effect from 25 July 2020.

4. The material day (the date by which physical factors have to be taken into account) was provided by the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 (SI 1992 No. 556) as amended. In respect of the subject appeal, the material day is 25 July 2020, which was the date the appellant had requested the assessment be deleted from the Rating List or reduced to a nominal figure of £1.

5. The check was served on the Valuation Officer (VO) on 18 January 2022. The challenge period came to an end when the VO issued his final decision on 5 October 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 19 January 2023. The grounds for the appeal were that the subject property was incapable of beneficial occupation as a gym due to flooding on three separate occasions.

6. Mr Lambert, the representative for the appellant appeared before the panel as an expert witness. He indicated that he was not instructed on a conditional fee basis. He accepted that first his duty was to the Tribunal and that he would comply with this duty together with the requirements of his professional body, regardless of whether or not the evidence supported the appellant's case. Such evidence would be inadmissible in the Upper Tribunal, having regard to the Upper Tribunal's judgment in *Gardiner & Theobald LLP v Jackson (VO)* [2018] UKUT 0253 (LC). However, 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 in England).

7. Mr Read, the senior member had issues with his IT equipment where he could not hear the parties speak, so he joined by video using Teams but also separately used his phone so he could participate in audio discussions. All parties were satisfied that the senior member could fully participate in the proceedings.

8. Mr Lambert had an issue with his camera. Whilst he appeared on camera, he was not able to hear or be heard during discussions. Even though it was expected that professional representatives should keep their cameras turned on whilst speaking during a hearing, the panel noted that this had caused issues and for the appeal to proceed, the panel allowed Mr Lambert to keep his camera turned off during the hearing. All parties were satisfied that they could present their respective cases satisfactorily during the hearing.

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

Issue

10. Whether the existing entry for the appeal property of £39,500 RV with effect from 1 April 2017 should remain in the Rating List at a rateable value (RV) of £39,500 or reduced to a nominal figure of £1 or be deleted from the Rating List with effect from 25 July 2020.

Evidence and submissions

11. The appellant produced an evidence statement which contained the initial challenge, VO's initial response to the challenge, the appellant's reply and the VO's final challenge decision notice. The evidence exchanged during challenge included a schedule of events, photographs of strip out and invoice, proposed floor plans and an email from the planning authority.

12. On behalf of the appellant, Mr Lambert contended that the appeal property became incapable of beneficial occupation on 25 July 2020 and was therefore not a hereditament on the material day. He stated that the subject property had been flooded on three separate occasions, on 25 July 2020, 19 April 2021 and 26 April 2021. Since the first flood, the subject property had been incapable of occupation as a gym. Mr Lambert stated that all furniture and equipment that would be normally on the floor had been removed. The wall fixtures and fittings had not been removed.

13. He considered that the deletion of the subject property was supported by the Upper Tribunal in its judgment in *Jackson (VO) v Canary Wharf Ltd* [2019] RA 411, in which it was confirmed that a stripped-out property can be deleted prior to the commencement of substantial redevelopment works, provided there is a clear intention to redevelop the property. He contended that a schedule of works had been provided where it would cost circa £100,000. However, this schedule of works could not commence as the cause of the flooding had not been confirmed. Therefore, he requested that the panel delete the assessment from the Rating List or at least reduce it to a nominal figure of £1 from 25 July 2020.

14. Mr Stamper, the representative for the respondent stated that at the material day, he had agreed that the subject property had been flooded and again the following year on two separate occasions. However, he was of the opinion that the subject property was still being used as a gym. Posts from social media had been provided which showed what the subject property looked like prior to the floods. Mr Stamper stated that a post on social media on 18 September 2020 showed a gym class was in session. The floor of the photograph showed the premises in a post flood state condition. Therefore, he was of the opinion that the subject property was still being used as a gym and therefore, asked the panel to dismiss the appeal.

Decision and reasons

15. The statutory definition of rateable value is set out in paragraph 2 of Schedule 6 to the Local Government Finance Act 1988 as follows;

16. (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.

17. Matters that affect the physical state or enjoyment of the property or the locality were to be taken as at 25 July 2020 (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.

18. The main 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 (Valuation Officer) (Respondent) v S J & J Monk (a firm) (Appellant)* [2017] UKSC 14 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.

19. 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.

20. 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)).

21. 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.

Are the Premises in a State of Disrepair or Undergoing Reconstruction?

22. 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 was the effective date of the deletion or reduction in value sought by the appellant, namely 25 July 2020.

23. The panel noted that Mr Lambert contended that all items of furniture, including large gym equipment had been removed and the floors taken up. He had provided a schedule of works where the panel noted that the works would include sanitation and general repair of the ground floor. The panel noted that the surveyor stated in the report that it would take circa five to six weeks to complete the works and that the subject property would be vacant during the works. This report had been dated 19 April 2021. However, the subject property had then had another flood which had taken place on 26 April 2021.

24. The panel noted a further report dated 25 May 2021, had been provided, which was a Surface and Foul Water Drainage Serving Site report. Photographs had also been provided to show the damage to the subject property's floor area. A scheme of works had also been provided with a breakdown of costs, which was within the region of circa £100,000.

25. The panel concluded that the works envisaged by the appellant included a large amount of repair, which included repairs to 900mm of the walls above the floor level. Repairs also were required around the concrete columns, 500mm above the floor level; removal of the kitchen base units and reinstallation of new ones; bio hazard sanitisation works; and many other works were included. The panel noted that the estimated repair costs put forward by Mr Lambert reflected the works required to bring it back into a state of reasonable repair. It considered that these costs were around thrice the current RV of the subject property and that a reasonable landlord would consider these repairs economic.

26. In considering the photographs provided within this report, the panel noted that these depicted what appeared to be access panels to stud walls and damaged floors within the appeal property. It was not evident from these photographs that the floor of the appeal property had been lifted or that any holes had been dug. The panel therefore found that at the material day, only minor works had been carried out to strip out the subject property and it constituted a property in a state of disrepair and did not consider that the reinstatement of the appeal property would be considered uneconomic.

27. The appellant had referred to the stripping out of the property as being a part of an intended program of redevelopment. The panel noted that a copy of the structural report resulting from floods at the subject property had been submitted in evidence and determined that any such investigations would be preliminary to any program of redevelopment.

28. 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

29. The panel considered that the situation at the subject property was very different. It considered that the subject property was at the material day, an empty gym (although it contained televisions on the walls and fixtures left by the appellant, and there was no evidence before it that it had been fully stripped out to anything like the extent of the property in Canary Wharf. It was capable of repair.

30. The appellant stated that he had stopped paying any rent as of 25 April 2020 due to the flood and had argued that had the subject property been vacant and to let as of the material day, there would have been no demand for the subject property due to the possibility of future floods since the issue of cause of the floods had not been resolved. However, as the panel had been provided with a breakdown of a schedule or works and costs, the panel concluded that the subject property was neither obsolete nor beyond reasonable repair. Any hypothetical tenant coming fresh to the scene would assume that these repairs had taken place.

31. The panel turned its attention to the posts located on social media where the condition of the floor from one of the posts showed to be in post flood condition. The appellant stated that the photographs used for social media were for advertising purposes only and that the subject property itself had not been used since the first flood on 25 July 2020 for any type of training purposes. However, the photograph taken on 18 August 2020 showed the floor or the gym to be in post flood condition and a gym session in use, therefore, the panel placed its greatest weight on the details of this image.

32. The panel held that the gym was capable or beneficial occupation and dismissed the appeal.

Date: 31 July 2023

Appeal number: CHG100807886

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.