VALUATION TRIBUNAL FOR ENGLAND

2017 rating list appeals: Local Government Finance Act 1988; gymnasium and premises; material changes of circumstances; the opening of other gymnasiums in the area; appeals dismissed.

APPEAL NUMBERS:	CHG100821993 and CHG100709731
RE:	1-4 Cambridge House, Henry Street, Bath, BA1 1JT (the "appeal property")

BETWEEN:	Triangle Fitness Bristol Ltd	Appellant
	and	
	Lucy Formela-Osbourne (Valuation Officer)	Respondent

SITTING:	*remotely using Microsoft Teams*
ON:	5 September 2024
BEFORE:	Mrs S Sohota, Presiding Senior Member Mrs OO Robson, Senior Member
CLERK:	Mr D Mulgrew
APPEARANCES:	Mr M Smith (Cushman and Wakefield), appellant's advocate and expert witness Mr T Davis (Cushman and Wakefield), witness of fact Mr W Cox, respondent's advocate and expert witness

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DECISION AND STATEMENT OF REASONS

Decision

1. The appeals were dismissed.

Introduction

2. This statement of reasons is not and does not purport to be a full verbatim record of the proceedings.

3. These appeals were brought in respect of the appeal property which was entered in the 2017 rating list as “gymnasium and premises” at rateable value (RV) £127,000 effective from 28 October 2017. They have been made to the Valuation Tribunal for England (VTE) in accordance with regulation 13A of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 on the grounds that the valuation for the appeal property was not reasonable. The appellant disputes the respondent’s decision to make no alteration to the 2017 rating list following two proposals made on the grounds of material changes of circumstances (MCC) as follows:

   - CHG100821993 – The MCC was the opening of another gym in the locality called Toniq. The effective date of the MCC was 11 August 2018 and the proposed RV was £74,000 from that date. The parties agreed that the material day was 6 April 2022.

   - CHG100709731 – The second MCC was made because of the opening of another gym in the locality called Pure Gym. The effective date of this MCC was 29 February 2020 and the proposed RV was £62,000 from that date. The parties agreed that the material day was 14 October 2020.

4. Both parties were represented by experienced advocates who each appeared in a dual role of expert witness. They each signed a declaration to confirm their primary duty in giving expert evidence was to the Tribunal and that they were not instructed under a conditional fee arrangement or other success related fee. In the case of Mr Smith, he also confirmed that Cushman and Wakefield were not on a success related fee.

5. The panel has accepted this expert witness evidence on the above basis as the appeals were not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 and is 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).

6. It was therefore appropriate for the panel hearing the evidence to consider the “expert” evidence and assess what weight, if any, to give it in the context of the matters in issue before it.

7. The witness of fact also confirmed that he was not appearing on a conditional fee basis.

8. As part of her induction training, a new member of the VTE was observing proceedings. It was explained to the parties that it was the panel’s intention to invite their colleague to accompany it to the retiring room. The parties were assured that the new member would not

participate in the decision-making exercise but would simply observe as part of their training. Neither party had any issues or objections to this.

Relevant Law

9. For the purposes of this appeal, the term “rateable value” is defined in Schedule 6 to the Local Government Finance Act 1988 (as amended):

> 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 –
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> (a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
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> (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;
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> (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.

10. Under Schedule 6 to the 1988 Act, paragraph 2(7) a number of matters are referred to which have to be taken into account on the material day. The matters are:

> (a) matters affecting the physical state or physical enjoyment of the hereditament,
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> (b) the mode or category of occupation of the hereditament,
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> …
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> (d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and
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> (e) the use or occupation of other premises situated in the locality of the hereditament

11. Section 1(4) of the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 provides:

> In making a relevant determination, no account is to be taken of any matter (whether arising before or after the passing of this Act) that is directly or indirectly attributable to coronavirus.

12. In respect of all entries in the 2017 rating list, the Rating Lists (Valuation Date) (England) Order 2014 requires the rental levels to be taken at 1 April 2015, the antecedent valuation date (AVD).

13. Regulation 14 of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 provides the following:

> (1B) Subject to paragraphs (3) to (7), for a list compiled on or after 1st April 2017, where an alteration is made to correct any inaccuracy in the list on or after the day on which it is compiled, the alteration shall have effect from the day on which the circumstances giving rise to the alteration first occurred.

14. Under regulation 3(7)(b) of the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992, where the determination is with a view to making an alteration to a list compiled on or after 1st April 2005, the material day is—

> (i) where the alteration is made in pursuance of a proposal, date on which the VO received a confirmation under regulation 4C of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (as stated in an acknowledgement served by the VO under regulation 4D(1) of those Regulations);

15. For the purpose of rateable value, economic factors were fixed at the AVD of 1 April 2015 and the parties have agreed that changes caused by coronavirus had to be disregarded. Only the changes in rental value because of the MCCs in the locality could be taken into account.

16. As mentioned, the parties have agreed that the material day for appeal CHG100821993, the opening of Toniq, is 6 April 2022. And that the material day for appeal CHG100709731, the opening of Pure Gym, is 14 October 2020.

Preliminary issue

17. The respondent was of the opinion that in the event that appeal CHG100821993 (the opening of Toniq from 11 August 2018) was successful, the effective date of any reduction was limited to the 29 February 2020, the date of the last material change within the locality (the opening date of Pure Gym).

18. Mr Smith was of the view that any reduction should be backdated to the 11 August 2018 notwithstanding the material day was 6 April 2022. In support of this he referred to the respondent's ability to give effect to reductions from the earlier date without the need for a proposal.

19. Reference was also made to page 189 of the bundle and some advice that had been given by the Tribunal's clerk assigned to the originally planned hearing date of 9 November 2023. This advice indicated that the material day did not preclude the effective date for any reduction for a successful appeal going back to 11 August 2018.

20. Mr Mulgrew stated that he did not agree with the advice that had been given by the previous clerk involved in the case and the panel should give the matter careful consideration.

21. The panel considered the matter and decided that the appeal for CHG100821993 could not succeed because of the direct implications of the material day. On the material day for that appeal it was a fact that both Toniq and Pure Gym were open along with two other gyms that had opened in 2019, Team Bath and Fly Fitness. When considering the matters contained in Schedule 6, paragraph 2(7), all of the changes to the locality had to be considered which meant that the earliest date for any reduction would be the date of the last material event, namely the opening of Pure Gym.

22. Effectively, the current appeal rules meant that the only means of reflecting on the opening of Toniq from the date it opened, would have been if a *check* had been signed off before the other material changes to the locality had occurred.

Discussion

23. Mr T Davis appeared as a witness of fact for the appellant. He had expertise in rental negotiations on behalf of the appellant on the appeal property and a number of other properties. While he was not involved in the original rent that was agreed in 2017, he was involved in the discussions for the subsequent rent-free period and reduction. He explained that on becoming involved in the matter in May 2020 that he had initial concerns that the 2017 rent was too high in relation to the size of the hereditament. Then when he obtained turnover figures, he did not consider the rent to be viable. He had commenced discussions with the landlord for a rent reduction. He maintained that a rent-free period had been agreed as a result of the pandemic but that the reduction in rent reflected the initial rent being too high and the opening of other gyms in Bath.

24. When asked by the respondent’s representative if there had been a decline in the market since 2017, he stated that retail rents had struggled since the global financial crisis and that rents had gone down, and that the pandemic had resulted in a further downturn as there were fewer office workers in town centres. However, he stated that in Bath there had been a good demand for gym operators.

25. The appellant’s director stated in an email of 31 January 2023:

> We initially approached the landlord in July 2019 when we became aware that Pure Gym were looking to open a unit not far away on the Lower Bristol Road. Revenues were already declining and it was apparent that a new large gym opening in the vicinity would make the rent unsustainable. The landlord initially rejected the suggestion of a rent reduction. In January 2020, when the new gym announced its opening date and started its pre-opening discounted memberships, the landlord entered into discussions. By the end of March, Covid restrictions had started and the gym was closed down by the government.

26. However, the panel noted at page 19 of the bundle that this had not been reflected in the "letter waiving, and making other concessions in connection with, the payment of rent." This stated at paragraphs 3 and 4:

> 3 *In the light of the outbreak of the infection Covid-19,* you have asked us to accept nil payment of the Yearly Rent under the Lease from and including 25 March 2020 to and including 28 September 2020, and to make other provisions for the payment of Yearly Rent from and including 29 September 2020 to and including 23 June 2021 as set out below.
>
> 4 In consideration of the sum of £1 paid by you to us (which we hereby acknowledge) we agree that the Yearly Rent payable by you under the Lease shall be (instead of the sum set out in the Lease for the period from and including 25 March 2020 to and including 23 June 2021):
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> (a) from and including 25 March 2020 to and including 28 September 2020, nil;
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> (b) from and including 29 September 2020 to and including 31 December 2020 (First Turnover Period):
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> i. £60,000 per annum, plus
> ii. any Turnover Rent (as defined in Schedule 1 of this letter) payable in respect of that period;
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> (c) from and including 1 January 2021 to and including 24 March 2021 (Second Turnover Period):
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> i. £90,000 per annum, plus
> ii. any Turnover Rent payable in respect of that period;
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> (d) from and including 25 March 2021 to and including 23 June 2021 (Third Turnover Period):
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> iii. £90,000 per annum, plus
> iv. any Turnover Rent payable in respect of that period;

(Emphasis added)

27. The panel found that although rent reduction discussions had commenced in July 2019, the landlord was not prepared to concede any rent reduction until the pandemic resulted in the first lock down. The panel also found that the revised rental agreement simply referred to the pandemic and not the MCCs.

28. The existing 2017 rating list entry in respect of the appeal property had been agreed at RV £127,000 effective from 28 October 2017. Mr Smith believed that this RV was wrong and his proposed valuation at RV £62,000 was based on that belief. The panel could understand his concern because he had discovered that the floor area recorded by the respondent was

significantly inaccurate. This was corrected from 600m^2 to 528.94m^2. It was usual where floor areas were revised downwards for a reduction in RV to follow.

29. However, the panel heard from Mr Cox that the agreed RV had been based on the actual rent on the appeal property that had commenced in 2017. The actual floor area had not been a material factor in that agreement.

30. The panel shared Mr Smith's concern that the rent on the appeal property was 2 ½ years after the AVD and that having regard to *Lotus and Delta Ltd v Culverwell (Valuation Officer) and Leicester City Council* [1976] RA 141, regard should also be had to other rents for gymnasiums and comparable assessments.

31. Notwithstanding that, the panel was influenced by the fact that the RV agreement was between two professional representatives and they had adopted the actual rent. The panel noted that the appeal property was in a prime city centre location, close to a food hall occupied by Marks and Spencer, and there had been interest in the property from other business classes, including a pub chain. Ultimately, there was a lack of directly comparable gymnasiums in this location and the panel was satisfied that the agreed rent was the appropriate starting point.

32. On investigation of the comparable assessments, Mr Smith had discovered that no other dry gymnasium had been assessed at more than £139.50/m^2. The appeal property was assessed at £241/m^2.

33. Mr Cox stated that analysing the assessment of Fly Fitness on an overall basis resulted in £222/m^2. Mr Smith had informed the Tribunal after the hearing that this was new evidence and that he did not have details of the analysis of this hereditament. Mr Cox, however, was able to explain how he had calculated this amount from the information already within the bundle.

34. The panel had concerns over the usefulness of the evidence because the ground floor of Fly Fitness included a café, with the gym being located on the first floor and some of the ground floor. That assessment had been zoned and had been measured on a net internal basis rather than a gross internal basis.

35. The panel also noted that there was a lack of direct comparable evidence within the immediate city centre location of other properties in the gymnasium category of occupation. This reduced the weight that could be attached to other gymnasiums outside of the city centre that had been cited as comparable.

36. Mr Cox also referred to the Lands Tribunal's decision in *ITMS Corporation Ltd v Mooney (VO) and Westminster City Council* [1983] RA145, where it was stated that the Valuation Officer should not have looked again at rents and to say what could have been projected with the advantage of hindsight, particularly without knowledge of the conditions prevailing in the

locality at the time when the rents were agreed. Mr Cox suggested that Mr Smith was trying to circumvent the agreement from 28 October 2017.

37. Having reflected on all of the above, the panel decided that it would consider the cumulative impact from all the MCC events on the material day of 14 October 2020, but on the basis that the correct RV from 28 October 2017 was £127,000. In the end, the RV from 28 October 2017 was agreed by both parties to reflect the rent and this was the one matter of certainty.

38. Mr Cox did not consider any reduction had been justified, arguing that no dry gyms had had their assessments reduced in the 2017 rating list, anywhere, because of the opening of other dry gyms, pointing to it being a growing sector.

39. To support a reduction the appellant relied on two graphs that had been provided.

40. The first graph showed turnover from December 2017 to August 2022. The panel found that the graph did not show any discernible fall in turnover following the opening of the following gyms: Toniq (August 2018), Team Bath (January 2019) and Fly Fitness (July 2019). The turnover at the appeal property in July and August 2019 was down by a small amount on the preceding months, but then had increased to its highest recorded level by September and October 2019.

41. The difficulty in considering turnover in respect of the opening of Pure Gym (29 February 2020) was that this coincided with the outbreak of the Covid 19 pandemic; in particular the announcement of the first national lockdown on 23 March 2020.

42. The panel looked at the turnover evidence to see if there was any impact in the months leading up to the opening of Pure Gym. The panel found that the turnover in November 2019 was significantly higher than in November 2018. No turnover information was provided in December 2019 to compare it with the previous December. The panel noted that the turnover in January 2020, before the first reported Covid 19 case in the UK at the end of January 2020, was down by 4% on the turnover in January 2019. The panel did not consider that such a modest change would warrant a rent reduction.

43. The turnover was down further in February 2019, but this was after the first reported case of Covid-19 in the UK.

44. The second graph depicted the appellant’s change in membership numbers at the appeal property. The panel found little use of this information because only membership numbers between April 2020 and August 2022 had been provided. There was no information provided before the opening of Pure Gym or, for that matter, any of the other gymnasiums. It was therefore impossible to gauge any negative impact from the opening of other gyms.

Disposal

45. In view of the above findings and conclusions, the panel was not persuaded by the available evidence that a reduction was warranted. The appeals were therefore dismissed.

Date issued to parties: 3 October 2024

Right of further 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.
