THE VALUATION TRIBUNAL FOR ENGLAND

2017 rating list appeal; Local Government Finance Act 1988; warehouse and premises; deletion from the rating list; hereditament test; repair assumptions; appeal dismissed.

APPEAL NUMBER: CHG100880426

BETWEEN:	Aegon UK Property Fund Ltd	Appellant
and	Jo Moore (Valuation Officer)	Respondent

RE: 1a Kestrel Place, Huntingdon, Cambridgeshire PE29 6FQ (“the subject property”)

PANEL: Ms A Verma (Presiding Senior Member)
Ms S Eze (Senior Member)

CLERK: Mrs A Sloan

SITTING ON: 13 October 2023 (remote hearing no.2)

APPEARANCES: Charles Merrett from FTB Chambers (Counsel for the appellant)
Horatio Waller from FTB Chambers (Counsel for the respondent)

Summary of decision

1. Appeal dismissed. The panel found that the subject property was capable of beneficial occupation on the material day and should remain in the 2017 rating list.

Introduction

2. The appellant had made a challenge against the entry in the 2017 rating list, seeking deletion by way of a proposal served on the Valuation Officer (VO) on 21 November 2022. After considering the proposal and evidence submitted during the challenge period, the VO decided that the proposal was not well founded and refused to delete the entry. A decision notice to that effect was served on the appellant on 8 February 2023 and this decision was appealed to the tribunal on 18 May 2023.

3. The subject property is described in the list as a warehouse and premises. Included in the assessment was the warehouse space with a mezzanine floor, offices and ancillary kitchen and toilet facilities. Following the vacation of the tenant, a programme of works began. The appellant sought deletion of the entry in the list with effect from 15 June 2022, on the basis that the works meant that the subject property was no longer capable of beneficial occupation. The VO disagreed with this position and considered the entry in the list should remain.

4. Both parties had instructed Counsel for the hearing and the panel considered the documentation exchanged during the Challenge stage, Counsel's skeleton arguments provided prior to the hearing and case law referenced in the respective submissions.

5. This document is not intended as a verbatim report of the proceedings, nor does it purport to reproduce in full all the parties' evidence.

Preliminary issue

6. Mr Merrett's skeleton argument was provided to the Tribunal and copied to the Valuation Office Agency (VOA) on 11 October. This was forwarded by the clerk to Mr Waller the same day. Mr Waller's skeleton argument was provided to the Tribunal and Mr Merrett after 6pm the day before the hearing, 12 October. In his skeleton argument Mr Waller indicated his intention to call Mr A Singh, a Lead Valuer for the VOA, as an expert witness. At the hearing, Mr Merrett objected to this late notification and expressed concern that the appellant had been given no opportunity to consider the evidence that Mr Singh would present or to arrange an expert witness of their own.

7. The panel retired to consider this issue as a preliminary matter. It understood that Mr Singh had not inspected the subject property and neither party planned to call a witness who had been present during the works. Mr Waller was of the view that it may assist the panel for Mr Singh to speak from his experience in valuation matters and provide commentary on the photographs of the property contained in the evidence bundle.

8. The panel noted that Mr Waller had stated he could make the points himself if needed and it had sympathy with the appellant's position in being made aware of this development late on the day before the hearing. The panel had concerns that the VOA expert could potentially introduce new evidence in breach of the legislation and the Tribunal's standard directions. It therefore decided to refuse permission for the late expert witness testimony and proceeded to hear the appeal on the evidence already provided and oral submissions from Counsel.

Issue

9. The issue in dispute before the panel was whether the subject property should be deleted from the 2017 rating list with effect from 15 June 2022.

Evidence

10. There were extensive arguments presented by both parties, which will not be re-stated in full here, and the panel thanked both Mr Merrett and Mr Waller for their assistance and detailed presentations.

11. The appellant was of the opinion that the programme of works lasting from 13 June 2022 to 5 August 2022, a period of eight weeks, meant that the subject property was not capable of

beneficial occupation and should be deleted from the list. The works included a soft strip out, electrical strip out and subsequent installation, demolition of partitions and the mezzanine floor, removal of the previous tenant's signage and branding, cleaning and repairs to various parts, installation of a replacement kitchen and application of an epoxy coating to the warehouse floor. The respondent contended that the property remained capable of occupation and these works were repairs carried out following the vacation of the previous tenant, to make the property ready to be re-let. The VO considered the works should be disregarded under the repair assumptions set out in Schedule 6 to the Local Government Finance Act 1988.

12. Mr Merrett submitted that the first step is to determine whether the property is capable of beneficial occupation for the mode and category of use described. Only if it can be established that it is capable of beneficial occupation, and therefore a hereditament exists, can the valuer move on to consider the repair assumptions. He contended that both *Newbigin (VO) v Monk* [2017] UKSC 14 and *Jackson (VO) v Canary Wharf Ltd* [2019] RA 411 had established that consideration of the hereditament must be the starting point. In the case of *Canary Wharf*, it was accepted that a rolling programme of works, stripping out the property following the departure of a tenant in preparation for re-fitting to a new tenant's requirements, was sufficient to render an office incapable of beneficial occupation. Mr Merrett was of the opinion that, on the material day, the subject property was not capable of beneficial occupation and therefore a hereditament did not exist. He asked the panel to delete the entry from 15 June 2022.

13. Mr Waller accepted the principles established in *Monk* and *Canary Wharf* but considered those cases were distinguishable because they concerned offices and the subject property is a warehouse. He referred the panel to a VTE decision from the President, *Aviva Investors v Bunyan* (VO) [2021] (appeal CHG100345300). This appeal concerned a warehouse which underwent a programme of works between 23 September 2019 and 13 December 2019. The President considered whether the works in that case were within the scope of *Monk* or if they were works that the hypothetical landlord would undertake prior to the commencement of a new tenancy under Schedule 6 to the 1998 Act. The case was fact sensitive and there was no detailed timetable of the works or any witness who could speak with authority to confirm when each stage was completed or the position on the material day. In the *Aviva* judgment, the President stated that no part of the building could be capable of beneficial occupation for a deletion to be considered. In that case, he was not persuaded that the situation on the material day was such that the entire building could not be occupied and found that the majority of the building was not stripped back and was subject to minor repairs. In the President's opinion, the warehouse remained capable of beneficial occupation regardless of a temporary lack of kitchen or toilet facilities. Although 1a Kestrel Place contained both warehouse space and offices, Mr Waller contended that the works were akin to the usual end of tenancy repairs and reinstatement of the warehouse to its original state, and it remained capable of beneficial occupation on the material day. He asked the panel to dismiss the appeal.

Decision and reasons

14. The material day on which to consider the property was 15 June 2022, this being the effective date of deletion sought if the appeal were successful.

15. In the subject appeal, there was a clear timeline for the programme of works. The panel found that *Monk* and *Canary Wharf* confirmed that the correct test was to first establish if a hereditament existed. However, those appeals differed from the subject property as they

were offices and clearly incapable of occupation for that use. The panel considered that there were different standards of fit out required for offices to warehouses, which are predominantly used for storage of goods. While it was accepted that the subject property also contained office space, the primary description was as a warehouse. The panel found the President's decision in *Aviva* to be useful as there were similarities with the subject appeal. Although VTE decisions are binding on the parties, they are not binding on other VTE panels. However, given the President's involvement and the similarities between the properties, the panel found the *Aviva* judgment persuasive.

16. From the programme of works, the panel noted that on the material day of 15 June 2022, the site set up had been completed, the soft strip out was underway and the electrical strip out and demolition of partitions had begun. The soft strip out was planned to take from 14 June to 20 June and the electrical strip out from 15 June to 21 June. There was no detail provided as to which part of the building was stripped first and the panel noted that this phase of the works was a gradual process lasting approximately a week. The demolition of the mezzanine in the warehouse did not begin until 20 June.

17. Considering the President's view that the entire building must be incapable of beneficial occupation for a deletion to be considered, the panel was not persuaded that the hereditament had ceased to exist on the material day. Although it was accepted that the soft strip out and electrical strip out had begun, both were in the early stages and it was not clear that, on the material day, the whole building had been stripped back to a shell. If the panel accepted, for example, that the strip out began with the first-floor offices, work had not yet begun on the material day to demolish the mezzanine in the warehouse. This meant that the warehouse presumably remained capable of beneficial occupation and could be used for storage if required. Equally, if the strip out began in the warehouse, then it was unlikely that the office strip out had also been completed on the material day, given those works only began on 14 and 15 June and were expected to take a week to complete. The kitchen replacement did not occur until 6 July. The electrical installation began on 11 July for a week and the epoxy floor coating, which affected the use of the warehouse for two days, did not begin until the same day.

18. The burden lay with the appellant in this appeal to persuade the panel that the appeal should be allowed. It found that there was insufficient evidence to demonstrate that the entire building was incapable of beneficial occupation on the material day of 15 June 2022. Therefore, a hereditament existed on that day and the panel concluded that the works must be disregarded under the repair assumptions. The appeal was therefore dismissed.

Date: 30 October 2023 **Appeal number:** CHG100880426

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.