[2024] VTE CHG101114257 (NV17)

VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating appeal; 2017 Rating List; paragraph 2(7) of Schedule 6 to the Local Government Finance Act 1988; material change of circumstances; recladding works and scaffolding; end allowance; rental concessions; appeal dismissed.

APPEAL NUMBER: CHG101114257

RE: 145-146 New Street, Birmingham B2 4NS ("the subject hereditament")

BETWEEN: Lush Ltd — Appellant

and

Lucy Formela-Osbourne (Valuation Officer) — Respondent

SITTING: *remotely using Microsoft Teams*

ON: 7 August 2024

BEFORE: Mr K Higgins (Presiding Senior Member)
Mrs N Yang (Senior Member)

CLERK: Mr S Fletcher

APPEARANCES: Mr A Fatta of Avison Young (Appellant's representative)
Mr D Panchal (Respondent's representative)

DECISION and STATEMENT OF REASONS

Decision

1. The appeal was dismissed. The panel confirmed the rateable value (RV) of the subject hereditament at £375,000 with effect from 21 February 2022.

Introduction

2. The appeal process began with a proposal made by the appellant's representative, on behalf of its client on 22 August 2022. The proposal was made under Regulation 4(1)(b) of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 on the basis that the rateable value (RV) shown in the list for a hereditament was inaccurate by

reason of a material change of circumstances which occurred on or after the day on which the list was compiled. The material change "event" referred to in the proposal related to extensive recladding works to Attwood House which comprised the subject hereditament. The appellant's representative proposed a reduced assessment with an end allowance of 35% for the material change of circumstances.

3. The respondent issued a challenge case decision notice on 11 January 2024 which stated that the existing rating list entry of £417,500 RV was unreasonable and determined a revised entry of £375,000 RV with effect from 21 February 2022. The revised RV accounted for a 10% end allowance due to the recladding works. The appellant's representative appealed that decision to this Tribunal on 19 March 2024 on the grounds that the valuation for the subject hereditament remained unreasonable.

4. The subject hereditament was a shop and premises in Attwood House, a mixed use six-storey building. The ground floor of Attwood House comprised retail units whilst the upper floors comprised domestic residential accommodation. The subject hereditament was occupied by lease by the appellant. Attwood House was located on New Street in Birmingham City Centre, described as a prime retail area, in close proximity to the Bullring Shopping Centre and Birmingham New Street Station.

4. The material date was 21 June 2022. The effective date, if the appeal was successful, was agreed by the parties as 21 February 2022, which was the date the works began. The antecedent valuation date (AVD) was 1 April 2015.

5. Mr Fatta appeared on behalf of the appellant as both advocate and expert witness. He stated that neither he nor Avison Young were instructed under a conditional fee arrangement.

6. As part of their induction training, a new member of the tribunal 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. The parties did not raise any issues or objections to this.

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

Issue

8. What, if any, further allowance was applicable for the material change of circumstances.

Relevant law

9. The term 'rateable value' is defined in paragraph 2(1), Schedule 6 to the Local Government Finance Act 1988 (the "1988 Act") (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 –

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.

10. As the proposal was made on the grounds of a material change in the locality, regard had to be made to paragraphs 2(6) and 2(7) of Schedule 6 to the 1988 Act;

(6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.

(7) The matters are—

(a) matters affecting the physical state or physical enjoyment of the hereditament,

(b) the mode or category of occupation of the hereditament,

(c) the quantity of minerals or other substances in or extracted from the hereditament,

(cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,

(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

(e) the use or occupation of other premises situated in the locality of the hereditament.

Evidence and submissions

11. Arguments and factual evidence from both the appellant's representative and the respondent was provided. This comprised documentation and correspondence exchanged between the parties as part of the challenge process, the appellant's representative's challenge submission, photographs of the subject hereditament and its locality, the challenge decision notice, a letter pertaining to the agreement in accordance with the lease of the subject hereditament between the landlord and tenant and reference to comparable assessments where allowances had been given pertaining to material changes of circumstances.

Discussion

12. Mr Fatta sought a 35% end allowance to RV to reflect recladding works to Attwood House which comprised the subject hereditament. On the material day, works commenced on the upper floors of Attwood House to fully replace its cladding, as the existing cladding was

non-compliant with building regulations. Mr Fatta stated that the works remained ongoing and were due to complete in 2025. He stated that the works impacted the tenant's physical enjoyment of the property, and cited noise, dust, loss of frontage, vibrations, fumes, loss of visibility and safety concerns as examples of resulting detriment.

13. Mr Fatta provided two rental concessions between the landlord and tenant of the subject hereditament, which he stated specifically pertained to the works. The first letter, dated 14 July 2022, stated that the concession was in consideration of critical fire safety works and the erection of scaffolding in front of the building, which may cause material interference with trade of business and disruption, disturbance or nuisance to the tenant and its customers/visitors. The rent was reduced by 40% for the period from 21 February 2022 until the earliest of, the date the scaffolding was removed from the front elevation of the premises, or 20 February 2023. A subsequent rental concession of 30% was given as the works were yet to complete, with effect from 21 February 2023 which would expire on either 31 January 2024, or the date the scaffolding was removed from the front elevation of the premises. The panel noted that prior concessions were also given as a result of the disruption caused by the COVID-19 pandemic of 50% with effect for periods within 26 March 2020 to 11 April 2021. Mr Fatta stated that the landlord and tenant were unconnected parties, and the two rental concessions for works was to reflect the impact of the material change alone. He contended that a 35% reduction to RV was reasonable given the rental concessions.

14. Mr Panchel contended that an end allowance which the respondent had conceded of 10% pertaining to the material change was fair and reasonable given the evidence, and no further allowance was warranted. He stated that the recladding works were to Attwood House, and no remedial works were required at the subject hereditament itself as the external envelope of the property did not contain combustible material. He stated that the scaffolding had been designed to ensure minimal disruption to the visibility and access to the retail units at Attwood House. Towers on the stanchion or party wall lines between the affected units were provided and the first-floor scaffold and support gantry were designed to avoid obstructing the visibility of the two-storey shop fronts. Mr Panchel stated that no scheme of works was provided indicating the expected timeframe of the works at the date of their commencement.

15. Mr Panchel stated that the subject hereditament was let on a new ten-year lease at a rent of £570,000 per annum with effect from 1 March 2018. He argued that a 35% allowance as sought by Mr Fatta given the rental concessions was excessive. He stated that the works were connected to the landlord's works to the residential accommodation above the subject hereditament and offended the terms of the occupier's lease. As such, he argued that the rental concessions were personal to the occupier in situ, which was the appellant of this appeal.

16. Mr Panchel argued that the concessions were not assignable, were strictly confidential and conceded in light of full and final claims the tenant may have in respect of the works. He referred to the agreements which stated, "this letter may not be assigned at any time by you and is personal to you". He considered that the agreements were personal between the landlord and tenant and born from their existing contractual relationship. He stated that the appellant was a large and popular retailer, and the subject hereditament was one of its flagship stores. The appellant had signed a long-term lease, which he argued was increasingly rare given the current market climate, and the landlord had sought to protect their relationship by offering concessions for the works which had been bestowed on the tenant contrary to its knowledge at the start of the tenancy. Mr Panchel contended that the

levels of concessions agreed would not be agreed by a hypothetical landlord and a tenant coming fresh to the scene, as any such tenant would be in a weaker position given the absence of an existing relationship.

17. Mr Panchel also highlighted that the rental concessions were agreed circa seven years after the AVD, which he argued, were in a markedly different economic climate. He stated there was still widespread uncertainty and financial pressures for landlords in the current market following the effects of the COVID-19 pandemic, which he believed would strengthen the negotiating powers of any sitting tenant far in excess of any hypothetical tenant fresh to the scene. Mr Panchel argued that there was a contrasting retail landscape at the AVD and at the date of the rental concessions. He stated that the market in Birmingham in 2015 was buoyant, plans for Europe's largest Primark store had been approved, Birmingham New Street station was in the process of being redeveloped into Grand Central and the Bullring Shopping Centre was a prime retail destination for shopping, all of which were in the locality of the subject hereditament. As such, he argued that a rental concession agreed seven years after the AVD could not be representative of a concession agreed at the AVD as the markets were not comparable.

18. Mr Panchel referred to comparable assessments which he believed that allowances were agreed for similar works in Birmingham as those to the subject hereditament. A 20% allowance was agreed to a reflect a scheme of works which enveloped 46 Pavilion Central, High Street and its neighbouring units, associated with the creation of a Primark store. The scheme of works involved the complete redevelopment of Pavillions Shopping Centre and involved significant disruption which included masking and access issues for three years. It was approximately 100m from the subject hereditament. A 5% end allowance at Unit 12 Temple Court was given by a Valuation Tribunal for disruption caused by building works to offices above the hereditament. Those works involved refurbishment and the addition of an extra storey, and the hereditament was partially obscured due to scaffolding. Various hereditaments between 23-41 Colmore Row were given an agreed 5% allowance to reflect a seventy-two-week scheme which involved works to the Grand Hotel located above. The retail units suffered noise and disturbance and scaffolding had been designed to create as minimal disruption to access and visibility. 10% allowances were given at The Stationary Co New Refectory Block and 18 Fleet Street for scaffolding and associated cladding repair. Mr Fatta argued that, notwithstanding 46 Pavillion Central, the comparable assessments were unreliable as they were smaller than the subject hereditament and some did not have scaffolding from the ground floor. He argued that whilst 46 Pavillion was similar in terms of the length of scheme, it was four times smaller than the subject hereditament and situated in a different position.

19. Both of the parties referred to 141 New Street. Mr Panchel stated that this property was three doors down from the subject hereditament, where the respondent had given a 10% allowance for the same building works which had partially screened that unit's frontage and based on a similar rental concession given by the landlord as at the subject hereditament. Mr Panchel stated that valuation was not appealed. Mr Fatta did ask what that rental concession was, but Mr Panchal was unable to answer. Mr Fatta believed that the agent involved in the negotiations did not appeal because it agreed with the respondent's concession, rather it was due to other factors such as the confidentiality of rental agreements.

20. The panel upheld the determination of the respondent and confirmed a RV of the subject hereditament at £375,000 with effect from 21 February 2022. It found that the allowance of

10% given for the material event at the subject hereditament was fair and reasonable based on the evidence before it, and no further allowance was warranted.

21. The panel noted that the appellant's lease at the subject hereditament was a ten-year lease with effect from 17 July 2018. The panel found that demonstrated a long-term commitment between the landlord and tenant where the tenant would expect to be a prominent occupier in the locality for a significant period of time. At the material time of signing the agreement, the tenant would not have expected to have recladding works impeding the property's visibility and negatively impacting its quiet enjoyment for a large period of the tenancy. As such, the panel found it was natural for any reasonable landlord to provide a concession in light of those works, in order to maintain a positive relationship between the landlord and tenant.

22. At the time the concessions were granted, and as evidenced by a prior rental concession given by the landlord to the tenant to the commencement of the works, it was acknowledged that the COVID-19 pandemic had negatively affected the market. Whilst Mr Fatta and the landlord stated that the rental concessions specifically pertained to the material change of circumstance, it was clear to the panel that the landlord would be mindful of other factors, especially the state of the market, when offering the concessions. Furthermore, the panel found that the relationship between the landlord and the tenant was a significant factor that the landlord would have considered when offering a concession. A brand-new hypothetical tenant would be in a weaker position than a tenant with the security of a long-term lease from the perspective of negotiations. Financial pressures on landlords were far more common at the point in time when the concessions were offered, suggesting to the panel that a landlord would prefer to keep a secure and reliable tenant rather than source a new tenant, and as such would offer more favourable terms to the former. The panel therefore determined that a 35% reduction to RV in line with the rental concession was not warranted.

23. The panel considered the comparable assessments referred to by the parties. Those hereditaments were situated in the locality of the subject hereditament and had end allowances given or agreed which ranged from 5-20%. Although Mr Fatta stated that the hereditament at 46 Pavilion Central was smaller than the subject hereditament, the panel found that the material change of circumstance was a far more significant scheme of works than at the Attwood House, which, as well as completely redeveloping a shopping centre, also created access issues. There were no such access issues at the subject hereditament. The allowance given at 46 Pavilion Central was 20%, and the panel found that it would be incorrect to award the same at subject hereditament given the comparative difference in the scale of the respective works. A 5% allowance was given at Unit 12 Temple Court and Various hereditaments between 23-41 Colmore Row. The panel found the works to be similar in terms of visibility issues and the effects from scaffolding. An allowance of 10% was given at The Stationary Co New Refectory Block, 18 Fleet Street and 141 New Street. In terms of the former two, that allowance accounted for scaffolding and cladding repair, which the panel found were similar to the works at the subject hereditament. Whilst Mr Fatta had stated that the allowance at 141 New Street was not challenged due to other factors, it was a direct neighbour to the subject hereditament and its allowance pertained to the same material change of circumstance. Furthermore, the frontage of the entrance to the subject hereditament was unaffected by any works. The panel therefore deemed a 10% allowance as already awarded by the respondent to be reasonable at the subject hereditament.

Disposal

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

Date:6 September 2024

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.
