UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0321 (LC)
UTLC Case Number: RA/49/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING - ALTERATION OF RATING LIST – material change of circumstances – whether premises incapable of beneficial occupation – when did works of reconstruction begin – appeal refused.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

MEADOWBANK INTERNATIONAL LTD

Appellant

and

MARTIN ALLIS
(VALUATION OFFICER)

Respondent

Re: First and Second Floor,
Tamworth Road,
Long Eaton,
Nottingham, NG10 1JE

Upper Tribunal Judge Elizabeth Cooke and Mr Mark Higgin FRICS
11 November 2020

At the Royal Courts of Justice,
Strand,
London WC2A 2LL

Mr Indranil Chakraborty for the appellant
Ms Jacqueline Lean for the respondents, instructed by HMRC, for the respondent.

The following cases are referred to in this decision:

Jackson (VO) v Canary Wharf Ltd [2019] UKUT 136 (LC)
Newbigin v SJ & J Monk [2017] 1 WLR 851

Introduction

1. This is an appeal by Meadowbank International Limited against a decision of the Valuation Tribunal for England ("the VTE") dated 15 June 2018 in which it dismissed appeals relating to the appellant's proposals for alteration of the 2010 rating list in respect of the first and second floors of 1-3 Tamworth, Long Eaton, Nottingham, NG10 1JE. The appellant sought a rateable value of nil for both floors, but as a result of the VTE's decision the rateable values remained at £12,250 and £9,000 for the first and second floors respectively.

2. The Valuation Officer has since offered to reduce the assessment of the second floor to nil with effect from 1 April 2015, albeit not for the reasons put forward by the appellant in its proposal. Mr Chakraborty would have liked to argue for an earlier effective date, but the provisions of regulation 14(2) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 make that impossible (see paragraph 25 below).

3. Therefore, this appeal now relates only to the first floor of the building ("the property"), which was occupied and used as a gym until 2014, and then stood empty until its conversion to residential flats. Crucial to the appeal is the question of when that conversion started.

4. We heard the appeal at the Royal Courts of Justice on 11 November 2020. Mr Indranil Chakraborty BCom(Hons) MCom FCMA represented the appellant and called Mr Santokh Herh, a director of the appellant, as a witness of fact. The appellant also relied on an expert report from Mr Andrew O'Dowd MRICS IRRV (Hons), but Mr O'Dowd did not attend the hearing.

5. Ms Jacqueline Lean appeared for the respondent and called Mr Martin Allis IRRV (Hons) Assoc RICS and Ms Rachel Sanders, both valuers in the East Regional Unit of the Valuation Office Agency.

6. In the paragraphs that follow we first summarise the facts insofar as they are relevant. We then discuss the law, in order to analyse the validity of the appellant's proposal to alter the rating list and to determine the material and effective dates. Finally, we turn to the evidence, the arguments and our conclusion.

The property

7. Long Eaton is approximately 8 miles west of Nottingham city centre and 6 miles east of Derby. Tamworth Road is one of the main arterial routes through Long Eaton and the property is close to the main retail High Street and surrounded by national and local businesses.

8. The property is described in the rating list as 'Gymnasium and premises'. It is situated above two retail units occupied by a building society and a restaurant/takeaway and is accessed through a lobby and staircase shared with the second floor. The building was originally constructed in the early 1900's and was formerly occupied by the Greater Nottingham Co-operative. The elevations on to Tamworth Road at first and second floor level have been clad with stone panels lending the property a more modern appearance.

9. The use as a gym started in 2007 and the tenant spent £53,000 on works to adapt the space to make it suitable. It has a carpeted floor, plastered walls and acoustic tiled ceiling with inset illumination.

10. In 2014 the tenant ceased to pay rent and went out of business; the liquidator disclaimed the lease in December 2014. The appellant's proposal was for a rateable value of £ nil from 25 April 2014 on the basis of the condition of the hereditament from that date onwards; we say more about the precise basis of the proposal below.

11. The property and the second floor have now been converted to residential use and the 2017 rating list assessment has been deleted. The property's current physical state is irrelevant to the appeal and so the Tribunal has not visited it; photographs of both the exterior and interior of the property were included in the expert reports and Ms Sanders provided a witness statement describing the interior following her visit in May 2017.

The legal framework, the proposal and the relevant dates

The proposal and its validity

12. Paragraph 2(1) of Schedule 6 to the Local Government and Finance Act 1988 ("the 1988 Act") provides that the rateable value of a hereditament:

> "shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to be let from year to year."

13. That rent is calculated on the three well-known assumptions in paragraph 2 of Schedule 6 to the Local Government Finance Act 1988: that the tenancy begins on the day by reference to which the determination is made, that the hereditament is in a state of reasonable repair, "but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic", and that the tenant pays for rates, taxes, repairs and insurance. The "date by reference to which the determination is made" in this case was 1 April 2008, being the antecedent valuation date for the 2010 rating list, compiled on 1 April 2010; a new rating list was due to be compiled on 1 April 2015 but that was deferred until 1 April 2017, with the result that the 2010 list remained effective for seven years rather than the usual five.

14. A ratepayer may propose that the list be altered. The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 ("the 2009 Regulations") set out a

number of grounds on which the list may be altered in regulation 4, including the following at 4(1)(b) and (e):

> "(b) the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled."

> "(e) the rateable value or any other information shown in the list for a hereditament is shown, by reason of a decision in relation to another hereditament of—
> … (iii) … a court determining an appeal or application for review from the VTE, a valuation tribunal, the Lands Tribunal or the Upper Tribunal, to be or to have been inaccurate."

15. Regulation 5 of the 2009 regulations provides that in general a proposal to alter a list may be made at any time before the date on which the next list is compiled. The appellant's proposal was made on 18 September 2017, and the 2017 rating list was compiled on 1 April 2017; so at first blush the proposal was out of time. However, Regulation 5 goes on to state two exceptions, of which the relevant one is:

> " (2) A proposal on the ground set out in—
>
> … (b) regulation 4(1)(e) may be served on the VO no later than six months after the day on which the next list is compiled."

16. The appellant's proposal said this:

> "Circumstances affecting the Rateable Value of the property changed on 25-APR-14
>
> Following the Judgment dated 1 Mar 2017 with Case ID 2015/0069 presided by Justices, Lord Neuberger, Lord Kerr, Lord reed, Lord Carnwath, Lord Hodge, SJ & J MONK has now won. The summary:
>
> Property addres: 1-3/3a Tamworth Road, Long Eaton. Notingham NG10 1JE 1st Floor became unoccupied since 25th April 2014. It was not fit to rent out due to layout of the entire floor. Much money was spent on advertisement for renting out but all went in vain. Later, it was found out the cost of building office space shall dwarf the rental yield. Therefore, having no other options, Mr Herh applied for 'change of use' to Erewash council and subsequently granted. Since ownership Mr Herh produced evidences to council several times over the inability to rent out the 1st floor due to the location and layout of the premises."

17. The wording of the proposal would appear to indicate reliance upon a material change of circumstances; but there is reference to the decision of the Supreme Court in *Newbigin v*

SJ & J Monk [2017] 1 WLR 851. The VO treated the proposal as being made under regulation 4(1)(e) of the 2009 regulations, and it is therefore saved by regulation 5.

18. That of course means that the Tribunal can consider the proposal *only* insofar as it relies upon *Newbigin v Monk*, and therefore we have to pause to explain what the Supreme Court decided in that case. Any other arguments raised in the proposal or at the hearing, for example about the difficulty of achieving a letting because of the layout of the property, have no relevance and cannot be considered.

The scope of the proposal: Newbigin v Monk

19. One of the assumptions to be made in assessing rateable value is that the property is in reasonable repair, and that assumption will displace the reality principle where the building is in need of repair. But what if it is being completely stripped out and converted to a different use? The decision of the Supreme Court in *Newbiggin v SJ & J Monk* [2017] 1 WLR 851 asked the question "Does a commercial building which is in the course of redevelopment have to be valued for the purposes of rating as if it were still a usable office?" (paragraph 1). Lord Hodge at paragraph 20 explained that the assumption of reasonable repair "…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." If the premises are not capable of beneficial occupation then they are not a hereditament, and must either be removed from the list or, more practically, entered with a nominal rateable value.

20. That is what the appellant says has happened in this appeal.

21. Accordingly, the Tribunal in this appeal must determine whether the property was unusable, because it was being reconstructed, at the material day and, if so, when that reconstruction work began.

22. At paragraph 23 of the decision in *Newbigin* Lord Hodge explained:

> "How does a valuation officer ascertain that premises are undergoing reconstruction rather than simply being in a state of disrepair? The subjective intentions of the freehold owner of a property are not relevant to the reality principle. The matter must be assessed objectively. But, in carrying out that objective assessment of the physical state of the property on the material day, the valuation officer can have regard to the programme of works which is in fact being undertaken on the property. It is clear on the UT's findings of fact, which I have summarised in para 4 above, that on 6 January 2012 the premises had been largely stripped out in the course of a redevelopment and an outline of the future development (the communal lavatory facilities) had been created. The premises were incapable of beneficial occupation, because, as an objective fact, they were in the process of redevelopment and no part of them was capable of beneficial use."

23. As the Tribunal (the Deputy President and Mr Peter McCrea FRICS) put it in *Jackson (VO) v Canary Wharf Ltd* [2019] UKUT 136 (LC):

> "Although the subjective intentions of the owner of a property were not relevant, the valuation officer could have regard to the programme of works which was being undertaken on the property."

24. The Tribunal in *Jackson* went on to say (at paragraph 38) that it is not necessary for the valuer to see a detailed programme of works, or physical evidence of the eventual form of the reconstructed premises. But it must be objectively ascertainable, at the material day, that the premises are undergoing reconstruction rather than simply being in a state of disrepair.

The material and effective dates in relation to the appellant's proposal

25. When a proposal is made to alter the list, it is necessary to work out what is the material day, which is the date at which the property is to be valued. The material day in this case is 18 September 2017, being the date that the proposal was received by the Valuation Officer (regulation 3 (7)(b) of SI 1992 No. 556 (The Non-Domestic Rating (Material Day for List Alterations) Regulations 1992).

26. It is also necessary to identify the effective date, from which the alteration in the list will take effect. Regulation 14(2) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 as amended by the Non-Domestic Rating (Alteration of Lists and Appeals) (England) (Amendment) 2015 Regulations states that where an alteration is made to the 2005 or 2010 lists, it shall have effect:

> (a) from the date on which the circumstances giving rise to the alteration first occurred, if the alteration is made
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> (i) before 1 April 2016 otherwise then to give effect to a proposal;
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> (ii) in order to give effect to a proposal served on the Valuation Officer before 1 April 2015;
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> (iii) on or after 1 April 2016 where the circumstances giving rise to the alteration first occurred on or after 1 April 2015 and the alteration is made otherwise them to give effect to a proposal;
>
> (iv) in order to give effect to a proposal served on the Valuation Officer on or after 1 April 2015 where the circumstances giving rise to the alteration first occurred on or after that date;
>
> (b) from 1 April 2015 if the circumstances giving rise to the alteration first occurred before that date and the alteration is made all or after 1 April 2016 otherwise them to give a factor of proposal;

(c) from 1 April 2015 if the alterations made to give effect to a proposal served on the Valuation Officer on or after that date and the circumstances giving rise to the alteration first occurred before that date.

27. The proposal falls within regulation 14(2)(c): it relies upon a change of circumstances in April 2014 (see paragraph 16 above), and the proposal was served after 1 April 2015; therefore the effective date in this appeal is 1 April 2015.

28. The consequence of all this is that the only issues arising in this appeal are (1) whether at the material day the property was undergoing works of reconstruction such that beneficial occupation could not take place and consequently the property was not a hereditament and (2) if so, when did that reconstruction begin. These are the points arising from *Newbigin v Monk*. Insofar as the proposal encompassed any other or wider grounds we do not need to consider them because it was not open to the appellant to make a proposal on any other basis.

The evidence and submissions

The appellant's position

29. In opening, Mr Chakraborty explained how his client came to acquire the property, the trading difficulties of the first floor tenant, how the tenant became insolvent and the steps taken to secure a letting in the period after the tenant had vacated. He said that the difficulty in finding tenants led Mr Herh to first devise a scheme to redevelop the second floor as residential accommodation, and later to convert the first floor in to flats as well.

30. Mr Herh's witness statement, which Mr Chakraborty drafted after discussion with him, consisted of argument based on the decisions in *Newbigin* and *Jackson* and did not assist the Tribunal on factual questions of whether reconstruction work had begun by the material day and if so when. However, in cross-examination Ms Lean took Mr Herh to the chronology set out in paragraph 12 of the VTE's decision and said to have been provided by Mr Chakraborty.

> January 2014 - the property was purchased by Meadowbank International Limited;
> October 2014 - planning permission for change of use submitted;
> December 2014 - the tenancy on the first floor ceased;
> June 2015 - quote received for altering the second floor from offices to domestic accommodation;
> January 2016 - funding offer for the development was accepted;
> March 2017 - revised planning application for change of use submitted;
> September 2017 - revised quote for conversion works;
> October 2017 - second funding offer for the development accepted;
> May 2018 - conversion works to the upper floors commence.

31. Mr Herh confirmed that he had been present when Mr Chakraborty gave this information to the VTE and that he agreed with it. He said that the date given in the proposal for the change of circumstances 25 April 2014, was before the tenant of the first floor ceased trading in July. He said that as soon as the tenant "went bankrupt" lots of work was done, because the idea was to do something with the building, and to put a tenant in there. When that didn't happen, he decided to go for the conversion to residential use. He said that a pre-planning application was made and that works commenced in 2018; he thought that that was the case for both the first and second floors.

32. Ms Lean took Mr Herh to a letter addressed to Mr Chakraborty dated 20 May 2018, from Alan McGowan Architects Ltd. That letter said that pre-planning enquiries and then a planning application were made in 2014; that a planning application was made in 2017; and that "works to convert the upper floors to residential use are due to commence on 29 May 2018." Mr Herh agreed that works did commence around that time.

33. Mr Chakraborty also sought to examine whether the Compiled List assessment was soundly based and asserted that the tenant had failed to undertake proper due diligence when the lease was agreed in 2007. No evidence was offered in support of this claim. As far as the passing rent was concerned Mr Chakraborty noted that the tenant had ceased to pay rent in the early part of 2014 and had proffered an analysis based on the total amount of rent paid divided by the term of the lease.

34. Mr Chakraborty did not call Mr O'Dowd; he explained that he had decided not to incur the expense of his attending the hearing. We bear in mind that his evidence has not been tested in cross examination. Mr O'Dowd's stated in his report that he believed that the scheme of reconstruction commenced when the tenant moved out. Everything was removed except for the carpets and the mains services were disconnected.

35. Mr O'Dowd's report also made a number of legal arguments, including that the effective date should not be regarded as limited by statute when it could be proved to be "correct and ethical" to alter the list at an earlier date. We have to disregard those arguments and they are in any event without merit. Mr O'Dowd also sought to argue that the rateable value of £12,500 was incorrect because the basis on which it was assessed, namely the rent being paid by the tenant, was unreliable, not having been negotiated at arms length. That is speculation and is in any event irrelevant to what the Tribunal has to decide.

36. Mr O'Dowd appended some photographs to his report, which Mr Chakraborty told us he took in May 2017. None shows any sign of work in progress.

The respondent's position

37. Ms Sanders gave evidence of fact for the respondent. She said that she had visited the hereditament on 31 May 2017, primarily in connection with the outstanding proposal on the second floor. However, Mr Chakraborty had asked her to look at the first floor too, on the basis that a proposal with respect to the first floor was about to be submitted, and she did so.

38. She noted the works undertaken by the tenant and that the property was in reasonable repair. She saw no signs of works having commenced. This was also the case at the second floor.

39. Mr Allis gave expert evidence for the respondent. He gave some background information as to how the current rateable value was arrived at which, in view of the narrow scope of the issues before the Tribunal, we do not need to consider. At the hearing he confirmed that he had not inspected the hereditament until 19th March 2019. He said that he had no evidence to suggest that conversion works had started by the date of submission of the proposal.

Discussion

40. As discussed above, the issues before the Tribunal are very narrow. Much of Mr Chakraborty's argument was an endeavour to persuade us that he property was not able to be let in 2014, due to the state of the market and the impossibility of finding a tenant despite the appellant's efforts; but that is not the issue. The question is whether the hereditament was incapable of beneficial occupation at the material day because it was undergoing reconstruction and, if so, when that reconstruction started.

41. Mr Herh's evidence together with the architect's letter make it clear that physical work at the property started in May 2018. Mr Chakraborty's argument can, we think, be analysed as having two strands. One is the argument that pre-planning enquiries or a planning application mark the start of the work of reconstruction. We regard that as untenable. Even the obtaining of planning permission for reconstruction does not make a building incapable of beneficial occupation; still less can enquiries or an application do so. In the absence of anything other than a planning permission before May 2018, the appeal fails on the facts on the basis of what was said by the Supreme Court in *Newbigin* and by the Tribunal in *Jackson*, without the need for any further elaboration.

42. We find that the works had not started by the Material Day and there are no grounds for a reduction in assessment.

Determination

43. For the reasons given above we dismiss the appeal and uphold the Valuation Tribunal's decision that the assessment should remain unchanged at Rateable Value £12,250.

Judge Elizabeth Cooke Mark Higgin FRICS

Dated: 19 November 2020