UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Valuation – statutory assumption that hereditament in reasonable state of repair – premises in disrepair, vacant and part of proposed redevelopment site – a reasonable landlord would not consider it economic to repair – Schedule 6 paragraph 2(1)(b) to Local Government Finance Act 1988

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

BETWEEN

DAVID BARBER (VALUATION OFFICER)	**Appellant**
AND	
CEREP III TW SARL	**Respondent**

Re: Shop and Premises,
43 Mount Pleasant Road,
Tunbridge Wells,
Kent TN1 1PN

Before: Her Honour Judge Alice Robinson and Mr P D McCrea FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
10 September 2015

Cain Ormondroyd, instructed by HMRC solicitor for the Appellant
The respondent was not represented and did not appear.

The following cases are referred to in this decision:

S J & J Monk v Newbigin (VO) [2014] UKUT 14 (LC)
Newbigin v S J & J Monk [2015] EWCA Civ 78
McDougall v Easington BC (1989) 58 P&CR 201
Dawkins (VO) v Ash Bros & Heaton Ltd [1969] 2 AC 366
Lurcott v Wakely [1911] 1 KB 905
Coppin (Valuation Officer) v East Midlands Airport Joint Committee (1971) 17 RRC 31
Rozel Motor Company Ltd v Clark (Valuation Officer) [1983] RA 70
Burley (Valuation Officer) v A&W Birch Ltd (1959) 5 RRC 147

DECISION

Introduction

1. This is an unopposed appeal by the Valuation Officer, Mr David Barber IRRV ("the appellant") against a decision of the Valuation Tribunal for England ("VTE") dated 28 July 2014, in which the VTE determined that the rateable value of 43 Mount Pleasant Road, Tunbridge Wells, Kent, TN1 1PN ("the appeal property") was £0 with effect from 1 April 2010. The appeal to the VTE arose from a proposal made on behalf of CEREP III TW Sarl ("the respondent") against the compiled 2010 rating list assessment of £57,500 RV.

2. The appellant was represented by Mr Cain Ormondroyd of counsel, who called Mr Barber to give expert valuation evidence, and Mr Adrian Jones BSc (Hons) MSc MRICS to give evidence in respect of the cost of repairs to the appeal property.

3. The antecedent valuation date (AVD) is 1 April 2008. The effective date and material day are both 1 April 2010.

Facts

4. In the light of the evidence we find the following facts.

5. The appeal property, which has now been demolished, was situated on the western side of Mount Pleasant Road, in central Tunbridge Wells. It was a two storey retail unit, with sales space on the ground floor and storage and wc accommodation on the first floor.

6. It formed part of a wider redevelopment site which centred on the redundant Tunbridge Wells cinema, and comprised various elements. First, the cinema building, together with six retail units along its northern boundary (10 to 15 Ritz Buildings, Church Street), and nine retail units along its eastern boundary (51 to 67 Mount Pleasant Road), all of which dated from the 1930's. Secondly, three further, but more modern, retail units, comprising 41, 43 (the appeal property) and 49 Mount Pleasant Road. The appeal property and number 41 were, in common with numbers 27 to 39 to the south (which fell outside the redevelopment area), constructed in the 1960's. Number 49 was constructed in the 1980's. The remaining element of the redevelopment site comprised two office buildings, Hill House and Clarincarde House, which were situated in the southern part of the site, to the rear of 41 and 43 Mount Pleasant Road. A public right of way lay between numbers 49 and 51, giving access from Mount Pleasant Road to Clarincarde Road to the west.

7. The cinema and the 15 units immediately adjoining it were surrounded by hoardings for several years prior to demolition in September 2014. The appeal property, together with numbers 41 and 49, were not subject to hoarding, but upon becoming vacant were boarded up.

8. At the AVD the appeal property, 41 and 49 Mount Pleasant Road, were all occupied and trading. The appeal property became vacant on 28 May 2008. At some time after this it was internally vandalised. One of the effects of the vandalism was that brown asbestos was exposed, as identified in an asbestos report dated 24 October 2012 which the respondents commissioned in respect of all of the properties in the redevelopment site.

9. By the material day, 1 April 2010, all of the units within the redevelopment scheme were vacant.

10. The original compiled list assessment for the appeal property was at £57,500 with effect from 1 April 2010. This was subject to a proposal by PricewaterhouseCoopers LLP on behalf of the respondent on 18 December 2012. The proposal was to reduce the rateable value to £0 with effect from 1 April 2010, on the grounds that "this assessment is part of a wider site assembly, has been sold for redevelopment, is vacant, has been stripped out by vandals, contains disturbed asbestos, and no longer has any value".

11. The assessment was reduced to £0 by the valuation officer with effect from 1 July 2013, when demolition works commenced.[1] However, negotiations in respect of the level of assessment from 1 April 2010 to 30 June 2013 proved fruitless, and the resulting appeal was determined by the VTE on 28 July 2014.

The VTE's Decision

12. The VTE's decision turned on whether the appeal property was capable of beneficial occupation, following the decision of this Tribunal in *S J & J Monk v Newbigin (VO)* [2014] UKUT 14 (LC), to which we shall refer hereafter as *Monk*. The panel was persuaded that the property was incapable of beneficial occupation owing to the presence of exposed asbestos. Accordingly the work required to make it capable of beneficial occupation would go beyond works of repair and would therefore fall outside the repairing assumption in the statutory rating hypothesis. The appeal was upheld and the assessment reduced to £0 with effect from 1 April 2010.

Statutory Framework

13. Section 56 of the Local Government Finance Act 1988 ("the Act") gives effect to Schedule 6 to the Act which sets out the statutory basis on which the rateable value of a non-domestic hereditament is determined. The statutory assumptions for determining rateable value are set out in paragraph 2 of Schedule 6, as follows:

> "2(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 the 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.
>
> ….

[1] The appellant now considers that reduction to be incorrect, having regard to the Court of Appeal's decision in Newbigin v S J & J Monk [2015] EWCA Civ 78, but since the effective date of alteration when correcting an earlier rating list alteration is limited to the date of alteration, and the assessment has now been deleted from the rating list, no further action can be taken.

(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,

….

(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"

Case for the Appellant

14. Mr Ormondroyd submitted that since the VTE's decision was heavily based on the decision of this Tribunal in *Monk*, which has since been overturned by the Court of Appeal in *Newbigin v S J & J Monk* [2015] EWCA Civ 78, to which we shall hereafter refer to as *Newbigin*, the appeal should be allowed and a rateable value of £57,500 reinstated in the rating list between the dates in question.

15. He submitted that following *Newbigin*, the question of beneficial occupation was irrelevant. Instead, the following questions should be addressed.

a. Was the appeal property in a state of disrepair?

b. Can the works be characterised as repair?

c. Are those repairs economic?

16. To assist in answering those questions, Mr Ormondroyd called Mr Jones and Mr Barber.

Mr Adrian Jones

17. Mr Jones is a chartered building surveyor employed by the Valuation Office Agency. He gave evidence in respect of the cost, at the AVD, of the work that would be required to put the appeal property into a condition upon which it could be let on the hypothetical basis assumed under Schedule 6 to the Act. In doing so, he had assumed that all of the works which he identified as being necessary in 2014, including the removal of asbestos in fact carried out in 2013, would have been required to be done at the material day. In other words, he assumed that the condition of the property in 2014 was as it would have been in 2010. The purpose of this was to ensure that the works required were identified on a worst case basis.

18. He had inspected 41 and 49 Mount Pleasant Road on 12 June 2014, accompanied by Mr Barber. He could not gain internal access to the appeal property. However, armed with a copy of the respondent's asbestos survey, and having had confirmation from the contractors on site that the appeal property was in the same state of dereliction as 41 Mount Pleasant Road, Mr Jones felt able to estimate the cost of work. He attributed costs to external repair works comprising overhauling the roof, gutters, coping stones, windows and doors, and clearing the rear yard, and also to internal works comprising removing asbestos, replacing the first floor beams and timber floor, renewing the ground floor suspended ceiling and carpet, redecorating and re-commissioning

services. His basic figure for these works was £80,211. This included a spot figure of £8,000 for the removal of asbestos but he was confident of the accuracy of this figure as it fairly compared with an apportionment of the cost for asbestos removal for 41-49 Mount Pleasant Road that the respondent's health and safety officer had obtained.

19. After allowing for contingencies, preliminaries, fees, and adjusting for location and the size of contract, Mr Jones arrived at a total cost of £112,000 or thereabouts. He was satisfied that, had he been acting for the hypothetical landlord under the rating hypothesis at the AVD, he could let the contract to carry out the work at that amount.

Mr David Barber

20. Mr Barber is a professional member of the Institute of Revenues, Rating and Valuation and has been employed by the Valuation Office Agency since 1987.

21. He said that different redevelopment proposals had been in place for the cinema site since the early 2000's. However no significant work was undertaken in connection with the current scheme until 1 July 2013, when work commenced to remove asbestos from various properties.

22. Mr Barber said that at the AVD, the appeal property together with 41 and 49 Mount Pleasant Road, were occupied and trading. The appeal property was vacated on 28 May 2008. On the material day, all of the retail units within the development site were vacant, and the cinema together with the 15 older retail units immediately surrounding it, were behind hoardings.

23. At the time of his inspection of 41 and 49 Mount Pleasant Road with Mr Jones, on 12 June 2014, asbestos had been removed from those properties and he understood also from the appeal property. Whilst the condition of the appeal property in terms of asbestos at the material day was unclear, Mr Barber was of the view that either the asbestos would have been safely concealed, or that it would have been economic to remove it and repair the property. He relied upon the fact that 39 Mount Pleasant Road (William Hill bookmakers), was of the same outward appearance and construction as the appeal property and had remained open for trading throughout.

24. It could be inferred from the asbestos report in 2012 that the appeal property had deteriorated and was in a state of disrepair. However, he said it was clear that the appeal property would not have been in a worse condition at the material day than it was as 4 October 2012 (the date of the inspection for the asbestos report), as no works of repair had been carried out. He considered that the works identified by Mr Jones were works of "repair."

25. In considering whether the works of repair were economic, Mr Barber assessed the notional rent. He said that at this stage of the 2010 rating list, a tone of the list had been established into which rents had been subsumed. In reaching this conclusion, he relied upon settlement evidence, all of which was based on a zone A rate of £660 per sqm, in respect of numbers 27 (agreed), 29 (appeal withdrawn), 31 (appeal withdrawn), 33 (appeal struck out), 35 (appeal struck out), 41 (appeal withdrawn) and 49 (appeal withdrawn). The appeal in respect of 41 was against an assessment based on £800 per sqm, but this was withdrawn when the property was reassessed at £660 per sqm. Mr Barber was unaware whether the assessment at £660 per sqm was the subject of an appeal. The condition of number 41 Mount Pleasant Road was described in the asbestos report as being very similar to that of the appeal property. Number 49 was also the subject of appeals against an original assessment of £800 per sqm, and a subsequent valuation at £660 per sqm, but both were withdrawn. Mr Barber placed less weight on the withdrawal of the appeals on numbers 41 and 49, as he was unaware of the circumstances of the withdrawal of the appeals, but thought that there was no financial incentive for their continuation. There was only

one outstanding appeal in the block, that of number 39 – William Hill, which was made in March 2015.

26. Based upon a zone A rate of £660 per sqm, Mr Barber considered that the rateable value of the appeal property, at 1 April 2010, should be £57,500.

27. He then compared this with Mr Jones's cost of work, and considered that since the cost of the work amounted to less than two years' rental value, a reasonable landlord would consider these repairs to be economic. He said in oral evidence that a landlord would consider repair works to be potentially uneconomic if the cost involved approximately equated to more than five years' rent. On this basis, the appeal property should, on the statutory hypothesis, be assumed to be in repair.

28. The redevelopment site had been known in the market since around 2000. The vacations meant that the properties deteriorated, but at the AVD the properties were all occupied and trading. Mr Barber considered that the hypothetical landlord would be confident of being able to let the property had he or she carried out the repair work. The appeal property would look similar to numbers 27-39 to the south, which had been in continuous occupation. He made no differentiation between the block of 41-49, and those to the south, even though 41-49 were within the redevelopment area. He thought the more relevant differentiation was for those properties within and without the hoarding. He said that the properties behind the hoarding had been treated differently by the VOA, as they were in a worse physical condition than 41-49.

29. In answer to a question from the Tribunal, he accepted that in the event that the work would be judged by the hypothetical landlord to be uneconomic, it could be considered that the rateable value of the appeal property at the material day might be £0.

Submissions

30. Mr Ormondroyd submitted that it was common ground that the appeal property was in disrepair. The works identified by Mr Jones were a worse case scenario and were works of repair, being replacement of subsidiary parts of the whole. They satisfied all three tests in *McDougall v Easington BC* (1989) 58 P&CR 201 per Mustill LJ at p.207. Mr Barber's valuation had never been challenged and his evidence was that the repairs were economic. The landlord was faced with a choice of doing the repairs and getting something back or doing nothing and getting nothing. The fact that the appeal property was close to the hoarded area had no effect on value and the planning permission for redevelopment fell to be disregarded as not being essential to the hereditament, see *Dawkins (VO) v Ash Bros & Heaton Ltd* [1969] 2 AC 366.

31. After the hearing Mr Ormondroyd made some further written submissions. First, he said that although the real landlord also owned the rest of the redevelopment site, thus potentially hastening the development, you could not assume that the hypothetical landlord did too, see *Coppin (Valuation Officer) v East Midlands Airport Joint Committee* (1971) 17 RRC 31, CA. Second, he drew our attention to the Lands Tribunal's decision in *Rozel Motor Company Ltd v Clark (Valuation Officer)* [1983] RA 70 in which it was held that, contrary to Mr Ormondroyd's oral submissions, planning matters are an essential characteristic of the hereditament regardless of ownership and therefore should be taken into account when considering the statutory assumptions. However, he maintained his submission that the repairs would still be regarded by the hypothetical landlord as economic. The landlord would not necessarily want to participate in any redevelopment if he could repair and relet his property without it. There was no evidence of the political will or financial commitment necessary to secure a CPO and in real life demolition works

did not commence for some time despite the redevelopment site being in single ownership. In this connection he relied upon *Burley (Valuation Officer) v A&W Birch Ltd* (1959) 5 RRC 147 to the effect that a landlord's intention to demolish is irrelevant.

Conclusions

32. The correct approach towards the statutory assumption in paragraph 2(1)(b) of Schedule 6 to the Act was considered at some length in *Newbigin*. The Court of Appeal rejected the test of asking whether the hereditament is incapable of beneficial occupation. Instead, as Mr Ormondroyd submitted, it is necessary to consider three questions:

(1) are the premises in such repair as, having regard to the age, character and locality of the property, would make it reasonably fit for the occupation of a reasonably-minded tenant? (*Newbigin* paragraph 24)

(2) if not, are the works required to put the premises into such condition works of "repair"? (*Newbigin* paragraphs 25-28)

(3) could those works of repair be carried out economically? (*Newbigin* paragraph 29)

33. As we have already set out in paragraph 12 above, the VTE in this case held that the appeal property was incapable of beneficial use and accordingly amended the entry for the property to a rateable value of £0. It follows that, in the light of the decision in *Newbigin*, the VTE decision cannot stand and we must reconsider the correct rateable value of the appeal property afresh.

34. The respondent has not participated in this appeal. However, the appellant has placed before us the evidence of the respondent that was before the VTE, including the report of Simon Tivey FRRV who gave evidence before the VTE. In summary the respondent's position was that the appeal property had deteriorated over time as a result of lack of maintenance and vandalism and the appeal property formed part of a site that was being assembled for redevelopment all of which was vacant, boarded up and in very poor condition. That impacts on the value of the appeal property such that its rateable value should be zero.

35. As to the first question identified in *Newbigin*, the respondent's position was that the appeal property was in disrepair such that it was incapable of occupation. Further, the appellant accepts that works were necessary in order to be able to let the appeal property. It is therefore common ground that the appeal property was not in such repair as, having regard to the age, character and locality, would make it reasonably fit for the occupation of a reasonably-minded tenant.

36. Although there is no direct evidence of the condition of the appeal property on 1 April 2010, the appellant did not dispute that it was in disrepair on that date and we agree. The appeal property was occupied until 28 May 2008 and there is no evidence that prior to that it was not in a reasonable state of repair. By contrast by 2014 the Health and Safety report of Penny Lawrence commissioned by the respondent described the appeal property as follows: "Dilapidation, poor lighting, boarded windows, broken sanitary ware, holes in floor, broken windows to rear and front, no working fire escape, damaged asbestos containing materials, broken roof lights". Evidently the appeal property had deteriorated from its former state. Further, it is apparent from the 2012 asbestos report (including the photographs) that the appeal property was in disrepair by that date.

37. Before the VTE the respondent argued that as the appeal property had been vacant since 28 May 2008, it was likely that it had been vandalised and the asbestos exposed by that date. This

was accepted by the VTE as "a reasonable assumption" and the VTE determined that the appeal property had been incapable of use from 1 April 2010 (paragraph 26). That finding of fact is not challenged by the appellant. Further, Mr Jones evidence assumes that the works necessary in 2014 to put the property into a reasonable condition were the same as would have been required in 2010. In other words, the property should be assumed to have been in a similar condition in 2010 to the condition it was in 2014 at the time of his inspection.

38. Accordingly, the property had deteriorated from its previous condition and, as Lewison LJ said in *Newbigin*, "it does not matter whether the deterioration resulted from error in design, or in workmanship, or from deliberate parsimony or any other cause" (paragraph 26). The property was not in a state of reasonable repair as required to be assumed by paragraph 2(1)(b) of the Act.

39. Turning to the second question identified in *Newbigin*, are the works required to put the appeal property into a state of being reasonably fit for occupation works of repair? We have no hesitation in answering this question in the affirmative. The works which Mr Jones says were required are summarised in paragraph 18 above and involved overhauling the roof, gutters, coping stones, windows and doors, clearing the yard, removal of asbestos, replacing first floor beams and timber floor, renewing ground floor ceiling and carpet, redecorating and re-commissioning services. The respondent did not dispute before the VTE that those were the works required to put the property into a reasonable state of repair. Those works involve "restoration by renewal or replacement of subsidiary parts of a whole" not reconstruction of the entirety or substantially the entirety of the property, per Buckley LJ in *Lurcott v Wakely* [1911] 1 KB 905 at p.924. Further, the works would not produce a building of a wholly different character, see the second test in *McDougall v Easington BC*. Although there is no evidence as to the effect which the works would have on the value and lifespan of the building (the third test in *McDougall v Easington*), the appellant asserts that the works would cost about £112,000 and the annual rent would then be £57,500. On that basis the cost of the works could be described as modest in relation to the value of the building on its own.

40. We turn therefore to the third question identified in *Newbigin*, could those works of repair be carried out economically? The appellant's case is that, whatever development possibilities might arise, a hypothetical landlord would pay for the works in order to get an immediate return and turn a profit after only two years rather than do nothing and get no return on the appeal property. Although in his subsequent written submissions Mr Ormondroyd accepted that the planning permission for redevelopment could be taken into account, there could be no certainty as to when any redevelopment might take place: redevelopment proposals had been in place since 2000, it could not be assumed that the hypothetical landlord owned the rest of the development site or would want to participate in any redevelopment, there was no evidence a CPO was a possibility and demolition works did not in fact commence for five years even though the site was in one ownership.

41. Recognising all of those factors, we nonetheless have reached the view that a landlord would regard the repair works as uneconomic.

42. As to value, we accept that a tone of the list had been established on Mount Pleasant Road, and that this was based on a zone A rate of £660 per sqm. We are therefore satisfied that, if in a state of repair such that it was fit for occupation by a reasonably-minded tenant, Mr Barber's assessment of the annual rental value of the appeal property at £57,500 is correct. Further, Mr Jones spoke to the cost of repairs and we accept his evidence that they would cost about £112,000. Neither figure has been contested by the respondents at any stage of these proceedings.

43. As regards whether the repair works would be considered to be economic, the rating hypothesis requires the physical nature of the property in question and the surrounding property and circumstances to be reflected. At the material day, the appeal property and every other property within the development site, were vacant. Hoardings had been erected around many of them. We were not persuaded by Mr Barber's contention that the hypothetical landlord would have more regard to the fact that the other properties on Mount Pleasant Road, from number 39 southwards, were occupied. We consider that the fact that the appeal property was in the redevelopment area to be of more relevance.

44. Although Mr Barber relied upon the fact that redevelopment proposals had existed since 2000, presumably as weakening the likelihood of redevelopment taking place in the near future, if ever, we take the view that a hypothetical landlord would consider this a positive indication that development was going to take place. Owners who had allowed their premises to be surrounded by hoardings or boarded up and become derelict or neglected over such a long period of time would almost certainly be looking to redevelop sooner rather than later. In the real world, no landlord had sought to repair either the appeal property or numbers 41 and 49 or relet them by the material day. The planning permission covered the whole of the site including the appeal property and numbers 41 and 49. The circumstances of number 39 were completely different, it was still in occupation with an established tenant trading (William Hill). The hoarding, boarding, dereliction and neglect followed the boundary of the planning consent.

45. We consider it highly unlikely that the hypothetical landlord would be willing to spend £112,000 or thereabouts on repair works in these circumstances. As Mr Barber correctly pointed out, there is no crystal ball informing the valuer, but we note that in fact a scheme to demolish the whole site commenced on 1 July 2013 and the appeal property was demolished in September 2014. The hypothetical landlord would be faced with the risk that the redevelopment would come forward sooner rather than later. At that stage he would be faced with a choice of joining the redevelopment or continuing to own a 1960's property entirely surrounded by building works and then new development. As Mr Barber accepted, his figures made no allowance for the fact that receiving the money as rent in subsequent instalments is worth less, in aggregate, than the total initial outlay as the landlord has foregone notional interest; or for the fact that the landlord would be in the business of making a profit not just breaking even. He also acknowledged that, if the landlord had known in 2010 that the property was going to be demolished in 2014 (which he could not have done) he might well have come to a different conclusion as to whether to carry out the repairs. We note this was even though the landlord would have had the benefit of four years rental by then.

46. In our judgment, in 2010 the hypothetical landlord could have had no confidence that his investment in the repairs would yield much, if any profit and accordingly, for the purposes of paragraph 2(1)(b), a reasonable landlord would consider them uneconomic. They should therefore be ignored for the purposes of valuation. On this basis, as Mr Barber agreed, albeit somewhat reluctantly, the correct assessment would be a rateable value of £0.

47. We are aware that this is inconsistent with the respondent's agent's withdrawal of proposals on 41 and 49 Mount Pleasant Road, which were apparently in a very similar state of disrepair as the appeal property and yet were assessed at £660 per sqm zone A. However since the respondent's representatives did not attend the hearing, no further information was available in respect of the withdrawal of those appeals. In any event, Mr Barber placed less weight on those withdrawals, again owing to the circumstances being unknown.

Disposal

48. The appeal is therefore dismissed, and the appeal property shall remain in the rating list from 1 April 2010 to 30 June 2013 at a rateable value of £0.

49. In the light of the fact that the appeal has failed and the respondent did not appear we make no order for costs.

Dated: 21 September 2015

Her Honour Judge Alice Robinson

P D McCrea FRICS