UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 70 (LC)
Case No: RA/55/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

RATING – VALUATION – proposal to delete hereditament from rating list on grounds of obsolescence – whether well founded – appeal dismissed.

BETWEEN:

CODEXE LIMITED **Appellant**

- and -

MARTYN LAMB
(VALUATION OFFICER) **Respondent**

Re: First Floor & Part Ground Floor,
Apollo House,
Birchwood Drive,
Bracken Hill Business Park,
Peterlee,
County Durham

Before: Martin Rodger QC, Deputy Chamber President, and P D McCrea FRICS

Sitting at North Shields
on
27 February 2018

Desiree Artesi for the appellant
George Mackenzie for the respondent

The following cases are referred to in this decision:

Leda Properties Ltd v Howells (VO) [2009] RA 165

S J & J Monk v Newbigin (VO) [2017] UKSC 14

Ravenseft Properties Limited v Newham London Borough Council [1976] QB 464

Introduction

1. The appellant, Codexe Limited, appeals against a decision by the Valuation Tribunal for England (VTE) given on 25 April 2016 by which it refused to delete an entry from the rating list in respect of office premises on the first floor and part of the ground floor of Apollo House, Birchwood Drive, Bracken Hill Business Park, Peterlee, County Durham ("the hereditament"). The entry showed the hereditament as having a rateable value of £189,000 with effect from 1 April 2010.

2. The appeal arose out of a proposal submitted by the appellant on 30 April 2014 seeking the deletion of the hereditament with effect from 7 November 2013 on the basis that it had been vacant for over three years, was in a poor condition and had become obsolete.

3. At the hearing of the appeal the appellant was represented by Ms Desiree Artesi and the respondent valuation officer by Mr George Mackenzie, both of counsel. We are grateful to them both for their assistance.

The building

4. Apollo House is a detached two-storey office building of 3,926 sq metres constructed in the late 1990's on the Bracken Hill Business Park approximately 2.5 miles west of Peterlee town centre. The Park extends to about 36 acres and comprises a variety of large and small office buildings.

5. Apollo House is linked to an adjacent building, Gemini House, by a two-storey link building providing access at both levels. The building is of steel framed construction with composite cladding elevations and profile metal roofing. Internally it comprises a central double height reception area with a staircase and two lifts giving access to open plan office areas on both floors on either side of the core. At the rear of the building is a canteen area.

6. The structural floors of the building are of concrete, with raised metal access floors in the office areas. The ceilings comprise a suspended tile system on an exposed metal grid. The internal walls are a mixture of stud partitions and block work.

7. As constructed, the building was supplied with all necessary service installations including three gas fired boilers and associated pumps providing heating, a chiller and associated pumps providing cooling, three air handling units providing ventilation, comprehensive service controls and all the necessary gas, electrical and water supplies.

8. This appeal is concerned with one of two units of assessment comprised in Apollo House, extending to approximately half of the ground floor and the whole of the first floor of the building, and having a net internal floor area of 2,179 sq metres. A second smaller hereditament, comprising the remainder of the ground floor and having a net internal floor area of 1,746 sq

metres, was also the subject of the appellant's proposal for deletion, but was not separately considered by the VTE. It is agreed by the parties that whatever the outcome of this appeal in relation to the larger hereditament, our conclusion will apply equally to the smaller unit.

9. There are 284 car parking spaces in a car park surrounding Apollo House on three sides, the use of which is common to both hereditaments and to Gemini House.

10. Apollo House was entered in the compiled 2010 rating list as offices and premises with a rateable value of £340,000. The assessment was subsequently split by the valuation office, for the purpose of both the 2005 and 2010 lists. The smaller ground floor hereditament was shown in the 2010 list with a rateable value of £150,000, while the larger (appeal) hereditament on the remainder of the ground floor and the first floor was ascribed a rateable value of £189,000, in each case with effect from 1 April 2010.

The facts

11. At the time of its construction the Bracken Hill Business Park was within the East Durham Enterprise Zone and prospective occupiers of the new buildings on the Park were offered significant tax breaks and other inducements designed to bring new employment to the area.

12. Apollo House, and its linked neighbour, Gemini House, were originally occupied together by a telecommunications company and used as a call centre from 2000. This occupation was pursuant to lease of Apollo House granted on 2 May 2000 at a rent of £440,000 a year. The call centre subsequently closed and for a period from February 2007 until 1 May 2010 the hereditament was occupied by BGL Group Ltd, while the remainder of Apollo House remained vacant.

13. BGL Group took an assignment of the Apollo House lease in about February 2007 in return for a reverse premium of £216,000 and continued to pay the same annual rent of £440,000. On the expiry of the lease in May 2010 BGL Group vacated Apollo House which has remained vacant ever since (with the exception of a short period of about two months when occupation was taken by a company installing solar panels on the roof of the building).

14. The appellant's interest in Apollo House is a long headlease granted in August 1999 for a term of 175 years (less 3 days) at, we assume, a nominal rent. On 7 November 2013 the appellant purchased that lease from the administrators of the previous headlessee, paying a premium of £175,000. By that time the whole of Apollo House had been vacant for about 3½ years.

The proposal

15. On 29 April 2014 the appellant submitted a proposal covering the whole of Apollo House and requesting an alteration in the rating list to delete both entries with effect from 7 November 2013, the date on which it had acquired its leasehold interest.

16. In Part C of the proposal form the appellant identified two grounds for the proposed alteration. The standard form invites the maker of the proposal to select only one ground from a menu of options, but Mr Shamir Budhdeo, a Director of the appellant company, nevertheless ticked both ground A, that "the rateable value(s) in the rating list on 1 April 2010 was/were inaccurate", and ground G, that "the entry shown on the list should be deleted for reasons other than those at E and F above." Grounds E and F apply where the property has been demolished or no longer exists, or is exempt from rating and no longer rateable.

17. In a statement of detailed reasons for the proposed alteration which accompanied the proposal form the appellant gave the following explanation, which we summarise.

(a) Due to its poor condition, Apollo House could not be put on the market for its previous use as a call centre and was obsolete.

(b) The appellant was unable to receive a rent due for Apollo House due to an over supply of similar buildings in the locality, a number of which would also become vacant in the near future.

(c) The property had been vacant for over three years before the appellant's acquisition, and its predecessor had gone into administration.

(d) The property had been used only for a short period of two months for the storage of solar panels and was in need of "substantive development" (for which the appellant had applied for planning permission) as it was "currently unfit for occupation by long term tenants."

18. In support of the proposition that Apollo House was obsolete, the appellant supported the proposal with a letter from Steve Cole BSc MRICS of Lexicon Cole, a firm of property advisers. The letter advised Mr Budhdeo on the current state of the local market; it is undated but we assume it was written between November 2013 and April 2014.

19. With his letter Mr Cole provided a schedule of vacant stock in the vicinity of Peterlee and advised that the occupational office market was going through "a sustained period of difficulty, particularly in this location" as large national occupiers had vacated Bracken Hill and moved to "primer offices" in other locations. Mr Cole estimated that there were between 190,000 and 220,000 sq ft of comparable office space within the immediate vicinity sitting vacant whose landlords were offering heavy incentives to attract tenants. He went on:

> "It is our opinion that at present for Apollo House we would envisage that if we are able to secure a letting, given the size of the building at 43,000 sq ft and rates liability the tenant would have to undertake, it may be only possible to achieve a rental level of £1 per sq ft, or even lower. We would market the property at a higher level, however given the incentives being offered to occupiers in other buildings we would suggest that (following any incentives required to secure the tenant) that is the sort of level we should be prepared to accept at the current time of the market."

Mr Cole added, finally, that the fact that the building had been vacant for a substantial period "creates a slight issue with marketing."

The relevant statutory provisions

20. Section 42(1), Local Government Finance Act 1988 requires that each non-domestic hereditament must been shown in a local non-domestic rating list. It is not disputed that the appeal property was appropriately included in the rating list in 2005 and 2010, but it is said by the appellant that by the time it acquired Apollo House in November 2013 circumstances had changed sufficiently that the appeal property ought to be removed from the list. That can only be because it was no longer a hereditament.

21. A hereditament is any "property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list" (as defined in section 115(1) of the General Rate Act 1967, incorporated by section 64(1), 1988 Act).

22. By paragraph 2 of Schedule 6 to the 1988 Act (as amended) the rateable value of a non-domestic hereditament is 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 on three assumptions.

23. The first assumption is that the notional tenancy "begins on the day by reference to which the determination is to be made."

24. Where a rateable value is being determined with a view to making an alteration to a list which is already been compiled, the date specified by the Secretary of State as the date by reference to which a determination of the rateable value is to be made is 1 April 2008 (article 2, Rating Lists (Valuation Date) (England) Order 2008). That date is referred to for convenience as the "antecedent valuation date" (AVD).

25. The second assumption required by paragraph 2(1) of Schedule 6 is that immediately before the notional tenancy begins "the hereditament is in a reasonable state of repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic." The third assumption is that the tenant will be responsible for all usual tenant's rates and taxes and will undertake to bear the cost of the repairs, insurance and other expenses necessary to maintain the hereditament in a state to command the assumed rent.

26. Where a rateable value is to be determined with a view to making an alteration to a list which has already been compiled, paragraph 2(6) of Schedule 6 requires certain further assumptions to be made regarding the hereditament and its locality. Thus, the matters mentioned in paragraph 2(7) of Schedule 6 are to "be taken to be as they are assumed to be on the material day."

27. The matters mentioned in paragraph 2(7), so far as they are relevant to this appeal, are the following:

(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.

28. The matters mentioned in paragraph 2(7) are to be taken to as they were on the "material day." For the purpose of a deletion proposal the material day is "the day on which the circumstances giving rise to the alteration occurred" (regulation 3(4), Non-domestic Rating (Material Day for List Alterations) Regulations 1992).

29. This appeal has proceeded on the basis that the material day is 7 November 2013, being the date with effect from which the appellant's proposal sought the deletion of the existing entry for the hereditament in the 2010 rating list. That date has no other significance as far as the circumstances of the hereditament are concerned, and we have understood the appellant's case as being that *by* that date at the latest the circumstances which it says justify the deletion of the entry from the rating list had occurred.

30. In *Leda Properties Ltd v Howells (VO)* [2009] RA 165, in which a ratepayer sought the deletion of a computer centre from the rating list on the grounds that it had become incapable of beneficial use, the Lands Tribunal (George Bartlett QC, President) explained that because the level of demand in the market is not one of the matters identified in paragraph 2(7) of Schedule 6 it must therefore be taken to be as it was on the antecedent valuation date. The point was resolved briefly (at paragraph 35):

> "The ratepayer's case is that at the date of the proposal the hereditament was functionally obsolete as a computer centre, and the effect of this was that there was no demand for it for this purpose. But demand (unless the level of it is such as to manifest itself physically in the locality in which the hereditament is situated: see paragraph 2 (7)(d) of Schedule 6) is a matter to be addressed not at the date of the proposal but at the AVD."

The Tribunal went on to point out that as the hereditament was occupied at the antecedent valuation date by a tenant paying a substantial rent, and remained so occupied for nearly a further five years, with the tenant in occupation deciding not to operate a break option exercise in the middle of that period, it was beyond argument that as at the antecedent valuation date there was a demand for the hereditament, in the condition in which it then was, as a computer centre.

The issues

31. In her submissions on behalf of the appellant Ms Artesi said that the issue in the appeal was whether the hereditament had become practically incapable of beneficial occupation by 7 November 2013 so that it ought to be deleted from the rating list.

32. In his skeleton argument Mr Mackenzie for the respondent, submitted that the resolution of this issue raised two questions:

(1) First, what was the physical state of the hereditament on the material day, 7 November 2013 (that being the physical state which paragraph 2(7)(a) requires that it must be taken to have been in for the purpose of determining its rateable value)?

(2) Secondly, on the assumption that the hereditament had been in that physical state on the antecedent valuation date, 1 April 2008, would there have been any demand for it such that it could not be said that it was practically incapable of beneficial occupation on that date?

33. The resolution of these issues in this appeal raises no question of valuation. That is for two reasons.

34. The first is that the appellant's proposal did not seek an alteration in the rating list to reduce the rateable value. Rather, it sought the deletion of the existing entry (in its entirety) with effect from 7 November 2013. It is true that Mr Budhdeo ticked ground A to indicate that he considered that the rateable value in the rating list on 1 April 2010 was inaccurate, but he had not suggested an alternative. Neither the detailed reasons given for making the proposal nor the undated letter from Lexicon Cole provided a valuation, although Mr Cole did suggest a ceiling on the rent which it might be possible to achieve if appropriate incentives were offered, namely "£1 per sq ft or even lower".

35. The second reason for the absence of any valuation issue in this appeal is that, apart from the undated letter from Mr Cole, the appellant has put forward no valuation evidence at all. Mr Cole's letter does not identify the date by reference to which his opinion of the likely letting value of Apollo House had been formed, but it was common ground that he appeared to be speaking of the position at some point between the claimant's acquisition of the property in November 2013 and the date of its proposal in April 2014. There was no evidence from the appellant concerning the rent at which the hereditament might reasonably have been expected to let on 1 April 2008, in any condition.

36. The valuation evidence provided by Mr Martyn Lamb MRICS on behalf of the Valuation Officer relied on the established tone of the list. For the purpose of the 2010 list 17 hereditaments in the vicinity described as offices and premises exceeding 1,000 sq metres had been entered in the list at £80 per sq metre with upward adjustments of 2½% for those with raised floors and 5% for those with air conditioning. No contrary evidence was relied on by the appellant to suggest that this tone was inaccurate or unreliable in any respect.

37. The appellant's general case that, by November 2013, the rental value of office premises on the Bracken Hill Business Park had fallen significantly as a result of the recession which began in 2008, and the end of the enterprise zone's concessionary environment in 2005, was entirely consistent with the rateable values entered in the 2017 list which show a marked reduction from the previous £80 per sq metre to a new level of £30 per sq metre. That evidence is of no value to the appellant in this appeal, as it relates to circumstances seven years after the antecedent valuation date.

The appellant's case

38. For the appellant, Ms Artesi acknowledged that the orthodox view, exemplified by the decision of the Lands Tribunal in *Leda Properties*, was that the notional letting of the hereditament required to be assumed by paragraph 2 of Schedule 6 took place in the economic circumstances and market conditions which prevailed at the antecedent valuation date. In this case that date was 1 April 2008, at a time when the hereditament was occupied. Ms Artesi nevertheless suggested that the recent decision of the Supreme Court in *S J & J Monk v Newbigin (VO)* [2017] UKSC 14 provided some support for a different approach, which would allow any factor having an influence on the value of the hereditament to be taken into account as it existed on the material day, in this case 7 November 2013, rather than on the antecedent valuation date.

39. Ms Artesi's submission was based on an ambitious reading of paragraph 30 of the speech of Lord Hodge JSC in *Monk*. As Lord Hodge recorded in paragraph [12] of his speech, before Parliament enacted schedule 6 to the 1988 Act it had been an established principle of rating law that a hereditament is to be valued as it in fact existed at the material day. That reality principle remains fundamental and is reflected in paragraphs 2(6) and (7) of Schedule 6, but was qualified by the assumption that the hereditament was in a reasonable state of repair, unless to put it in that state would be considered uneconomic. The issue in *Monk* was how the reality principle applied where a building was undergoing redevelopment (see paragraph [22]).

40. In such a case Lord Hodge suggested that the correct approach in such a case was first to determine whether a property was capable of rateable occupation at all and thus whether it was a hereditament; if it was a hereditament, then its mode or category of occupation should next be determined; finally it should be considered whether the property was in a state of reasonable repair for use consistent with that mode or category.

41. The paragraph of Lord Hodge's speech on which Ms Artesi relied was addressing an argument on behalf of the Valuation Officer that section 46A(5) of the 1988 Act meant that a building undergoing structural reconstruction continued to be liable to rates until the new building was completed, thus leaving no scope for an entry in the list for a "building undergoing reconstruction". At paragraph 29 Lord Hodge rejected this argument and said that section 46A(5) did not bar an application to alter the rating list to reflect the actual state of a hereditament undergoing redevelopment. He referred to *Ravenseft Properties Limited v Newham London Borough Council* [1976] QB 464, in which Bridge LJ said that a hereditament which was "undergoing radical structural alterations" could be the subject of a proposal for an alteration in the valuation list for any substantial period during which it was incapable occupation. At

paragraph 30 of his speech, the final sentence of which was relied on by Ms Artesi, Lord Hodge went on:

> "Bridge LJ expressed that view in the context of section 68(4)(b) of the 1967 Act which defined the expression "material change of circumstances" as a change in value of the hereditament caused by the making of structural alterations or the total or partial destruction of the building. Now, the Non-domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (SI 2009/2268) lists as a ground for making a proposal to alter a rating list that "the rateable value shown in the list … is inaccurate by reason of a material change of circumstances" (regulation 4(1)(b)) and define "material change of circumstances" as "a change in any of the matters mentioned in paragraph 2(7) of schedule 6 to the [1988 Act]": regulation 3. I consider, therefore, that radical alterations, whether or not there are structural, which render the hereditament unoccupiable, may justified a proposal to alter the rating list."

42. It is clear, reading Lord Hodge's final sentence in context, that he was very far from suggesting that "radical alterations" of whatever nature, even "alterations" to economic circumstances or market conditions, might justify a proposal to alter the rating list. The alterations to which Lord Hodge was referring were physical alterations to the hereditament; his point was that these alterations need not be structural to justify the making of a proposal, provided they rendered the hereditament unoccupiable. Economic circumstances and market conditions are not apt to render a hereditament unoccupiable, although they may have the consequence that no-one wishes to occupy it.

43. We therefore reject Ms Artesi's submission that the state of the market and other economic circumstances, including the prolonged effect of the 2008 banking crisis and subsequent recession, may be taken into account in assessing the rateable value of the hereditament because they may have influenced its value on the material day. Those factors are not amongst the matters referred to in paragraph 2(7) and must to be taken to have been as they were on the antecedent valuation date.

44. Ms Artesi was unable to rely on any evidence concerning the value of the appeal property on 1 April 2008. Nor was she able to point to any evidence in support of her proposition that in its condition as at the material day, 7 November 2013, Apollo House had been incapable of beneficial occupation such that it ought to be removed from the rating list. The evidence was entirely to the contrary.

45. The evidence concerning the physical condition of Apollo House relied on by the appellant was contained in two building survey reports by Paul Wharton MRICS and Craig Weir MCIBSE, the first prepared on 12 June 2017 and the second on 5 December 2017. Mr Wharton and Mr Weir were not tendered as expert witnesses in the appeal nor did they give oral evidence at all. Their first knowledge of the hereditament was acquired in May 2017, more than 2½ years after the material date.

46. By the time Mr Wharton and Mr Weir first visited the hereditament it had been extensively altered by the appellant, in that the raised floors and the suspended ceilings had been dismantled in the greater part of the building and left piled around the edges of the open plan office space. This was done in 2015. A photograph of the ground floor of the property taken in May 2014, six months after the material day, showed that at that time the floors and ceilings were still intact.

47. At a later stage the service installations in the building were vandalised and materials of value were "maliciously removed" as the appellant's surveyors put it. Components which were damaged or removed included the boiler casing and installation, AHU components, and substantial quantities of copper cabling.

48. None of this damage had yet occurred at the material day and the appellant's surveyors were scrupulous in making it clear to the Tribunal that they had no information concerning the condition of the appeal property at that time. Their evidence was limited to considering the cost of remedial works to the building fabric and the M & E installations in the wake of the malicious damage. They considered that remedial works in excess of £600,000 and possibly as much as £1m would be required to recommission the building services. Further expenditure to refurbish the building would also be required to bring it up to a lettable condition, of perhaps £1.6m in total.

49. The only part of the evidence of the appellant's surveyors which was relevant and valuable to the Tribunal in ascertaining the condition of the hereditament on the material day was contained in a joint statement prepared with the respondent's experts, Ms Saara Saloranta MRICS and Mr Nimal Rajapakse MCIBSE.

50. In the first of the joint statements Mr Wharton and Ms Saloranta were able to agree that at the material day the building fabric was in good order with only minor defects of a largely cosmetic nature being present. The cost of the repairs necessary to remedy those defects was estimated at £13,870 at 2017 prices (excluding VAT).

51. Less agreement was possible between Mr Weir, the appellant's M & E expert and Mr Rajapakse, because Mr Weir had no information concerning the condition of the building services before May 2017. Nevertheless, after cross-examining Mr Rajapakse Ms Artesi did not invite the Tribunal to reject his evidence that, at 2017 prices, the work required to re-commission the building services, in the condition in which they were on the material day, would not have exceeded £150,000 to which overheads of a further 10% might be added. Mr Rajapakse estimated that building costs had increased by about 20% since April 2008, and pointed out that VAT would be capable of being recovered so ought not to be taken into account when determining the 2008 cost of putting Apollo House, as it was on the material day, into a lettable condition.

Conclusions

52. We accept the evidence of Mr Rajapakse and Miss Saloranta and are satisfied that as at the material day Apollo House was in the condition they described and would have required

expenditure of not more than £180,000 to put it into a lettable condition using 2017 building costs. Those costs would have to be reduced by approximately 20% to arrive at an estimate of the costs of rendering the building lettable at the antecedent valuation date on the assumption that, at that date, it was in the condition we have found it to have been on 7 November 2013.

53. We also accept the submission of Mr Mackenzie that any reasonable landlord would consider it economic to spend sums of that order in putting Apollo House as a whole into a lettable condition in the expectation that a rent of £189,000 a year (the tone rent) would have been achievable for the hereditament with a further £150,000 a year achievable for the rest of the ground floor of Apollo House. Ms Artesi suggested that a reasonable landlord would not have regarded that expenditure as economic but she provided no evidence in support of that submission and we have no hesitation in rejecting it.

54. It follows that it must be assumed by reason of paragraph 2(1)(b) of Schedule 6 that the hereditament was in a reasonable state of repair at the antecedent valuation date. The final question, therefore, is whether, in that condition, there was any demand for it.

55. At the antecedent valuation date the appeal property was occupied by BGL Group Ltd. That occupation must be taken to have terminated in order to enable the assumption required by paragraph 2(1) to be made, namely, that the hereditament was available to be let on an annual tenancy. Nevertheless the fact that BGL Group had taken an assignment of the lease of Apollo House in February 2007, albeit receiving a reverse premium amounting to around six months' rent, is clearly indicative of a demand for it on its part at that time.

56. Evidence is also available of the let of other space on the Business Park after the antecedent valuation date. That evidence is somewhat remote and comprises the lettings of two units at Nos. 4 and 7 Fern Court, Bracken Hill Business Park. The first floor of that building was let for a term of six years in September 2014 at a rent of about £53 per sq metre and the ground floor was let in December the following year at a similar rate for the term of 5 years. This evidence contradicts the submission of Ms Artesi that, after the expiry of the benefits conferred by the Enterprise Zone in 2005, the buildings on the Park became incapable of being let.

57. More compelling, however, is the evidence of the settlement of rating assessments on comparable hereditaments on the Park by reference to their value as at the antecedent valuation date. As Mr Lamb convincingly demonstrated in his comprehensive report a tone of £80 per sq metre is incontrovertible. That tone is based on assumed lettings of each of the other buildings on the Park and is evidence, at the very least, that the professional advisers of the occupiers of those buildings considered that there was demand for them at that date justifying rents in the order of £80 per sq metre.

58. For these reasons we are satisfied that no case has been made out for the deletion of either of the hereditaments at Apollo House from the 2010 rating list with effect from 7 November 2013.

Determination

59. The appeal is dismissed. This decision is final on all matters other than costs. The parties may now make submissions on costs, and a letter giving directions for the exchange of submissions accompanies this decision.

Martin Rodger QC

Deputy Chamber President

P.D. McCrea FRICS

Member

8 March 2018