Hilary Term

[2017] UKSC 14

On appeal from: [2015] EWCA Civ 78

JUDGMENT

Newbigin (Valuation Officer) (Respondent) v S J & J Monk (a firm) (Appellant)

before

Lord Neuberger, President

Lord Kerr

Lord Reed

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

1 March 2017

Heard on 7 November 2016

Appellant	Respondent
David Reade QC	Sarabjit Singh
Dominic Bayne	Matthew Donmall
(Instructed by S J & J Monk (a firm))	(Instructed by HMRC Solicitor's Office)

Interveners (
Surveyo
Association
British Prop
Federatio
Daniel Kolins
Luke Wil
(Instructed
Berwin Leig
Paisner L

LORD HODGE: (with whom Lord Neuberger, Lord Kerr, Lord Reed and Lord Carnwath agree)

1.

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 useable office? That is the question raised in this appeal. An analogous question would arise if the building were a former hospital which was in the process of conversion into flats. Should it be valued as if it were still available for occupation as a hospital? The question is of general public importance to the law of rating and valuation.

2.
The appellants ("SJJM") own the freehold of the first floor ("the premises") of a three-storey office building built in the 1990s, known as Avalon House, at St Catherine's Court, Sunderland Enterprise Park, Sunderland. In the past the premises were occupied by tenants as a single office suite of 795.73 square metres. In 2006 the tenants vacated the premises and in December 2009 SJJM accepted the surrender of the lease of the premises. On 9 March 2010 SJJM entered into a contract with Jomast Developments Ltd for the renovation and improvement of the premises with a view to making them more adaptable for use as either three separate suites of offices or as a single suite, in order to attract replacement tenants.

3.
The contracted building works involved the removal of all internal elements, except for the enclosure for the lift and staircase by which people gained access to other floors. This entailed stripping out the cooling system including all internal and external plant, the lighting and power installations, the fire alarm system, the suspended ceiling, all sanitary fittings and drainage connections, the timber joisted and modular raised flooring, and existing masonry walls and metal stud partitions. The contract also provided for the construction of new common parts to the premises and new communal sanitary facilities, which involved new solid partitioning, a raised floor, new sanitary fittings, new drainage and plumbing systems, and new electric lighting, alarm and heating systems. Finally, the contract envisaged the construction of three new letting areas within the premises with three self-contained electrical distribution circuits and air conditioning and heating systems.

4.
After entering into the building contract and until at least 6 January 2012 SJJM had the premises marketed as available for rental either as three separate office suites or as a whole. On 6 January 2012, which is the relevant date for assessing the facts and applying the statutory assumptions discussed below when determining the rateable value of the premises on an application to alter the rating list ("the material day"), the premises were vacant. Contractors had removed the majority of the ceiling tiles and the suspended ceiling grid and light fittings and also 50% of the raised floor. They had also removed the cooling system and the sanitary fittings, demolished the block walls of the lavatories and stripped out the electrical wiring. The contractors had erected and plastered plasterboard partitions to form the outline of the proposed communal lavatories and had erected and plastered a partition across the floor at the east side of the premises. They had completed first fix electrical installations to the lavatory area and had altered the drainage to accommodate the new location of the lavatories.

5.
SJJM wished to reduce its liability to local authority rates on the premises while they were being reconstructed. Local authority rates are a tax on property and the unit of assessment is the "hereditament". A "hereditament" is defined as "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": section 64(1) of the Local Government Finance Act 1988 ("the 1988 Act") which refers to this definition in section 115(1) of the General Rate Act 1967 ("the 1967 Act"). Each hereditament is

separately identified on the rating list (which formerly was called the valuation list). The premises were so listed on the 2010 rating list as “offices and premises” with a rateable value of £102,000.

6.
On 6 January 2012 SJJM’s agents proposed to the respondent, who is the valuation officer for Sunderland (“the VO”), that the description of the premises on the rating list should be altered with effect from 1 April 2010 to “building undergoing reconstruction” and that the rateable value should be reduced to £1. The agents justified their proposal on the basis that the premises were undergoing building works which rendered them incapable of beneficial occupation on the material day. They explained that the scheme of building work was “remodelling and refurbishing the floor plate to allow subdivision into up to three separate offices served by communal W/Cs”. The VO did not accept the proposal and referred it to the Valuation Tribunal for England (“the Valuation Tribunal”) as an appeal against his refusal to alter the rating list.

The relevant legislation

7.
The central issue in this appeal is whether the premises should be rated by having regard to the physical condition they were in on 6 January 2012 or whether para 2(1)(b) of Schedule 6 to the 1988 Act as amended by the Rating (Valuation) Act 1999 (“the 1999 Act”), which I set out below, requires a valuation officer to assume that they were in reasonable repair as “offices and premises” on that date.

8.
Schedule 6 to the 1988 Act, which is headed “Non-domestic rating: valuation”, provides so far as relevant:

“1. This Schedule has effect to determine the rateable value of non-domestic hereditaments for the purposes of this Part.

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 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.

…

(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.

…

(8A) For the purposes of this paragraph the state of repair of a hereditament at any time relevant for the purposes of a list shall be assumed to be the state of repair in which, under sub-paragraph (1) above, it is assumed to be immediately before the assumed tenancy begins."

The prior proceedings

9.
On 19 October 2012 the Valuation Tribunal dismissed SJJM's appeal. It identified the material day as 6 January 2012 and concluded that on that day there was nothing to prevent the economic repair of the premises. It held that the premises were an office suite in disrepair and were to be rated as if they were in reasonable repair.

10.
SJJM appealed to the Upper Tribunal (Lands Chamber) ("UT"), which heard evidence, as the appeal proceeded as a re-hearing. The UT confirmed the Valuation Tribunal's finding that the material day was 6 January 2012, and that decision has not been appealed. Otherwise, the UT allowed SJJM's appeal, holding that the premises had been stripped out to such an extent that to replace its major building elements would go beyond the meaning of repair. The assumption in para 2(1)(b) of Schedule 6 to the 1988 Act that a hereditament was in a state of reasonable repair did not extend to the replacement of systems that had been completely removed. The alterations had rendered the premises incapable of beneficial occupation as an office and accordingly the premises were to be rated as a "building undergoing reconstruction". As a result, the rateable value of the premises should be reduced to the nominal amount of £1.

11.
The VO appealed to the Court of Appeal, which allowed his appeal and therefore dismissed SJJM's underlying appeal. The Court of Appeal reasoned as follows. It recognised that the principle of reality, which I discuss in para 12 below, could be displaced by contrary statutory instructions. The question was the extent to which para 2(1)(b) applied to create a counterfactual assumption. The Court concluded as a matter of statutory construction that the para did create such an assumption and so displaced the reality principle. The premises were described in the rating list as "offices and premises". On the facts found by the UT, the hereditament so described was not in a reasonable state of repair. It was not correct to look to the future to see what the premises might become when works were completed. In applying the statutory assumption in para 2(1)(b), the court had to compare the

hereditament in its actual state with its previous state as listed, namely as offices and premises. In order to decide whether the replacement of the stripped out elements could fairly be described as repairs as distinct from improvements or alterations, the court should look to the tests applied in the common law of landlord and tenant: Camden London Borough Council v Langford [1980] R A 369. Applying those tests, the court concluded that the replacement of the stripped out elements would amount to repairs. On the facts found by the UT, those repairs would economically return the premises to their former state. Therefore the statutory assumption applied and the premises should be valued as if they were in a state of reasonable repair.

Discussion

12.
For many years and long 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. This principle, which in the past was described by the Latin phrase, rebus sic stantibus (ie as things stand), and is often referred to as "the principle of reality" or "the reality principle", was stated by Lord Buckmaster in Poplar Assessment Committee v Roberts [1922] 2 AC 93, 103, thus:

"[A]though the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made."

Similarly, in Townley Mill Co (1919) Ltd v Oldham Assessment Committee [1937] AC 419, 437, Lord Maugham, when explaining the legal context in which the Rating and Valuation Act 1925 was enacted, said:

"The hypothetical tenant was assumed to be a tenant from year to year with a reasonable prospect of continuing in occupation; but the hypothetical rent which the tenant could give was estimated with reference to the hereditament in its actual physical condition (rebus sic stantibus), and a continuance of the existing state of things was prima facie to be presumed."

13.
In Dawkins (VO) v Ash Brothers and Heaton Ltd [1969] 2 AC 366, in which the House of Lords held that the Lands Tribunal had been correct to take account of an existing demolition order in assessing the hypothetical rent, Lord Pearce stated (382):

"one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some estimate of what value should be attributed to a hereditament on the universal standard, namely a letting 'from year to year'. But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded in so far as they are accidental to the letting of a hereditament. They are acknowledged in so far as they are essential to the hereditament itself."

In the same case, Lord Wilberforce described the reality principle thus (385-386):

"The principle that the property must be valued as it exists at the relevant date is an old one … The principle was mainly devised to meet, and it does deal with, an obvious type of case where the character or condition of the property either has undergone a change or is about to do so: thus a house in course of construction cannot be rated: nor can a building be rated by reference to changes which might be made in it either as to its structure or its use."

In this passage Lord Wilberforce referred to each of what is generally regarded as the two limbs of the reality principle, namely the physical state of the property and its use.

14.
The reality principle continues to be a fundamental principle of rating and is manifested in Schedule 6 to the 1988 Act, in particular in para 2(6) and (7). In Scottish & Newcastle Retail Ltd v Williams (VO) [2001] 1 EGLR 157 the Court of Appeal upheld the decision of the Lands Tribunal that the reality principle meant that it was assumed that a hereditament was in the same physical state as upon the material day, save for minor alterations, and could be occupied only for a purpose within the same mode or category of purpose as that for which it was occupied on the material day. Thus in that case two public houses in a shopping centre had to be valued as public houses and not as retail units.

15.
The decision appealed against interprets Schedule 6 to the 1988 Act as entailing a major departure from the reality principle by requiring that the hereditament be assumed to be in a reasonable state of repair for the mode of occupation listed in the rating list, namely as “offices and premises”. I do not agree with that approach. In my view, the legislative history shows that the repairing assumption which para 2(1) of Schedule 6 introduced did not supplant the reality principle to that degree.

16.
Before the enactment of the 1988 Act the statutory hypothetical tenancy of non-industrial property required that the landlord bear the cost of repairs. For example, section 2 of the Valuation for Rating Act 1953 provided that the hypothetical tenancy of a dwelling house was one in which the “landlord had undertaken 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 that rent”. In Wexler v Playle (VO) [1960] 1 QB 217 the Court of Appeal held that the statutory hypothesis was that the reasonable landlord, when contracting with the tenant for the let of a dwelling house, undertook to put the property in repair and would do so by removing “readily remediable defects” (Wilmer LJ 239) or “reparable and temporary defects” (Harman LJ 240). Thus the existence of such defects in the property did not affect its value for rating purposes. This reflected what might reasonably be expected in reality (Morris LJ 235). See also, on the equivalent provisions in section 19(6) of the 1967 Act, the similar view in relation to commercial offices expressed by Eveleigh LJ in Camden London Borough Council v Langford (VO) in which he distinguished between repairs needed to make good decay, which fell within the hypothetical landlord’s repair obligation, and structural work on reinforced concrete columns and beams to preserve the stability and duration of the building, which went beyond repair and rendered the building unlettable. Further, in Saunders v Maltby (VO) (1976) 19 RRC 33 the Court of Appeal held that the landlord’s repair obligation in the statutory provision did not extend to uneconomic repairs which were disproportionate to the value of the property; instead the landlord would let the property at a lower rent.

17.
Case law distinguished between a mere lack of repair, which did not affect rateable value because of the hypothetical landlord’s obligation to repair, and redevelopment works which made a building uninhabitable. Thus, for example, in Paynter (VO) v Buxton [1986] RVR 132, the Lands Tribunal upheld a nil valuation of two flats on the first and second floors of a terraced house in London which, along with the third floor flat, were undergoing a programme of refurbishment works, which were progressing from the top down. At the relevant time, there were extensive alterations to the third floor flat, which had been valued at nil and was not the subject of appeal, but lesser activity in the other flats in which there had been some re-plastering, some sanitary ware had been removed, some

floorboards lifted and skirting boards and a door had been removed. The Lands Tribunal accepted evidence that a programme of alterations on the three floors was being carried out on all three flats and concluded that the works amounted to “alteration and modernisation” and not repair. Thus the tribunal upheld the nil valuation. See also De Silva and Another v Davis (VO) [1983] 1 EGLR 211 and Hounslow London Borough Council v Rent Audio Visual Ltd & Bryant (VO) [1970] RA 535 for other applications of the distinction.

18.
The 1988 Act ended domestic rating, replacing it with the Community Charge. It also removed from the hypothetical tenancy the assumption that the landlord carried the repairing obligation by providing in Schedule 6 that all non-domestic hereditaments be rated by reference to a hypothetical tenancy in which the tenant bore the repairing obligation. As originally enacted para 2(1) of Schedule 6 to the 1988 Act provided:

“The rateable value of a non-domestic hereditament 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 if the tenant undertook 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 that rent.”

19.
Following the decision of the Lands Tribunal in Benjamin v Anston Properties Ltd [1998] 2 EGLR 147 that, because, under the 1988 Act, the hypothetical tenant bore the obligation to repair, the rental value of the hereditament would be adversely affected by a state of disrepair, Parliament, by section 1 of the Rating (Valuation) Act 1999, amended the 1998 Act to reinstate the prior law as to the assumption that the building was in a state of repair. It did so (a) by deleting the words in para 2(1) of Schedule 6 (para 18 above) from “if the tenant” to the end and replacing them with the three assumptions in the current para 2(1) and (b) by introducing para 2(8A). For both the current para 2(1) and para 2(8A) see para 8 above. As a general rule those amendments took effect retrospectively on 1 April 1990 (the date on which Part III of the 1988 Act first required the compilation of rating lists) in relation to rating lists compiled before the 1999 Act was passed. Paragraph 3 of the 1999 Act’s explanatory notes stated that the Act was designed to put on a statutory footing the law as it was widely believed to apply before the Benjamin decision.

20.
The 1999 Act can thus be seen as applying principles analogous to those in Wexler, Camden London Borough Council and Saunders (para 16 above) to a hypothetical lease in which the tenant bore the obligation to put the hereditament in repair. In my view the Court of Appeal goes too far in interpreting the 1999 Act as completely displacing the reality principle in relation to both the physical state and the mode of occupation of a hereditament which is undergoing redevelopment. The 1999 Act, by introducing the assumption of reasonable repair at the outset of the hypothetical tenancy (“the repair assumption”), 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. Thus the repair assumption (para 2(1)(b)) applies to matters affecting the physical state of the hereditament (para 2(7)(a)) but not to the mode or category of occupation of the hereditament (para 2(7)(b)).

21.

I derive support for this view from the speech of Baroness Farrington, who identified the mischief which the 1999 Act addresses when she promoted it as a Bill in the Grand Committee in the House of Lords (Hansard 5 May 1999, CWH2-3). After referring, with apparent approval, to Wexler v Playle and Saunders v Maltby she stated:

"the 1988 Act does not contain any express reference to the hereditament's state of repair. I am aware that the noble Earl, Lord Lytton, regards this as a lacuna. I agree with him that this lacuna lies at the heart of the Lands Tribunal decision in Benjamin v Anston Properties which determined that valuers should take account of disrepair in rating valuations. It is this lacuna, and this alone, that the Bill seeks to address."

She went on to state (CWH6):

"The Bill deals with a single issue of principle in the field of valuation for rating by way of correcting a lacuna. The Government are anxious that what is in effect an old principle governing rating valuation should merely be restated and incorporated with the minimum of disturbance to the corpus of law and valuation practice, which has grown up and developed over the passage of time."

This statement, in my view, negatives a suggestion that the 1999 Act was addressing any mischief caused by the established distinction between works to correct a lack of repair on the one hand and what she called "renewal, refurbishment or improvement" on the other.

22.
In a helpful intervention, the Rating Surveyors' Association and the British Property Federation submitted that, where works were being carried out on an existing building, the correct approach was to proceed in this order: (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament, (ii) if the property is a hereditament, to determine the mode or category of occupation and then (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. The first two stages of that process involve the application of the reality principle. At the third stage the valuation officer applies the statutory assumption in para 2(1)(b) if the reality is otherwise. In my view, this is a helpful approach where a building is undergoing redevelopment. But it is subject to the useful practice, which I discuss in para 31 below, of reducing the rateable value of a building, which is incapable of rateable occupation because of such temporary works, to a nominal figure rather than removing it from the rating list altogether.

23.
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. If the works are objectively assessed as involving such redevelopment, there is no basis for applying the assumption in para 2(1)(b) to override the reality principle and to create a hypothetical tenancy of the previously existing premises in a reasonable state of repair. This is both because a building under redevelopment, like a building under

construction, is incapable of beneficial occupation and, in any event, the hypothetical landlord of a building undergoing redevelopment would normally not consider it economic to restore it to its prior use.

24.
When in the course of a redevelopment some part of the developed property becomes capable of beneficial occupation, and thus becomes a separate hereditament, the assumption in para 2(1)(b) might apply to that part. Thus, if, in the course of the conversion of a hospital into offices, a part of the development became capable of beneficial occupation as flatted accommodation, para 2(1)(b) might apply to deem a hole in the roof of that part to have been repaired immediately before the beginning of the hypothetical tenancy of that part. But para 2(1)(b) neither deems the development to be complete nor assumes that the building in whole or in part is in a state of repair to be let as a hospital.

25.
It is necessary to examine other statutory provisions and the cases to which counsel for the VO referred to see whether they contradict this approach. He referred, first, to the statutory provisions relating to the completion of a building under structural alteration. Section 46A(5) of the 1988 Act provides that, where a completion day has been notified, the hereditament which comprised the existing building is deemed to have ceased to exist on the day of completion of the new building which results from the structural alteration. The VO argued that this meant that a building undergoing structural reconstruction continued to be liable to rates until the new building was completed. There was thus, he submitted, no scope for an entry in the list as a transitory “building undergoing reconstruction” either when the reconstruction involved structural alteration or, by analogy, when it did not. He submitted that this was supported also by para 2(7)(b) of Schedule 6 to the 1988 Act which required the identification of “the mode and category of occupation”, which under para 2(6) was to be taken “as they are assumed to be on the material day”. On SJJM’s approach, there was and could be no such mode or category of occupation. In the alternative, the VO argued that, if there were such a thing in the world of rating as a transitory “building under reconstruction”, a hereditament could achieve that status only once it had become uneconomic to repair the building to its former status.

26.
Again, light is shed on the effect of the statutory provisions by referring to historical developments on the rating regime. Before 1966 liability for occupier’s rates depended upon a building being occupied. A building undergoing redevelopment was not occupied in the relevant sense by the carrying out of alterations or by the presence of the workmen who were doing so: Arbuckle Smith & Co Ltd v Greenock Corpn [1960] AC 813. The Local Government Act 1966 introduced liability for rates on premises which were not occupied, if a rating authority so resolved, and its provisions were repeated in the consolidating General Rate Act 1967 in section 17 and Schedule 1. Paragraph 1 of Schedule 1 to the 1967 Act created the liability of an owner to be rated in respect of an unoccupied hereditament at one-half of the amount payable if the hereditament were occupied. Paragraph 8 of that Schedule empowered a rating authority to serve a completion notice on the owner of a newly erected or altered building. The notice had the effect that the building was to be treated for the purpose of the schedule as completed on the date specified in the notice and the owner thereafter became liable to be rated in respect of the property. Paragraph 10 of the Schedule contained a precursor of section 46A(5) of the 1988 Act, deeming a relevant hereditament to have ceased to exist on the completion of the structural alteration. The paragraph stated in its concluding words that it was not to be construed as affecting any liability for rates under para 1 in respect of the hereditament for any period before that date.

27.

Section 46A of the 1988 Act was thus not a novelty. It was introduced retrospectively into the 1988 Act by the Local Government and Housing Act 1989 (section 139 and Schedule 5 paras 25 and 79(3)). While section 46A(5) does not contain the concluding words of para 10 of Schedule 1 to the 1967 Act, I see no reason to give the section a different interpretation from its precursor in this respect.

28.

Counsel for the VO sought to support his position by referring to the judgment of the Divisional Court in Easiwork Homes Ltd v Redbridge London Borough Council [1970] 2 QB 406. In that case, the owners chose to modernise a block of flats. During the modernisation works, the flats were uninhabitable, as the plumbing had been removed and all the essential services were being renewed. The Council assessed each flat for rates while unoccupied. The owners did not pay and the Council applied for a distress warrant to enforce the liability. The Justices decided that the owners were liable to pay rates and issued a distress warrant. The Divisional Court dismissed the owners' appeal on the question whether section 17 of the 1967 Act could apply to premises which were unoccupiable. The Court held that the statute contemplated that liability to rates might arise when an owner was carrying out alterations and improvements which temporarily rendered a property incapable of occupation because para 10 of Schedule 1 to the 1967 Act provided for the payment of rates when more radical structural alterations were being carried out. But, in my view, the case does not assist the VO because the owners had not applied to have the valuation list altered during the period of the works; they had challenged their liability only at the stage of enforcement. Indeed, the Council had contended before the Justices that the owners could have applied for a reduction of the rateable values for the period when the premises were unoccupiable.

29.

It is clear that para 10 of Schedule 1 to the 1967 Act and its successor, section 46A(5) of the 1988 Act, did not and do not bar an application to alter the rating list to reflect the actual state of a hereditament undergoing redevelopment. In Ravenseft Properties Ltd v Newham London Borough Council [1976] QB 464 the Court of Appeal considered an appeal by the owners of offices, which were in the course of erection, against completion notices under para 8 of Schedule 1 to the 1967 Act. The court held that the test for completion of a new building or an existing hereditament undergoing structural alteration was whether it was ready for occupation. Lord Denning MR in the course of his judgment said that Easiwork had been correctly decided because the old valuation list, unless it was altered, continued to apply (p 474) (emphasis added). Bridge LJ, who had sat in the Easiwork appeal, was of the same view. He stated (p 479)

"It is clear that in a situation where an old existing hereditament has a valuation based on its occupiable value and is undergoing radical structural alterations, it can be the subject of a proposal for an alteration in the valuation list for, at all events, any substantial period when by reason of the alteration it is incapable of occupation. That seems to me to provide the answer to the problem of hardship to an owner which in the Divisional Court we felt could arise in the Easiwork case."

30.

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 list 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 para 2(7) of Schedule 6 to the [1988] Act” (regulation 3). I consider, therefore, that radical alterations, whether or not they are structural, which render the hereditament unoccupiable, may justify a proposal to alter the rating list.

31.

I also do not accept the point made by counsel for the VO (para 25 above) about paras 2(6) and 2(7)(b) of Schedule 6 to the 1988 Act. The location of the reality principle in para 2(7) of Schedule 6 does not require a valuation officer to disregard the fact that a building is incapable of occupation because it is undergoing reconstruction. In my view the assumption in para 2(1)(b), which para 2(6) brings into the assessment of the reality in para 2(7), can operate in the manner set out in para 24 above. But it does not negate the reality principle to the extent that counsel for the VO contended. Further, while a building which is undergoing reconstruction may be incapable of occupation for a time, it has been the practice of the Valuation Office to treat the property as a hereditament with only a nominal value rather than to remove the property from the rating list temporarily: see, for example, Hounslow London Borough Council v Rank Audio Visual Ltd and Paynter v Buxton. There is no bar to implementing a proposal to alter the description of the hereditament on the rating list from “offices and premises” to “building undergoing reconstruction” and consequently to reduce the listed rateable value to a nominal amount if the facts, objectively assessed, support that alteration. There is also, for the reasons given above, no basis for the alternative argument that a building can be listed as being under reconstruction only once the works have proceeded so far that it is no longer economic to restore the hereditament to its former state by means of repair.

32.

Does the interpretation advanced by SJJM create a danger of ratepayers abusing the system, for example, by removing sanitary facilities or windows and then claiming that the hereditament was incapable of beneficial occupation? The Court of Appeal saw their approach as preventing such abuse: Lewison LJ para 30. But the Court of Appeal’s interpretation was novel. Prior practice, which had been reflected in the non-statutory guidance in the Rating Manual produced by the Valuation Office, had been consistent with the approach which SJJM advocates. It was not suggested to this Court that the administration of rates had not been effective in the past. Further, when Parliament in the Rating (Empty Properties) Act 2007 increased the unoccupied business rate to make owners of unoccupied property liable for the same rate as those payable on occupied properties, it also introduced into the 1988 Act, in section 66A, an anti-avoidance power which enables the Secretary of State and the Welsh Ministers to make regulations to disregard changes in the state of an unoccupied hereditament. This power can be used to undermine attempts by owners to avoid unoccupied rates through causing or allowing the state of their property to change. To date neither government have used the power: I infer that the practice before the Court of Appeal’s decision had not caused a serious problem. In any event, the power can be exercised, if it is needed, for example to prevent avoidance by the partial implementation of a scheme of works and its deliberate non-completion.

33.

On the facts found by the UT, which I summarised in paras 2-4 above, I conclude that the premises were undergoing reconstruction on the material day and that the UT was entitled to alter the rating list as it did to reflect that reality.

Conclusion

34.

For these reasons, which differ in some respects from those of the Upper Tribunal, I would allow the appeal and restore the determination of the Upper Tribunal set out in paras 88 and 90 of its decision.