UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0058 (LC)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – PROCEDURE – material change of circumstances while offices temporarily incapable of beneficial occupation during fitting out – whether VTE having power to require alteration to list in respect of fitting out period only – reg.38(7), Valuation Tribunal for England (Council Tax and rating Appeals) (Procedure) Regulations 2009 – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF

THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

AVISON YOUNG LTD

(formerly GVA GRIMLEY LTD)

Appellant

and

DAVID JACKSON (VO) **Respondent**

Re: Office and premises

Pt 2nd Floor South and 3rd Floor,

10 Aldermanbury,

London EC2V 6NQ

Martin Rodger QC, Deputy Chamber President

20 February 2020

Royal Courts of Justice

Luke Wilcox, instructed by Avison Young, for the appellant

George Mackenzie, instructed by the HMRC Solicitors for the respondent

The following cases are referred to in this decision:

Arnold v Dearing (VO) [2019] UKUT 224 (LC)

BMC Properties and Management v Jackson (VO) [2016] RA 1

Jackson (VO) v Canary Wharf Ltd [2019] UKUT 136 (LC)

National Car Parks Ltd v Baird (VO) [2004] EWCA Civ 967

Newbigin (VO) v Monk [2017] UKSC 14

Simpsons Malt Ltd v Jones [2017] UKUT 460 (LC)

Introduction

1.
After dealing with an appeal arising out of a disagreement as to a proposed alteration to the non-domestic rating list, the Valuation Tribunal for England (VTE) may by order require a valuation officer to alter the list. By regulation 38(7), Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 (the VTE Regulations) where it appears that circumstances giving rise to an alteration ordered by the VTE have ceased to exist, the order may require the alteration to be made in respect of such period as appears to the VTE to reflect the duration of those circumstances.

2.
This appeal concerns the application of the VTE's power in regulation 38(7), VTE Regulations, in circumstances where a hereditament has temporarily been rendered incapable of beneficial occupation due to the execution of works to the hereditament itself.

3.
The appeal is brought by the ratepayer, GVA Grimley Ltd, now known as Avison Young Ltd, in respect of property comprising the third floor and part of the second floor of an office building at 10 Aldermanbury, London EC2 which was entered as a single hereditament in the 2010 non-domestic rating list. The appeal is against a decision of the VTE given on 15 April 2019 by Mr M.F. Young, Vice-President. The Vice-President ordered that the rateable value of the property be reduced to nil with effect from 1 September 2014, but that it should be restored to the list with effect from 23 January 2015 with a rateable value of £1.83m.

4.
There was no dispute before the VTE, or this Tribunal, that the reduction of the rateable value to nil from 1 September 2014 was justified. The focus of the appeal is on the VTE's power to limit the period of the reduction in the exercise of the power under regulation 38(7).

5.
The appellant was represented by Mr Luke Wilcox at the hearing of the appeal while the respondent was represented by Mr George Mackenzie. I am grateful to both counsel for their submissions.

The facts

6.
The facts are not in dispute.

7.
The appeal hereditament comprises the third floor and part of the second floor of 10 Aldermanbury, also known as 65 Gresham St.

8.
On 3 June 2014 the appellant entered into an agreement to take a lease of the premises which included an obligation on the landlord to carry out works to fit them out to a Category A standard, and an obligation on the appellant to install an internal staircase linking the second and third floors.

9.
Before the works were carried out the premises had a total floor area of about 4,598 sqm, and appeared in the rating list as office and premises with a rateable value of £1,830,000.

10.
The installation of the internal staircase reduced the floor area of the premises by a little under 50 sqm to about 4,551 sqm. That reduction was reflected in an alteration to the list by a valuation officer's notice by which the rateable value of the premises was reduced to £1.8m. The effective date of that reduction was 1 April 2015 (because the valuation officer's power to alter the list with effect from any earlier date was constrained by regulation 14, Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (the ALA Regulations).

11.
The work to strip the premises out, install the new staircase, and refit the premises commenced on 1 September 2014. As a result, it is agreed that they became incapable of beneficial occupation on that date and continued to be so until the works were completed on 23 January 2015.

12.
On 3 October 2014, shortly after the works had begun, the appellant submitted a proposal to alter the rating list to reduce the rateable value of the premises to £1. The proposal explained that circumstances affecting the rateable value of the premises had changed on 1 September, in that they had been rendered incapable of beneficial occupation as offices due to the works being undertaken. Although the electronic form on which the proposal was made did not require reference to the statutory ground for making the proposal, the appellant clearly intended to invoke ground (b) of regulation 4(1), ALA Regulations which applies where the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled.

13.
The valuation officer did not consider the proposal to be well founded and it was referred to the VTE as an appeal against his refusal to alter the list. By the time the appeal came before the VTE on 22 February 2019 the parties had agreed that the rateable value of the premises should be reduced to nil from 1 September 2014 to 8 February 2015. They disagreed over what should happen in respect of the period after that date. The appellant was not prepared to agree that the rateable value of £1.83m which had applied before the fitting out works should be reinstated for the period from 8 February to 30 March 2015. I infer from the VTE's decision that the appellant would have been content with the figure of £1.8m which had been agreed to be appropriate in view of the reduced floor area. The valuation officer considered that he had no power to give effect to a reduction in rateable value for any period earlier than 1 April 2015.

14.
The issue for the VTE was whether the rateable value should remain at nil for the period from the date on which the hereditament became capable of beneficial occupation until the valuation officer's unilateral alteration took effect on 1 April 2015, or whether it should be restored to the list at its former figure of £1.83m with effect from 8 February 2015.

15.
It is also relevant to mention a separate proposal made by the appellant on 22 July 2016 seeking a reduction in the rateable value of the premises on account of a further change of circumstances which commenced on 1 May 2016. In the context of that proposal the valuation officer reconsidered the effect which the new staircase had on the rateable value of the hereditament and concluded that the appropriate valuation was £1,819,156. That figure was accepted by the VTE in an appeal arising out

of the second proposal, and (after rounding down) was used by it as the starting point for an adjustment to reflect the material change of circumstances.

The legislative framework

16.
Section 41, Local Government Finance Act 1988 places a duty on the valuation officer to compile and maintain a rating list for each billing authority, to be called its local non-domestic rating list. In BMC Properties and Management v Jackson (VO)[2016] RA 1, at [18], Patten LJ said that it was obvious that "maintain" in the context of section 41 imposed an obligation to maintain the list in an accurate rather than an inaccurate state. By section 42(1) the list must contain each qualifying hereditament within the billing authority's area for each day in each chargeable financial year.

17.
Power to alter the list, and so to maintain its accuracy, is conferred on the valuation officer by the ALA Regulations, made under section 55, 1988 Act. Section 55(6) expressly contemplates that regulations may be made authorising alterations to the list with retrospective effect.

18.
It is implicit that the duty of the valuation officer to maintain an accurate list imports a power to alter the list of his own volition (see National Car Parks Ltd v Baird (VO)[2004] EWCA Civ 967, and BMC Properties and Management v Jackson (VO)). In practice that power is exercised by the valuation officer giving unilateral notice of the alteration, but the ability to make such an alteration is restricted by regulation 14(8), ALA Regulations; the valuation officer is not able to make an alteration to a prior list later than the first anniversary of the day on which the next list is compiled. It is that restriction, and the passage of time before the valuation officer gave notice altering the list to reflect the reduced floor area of the hereditament, which has created the difficulty in this case.

19.
Other interested parties, including the ratepayer, may make proposals to alter the list and in that way bring to the attention of the valuation officer circumstances which may require him or her to act to maintain the list in an accurate state. Where the valuation officer considers that a proposal is not well-founded, and no other consensual resolution is reached, the valuation officer is required by regulation 13, ALA Regulations to refer the proposal to the VTE as an appeal by the proposer against the VO's refusal to alter the list.

20.
The circumstances in which such a proposal may be made are prescribed by regulation 4, ALA Regulations. So far as they are material to this appeal they include the following:

"4.—(1) The grounds for making a proposal are—

(a) …

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

(c)-(f) …

(g) a hereditament not shown in the list ought to be shown in that list;

(h) a hereditament shown in the list ought not to be shown in that list; …"

20.
The reference in paragraph 4(1)(b) to a material change of circumstances is amplified in regulation 3, ALA Regulations, where it is the expression is defined as meaning a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the 1988 Act. Those matters include the physical state of the hereditament, its mode or category of occupation, and various aspects of its locality.

21.
The time from which an alteration to the list may take effect is prescribed by regulation 14, ALA Regulations. So far as is material to this appeal regulation 14(2) provided that an alteration to give effect to a proposal served on the valuation officer before 1 April 2015 had effect from the day on which the circumstances giving rise to the alteration first occurred, but that an alteration to give effect to a proposal served after that date, where the circumstances first occurred before that date, could not have effect any earlier than 1 April 2015. The effect of regulation 14(8) has already been mentioned: the valuation officer was empowered to make unilateral alterations to the list with retrospective effect up to a year after the commencement of the next list, and so could do so only until 1 April 2016.

22.
The power with which this appeal is concerned is found in regulation 38, VTE Regulations, which is headed “Orders other than consent orders”. So far as material it provides as follows:

“(4) After dealing with an appeal under regulation 13 of the NDR Regulations (disagreement as to proposed alteration), the VTE may, subject to paragraph (6), by order require a VO to alter a list in accordance with any provision made by or under the 1988 Act.

(5) Subject to paragraph (7), where it is decided that a disputed rateable value should be an amount greater than—

(a) the amount shown in the list at the date of the proposal; and

(b) the amount proposed by the appellant,

the VTE must order the VO to alter the list with effect from the day on which the VTE Panel made the decision.

(6) Paragraph (5) does not apply where the order requires the VO to alter the list to show—

(a) property previously rated as a single hereditament becoming liable to be rated in parts, or

(b) property previously liable to be rated in parts becoming liable to be rated as a single hereditament, or

(c) any part of a hereditament becoming part of a different hereditament.

(7) Where it appears that circumstances giving rise to an alteration ordered by the VTE have ceased to exist, the order may require the alteration to be made in respect of such period as appears to the VTE to reflect the duration of those circumstances.

…

(10) An order under this regulation may require any matter ancillary to its subject matter to be attended to.”

23.
I was told that the only occasion on which the power in rule 38(7) has been employed by this Tribunal was in the case of Arnold v Dearing (VO)[2019] UKUT 224 (LC) in which the Tribunal (Mr Andrew Trott FRICS) directed an alteration to split an entry for premises originally entered as one hereditament for the duration of a temporary sub-letting of part. There was no dispute that that was an appropriate course of action in the circumstances of that appeal, and the Tribunal did not discuss regulation 38(7) in any detail.

The VTE's decision

24.
The Vice-President gave effect to the parties' agreement that the premises were incapable of beneficial occupation for the period of the works, so that the approach taken by the Supreme Court in Newbigin (VO) v Monk[2017] UKSC 14 should be followed and the rateable value reduced to nil. He took the view that the circumstances which had given rise to that alteration had ceased to exist on 23 January 2015 when the premises were fitted out and ready for occupation. He accepted submissions on behalf of the valuation officer that the power under regulation 38(7) was therefore engaged and that it enabled him to limit the period for which the nominal rateable value would apply to the period of the works. No new hereditament had been created by the works and the original hereditament had remained in the list and could be dealt with accordingly. He pointed out, albeit with the benefit of hindsight, that the appellant could have proposed the deletion of the entry from the list altogether, but had not done so, and acknowledged that the restoration of the original entry would cause it to have a rateable value which the valuation officer had regarded as too high.

The appeal

25.
On behalf of the appellant Mr Wilcox first drew attention to some relevant features of regulation 38(7). The power was available where circumstances giving rise to an alteration in the list had ceased to exist; it enabled the alteration to be limited so as to reflect the duration of the circumstances themselves; and the regulation created a power not a duty. Each of these, he submitted, supported his adopting an approach which gave the regulation a limited meaning.

26.
Mr Wilcox's basic proposition was that the power to make a temporary alteration under regulation 38(7) was not available where the circumstance giving rise to the alteration to the list was a one-off event, which was followed by another different event or circumstance at the conclusion of which the list was required to be altered for a second time. It was, he submitted, "linguistically inapt" to describe the first event as having ceased to exist, and it was unfair for the power to be used to reinstate the original rateable value which was no longer accurate. In such circumstances the power in regulation 38(7) was either not available at all, as a matter of law, or if that was not right, it ought not, as a matter of discretion, to be exercised so as to introduce an inaccuracy into the list.

27.
Applying that proposition to the facts of this appeal Mr Wilcox submitted that the circumstance which had given rise to the requirement to alter the list by reducing the rateable value of the hereditament to nil was that it had ceased to be capable of beneficial occupation. That was the result of the stripping out which had commenced on 1 September 2014 and been completed within a few days. What then followed, he submitted, was a further and different change of circumstances, by which the premises were physically altered until they once more became capable of beneficial occupation so that

a further alteration to the list was required. It was wrong, he suggested, to regard the whole programme of work as the circumstance which had given rise to the alteration to the list, and to treat that as having ceased to exist on 23 January 2015.

28.
Both counsel acknowledged that technically, in the light of Monk, the premises had ceased to be a hereditament at all when they became incapable of beneficial occupation, but Mr Wilcox agreed that that made no difference to his argument on the scope of regulation 38(7). He also accepted that his argument did not depend on the premises themselves having changed physically by the works or their rateable value having been reduced to nil, although both were features of this case.

29.
The power to limit the period of an alteration in the list was only available, Mr Wilcox submitted, where the alteration arose out of circumstances which can cease to exist i.e. circumstances which are ongoing, and which justify an alteration for each day on which they continue, but which will no longer justify an alteration when they cease to exist. An example of such an alteration would be the temporary closure of a road providing access to the hereditament. The closure would reduce the value of the hereditament for each day on which the road remained closed, but the value of the hereditament would return to its previous level when the road re-opened.

30.
Mr Wilcox supported his argument by referring to the general structure of the rating legislation which focussed attention on circumstances as they existed at a particular date, the material day. The VTE, and the parties appearing before it, were usually concerned only with the accuracy of the list on the material day and the evidence which they would prepare would reflect that. Regulation 38(7) should be seen as a narrow exception to that focus.

31.
Mr Wilcox also referred to the Tribunal's decision in Jackson (VO) v Canary Wharf Ltd[2019] UKUT 136 (LC) at [36] which was said to support the proposition that the circumstance giving rise to the alteration in the list was the stripping out of the hereditament rather than the continuation of the programme of works itself.

32.
If the Tribunal concluded that the power in regulation 38(7) was available in principle, Mr Wilcox argued that it should use its discretion to refuse to limit the period of the alteration. Whether on the basis of the valuation officer's notice reducing the rateable value to £1.8m, or the VTE's acceptance of a starting figure of just under £1.82m in the second appeal, to restore the rateable value to its original level of £1.83m would result in an inaccuracy in the list adverse to the ratepayer's interest. In principle the discretion under regulation 38(7) should be exercised to avoid such an inaccuracy, even if it meant the rateable value remained at nil for the period of approximately ten weeks after the hereditament once more became capable of beneficial occupation until the valuation officer's alteration took effect of 1 April 2015.

33.
I do not accept these submissions. They seem to me to adopt an inappropriately semantic and unnecessarily legalistic approach to a power expressed in non-technical terms.

34.

The language of regulation 38(7) is simple and its purpose is clear, namely to enable the VTE to direct temporary alterations to the list where the circumstances justifying those alterations are themselves temporary. Given that the power is a discretionary one there is no obvious reason to give it a narrow interpretation, and to do so would blunt its usefulness.

35.
It does not seem to me to matter how one describes the circumstances which gave rise to the alteration in the list to reduce the rateable value to nil. The existence of the power does not depend on the form of the proposal or the way in which it has been expressed. In this case it would be equally accurate to say that the relevant circumstances were that the hereditament had become incapable of beneficial occupation, or that the circumstances were the stripping out which rendered it in that condition. The reference to circumstances is consistent with the heading of regulation 4, ALA Regulations ("circumstances in which proposals may be made"), which describes all the grounds or circumstances which may justify a proposal to alter the list. There may be circumstances identified in regulation 4 which do not lend themselves to the exercise of the power in regulation 38(7), but that does not mean the general words in which the power is expressed should be given a restricted meaning, as referring only to a specific event with particular consequences. To do so would introduce unnecessary complexity into a simple provision.

36.
In my judgment, and in respectful agreement with the Vice-President, the VTE was entitled to conclude on the agreed facts that the circumstances giving rise to the alteration in the list ceased to exist on 23 January 2015. The power under regulation 38(7) was therefore available.

37.
Mr Wilcox submitted that if I did not accept his primary contention on the meaning of regulation 38(7) I should nevertheless exercise the discretion under it by refusing to make an order. That suggestion was not raised in the appellant's statement of case and neither counsel made submissions on the proper approach which this Tribunal should take to an appeal against a discretionary decision of the VTE.

38.
In Simpsons Malt Ltd v Jones [2017] UKUT 460 (LC) at [63]-[74] the Tribunal explained why it treats appeals against discretionary case management decisions of the VTE differently from appeals against decisions on issues of valuation. In the former case the Tribunal's practice is to review the decision under appeal, while in the latter it conducts a re-hearing and reach its own conclusion on the issue. I am inclined to think that, for the purposes of an appeal, the Tribunal should adopt the same approach to a discretionary decision under regulation 38(7) as it takes to discretionary decisions on a matter of case management. In the absence of submissions I will not decide that issue as, on the view I take, it would make no difference to the outcome of the appeal.

39.
In my judgment the Vice-President was entitled to exercise his discretion in the way he did. Mr Wilcox did not suggest that, if the power was engaged, the Vice-President had failed to have regard to any relevant matter, taken into account anything irrelevant, or otherwise reached a conclusion which was not open to him properly directing himself on the law.

40.
If it falls to me to exercise the discretion afresh (which I doubt) I would do so in the same way as the Vice-President. Both counsel acknowledged that, because the list can no longer be altered with effect

from a date earlier than 1 April 2015, it will be inaccurate however the discretion under regulation 38(7) is exercised. The appellant will either be assessed for rates for a period from 23 January to 31 March 2015 on a rateable value of £1.83m rather than £1.8m, or it will be assessed on a rateable value of nil for the same period. The discrepancy against the ratepayer is modest but not insignificant if the power to limit the alteration only to the period of the works is exercised. It is very significant (albeit in favour of the ratepayer) if the list remains unaltered after the reduction in rateable value to nil. I also take into account that the appellant was in a position to protect itself against the risk of this inaccuracy arising by making a proposal to enter an appropriate rateable value after the completion of the works. In all these circumstances the appropriate order is the one made by the VTE which I decline to disturb.

Martin Rodger QC

Deputy Chamber President

25 February 2020
