IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 168 (LC)
Case No: RA/26/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING - whether hereditament should be deleted from rating list – whether (if not deleted) the rateable value assessment shown in the list should be reduced – extent of disrepair at material day – operation of second assumption in schedule 6 paragraph 2(1) to the Local Government Finance Act 1988 regarding whether necessary repairs would be considered uneconomic by a reasonable landlord – effect of absence of toilet facilities – rateable value determined at £16,000

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

BETWEEN:

CHRISTOPHER JOHN SHAW — **Appellant**

And

LEIGH BENTON
(Valuation Officer) — **Respondent**

Re: Unit C1A, Newton Business Park,
Talbot Road,
Hyde,
Cheshire, SK14 4UQ

Before: His Honour Judge Huskinson and Peter McCrea FRICS

Royal Courts of Justice, Strand, London WC2A 2LL
on
8 May 2018

The Appellant appeared in person
Hugh Flanagan, instructed by the Valuation Officer, for the Respondent

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The following cases are referred to in this Decision:

Newbigin v Monk (VO) [2017] UKSC 14

Codexe Limited v Lamb (VO) [2018] UKUT 70 (LC)

Proudfoot v Hart (1890) 25 QBD 42

Thomas & Davies (Merthyr Tydfil) Ltd v Denly (VO) [2014] UKUT 146 (LC)

Hoare v National Trust (1999) 77 P & CR 366

Telereal Trillium v Hewitt (VO) [2018] EWCA Civ 26

Kendrick (VO) RA/59/2007

Addis Ltd v Clement (VO) [1987] RA 1

DECISION

Introduction

1. This is an appeal from the decision of the Valuation Tribunal for England ("VTE") dated 22 February 2016 whereby the VTE dismissed an appeal brought by the appellant seeking the deletion of an existing entry in the 2010 rating list. The hereditament in respect of which the appeal had been brought was Unit C1A, Newton Business Park, Talbot Road, Hyde, Cheshire SK14 4UQ ("the appeal property").

2. The appeal property was included at the outset of the 2010 rating list as part of a hereditament comprising Units C1A and C1B together. This was split into two hereditaments following the separate occupation of Unit C1B from 1 July 2014 by an alteration made by the valuation officer on 15 September 2014. As a result the appeal property was entered in the 2010 rating list as "workshop and premises" at the rateable value of £18,000 effective from 1 July 2014.

3. It is necessary briefly to explain how the matter came first before the VTE and how it now comes before the Upper Tribunal, because it is common ground between the parties that the appellant's argument contains two strands.

4. First the appellant argues that the hereditament should be deleted from the rating list with effect from 1 September 2014 because "Work commenced to split this unit into three smaller units. There is a great deal of renovation work to carry out." This was the substance of the proposal made by the appellant to alter the 2010 rating list which was received by the valuation office on 11 November 2014. The claimed date of the change of circumstances was 1 September 2014.

5. Secondly the appellant argues that the rateable value as entered in the rating list (namely £18,000) was excessive and should be reduced. No specific proposal to that effect became the subject of any substantive appeal to the VTE. However before the VTE this argument was also presented by the appellant and was (briefly) dealt with by the VTE, which rejected the appellant's argument. This second strand of the appellant's argument has also been apparent in the documents served in relation to the present appeal to the Upper Tribunal. The respondent (helpfully and appropriately) observes that, while strictly the appellant may not be able to advance both arguments, the respondent does not object to the Upper Tribunal dealing with both arguments. This is what we propose to do. The manner in which both these arguments have been raised before the VTE and the Upper Tribunal should however not be taken as a precedent as to the appropriate procedural steps for the purpose of raising both such arguments (namely deletion and also, if not deleted, a reduction in the rateable value).

6. As a result of the foregoing there are two separate material dates to be considered, but fortunately neither party suggests that any relevant circumstance was different at one of the dates

as compared with the other. As regards the appellant's argument that the appeal property should be deleted from the list the material day is 1 September 2014 (i.e. the date on which the circumstances giving rise to the alteration allegedly occurred) – see the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 regulation 3(4)(a). However as regards the appellant's argument that an alteration should be made to the list due to a material change of circumstances affecting the rateable value the material day is the day on which the proposal was served on the valuation officer, namely 11 November 2014, see regulation 3(7)(b)(i).

7. It is agreed that the antecedent valuation date (AVD) for the appeal is 1 April 2008.

8. The parties have helpfully provided a document by way of a statement of agreed facts which includes the following description of the appeal property and its situation:

> "Newton Business Park, Talbot Road, Hyde, Tameside SK14 4UQ is a seventeen acre former ICI factory site, comprising of 460,000 (four hundred and sixty thousand) square feet of floor space, which has been split into approximately 50 (fifty) separate industrial units for warehousing and manufacturing use. The estate is, at the present time, 80% occupied.
>
> Unit C1A Newton Business Park is a semi-detached single storey building of 648.00 (six hundred and forty eight) square metres which was constructed in the 1920's. The property is of brick construction with a north light roof covering supported on a light steel truss frame.
>
> Internally the property has a concrete floor, painted brick/block walls and a timber & glass roof covering. The accommodation comprises of a main workshop/warehouse space with separate stores which were formerly used as office areas. There is a metal roller shutter door for loading & separate timber doors for pedestrian access. A large car park in the centre of the industrial estate provides ample parking spaces on a shared basis."

9. The parties have recorded the following as being agreed facts and issues:

1. The parties are agreed that the appeal property is an industrial building and would normally be valued using the rentals method, applying the appropriate price, or prices, per square metre to the Gross Internal Area.

2. The parties have agreed that the material day for valuation purposes should be 11 November 2014[1] and the effective date should be 1 September 2014.

3. The parties are agreed that little or no work (to the fabric of the building) had been started to split the property into separate assessments at either the material date or the date of the inspection.

[1] The material day under the proposal to delete the assessment from the rating list

4. The parties have agreed, for the purposes of this appeal, the floor areas and layout plan together with aerial view, photographs and location plans for the property.

5. The Appellant and Respondent jointly inspected the property on 27 September 2017 and it is this date on which the photographs were taken.

10. The following matters are listed by the parties as issues which are not agreed:

1. Whether the property is derelict or not is not agreed.

2. The condition of the building on the Material Day 11 November 2014[2] is not agreed.

3. The parties have not agreed the unit price/prices to be applied to the subject property

4. The condition of the building on the Material Day is not agreed and therefore the majority of repairs required and associated costs cannot be agreed.

5. The parties do not agree that the report by Roger Hannah dated 6 November 2015 demonstrates a lack of demand or oversupply of industrial property in the vicinity at the antecedent valuation date

6. The basis of the assumption of the reasonable landlord and the economics of repair cannot be agreed.

7. It is not agreed that 15% of the estate is vacant and in good repair.

11. In summary the appellant's argument is based upon the contention that as at the material day (whether 1 September 2014 or 11 November 2014) the appeal property was in very poor physical condition such that it could in effect be described as derelict; that the appeal property was totally unacceptable for use as an industrial unit in its then existing condition; and that the statutory assumption required to be made by paragraph 2(b) of Schedule 6 to the Local Government Finance Act 1988 did not require the assumption that, immediately before the hypothetical tenancy begins, the appeal property was in a state of reasonable repair because the repairs required to the appeal property were repairs "which a reasonable landlord would consider uneconomic". The appellant drew attention to the history of Newton Business Park (which he and a partner had developed since the 1980s), to the substantial quantity of workshop premises available for letting at all material dates, and to the fact that the appellant had never repaired a unit and made it suitable for occupation prior to a tenant coming forward and wanting to rent the unit. The appellant submitted that it would be uneconomic to have repaired the appeal property in advance of a committed tenant (whose needs could be recognised in such works as were done to the unit) because such conduct would give rise to immediate substantial expenditure and the likelihood of the appellant having the appeal property upon his hands unlet and empty for a substantial period and with the prospect of further works needing to be done if and when

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[2] The material day under the material change in circumstances proposal

(eventually) a tenant wished to take the unit, namely further works so as to tailor the unit to the needs of that tenant.

12. The appellant said that there are a number of derelict units upon the estate but that he had chosen the appeal property (Unit C1A) as a test case. As regards the appeal property he explained that this unit was used by a metal fabrication and powder coating company. The powder coating line was large and occupied most of the unit and was a very dirty process and left the unit looking as though there had been a serious internal fire with smoke blackening of all surfaces. This company (Ambery Metalwork Ltd) had gone into administration in 2010. The coating line had been leased by the tenant from another company. The administrator and the bank simply walked away and left the appellant to sort out the mess. The appellant had eventually brought a scrap metal merchant onto the site to disassemble and scrap all the machinery. He then organised removal of all damaged asbestos insulated pipe work. The unit was then used periodically for the storage of scrap and third-party building materials. However by 1 September 2014 the appellant had decided that it was unsafe to use the unit for any purpose and it had not been used since that date.

13. As regards the letting to Ambery Metalwork Ltd this had been a three-year lease granted in about January 2008 and expressed to run from 1 January 2008 to 31 December 2010. The lease ran its course and terminated on 31 December 2010, by which time the tenant was in administration. Accordingly at the term date of the lease the tenant left the appellant with the above-mentioned problems.

14. The evidence given by the appellant in support of his appeal is described in more detail below.

15. In summary the position of the respondent is as follows. The respondent points out that as at the material day the appeal property continued to exist as a hereditament. It had only recently been entered in the rating list as a separate hereditament (i.e. separate from the previous larger hereditament which had comprised both Units C1A and C1B) with effect from 1 July 2014. No significant works had been done by the material day for the purpose of dividing the appeal property into two or more units. There was accordingly no justification for deleting the appeal property from the rating list.

16. As regards the appellant's separate argument that the value of the appeal property as entered (£18,000) is too high and should be reduced to nil or a nominal amount, alternatively to an amount less than £18,000, the respondent argued that as at the AVD, namely 1 April 2008, the appeal property would have let on the statutory terms (in accordance with the assumptions in schedule 6 paragraph 2 of the 1988 Act) at a rent of £28.50 per square metre (less a 2 ½% allowance for the lack of heating) namely £27.79 per square metre which gave a figure of £18,008 which was rounded down to £18,000. In the result therefore no reduction should be made in the value as entered in the rating list for the appeal property, namely £18,000. The respondent argued that the appeal property as at the material day was only to a limited extent out of repair (namely as regards the plaster on the ceiling) and that such repairs (or more extensive repairs if more

extensive repairs were required) were repairs which a reasonable landlord would not consider uneconomic and accordingly the appeal property should be valued as being offered for letting in repair. The respondent drew attention to substantial comparable evidence by way of lettings of units on Newton Business Park and by way of rating assessments for the 2010 list of units on Newton Business Park. The respondent contended that this evidence showed a clear tone for the 2010 rating list of £28.50 per square metre for a hereditament such as the appeal property.

17. The evidence given by Stewart Wright MRICS, the respondent valuation officer, in support of these arguments on behalf of the respondent is described in more detail below.

Evidence

18. The appellant gave evidence to the following effect.

19. In 1987, Mr Shaw and a business partner bought the former ICI works at Talbot Road, Hyde, which amounted to some 450,000 sq ft, ranging from original 1920's buildings to 1970's additions. The complex is now owned by Mr Shaw and his wife and is known as Newton Business Park. Mr Shaw's office is on site, from which he manages the complex, meets prospective tenants and negotiates leases of various buildings. He shows prospective tenants around the complex, ascertains their requirements, and modifies buildings accordingly. By around 1997, the complex was more or less full. Full rate liability for empty industrial property had not yet been introduced, but once a building or part of a building had been let, Mr Shaw would alert the valuation office, who would assess the property for non-domestic rates.

20. As time went on and the economy deteriorated, larger tenants struggled to survive and units were handed back to the partnership. Usually this resulted in a larger unit being split into several smaller ones. Sometimes former tenants vacated leaving units in an appalling condition, full of debris and equipment which the landlord had to dispose of. Some units were handed back in an effectively derelict condition. On these occasions, the valuation office agreed to remove the assessments of those units from the rating list. Once the unit had been refurbished, it was reinstated in the list.

21. Mr Shaw said that this cooperative arrangement with the valuation office ended in 2008 with the advent of the government's decision to make industrial property liable to full business rates after six months of vacancy, combined with the onset of the global recession. In his view this was a seriously flawed decision, and unfairly affected the north of England. Whilst larger, more sophisticated property owners could devise schemes to alleviate the empty rate liability as far as possible, smaller landlords bore the brunt of the change in policy.

22. Across Newton Business Park, around 15% of the floorspace is empty but in good condition – Mr Shaw reluctantly accepts that these are liable to empty rates. But 5% of the accommodation is very obviously derelict. In contrast to the position pre-2008, the valuation

office has refused to delete the assessment of these units from the rating list. Mr Shaw has chosen unit C1A, which is typical of this 5%, as a test case and which forms the basis of this appeal.

23. Mr Shaw said that unit C1A was originally part of a larger unit, including C1B. There was a wall which partially divided the two parts. The half that became C1A was used for sandblasting, spray coating and other dirty work while that which became C1B was used for clean storage. The tenant, Ambery Metalwork Ltd (who already had units F5 and F6, comprising some 25,000 sq ft, elsewhere in the complex), had a lease of both halves, at a rent equating to around £2.65 to £2.75 per sq ft (or £28.50 to £29.60 per sq m), for a term of three years from January 2008. As part of the letting, Mr Shaw completed the part wall to form two separate halves and carried out some work to the roof.

24. As divided, unit C1A has a basic office, but no toilets. Ambery Metalwork Ltd, as the tenant of both halves, used the facilities in what became unit C1B. Mr Shaw said that in all instances where a unit was let without toilet facilities, the tenant had accommodation elsewhere in the complex so were content to take the unit without facilities. He could not recall letting a unit without toilet facilities to a tenant which was completely fresh to the scene, and his evidence was that any tenant would insist on toilet facilities within the unit. He accepted that providing toilet facilities in unit C1A would be an improvement rather than repair.

25. As a result of the processes carried out by Ambery Metalwork, when the company vacated the unit was left in a very poor condition, and looked as if there had been a fire, with many of the surfaces blackened, and with exposed asbestos pipe lagging. Both the administrator of Ambery and the company which had provided finance for its equipment, simply walked away leaving Mr Shaw to arrange for the unit to be cleared. This was arranged some twelve months later by a scrap dealer. The unit was then used for the storage of scrap and building materials, but by September 2014 Mr Shaw considered the unit was in sufficiently poor condition to make it unsafe, and it has been vacant since then. It has been advertised on Mr Shaw's website, with little interest until recently, but the interested party has now gone elsewhere. However, the terms discussed were a three-year lease, again at a rent of £2.75 per sq ft.

26. Mr Shaw's policy throughout has been to not refurbish units speculatively. He waits for potential tenants to come along, and then tailors a unit to suit their bespoke needs, once terms have been agreed. Adopting this policy for the last thirty years has meant that every penny the partnership spent would have a good prospect of payback.

27. In 2008, the occupancy rate was around 80%. It dipped slightly during the recession, but is now back at that level. Mr Shaw exhibited an extract from a report prepared by Roger Hannah and Co, Chartered Surveyors, dated 24 November 2015 ("the Hannah report"), which indicated that at that time there was about 660,000 sq ft of available industrial space within a 1.5 mile radius of the appeal property. The report also commented that "rental rates in the Hyde area have been experiencing a marked decline since 2009" and indicated that the length of time that industrial properties were on the market before a letting took place had also increased significantly in the same period.

28. In cross examination, Mr Shaw accepted that the rent passing in April 2008, at around £29.00 per sq m, supported Mr Wright's valuation. As regards the comparable lettings upon which Mr Wright relied, Mr Shaw accepted that, once he had repaired and refurbished units in the complex, he would expect the achievable rents to be in line with those lettings. He also accepted that if there were a tenant prepared to pay rents of these levels, Mr Shaw would consider it economic to carry out the repair work, and would be prepared to spend an amount equivalent to two or possibly three years' rent on repair work to effect a letting.

29. Mr Shaw had exhibited three estimates for repair work. The first, dated 24 September 2017 was from local contractor "Kwik-Fix" in the sum of £47,650. Of this, Mr Shaw accepted that the cost of £8,450 for building toilets, and part of roofing costs of £8,000, could be constituted as improvements. The second quote, from Cheshire Roofing and Joinery dated 26 September 2017, totalled £62,700. Of this, Mr Shaw readily agreed that about £20,000 could be thought of as improvement or excess cost. The third, much earlier quote, from A W Décor dated 19 March 2015 totalling £14,300. Whilst this did not include an element of flooring work which was assumed that landlord would carry out, nor for offices or toilets, in any event Mr Shaw thought that it was highly unlikely that the work involved could be completed for that amount.

30. Mr Shaw readily accepted that if there was a tenant that was prepared to take a lease of the property (which he had accepted would be in line with Mr Wright's valuation), then it would be economic to carry out the repair work. His point was that he would not be prepared to do so speculatively, as there was no guarantee that the partnership would recoup the cost in the years immediately thereafter. Whilst this might be possible in the south-east, it was highly unlikely in the north of England.

31. Owing to Mr Shaw's acceptance of Mr Wright's valuation, we can outline very briefly Mr Wright's evidence on behalf of the respondent.

32. Mr Wright is a Chartered Surveyor and has over thirty years' experience in rating in the Manchester area. He inspected the appeal property on 27 September 2017, and the photographs within his expert report were accepted by Mr Shaw as being accurate. Mr Wright did not consider the appeal property to be in a state of disrepair. He thought its condition was reasonable, and consistent with buildings of its nature and age.

33. As regards value, Mr Wright was able to rely upon a large number of both rental and assessment evidence within Newton Business Park, from which he adopted a rate of £28.50 per sqm, less 2.5% for lack of heating. This resulted in a rateable value of £18,000.

34. In preparing his valuation, Mr Wright had noted that the appeal property did not have toilet facilities, but had assumed that there was access to shared facilities elsewhere in the development. He accepted that this was not the case and in answering questions from us on the issue accepted, albeit with a degree of reluctance, that he had come across end allowances given of 2.5% and 5% for lack of toilets. But ideally he would want to see evidence of differentials in rents for units with and without facilities before forming a view, and considered that in a strong

market the rent agreed by the hypothetical parties would not be reduced owing to a lack of toilets. He additionally made the point that minor alterations can be contemplated within the physical limb of the *rebus sic stantibus* or reality principle, and the test was whether a reasonable observer would consider the alterations to be minor.

Law

35. The statutory definition of rateable value is that contained in paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988, i.e. an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year, subject to the three statutory assumptions. The second assumption is of importance in the present case. Paragraph 2(1) provides:

> "(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."

Subparagraphs (6), (6A) and (7) provide:

> "(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.
>
> (6A) For the purposes of sub-paragraph (6) above the material day shall be such day as is determined in accordance with rules prescribed by regulations made by the Secretary of State.
>
> (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) ……..

(cc) …….

(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."

The appellant's submissions

36. Mr Shaw advanced the following submissions.

37. While making no concessions, Mr Shaw did not advance any reasoned argument to the effect that the appeal property should be deleted from the rating list. He accepted in evidence that, when he had stated in his proposal to alter the rating list in box 16 that work had been commenced to split this unit into three smaller units and that there was a great deal of renovation work to carry out, this was what was in his mind as the most likely way forward for the appeal property. However he accepted that such works to split the appeal property into smaller units had not actually started. Accordingly Mr Shaw's arguments principally concentrated upon his contention that, supposing the appeal property would remain as a hereditament within the rating list, the rateable value attributable to the appeal property should be reduced to £1 or to a sum substantially less than £18,000.

38. Mr Shaw drew attention to the Supreme Court decision in *Newbigin v Monk (VO)* [2017] UKSC 14 and he relied upon the reality principle as there recognised. He contended that the appeal property had been left in effectively a derelict state and that therefore the appeal property, in such state, equated to the property with which the *Newbigin* case was concerned – in the latter case the office unit had been stripped out for renovation whereas in the present case the appeal property had been left in a derelict state by a previous tenant who had gone into administration, since when no potential tenant had come forward with an interest in the appeal property being repaired or refurbished.

39. He submitted that the appeal property, in its actual physical state as it existed at the material day (whether that was 1 September 2014 or 11 November 2014) was in a state which was unacceptable and in which the property could not be let – especially because of potential

hazard for any tenant from falling plaster from the disrepair of the roof. If this was right then the rateable value should be nominal. Alternatively if this were wrong and the appeal property could be let (as it had in fact been let for temporary storage uses after the previous tenant's plant had eventually been removed) this would only be at a greatly reduced rent such as the rent the appellant had in fact achieved for such a letting, namely £250 per month.

40. Mr Shaw recognised that the proper interpretation and application of the assumption in subparagraph 2(1)(b) is of importance in the present case. He accepted during his evidence that it would be economic to spend on repairs two or three times the amount of the achievable rent, but that acceptance was on an important assumption namely that there would indeed be a tenant who would take the appeal property at the market rent (i.e. market rent for a repaired property) once these repairs had been done. In the absence of a tenant who was prepared to rent the appeal property it would not be economic to spend this money, because the money would be spent speculatively and merely in the hope of attracting a tenant which might well not occur for a lengthy period and which (if and when it did occur) could result in the tenant wanting works done different from the works which the appellant had earlier done on this speculative basis, with the result that some of the works already paid for would be wasted. He pointed out that the positioning and size of doorways, offices, kitchen and toilets are of key importance to tenants and his ability to tailor work to meet their requirements is crucial to achieving a letting. Straightforward repair to a specification that a tenant does not want would not be economic or sensible.

41. Upon the proper interpretation of subparagraph 2(1)(b) Mr Shaw drew attention to definitions in the Oxford English Dictionary regarding "reasonable" and "uneconomic" and "repair". As regards the word "reasonable" he submitted that that meant: having sound judgement, fair and sensible, based on good sense, able to reason logically. As regards the word "uneconomic" he submitted that that meant: unprofitable, constituting an inefficient use of money or other resources. As regards the word "repair" he submitted that that meant: restore to good condition, make good, put right (and that it meant restoration of any existing situation rather than reconfiguration or movement away from what exists).

42. Against that background of the statutory provision and the meaning of the relevant words, Mr Shaw advanced the following argument. He said that the premises should be valued for rating taking into account reality, namely that the landlord was him and that he owned the Newton Business Park. He pointed out that he had successfully run this business park since the 1980s, that he was a reasonable man, that he would not (and did not) consider it economic to carry out the necessary repairs to the appeal property and that therefore this should answer the question posed by subparagraph 2(1)(b), namely by giving an answer that the repairs would be considered by a reasonable landlord to be uneconomic. Put another way, it could not be said that he was unreasonable in his decision not to carry out repairs to the appeal property but instead to wait until some interested tenant came forward – at which date works could be done to the appeal property to deal with both repairs and any requirements the tenant might reasonably have.

43. In considering valuation matters, including the question of whether the repairs were such as a reasonable landlord would consider uneconomic, he drew attention to the provisions of

subparagraph 2(7). He submitted that the decision of the Upper Tribunal in *Codexe Limited v Lamb (VO)* [2018] UKUT 70 (LC) was wrong insofar as it proceeded upon the basis that the level of demand in the market was not one of the matters identified in this subparagraph and the decision was wrong in concluding that the level of demand must be taken as it was on the AVD rather than at the material day. He submitted that in so far as the physical state of the locality was affected by economic circumstances pertaining at the material day such that the economic circumstances were physically manifest in the locality, then that physical state should be taken into account in assessing the rateable value. He drew attention to the extract he had provided from the Hannah report indicating a significant amount of available space (over 600,000 ft.^{2}) within the search area there studied and an increasing length of time before industrial units in the area were let. The Hannah report spoke of an overall picture of a rapidly diminishing level of demand in the area with lettings and asking rents declining rapidly and the average letting time increasing – all of which indicated that the industrial market in the Hyde area was struggling. He submitted that this state of affairs should be taken into account and assumed to exist when assessing the rental value at the AVD.

44. So far as concerns the economic situation as at the AVD, 1 April 2008, Mr Shaw drew attention to the fact that there had already been a substantial check upon the economy before this date – most notably in September 2007 with the crash of Northern Rock. Since that date the economy was already declining and with it the potential for achieving lettings on beneficial terms. It was not right to suggest that the decline in the economy could only properly be seen to start from a date after 1 April 2008, such as the crash of Lehman in September 2008.

45. Separately from all the foregoing and in any event, Mr Shaw pointed out that the appeal property had no toilet facilities. These are works which he would have done if and when a tenant came forward to take a tenancy of the property. However so far as concerns the statutory assumption under subparagraph 2(1)(b) the introduction of new toilet facilities into a property which did not have any such facilities at all could not on any basis be considered to be repair (indeed the respondent does not argue that such an installation would be a repair) with the result that the hypothetical tenancy of the appeal property must be taken to be a tenancy of a unit without any toilet facilities and without any right to share any communal toilet facilities on the business park. That must substantially diminish the rental value.

The respondent's submissions

46. On behalf of the respondent Mr Flanagan advanced the following submissions.

47. The appellant's proposal that the appeal property should be deleted from the valuation list must be rejected for the reasons already summarised in paragraph 15 above. What this case is in substance is a case where the appellant is seeking a reduction in the rateable value rather than a deletion of the appeal property from the list.

48. The proper approach in outline involves asking the following three questions:

(i) First, what was the physical state of the appeal property on the material day (this being the physical state which subparagraph 2(7)(a) requires that the appeal property must be assumed to have been in for the purposes of determining its rateable value).

(ii) Secondly, if the appeal property was in disrepair on that date, would such repairs as would be necessary to put the appeal property in a state of reasonable repair be considered by a reasonable landlord to be uneconomic? Unless such repairs would be uneconomic, the appeal property is to be assumed as being in a state of reasonable repair having regard to the provisions of subparagraph 2(1)(b).

(iii) Thirdly, on the above assumptions, would there have been demand for the appeal property at the AVD, 1 April 2008, and if so what rental value would have been achieved?

49. As regards the first question, the respondent now accepts that the appeal property was to a limited extent in a state of disrepair as at the material day, namely by reason of the disrepair to the roof requiring the introduction of boarding. The lower of the two quotations for such work from Kwik-Fix was for £8000 (which might involve an element of improvement by reason of the installation of insulation). However no further works were required so as to put the appeal property into such repair as, having regard to the age, character and locality of the property, would make it reasonably fit for the occupation of a tenant of the type likely to take it. Bearing in mind therefore the principles in *Proudfoot v Hart* (1890) 25 QBD 42 the extent of the disrepair was only the roof for which a cost of £8000 or less was appropriate. The walls were in a condition which one would expect in a property of such an age and type. As regards the alleged problem with asbestos clad pipes, Mr Wright did not see any problem regarding this on his inspection. Also the appellant has stated in his witness statement at paragraph 16 that after the previous tenant had left the appeal property he "organised removal of all damaged asbestos insulated pipe work".

50. As regards the second question, bearing in mind that the rent that could reasonably be expected to be achieved for a letting of the premises on the hypothetical terms as at the AVD would be at a rate of about £18,000 per annum, it would plainly be economic to carry out the repairs to the roof. Separately from the foregoing, and even supposing that Mr Wright's analysis was wrong regarding the extent of the repairs required such that substantially more repair work was required than merely works to the roof, such works once again would be economic to carry out. This followed from Mr Shaw's own evidence that he would be prepared to spend twice or three times the rent on carrying out necessary works (provided he had a tenant ready to take the premises). It also followed from a simple comparison between the level of the rent and the cost of the repairs and from, for example, the analysis of the Upper Tribunal in *Thomas & Davies (Merthyr Tydfil) Ltd v Denly (VO)* [2014] UKUT 0146 (LC).

51. As regards Mr Shaw's argument that the necessary repairs would only be economic if there was a tenant ready and willing to take the property, once the repairs were done, Mr Flanagan pointed out that the rating hypothesis, as set forth in paragraph 2 of schedule 6 of the 1988 act,

requires there to be assumed that a letting **will** take place, see *Hoare v National Trust* (1999) 77 P & CR 366.

52. Mr Flanagan submitted that this statutory assumption, namely that a letting will take place, was of importance when properly applying the assumption in subparagraph 2(1)(b) regarding repairs. The assumption to be made 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." Thus the assumption is that there will be a letting and that the landowner will be a landlord under the hypothetical letting and the question is whether, upon this assumption, the necessary repairs would be considered by a reasonable landlord to be uneconomic. The question is not whether a reasonable landowner would consider the repair works to be uneconomic in circumstances where the landowner had no promise of a tenant and faced the prospect of merely doing the work speculatively against the possibility that eventually a tenant might come forward. If the statutory assumption is construed in the correct manner then it is clear that a reasonable landlord would not consider the necessary repairs to be uneconomic – and indeed Mr Shaw himself accepted that the repairs would be economic provided there was to be a letting.

53. The recent Court of Appeal decision in *Telereal Trillium v Hewitt (VO)* [2018] EWCA Civ 26 does not affect the foregoing argument. In that case it was agreed between the parties that, in the real world (and apart from any rating assumption), there was nobody who would be prepared to pay or bid a positive price for the hereditament as at the AVD. In the present case it is clear that as at the AVD the appeal property, if in repair, would be let at about £18,000 per annum having regard to the substantial evidence produced by Mr Wright regarding comparables, both comparables involving actual lettings and comparables involving rating assessments.

54. As regards the third question regarding demand for the appeal property at the AVD, Mr Flanagan submitted that economic factors existing as at the material day were not relevant. He drew attention to *Codexe v Lamb (VO)* especially at paragraph 43 where the Upper Tribunal stated:

> "We therefore reject [counsel'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 be taken to have been as they were on the antecedent valuation date."

55. Mr Flanagan also drew attention to a decision of the Lands Tribunal (George Bartlett QC, President) in the case of *Kendrick (VO)* RA/59/2007 where it was recognised, having regard to the Court of Appeal decision in *Addis Ltd v Clement (VO)* [1987] RA 1, that subparagraph 2(7)(d) can operate to require there to be taken into account a change in economic conditions provided the effects of such a change were observable "on the ground" in the locality. However in the present case there was no evidence of any relevant physical manifestation in the locality as at the material day. Also the Hannah report was dated November 2015 which is substantially later than

the material day. Also Mr Shaw did not give evidence of any marked difference in occupancy levels upon Newton Business Park as at the material day as compared with the AVD – his evidence was that throughout occupancy levels were around 80%.

56. The Hannah report was however instructive as confirming Mr Wright's evidence that, as at the AVD in April 2008, there was a relatively strong market. This is also confirmed by the comparables (both lettings and rating assessments) produced by Mr Wright. This is further confirmed by the fact that the appeal property itself was let on a three-year lease in January 2008 at about £28.50 per square metre.

57. As regards the fact that there were no toilet facilities in the appeal property, Mr Flanagan submitted that if this were to be dealt with at all it would be dealt with by way of an end allowance. However he called attention to Mr Wright's evidence that it is questionable whether, in a strong market, there should be any extra end allowance for the absence of toilets.

Discussion

58. Upon the question of whether the appeal property should be deleted from the rating list, we conclude that it should not be deleted. There was no change of circumstance which could justify such a deletion. On the material day the appeal property continued to exist as a hereditament. It had only recently been entered in the rating list as a separate hereditament (with effect from 1 July 2014). No significant works had been done by the material day for the purpose of dividing the appeal property into two or more units. Mr Shaw frankly accepted that works to split the appeal property into smaller units had not actually started and that his proposal for deletion had referred (in box 16 of the document) not to work which had been commenced but instead to what was in his mind as the way forward for the appeal property.

59. We accept that it is convenient next to consider the three questions raised by Mr Flanagan in his submissions (see paragraph 48 above).

60. The first question concerns the physical state of the appeal property on the material day, which for the purpose of this proposal (i.e. a proposal to reduce the rateable value) is 11 November 2014. It is agreed between the parties that there was no relevant difference in the condition of the appeal property between the material day and September 2017 when Mr Wright inspected the appeal property and took the photographs.

61. Upon the evidence before us it is not possible to reach precise conclusions as to the extent of disrepair and the cost of remedying such disrepair. This is because there is no detailed schedule of condition provided by either party. Also, so far as concerns any estimate of costs of such works as might be required, these are offered to the Tribunal by way of three estimates from builders – the builders have not given evidence and the estimates are briefly stated. It is however possible for us to reach sufficient conclusions regarding the extent of the disrepair for the purpose of determining the present appeal.

62. We note that originally Mr Wright contended that the appeal property was not in disrepair at all at the material day, having regard to the relevant test as laid down in *Proudfoot v Hart*. However in his evidence Mr Wright accepted that the roof was out of repair having regard to the cracking and falling of certain areas of plaster work. We also note that, as regards the alleged disrepair regarding asbestos pipework, Mr Wright did not see any evidence of this on his inspection and Mr Shaw himself stated at paragraph 16 of his witness statement that he had organised removal of all damaged asbestos insulated pipework.

63. As regards such estimates as exist for carrying out works to the appeal property we note that the estimates from Kwik-Fix and from Cheshire Roofing & Joinery are both dated September 2017, which is about three years after the material day. Also the earlier estimate dated March 2015 from A W Decor is an estimate totalling £14,300 plus VAT which Mr Shaw considered (we believe correctly) to be somewhat too low for the works there mentioned.

64. Our conclusion is that more works were required to put the appeal property into a state of reasonable repair than are recognised by Mr Wright. We find the estimate provided by Kwik-Fix to be of assistance. We note that this estimate, totalling £47,650, includes items which are clearly improvements – the most obvious examples being items 8 and 9 which involve building an office (£5,300) and building toilet blocks (£8,450), and item 4 (roof works costing £8,000) which included fitting 50mm thick insulation panels. The cost of removing rubbish, at £4,750, is not a repair, and we do not accept that such extensive works (including two coats of paint) were required to the full floor area as mentioned in this quotation. However we accept Mr Shaw's evidence that given the way that the former tenant had left the premises, redecoration would have been required. Our overall conclusion is that the appeal property at the material day was not in a state of reasonable repair and that it would have cost something in the order of £25,000 to put it into a state of reasonable repair.

65. We turn next to the second question raised by Mr Flanagan, namely whether such repairs as were necessary to put the appeal property into a state of reasonable repair would be considered by a reasonable landlord to be uneconomic.

66. We do not doubt the care which the appellant has devoted over many years to the development and letting of units on the Newton Business Park nor have we any reason to conclude that the way he has managed this business park has been unreasonable. However we are unable to accept the appellant's submission that, bearing in mind he is a reasonable landowner and did not consider it economic to carry out speculative repair works to the appeal property at the material date, this necessarily answers in a sense favourable to the appellant the question of whether the necessary repair works would be considered by a reasonable landlord to be uneconomic. Our reasons for so concluding are as follows.

67. First, it is not right to test the question of whether a reasonable landlord would consider the repairs to be an economic solely by reference to the appellant. The appellant's attitude (and actual conduct) is no doubt of relevance but it is not determinative.

68. Secondly, and more importantly, the appellant's decision not to carry out repair works was taken upon the basis that he advised himself that he had no certainty of any tenant coming forward to take the property and that therefore, if he did the repair works, he would be doing them speculatively and in circumstances where there was the prospect of the appeal property remaining unlet for a long time after he had spent money on the repairs. However in our judgement this is not the relevant test. We accept Mr Flanagan's argument that the rating hypothesis requires it to be assumed that there will be a letting. In testing whether, under the second assumption in paragraph 2(1) of the sixth schedule, repairs would be considered by a reasonable landlord to be uneconomic it is necessary to proceed on this basis, namely that there will be a letting. The hypothetical reasonable landlord who is considering whether or not the necessary repairs are uneconomic is to be taken as carrying out this consideration in circumstances where it is known that there will be a letting of the premises on the terms of the statutory assumptions. Accordingly this landlord will know that, if the necessary repair works are carried out so as to put the appeal property into a state of reasonable repair, the landlord will then obtain a letting at the market rate for such a letting assessed as at the AVD. The question for the hypothetical reasonable landlord to consider is whether it is economic to carry out the necessary repairs so as to secure such a letting.

69. Applying the second assumption in the foregoing manner our conclusion is that a reasonable landlord would not consider the necessary repairs to be uneconomic. The appellant himself accepted that if he could be confident there would be a letting then he would consider it economic to spend twice (or perhaps even up to three times) the amount of the rent on the repairs. The respondent submits that the evidence in the present case of rental values, taken from the various comparables referred to by Mr Wright, shows that for the appeal property in a repaired state (and disregarding for the moment the absence of toilets) an annual rent of about £28.50 per sq m, or £18,000, would be achieved. We examine this submission further below (when examining Mr Flanagan's third point), but for the present we conclude that if the appeal property in a repaired state might reasonably be expected to have been let on the statutory assumptions for about £18,000 per annum then a reasonable landlord would consider it economic to carry out the necessary repair works to the appeal property to put it into a state of reasonable repair so as to achieve such a rent. The expenditure required would be less than twice the annual rent. This remains the case even if the reasonably expected rent was only £16,000 (as to which see paragraph 75 below).

70. We now turn to Mr Flanagan's third point regarding consideration of what demand there would have been for the appeal property at the AVD (1 April 2008) and what rental value would have been achieved for a letting on the statutory assumptions.

71. We are unable to accept the appellant's submission that, for the purpose of examining this question, the economic circumstances as they existed at the material day (11 November 2014) can properly be taken into account. It is true that paragraph 2(7)(d) of the sixth schedule can operate to require there to be taken into account a change in economic conditions if the effects of such a change were observable "on the ground" in the locality (see paragraph 55 above). However we accept Mr Flanagan's submission that the evidence does not justify such a conclusion in the present case. The Hannah report, which is dated a year after the material day, does not record any changes in the physical state of the locality arising from any change in economic conditions, nor does the report record any physical manifestation in the locality of any relevant economic matters.

Further the appellant's own evidence regarding the state of letting as at the business park was that it continued throughout all material periods (and therefore as at the AVD and also at the material day) to be about 80% let. We respectfully agree with the conclusion expressed by this Tribunal in *Codexe v Lamb (VO)* that any downturn in the economy after the AVD as a result of the 2008 banking crisis and subsequent recession cannot be taken into account. For the purpose of assessing the hypothetical rent upon the rating assumptions the market and other economic circumstances must be taken to have been as they were on the AVD.

72. We accept that there were already signs of stress and potential difficulty in the financial markets prior to the AVD, such as the collapse of Northern Rock to which the appellant refers. However so far as concerns the demand for workshop premises such as the appeal property as at the AVD we conclude that there is substantial evidence before us to show that there was a demand for such property and that a rent in the order of £18,000 per annum could reasonably be expected to have been obtained – see the numerous comparables regarding both lettings and rating assessments relied upon by Mr Wright.

73. Accordingly we accept the respondent's submissions save as regards the following point. Mr Wright in his assessment of the rateable value in accordance with the statutory assumptions proceeded upon the basis that, while there were no toilet facilities provided within the appeal property itself, the hypothetical tenant would have a satisfactory arrangement to share the use of some communal toilets elsewhere. We find that this approach is not justified. As both the appellant and the respondent point out, the installation of a toilet block within the appeal property would constitute an improvement rather than repair – it therefore cannot be assumed that a toilet block has been installed prior to the hypothetical letting. The evidence is that the hypothetical tenancy of the appeal property would be a tenancy of a property without any toilet facilities and without any right to any shared use of any other toilet facilities. We consider this a point of substance which would have a significant effect upon the rent which would be achieved.

74. We are unable to accept Mr Wright's evidence that the market as at the AVD was such that the hypothetical tenant would not have diminished its bid for the appeal property to reflect the fact that there were no toilet facilities available. We conclude that the hypothetical tenant would have had in mind, when deciding what to bid for the appeal property, that it would have to provide toilet facilities within the appeal property at its own expense. There is an estimate before us that the cost would have been about £8,450. The hypothetical tenancy is a tenancy from year to year but with reasonable expectation of continuance. We consider that the hypothetical tenant would have successfully negotiated a 10% reduction in rent with the hypothetical landlord to reflect the lack of toilet facilities, (over and above the 2.5% allowance for lack of heating as determined by Mr Wright) thereby reducing the rent which might reasonably be expected to be achieved on the rating assumptions as follows:

648 sqm @ £28.50 per sqm: £18,468.00

Less	10% for lack of wc's	(£1,846.80)
	2.5% for lack of heating	(£461.70)
		£16,159.50

75. Adopting the rounding scheme in the Rating Manual for the 2010 rating list, we have rounded this down to £16,000.

Determination

76. For the reasons set out above, we allow the appellant's appeal, but only to the extent of reducing the value to be entered for the appeal property in the rating list. We direct that the appeal property shall be entered into the rating list at a rateable value of £16,000 with effect from 1 July 2014.

77. This decision is final on all matters other than costs. The parties may now make submissions in writing on costs and a letter containing further directions accompanies this decision.

11 May 2018

His Honour Judge Huskinson

P D McCrea FRICS