IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 0406 (LC)
Case No: RA/24/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Alteration of Rating List – proposal that a material change of circumstances under para. 2(7)(d) of sch. 6 to the Local Government Finance Act 1988 had occurred – the ambit of the rebus sic stantibus or reality principle – whether the proposal dealt with intrinsic characteristics of the hereditament or its locality – whether the proposal fell within the true ambit of para. 2(7)(d) – matters which are "physically manifest" in the locality – expert report filed purporting to be a witness statement as to fact – failure to declare a contingency fee arrangement

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

BETWEEN :

MERLIN ENTERTAINMENTS GROUP LIMITED — **Appellant**

- and -

WAYNE COX (VALUATION OFFICER) — **Respondent**

Re: Alton Towers
Farley Lane
Alton
ST10 4BZ

The Hon. Sir David Holgate, President and Mr P D McCrea FRICS

Royal Courts of Justice, London, WC2A 2LL
23 -24 October 2018

Cain Ormondroyd, instructed by Geoffrey Leaver Solicitors, for the Appellant
Hui Ling McCarthy QC, instructed by HMRC Solicitor, for the Respondent

The following cases are referred to in this Decision:

Addis Ltd v Clement (1986) 85 LGR 489
Assessor for Glasgow v Shuh Ltd (2012) SLT 904
Baker Britt & Co Ltd v Hampsher [1976] RA 169
Barratt v Gravesend Assessment Committee [1941] 2 KB 107
BMC Properties and Management Limited v Jackson [2016] RA 1
Chilton-Merryweather v Hunt [2009] PTSR 568.
Clement v Addis Ltd [1988] 1 WLR 301
Dawkins v Ash [1969] 2 AC 366
Gardiner & Theobald LLP v Jackson [2018] UKUT 253 (LC); [2018] R.V.R. 289
GPS (Great Britain) Ltd v Bird [2013] UKUT 527 (LC); [2014] RA 145
Hoare v National Trust [1998] RA 391
Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation (2011) 14 HKCFAR 579
Inland Revenue Commissioners v Gray [1994] STC 360
K Shoe Shops Ltd v Hardy [1983] 1 WLR 1273
Mersey Docks Board v Liverpool [1873] LR 9 QB 84
National Car Parks Limited v Baird [2005] 1 All ER 53
Orange PCS v Bradford [2004] 2 All ER 651
Pepper v Hart [1993] AC 593
Poplar Metropolitan Borough Assessment Committee v Roberts [1922] 2 AC 93
Port of London Authority v Orsett Union [1920] AC 273
R v Paddington Valuation Officer ex parte Peachey Property Corporation Ltd [1966] 1 QB 380
R v Secretary of State for the Environment ex parte Spath Holme [2001] 2 AC 349
Robinson Brothers (Brewers) Ltd v Houghton and Chester le Street Assessment Committee [1937] 2 KB 445
Shuh Ltd v Assessor for Glasgow (2014) SLT 184
SJ & J Monk v Newbigin (Rating Surveyors Association and another intervening) [2017] 1 WLR 851
Stock v Frank Jones (Tipton) Limited [1978] 1 WLR 231
Telereal Trillium Limited v Hewitt [2018] 1 WLR 3463
The Appeal of Kendrick [2009] RA 145
Townley Mill Company (1919) Limited v Oldham Assessment Committee [1937] AC 419
Williams v Scottish and Newcastle Retail Limited [2001] RA

DECISION ON A PRELIMINARY ISSUE

Introduction

1. Alton Towers in Staffordshire is the largest theme park in the country. On 2 June 2015 the "Smiler" (the world's first multi-inversion rollercoaster) at Alton Towers crashed, resulting in serious injury to five passengers, including two people who subsequently required leg amputations. Alton Towers closed for five days while investigations were carried out, but the Smiler did not reopen until the start of the following season, on 19 March 2016.

2. It is common ground that the annual number of visitors to Alton Towers fell following the crash. On 24 March 2016 the agent for the owner of Alton Towers, Merlin Entertainments Group Limited ("the appellant" or "Merlin") made a proposal to alter the assessment of Alton Towers in the 2010 Rating List, which at that time was £6,625,000 with effect from 11 April 2015. The reason stated for the proposal was that "the crash on 2 June 2015 involving the Smiler ride within Alton Towers has resulted in a diminution in the value of the hereditament".

3. The Valuation Officer considered that the proposal was not well-founded, and at the subsequent appeal to the Valuation Tribunal for England ("the VTE") the President dismissed the appeal. Merlin now appeals against the VTE's decision.

4. The Tribunal has been asked to determine as a preliminary issue:

> "Whether the attitude of members of the public to thrill rides, and to thrill rides at Alton Towers in particular, as a result of the Smiler crash, was a matter which was physically manifest in the locality of the hereditament at the material day such that it falls within the Local Government Finance Act 1988 ("LGFA 1988"), sch. 6 para. 2(7)(d)."

5. The appellant submits that the question should be answered in the affirmative. The respondent contends that the appellant is wrong, and that the decision of the VTE should be upheld.

6. The appellant was represented by Mr Cain Ormondroyd, who called Mr Ian Crabbe, the Divisional Director of the appellant, and Mr Charles Wilford FRICS, a partner in Gerald Eve LLP. Ms Hui Ling McCarthy QC appeared for the respondent Valuation Officer.

Facts

7. Although we were not provided with a Statement of Agreed Facts, the change in visitor numbers is uncontroversial. The percentage change in annual visitor numbers since 2009 was as follows:

Year	% Change
2009	3.6%
2010	12.8%
2011	-9.3%
2012	-11.2%
2013	9.6%
2014	9.6%
2015	-35%
2016	-7.4%

8. The figures for 2014-2016 are available in greater detail. It is the appellant's accounting practice to divide the calendar year into periods of weeks with each quarter of the year divided on a 5/4/4-week basis, corresponding approximately to months. The change in visitor numbers in 2014-2016 were recorded as follows (noting that the fourth column covers a two-year period):

		Like for Like Comparison		
Trading Period	No of weeks	2014-2015	2014-2016	2015-2016
1	5			
2	4	17%	-100%	-100%
3	4	29%	13%	-12%
4	5	6%	-32%	-36%
5	4	7%	-50%	-53%
6	4	-51%	-43%	15%
7	5	-48%	-37%	22%
8	4	-50%	-42%	15%
9	4	-52%	-41%	22%
10	5	-44%	-38%	9%
11	4	-30%	-23%	9%
12	4			
Total	52	-35%	-40%	-7%

Evidence

Mr Ian Crabbe

9. Mr Crabbe has been employed by the appellant for 22 years, the last nine of which in the role of Divisional Director. He explained that Alton Towers is one of the largest employers in Staffordshire, with around 2,000 employees during peak season. It is situated in an isolated rural position close to the village of Alton which has a population of around 1,200. The only other significant business in the locality is JCB at Rocester, six miles away. He accepted that Alton Towers was a "visitor destination", with little custom from passing trade.

10. Mr Crabbe said that Alton Towers is the major generator of traffic movement within the locality. Before the crash, peak visitor numbers would frequently be over 15,000 per day, having a major effect on local roads and the road network beyond. Annexed to Mr Crabbe's witness statement were a series of graphs which showed monthly traffic flow in and out of Alton Towers during 2014-2016, taken from data captured by traffic cameras. He said that these showed a clear drop in traffic volume between 2014 and 2016, averaging at a reduction of 27.5%. The total number of vehicles parking at Alton Towers showed a similar reduction, while Theme Park only parking (which ignored parking at the hotel and accommodation) reduced by 34%. Mr Crabbe's own view was that there had been a reduction in the requirement to open overspill car parks.

11. In cross-examination, Mr Crabbe accepted that, on a daily basis, traffic numbers peaked in the morning and afternoon. In high season, this peak period would be 2.5 to 3 hours at both times, while in quieter parts of the year the busy periods would only extend to around 1.5 hours.

12. There had also been an impact on local businesses, with two bed-and-breakfasts in Alton closing, and on local residents, who have noticed a considerable decrease in activity, but he accepted in cross-examination that these closures had not had an impact on visitor numbers at Alton Towers.

13. Mr Crabbe explained that Merlin monitors queue times at each individual ride. Average queue times on like for like attractions over the same period in 2014 and 2016 shows that queue times have reduced by 26% since the crash. He considered this noticeable when walking around the park, and it had been reflected in comments on social media. The crash, and the resulting drop in visitor numbers attracted global news coverage.

14. In his witness statement, Mr Crabbe said that he was better placed than Mr Wilford to comment on the effects of weather on visitor numbers, since he is continually conscious of the weather as part of his role. He could not "recall" any prolonged periods of exceptionally good or bad weather in 2015 to 2017. In cross-examination, he confirmed that Merlin kept records of the weather, and he had researched these before preparing his witness statement. But he did not adduce any evidence of those records.

15. As regards pricing, Mr Crabbe explained that only a tiny proportion of customers actually paid the lead price of £55 for an adult. Many benefited from discounted deals such as two-for-one or buy-one-get-one-free. He accepted that pricing can have an effect on visitor numbers, but Merlin did not specifically change its pricing policy as a result of the crash.

16. Mr Crabbe said that marketing activity definitely has an effect on visitor numbers - it was "the life blood" of the business. He explained that marketing campaigns had a relatively long lead-in time. They were either "destination resort-led" or were "product-led", for example the introduction of a new ride or attraction. The promotional activity for 2015 had been planned well in advance of the crash. It would have been too late to alter it in response to the crash, and in any event, being sensitive to the physical and emotional damage to the victims of the crash, Merlin did not want to do anything which could "grate on those emotions".

17. Merlin used television advertising, in two campaigns each year: the first in March, pre-season, and the second in June or July. In 2015, following the crash, it did not carry out the second tranche of marketing. The general approach to other marketing campaigns, such as Facebook, was to "tone down" their content. To use Mr Crabbe's phrase, "we were cognisant of not necessarily making a big deal out of big coasters for a while".

18. In summary, Mr Crabbe said that Merlin would have carried out more marketing activity in 2015 had the crash not happened.

19. Merlin did not alter its marketing for 2016 as a result of the crash. It had a new "roller-coaster restaurant", in which customers could enjoy food being delivered to their table on a mini-roller coaster, and the refurbishment of an older ride, based now on a virtual-reality ride – "Galactica". These two attractions formed the spearhead of the 2016 campaign, but marketing was at a lower level than if a major ride been launched.

20. Mr Crabbe said that Merlin had been surprised that visitor numbers had not recovered more swiftly. He expected that they would not recover completely for around a further two years. He therefore expected the overall effect of the crash to last for about five years. He accepted in answer to a question from the Tribunal that the longer that period, the more likely that other factors would have an effect on visitor attraction.

Mr Charles Wilford

21. Mr Wilford is a Chartered Surveyor and a partner in Gerald Eve. He has advised Merlin and its predecessor companies for all their attractions since the 1995 rating list, including Chessington World of Adventures, Thorpe Park, Legoland and Alton Towers. At this stage we simply summarise aspects of his evidence; we deal with its status below.

22. Mr Wilford explained that theme parks are valued for rating purposes by reference to their trading potential on a Fair Maintainable Trade basis. This had the effect of smoothing out any fluctuations caused, for instance, by weather or competing national events such as the Royal Wedding 2011 or the 2012 London Olympics. By contrast, there are other factors that can have a longer-term impact on trading potential, including investment in a major new ride, where a physical change to the relevant part of the hereditament leads to an alteration in the anticipated maintainable trade and a consequent change in rateable value.

23. Mr Wilford said that there was an immediate, pronounced and sustained decline in visitor numbers in the immediate aftermath of the Smiler tragedy which was a specific, single event that could not have been anticipated or reflected in the trading projections for the business. The percentage changes in the weekly periods have been set out in paragraph 7 above.

24. In terms of capital investment by Merlin, Mr Wilford provided a table which showed the new attractions introduced each year since 2008 at substantial capital costs of up to and exceeding £10 million. The significant growth in visitor numbers in 2008-2010 coincided with major investment in a variety of new attractions (Mutiny Bay in 2008 and Sea Life in 2009 and a new thrill ride, TH13TEEN, in 2010).

25. Mr Wilford's view was that TH13TEEN accounted for the strong growth in 2010, before visitor numbers dropped back to a normal level the following year – the only year in which there had been no major capital project. He said that the decline in numbers in 2012 was owed much to the paying public visiting the Olympic Games in London.

26. The Smiler was introduced in 2013. Mr Wilford said that construction delays led to a delay in the opening of the ride, and therefore Merlin's marketing campaign continued to promote the new ride in 2014. Ignoring the "blip" caused by the Olympics, the net effect of introducing the Smiler in 2013 and CBeebies Land in 2014, was to add about 6.7% to visitor numbers from 2011 to 2014.

27. This pattern of investment continued beyond the date of the crash, including the new roller-coaster restaurant in 2016, Go Jetters and Furchester Hotel in 2017, and a new roller coaster "The Wickerman" 2018.

28. Mr Wilford also considered pricing policy, by collating data for six of the principal theme parks in the UK, between 2014 - 2017. He noted that in 2015 Merlin increased the lead price at three of their four parks, including Alton Towers, by 4 - 6 %. Two other parks kept prices unchanged and the sixth increased prices by 3.4%. He described the general pattern of ticket price increases as unremarkable. Since 2014, Merlin had not increased prices at Alton Towers more than at any other major theme park in the country.

29. In response to the respondent's contention that changes in wider economic conditions may have played a part in the sudden decline in visitor numbers at Alton Towers, Mr Wilford produced a table which contrasted that fall with increases in visitor numbers recorded nationally, in the East Midlands, and specifically for leisure or theme parks, taken from data provided by Visit England, as below:

	2014	2015	2016
Alton Towers	9.6%	-35%	-7.4%
All attractions, England	4%	2%	2%
All attractions, East Midlands	3%	6%	5%
Leisure/theme Park admissions	3%	7%	8%

30. Mr Wilford provided a list of the major theme parks in the UK, listed in order of rateable value. Merlin's four parks - Alton Towers, Legoland, Thorpe Park, and Chessington World of Adventures – were all significantly larger, at least in terms of their rateable value, than the next six largest. He considered that since theme parks are valued for rating purposes having regard to

their trading potential, it is reasonable to assume that rateable value provided a good proxy for the scale and size of each business. Thus, the scale of Alton Towers is nearly double that of Merlin's next largest theme park, and five times as large as the next largest theme park not owned by Merlin (Flamingo Land – RV £1,680,000). The smallest theme park in the table was Oakwood – RV £280,000.

31. Mr Wilford accepted in cross-examination that, given the disparity revealed by his analysis, the data he provided on growth in admissions to Leisure/Theme parks overall (see para. 29 above) might include theme parks which were not in any way comparable to Alton Towers. For example, there was no way of knowing whether they included theme parks which allowed free admission or charged a significantly lower entry price than Alton Towers. He also acknowledged that without more detailed information and analysis, the table was of limited assistance. However, he maintained that it was still useful in that it provided "high-level generic" trends for visitor numbers, and a wide-ranging context across a basket of attractions, some of which might have free admission.

32. Mr Wilford's report also included some commentary on whether the decline in trading performance was influenced by the loss of public confidence in Merlin itself. The respondent did not press this point and it is unnecessary for us to outline this evidence.

The Statutory Framework and Legal Principles

33. The present regime for "non-domestic rating" was introduced by the LGFA 1988. This new code determined liability for rates with effect from 1 April 1990, initially for the 1990-1991 rating year, and then subsequent years. Before then rating had been dealt with under the General Rate Act 1967.

34. Valuation Officers are responsible for compiling and then maintaining local non-domestic rating lists for the area of each billing authority (s.41(1)). Initially, each list had to be compiled on 1 April 1990 and then at intervals of five years thereafter (s.41(2)). However, in England the compilation of the list due on 1 April 2015 was deferred to 1 April 2017, with the pattern of quinquennial reviews following on from that date (s.41(2A)). A list must contain each hereditament qualifying for non-domestic rating and the rateable value of each such hereditament (s.42). In brief, the rateable occupier is responsible for paying the rates due on any rateable hereditament, in any given year, arrived at by multiplying its rateable value by the national multiplier set by central government for that year (ss. 43, 44, 56 and schedule 7), subject to any reliefs or exemptions

35. A list comes into force on the date on which it is compiled (eg. 1 April 1990) and then remains in force until the next list is compiled five years later (s.41(3)). That principle has been enacted notwithstanding that it is inevitable that during the lifetime of a list economic circumstances affecting the value of rateable properties and market values generally will change. The legislation delimits the specific circumstances in which a revaluation of a particular property is permissible. A valuation officer has an implicit power to alter a rating list to correct an inaccuracy, subject to giving notice thereof in accordance with secondary legislation (ss.41(1) and 55); *National Car Parks Limited v Baird* [2005] 1 All ER 53; *BMC Properties and Management Limited v Jackson* [2016] RA 1). Otherwise, in England, a list may only be altered pursuant to proposals served by an "interested person" on one of the grounds allowed by the legislation or an order by the Valuation Tribunal for England or by this Tribunal on an appeal from such a

proposal (see Non-Domestic Rating (Alteration of Lists and Appeals)(England) Regulations 2009 (SI 2009 No.2268) made under s.55).

36. Regulation 4 of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 (SI 2009 No.2268) defines the circumstances in which an interested person may make a proposal to alter the rating list. Such a proposal is limited to the grounds set out in Regulation 4 (1) which include "(b) the rateable value shown in the list for a hereditament is inaccurate by the reason of a material change of circumstances which occurred on or after the day on which the list was compiled". A "material change of circumstances" in relation to a hereditament "means a change in any of the matters mentioned in para. 2 (7) of schedule 6 to the Act" (Regulation 3 (1)). Regulation 4 (1) (a) enables a proposal to be made that the rateable value shown in the list for a hereditament was inaccurate on *the day the list was compiled*. But Regulation 4 does not allow a proposal to be made simply because property values or economic circumstances change after the date the list was compiled and for that reason alone the rateable value in the list has ceased to be accurate.

37. The rateable value of a hereditament is determined according to the provisions contained in schedule 6 (s.56). Paragraph 3(b) empowers the Secretary of State to prescribe a valuation date for the determination of rateable values earlier than the date on which a rating list is to come into force, generally known as the antecedent valuation date ("AVD"). Otherwise the valuation date is the date on which the list is compiled (para. 3(a)). The practice has been to set an AVD two years prior to the date on which a list is compiled. So for the 1990 list the AVD was 1 April 1988. This appeal relates to the 2010 list, for which the AVD was 1 April 2008. Where a rateable value is to be determined for the purposes of altering a list which has already been compiled, the valuation date is the same date as that which was used when compiling the list (para. 4). In practice that date is the AVD. Thus, the general legal principle is that all rateable values for properties entered in a rating list, including any alterations to that list, are determined by reference to the same valuation date, the AVD, prescribed for that particular list. This is but one aspect of the "principle of uniformity" which provides equal treatment for all ratepayers.

38. For several hundred years rating has employed a single standard by which every hereditament in the country can be measured in relation to every other hereditament, namely annual letting value (*Dawkins v Ash* [1969] 2 AC 366, 381H). Paragraph 2(1) of schedule 6 provides that the rateable value:

> "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."

39. This statutory hypothesis of a notional yearly tenancy is only a mechanism to enable the valuer to arrive at the value of a particular hereditament for rating purposes. It does not entitle the valuer to depart from the real world further than the hypothesis compels (*Hoare v National Trust* [1998] RA 391 [42]).

40. The rental value to be ascertained is the figure at which the hypothetical parties would, in the opinion of the valuer or the tribunal, come to terms as a result of bargaining for the hereditament, in the light of competition or its absence in both demand and supply; "the totality of opposing forces of demand and supply" *Robinson Brothers (Brewers) Ltd v Houghton and Chester le Street Assessment Committee* [1937] 2 KB 445, 469-470, 474). Although the letting is hypothetical, it is assumed to take place in the open market, which is real, and must be applied to the property as it existed on the relevant date. The hypothetical parties are assumed to act reasonably. The hypothetical landlord is anonymous, but the hypothetical tenant embodies whatever was the actual demand for the property at the relevant time (*Inland Revenue Commissioners v Gray* [1994] STC 360; *Telereal Trillium Limited v Hewitt* [2018] 1 WLR 3463 [33-35]).

41. The principle that the property should be valued as it was on the relevant date, traditionally referred to as the *rebus sic stantibus* principle (ie. "as things stand"), became well-established in a series of cases beginning in the nineteenth century and reviewed by the Court of Appeal in *Williams v Scottish and Newcastle Retail Limited* [2001] RA 41. The principle was used to identify the property to which the measure of annual letting value should be applied by the valuer (see eg. *Townley Mill Company (1919) Limited v Oldham Assessment Committee* [1937] AC 419, 437. It comprised two limbs, one describing the physical state of the hereditament and the other its use (*Williams* [17]). As to the physical limb, it is to be assumed that the hereditament would have been in the same physical state as it was on the relevant date, save that the valuer may take into account alterations which the hypothetical tenant might make to the property provided that, taken overall, they are "minor". As to the user limb, it is to be assumed that the hereditament may only be occupied for a purpose within the same mode or category of occupation or purpose as that for which it was actually being used on the relevant day. The valuer should ignore any prospective change of use outside that mode or category (see *Williams* [52], [68-72] and [74-5]).

42. In *SJ & J Monk v Newbigin (Rating Surveyors Association and another intervening)* [2017] 1 WLR 851 the Supreme Court revisited leading authorities which have explained the basis for the *rebus* principle. They chose to refer to this principle in current day language as "the principle of reality" or "the reality principle". We consider that this change of language was long overdue and that from now on we should adopt the term. As this case shows, whether tribunals use Latin or contemporary English for the name given to the principle, issues will nonetheless arise as to its true meaning and content. But it is preferable to use the term "the reality principle" to describe the principle which identifies the subject-matter of a rating valuation.

43. As the House of Lords explained in *Dawkins* ([1969] 2 AC 383, 385 and 389-390), the reality principle rests on the fundamental objective of the rating hypothesis, namely to arrive at the real annual value of the occupation of the hereditament to a hypothetical tenant, otherwise referred to as "a just and true result" (a phrase upon which the appellant sought to place reliance

in this case). The leading authority upon which the House of Lords relied was its earlier decision in *Poplar Metropolitan Borough Assessment Committee v Roberts* [1922] 2 AC 93, particularly at pp 103-104 and 120. These seminal passages were helpfully analysed by Thomas LJ (as he then was) in *Orange PCS v Bradford* [2004] 2 All ER 651 [18-20]. Because rateable value represents the annual market value of the hereditament to the hypothetical tenant, specific circumstances which are personal to the actual occupier are to be disregarded. Regard is to be had to the "actual conditions affecting the hereditament" at the relevant time, but not any element of value attributable to the special skill or industry (or otherwise) of the actual occupier (*Poplar* at pp 103 and 121). Such personal attributes are not "natural conditions which attach to the property". Likewise, when the mode or category of occupation is being determined, the fact that the actual occupier runs his business in a half-hearted or inefficient (or even incompetent) manner or leaves half of his premises empty is irrelevant; such matters simply go to the way in which the particular business of the actual occupier has been run (see Walker LJ (as he then was) in *Williams* [71]).

44. It is these principles which illuminate the passages in *Dawkins v Ash* at [1969] 2 AC 382, 383, 386 and 393-394 to which the appellant referred. The valuer must have regard to the "essential" or "intrinsic" qualities or characteristics *of the hereditament* and to disregard factors which are non-essential or "accidental" to that property. Thus, the intention of the actual occupier to demolish his property would be irrelevant to the application of the rating hypothesis, but a demolition order which would render a property "doomed to demolition" whoever might be the occupier, would be an essential characteristic of the property. That circumstance would not be due to any "accident of ownership".

45. It is well-established in the application of these principles that the volume of trade or the level of profitability achieved by a particular occupier is not a characteristic which is essential to the value of the right to occupy the property from which his business is conducted. In *Robinson* [1937] 2 KB at p.478, Scott LJ cited with approval the well-known passages from the judgment of Blackburn J in *Mersey Docks Board v Liverpool* [1873] LR 9 QB 84. The rateable value of shops varies according to location because of differences in the opportunity provided by a location to earn profits, but rateable value is quite independent of the actual amount of a retailer's profits. For a given property, the rateable value is the same whether the actual occupier runs a flourishing business or trades at a loss. Likewise, the rateable value of chambers in the Inns of Court would not vary according to the actual income of an occupant, whether a young barrister just called to the bar or the Attorney General. Even where premises are valued by a method based on receipts and expenditure or turnover, actual accounting information is only used to estimate the rent which would be paid by a *hypothetical tenant*, representing the sum total of market demand. Rates are not a tax on actual profits.

46. *Dawkins v Ash* also explained that the rating hypothesis has regard to matters external to the hereditament which are "essential" to that property, for example, an advantageous location close to the sea ([1969] 2 AC 382C). The presence of a motorway, airport, prison or open space may add to, or detract from, the value of a property ([1969] 2 AC 386C). A property is valued not in isolation, but in the context of its location, or "locality". That is what Scott LJ had in mind in *Robinson* when he stated at [1937] 2 KB p.471, that "every factor, intrinsic or extrinsic, which tends to increase either demand or supply is economically relevant". So, the fact that the public house had a licence, was an intrinsic characteristic of the hereditament, and the number of licensed premises in the area in which the property competed would affect its share of trade or monopoly value. That was an "extrinsic" circumstance relevant to the valuation of a public house.

Plainly, Scott LJ was not using the word "extrinsic" here to describe a factor which was irrelevant, or non-essential, to the hereditament being valued. Instead, it referred to factors external to a hereditament, in the location or locality in which the property is set, which are relevant to that property's value.

47. As the Court of Appeal acknowledged in *Williams*, Parliament decided to enact in para. 2(7) of schedule 6 to the LGFA 1988 the physical state and user limbs of the reality principle, in relation to both the hereditament and its locality (see also *SJ & J Monk v Newbigin* [14]). The context for understanding the scope of that provision includes the rules which govern its operation. Paragraph 2(5) provides that when the list is compiled the "reality factors*"* in para. 2(7) are to be taken as they were on the date on which the list was compiled. Paragraph 2(6) provides that where a rateable value is being determined for the alteration of a list, the factors in para. 2(7) are to be taken as they were on "the material day". The "material day" is defined by the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 (SI 1992 No. 556). So, by way of example, the material day for an alteration to correct an inaccuracy in the list when it was compiled, is the date on which the list was compiled. The material day for an alteration to give effect to a "material change of circumstance" in a factor listed in para. 2(7) is generally the date on which the valuation officer altered the list or the proposal was served on the valuation officer.

48. Thus, whether the factors in para. 2(7) are applied when compiling the list or altering the list, they are applied to the circumstances which existed on the relevant date (two years or more after the AVD) and those circumstances are then treated as if they existed as at the AVD. It is important to appreciate two points when construing para. 2(7) of schedule 6. First, whatever is the true ambit of these factors, para. 2(7) applies both to the compilation of the list and to the issue whether it is permissible to alter the list subsequently. Second, any matter or circumstance which falls *outside* the ambit of para. 2(7) which is relevant to the valuation of a hereditament for rating purposes, is taken as at the valuation date, the AVD, and not the date on which the list is compiled or any later date.

49. The factors to which the reality principle applies are set out in para. 2(7) as follows: -

> "(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."

50. One aspect is excluded from these provisions, but this is to do solely with the physical state of the hereditament. Under para. 2(7)(b) it must be assumed that immediately before the hypothetical letting began on the AVD, the hereditament was in a reasonable state of repair (save for any repairs which a reasonable landlord would consider uneconomic), whether or not that was in fact the case, and that that state of affairs continues throughout the duration of the rating list (see para. 2(8A) of sched. 6 and *SJ & J Monk v Newbigin*).

51. The factors in para. 2(7) fall into two parts. Sub-paragraphs (a) to (cc) deal with the hereditament. Sub-paragraphs (d) to (e) deal with the locality. All of these provisions focus on what is to be valued by using the measure provided by the hypothetical letting. They describe the subject matter of the valuation. It is the object of the legislation to levy rates on the annual occupation value of a rateable property, assessed in the context of its locality. For any given rating list, a liability to pay rates begins from the date when that list was compiled. It is therefore logical that the factors in para. 2(7) are first applied as at that date. The legislation then entitles the ratepayer to a revaluation if certain defined changes affecting the *subject* of the valuation, the hereditament or its locality, occur, because the consistent principle is that rates represent a levy on the annual value of *that subject*. The objective of achieving equal treatment as between the occupiers of different properties is achieved partly by requiring the use of a common valuation date. Here the LGFA 1988 differs from the General Rate Act 1967 by relying on the AVD, rather than the date of the list or proposal. The principle underlying the LGFA 1988 is that changes in the subject matter of the valuation after the compilation of the list are taken into account, but always by reference to values subsisting at the same point in time, the AVD.

52. Sub-paragraph (b) expresses the user limb of the reality principle for the hereditament. Sub-paragraphs (a), (c) and (cc) describe the physical limb as it applies to the hereditament.

53. Sub-paragraph (a) is to do with the physical state of the hereditament itself or its use. Sub-paragraph (c) creates a special rule for the physical state of mines and quarries. An important feature of such hereditaments is, of course, the mineral reserve. But that asset can only be exploited once and for all. During the lifetime of a rating list the reserve in a working mine or quarry will decrease as minerals are extracted and processed each year. Sub-paragraph (c) reflects those unusual features of that class of hereditament. It cannot be taken to support any general proposition that rates are levied on the volume, or trade, or profits of a business, which would be contrary to established principle (*Port of London Authority v Orsett Union* [1920] AC 273, 295; *Hoare* [1998] RA 391, 394; *Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation* (2011) 14 HKCFAR 579). The same analysis applies to the treatment of waste landfill sites (see sub-para. (cc)).

54. Sub-paragraph (e) refers to the use or occupation of the premises in the locality, and is similar to sub-para. (b).

55. Sub-paragraph (d) has two limbs. The first limb, "matters affecting the physical state of the locality" mirrors the language used in the first part of sub-para (a). The physical fabric of the locality is to be taken as it was on the date when the list was compiled and changes to that fabric may give rise to a requirement for a new valuation to be carried out.

56. The second-limb of sub-para. (d) refers to matters which (i) do not affect the physical state of the locality but which (ii) "are nonetheless physically manifest there". This language is not used elsewhere in para. 2 (7). The word "affecting" is not used. Instead, it is "the matter" *itself* which must be "physically manifest" in the locality. It does not suffice that the matter affects the locality. We therefore see no significance in the appellant's submission that the second limb begins with the word "matters" rather than "physical matters". That opening word applies to both limbs of sub-para. (d), but under the second limb, only matters which themselves are physically present can qualify. Even then, their presence must be manifest. Here, the first definition of "manifest" in the Oxford English Dictionary is pertinent: -

> "Clearly revealed to the eye, mind, or judgment; open to view or comprehension; obvious"

57. Examples of matters falling within the second limb of para. 2(7), include noise, fumes or vibration and facilities such as public transport services.

58. One of the issues which has arisen in this appeal is whether a purely economic matter can fall within para. 2(7)(d) and if so, to what extent. We return to this issue below.

A summary of the parties' submissions

59. The parties' submissions were set out in some detail in their respective skeleton arguments and speaking notes. What follows here is only a brief summary of their positions.

60. The appellant's case is that a material change of circumstances falling within para. 2(7)(d) took place after the date on which the list was compiled. The appellant accepts that no change falling with para. 2(7)(a) took place, that is a change affecting the physical state or physical enjoyment of the hereditament itself, Alton Towers. Instead, the appellant's case is said to fall solely within the second limb of para. 2(7)(d), that is a matter which is physically manifest in the locality of the hereditament, but not something affecting the physical state of the locality.

61. The proposal was received by the respondent on 24 March 2016, "the material day". Unfortunately, the proposal was not included in the bundle for the hearing before us. A copy provided after the hearing shows that it merely stated that:-

> "the crash on 2 June 2015 involving the Smiler ride within Alton Towers has resulted in a diminution in value of the hereditament."

The appellant rightly accepts that the crash itself did not fall within para. 2(7) at all. Rather the appellant now relies upon the alleged "result" of the crash as a matter falling within para. 2(7)(d). This has been expressed in the parties' statements of case as the preliminary issue set out in para. 4 above.

62. In its statement of case, the appellant seeks to apply the approach taken by this Tribunal in *The Appeal of Kendrick* [2009] RA 145. The attitude of the public to thrill rides resulting from the Smiler crash is said to be a matter which may qualify as a "matter" in para. 2(7)(d), in the same way as the attitude of passengers to air travel as the result of the terrorist attacks on 11 September 2001 (see *Kendrick* [16]). The appellant says that the fact that the change relied upon here resulted from an event which occurred within the hereditament, whereas in *Kendrick* the

event said to have caused a change in public attitude took place elsewhere, is not a relevant legal distinction. The appellant then submits that the consequence of this change in attitude was a substantial drop in the number of visitors to Alton Towers. As for the *locality*, the change which is said to have been physically manifest there is this same drop in visitor numbers, but expressed as a substantial decline in the volume of traffic in that area.

63. In submissions before the Tribunal, the appellant also relied upon the legislative history of para. 2(7)(d), beginning with s. 20 of the General Rate Act 1967. Counsel submitted that when, by s.121 of the LGFA 1988, Parliament amended s. 20 so as to restrict "the state" of the hereditament and its locality by the language we now find in paras. 2(7)(a) and (d) of schedule 6, it did so in order to reverse the decision of the House of Lords in *Clement v Addis Ltd* [1988] 1 WLR 301 and to restore the law as stated by the Court of Appeal in *Addis Ltd v Clement* (1986) 85 LGR 489. This change in the wording of s.20 of the 1967 Act was made in order to deal with rating assessments in the 1973 valuation lists until the new rating lists were introduced on 1 April 1990 under the LGFA 1988. The same language was also included in the provisions establishing the new regime.

64. In particular, Mr Ormondroyd relied upon two passages from the judgment of Woolf LJ (as he then was) at (1986) 85 LGR 500-501 to justify construing the second limb of para. 2(7)(d) to include economic changes in so far as "they result in changes in the locality which are capable of being observed "on the ground" in the locality". In this context, he referred to Parliamentary materials relating to the introduction of the relevant amendments and submitted that his analysis was supported by the Court of Appeal in *Chilton-Merryweather v Hunt* [2009] PTSR 568.

65. In response to an invitation from the Tribunal, Mr Ormondroyd addressed Scottish legislation dealing with alterations to the rolls maintained by the Assessors in that jurisdiction. The legislation is so different from that which we have to deal with that it is of "little relevance" (para. 33 of the appellant's skeleton). The respondent took the same view and we agree. Section 3(4) of the Local Government (Scotland) Act 1975 allows changes to be made to a roll to give effect to any alteration in the value of land and heritages resulting from a "material change in circumstances". That term is defined by s.37(1) to include a "change of circumstances affecting their value", language which is much broader than that contained in the English legislation. The Rating and Valuation (Scotland) Act 1989 went even further by removing the exclusions from a material change of circumstances which related to the rental value of a property or changes in the general level of value of land situated in the area of a rating authority.

66. The courts in Scotland have given this legislation a purposive construction, by reading down its apparent breadth so that the statutory basis of quinquennial revaluations is not undermined. The Lands Valuation Appeal Court has held that changes in rental value which form part of the ebb and flow of an industry (eg changing patterns in retailing, changes in the fortune of individual locations, and the emergence of new centres) or changes in rental value because of fluctuations in the economy are not "material". To demonstrate a material change in circumstance it is necessary to show a new event fundamentally altering the nature of the property or an abnormal economic circumstance. To be material a factor must be "extraordinary" or "exceptional" (*Assessor for Glasgow v Shuh Ltd* (2012) SLT 904 [30-34]; *Shuh Ltd v Assessor for Glasgow* (2014) SLT 184 [20-23] and [30]). The only point which Mr Ormondroyd sought to take from Scottish law was the suggestion that a limitation to "exceptional and extraordinary events" could be implied by this Tribunal to prevent rateable values having to be amended to

reflect general changes in economic or market values. He submitted that the change in visitor numbers experienced because of the accident in June 2014 should be treated as extraordinary or exceptional. They did not form part of the normal ebb and flow of the business of leisure parks in general, or Alton Towers in particular.

67. The appellant maintains that the fall in visitor numbers at Alton Towers was caused by the crash on the Smiler ride and should not be attributed to other suggested causes. Likewise, it is submitted that the change relied upon was not "masked" by other factors so that it cannot be attributed to the cause relied upon by the appellant, the crash, and so should be treated as having been "physically manifest" in the locality (distinguishing *Kendrick* on its facts). Causation is a relevant consideration because it is necessary for the appellant to demonstrate a "physical manifestation" of something which may be intangible. However, the appellant does not have to demonstrate that the change which was physically manifest was caused by only *one* factor, such as the public's reaction to the crash. It is sufficient if such a change was caused by a number of factors, of which the matter relied upon by the appellant was one, so long as that matter was not *de minimis.*

68. The primary submission made by Ms McCarthy QC on behalf of the respondent was that the material change in circumstance relied upon by the appellant, the reduction in road traffic in the locality caused by a change of public attitude to thrill rides as a result of the crash, was simply the consequence of the manner in which the appellant had operated its business at Alton Towers, in particular the ride and, applying *Dawkins v Ash* [1969] 2 AC 366, that was not a matter relevant to the essential characteristics of either the hereditament or its locality.

69. Secondly, Ms McCarthy QC submits that sub-paras. (a) and (d) of para. 2(7) of schedule 6 to LGFA 1988 are mutually exclusive. She also submits that the area covered by the "locality" of a hereditament must lie outside the hereditament itself. The two areas cannot overlap geographically. The respondent contends that the change in circumstance upon which the appellant relies is really concerned with a reduction in visitors to the hereditament itself, rather than some freestanding change in the characteristics of its locality. This change is attributable to an event, the accident, which occurred inside the hereditament and, moreover, in the operation of a non-rateable item of plant and machinery, namely one of the rides. The appellant accepts that the circumstances it relies upon do not fall within para. 2(7)(a). Ms McCarthy QC submits that para. 2(7)(d) does not apply to something which is essentially to do with the use conducted on the hereditament itself and which falls outside the limited scope of para. 2(7)(a). The limitations placed upon the ambit of the latter provision cannot be circumvented in that way.

70. Thirdly, Ms McCarthy QC submits that the appellant's case offended the principle that ratepayers should be treated uniformly. Some land uses are dependent on visitors travelling by car, whereas others have no connection with that mode of transport (eg. a business reliant on internet transactions). A land use dependent on visitors travelling by car, where the hereditament is valued by reference to a "fair maintainable trade" (as in the case of Alton Towers), would be able to demonstrate a material change in circumstance, whereas a land use valued on a comparative or comparable basis would not be able to do so. Thus, it is submitted that a material change of circumstances related to a change in the volume of trade or business falls outside para. 2(7)(d) as a matter of principle.

71. Next the respondent submits that the history of the legislation and case law leading up to LGFA 1988 provides very limited help. The Parliamentary material is not admissible, applying the tests in *Pepper v Hart* [1993] AC 593, because the Ministerial statements are unclear when it comes to resolving the issue raised by the appellant's case. Although the respondent's legal team in this appeal have no instructions to contest the appellant's proposition that intangible matters, such as economic matters, may be relied upon under para. 2(7)(d) if "physically manifest" in the locality, that does not assist the appellant's case because that is only concerned with a difference in the appellant's volume of trade, an irrelevant factor.

72. The respondent contends that the wording of the English legislation would not allow the Tribunal to superimpose as a judicial principle any limitation derived from Scottish case law or legislation. The English code does not define the phrase "material change of circumstances" by reference to effect on value and there is no scope for applying an "exceptionality" test, whether to sub-para. (d) or to any of the other provisions of para. 2(7).

73. The respondent submits that on a proper construction of LGFA 1988, the application of para. 2(7)(d) of schedule 6 does not depend upon identifying something which caused a "matter" to be "physically manifest" in the locality. It is the *matter itself* which must be physically manifest in the locality. It is therefore unnecessary for the Tribunal to consider whether the change in visitor numbers, or the decline in the number of vehicles in the locality outside the hereditament, was caused by the one factor relied upon by the appellant, a change in the public's attitude to thrill rides because of the crash in June 2015 (in fact two causes following sequentially), or was caused by that factor along with another or even a mix of factors (none of which was *de minimis).* However, if this exercise is relevant, the respondent submits that the appellant has not demonstrated on the evidence that the decline in traffic in the locality heading for Alton Towers was caused by changes in public attitudes because of the crash, either as the sole cause or as one of a number of causes.

The issues for determination

74. We consider that the following issues fall to be decided in this appeal: -

(i) Is the proposal concerned with any intrinsic or essential characteristic of the hereditament or locality?

(ii) Are paras. 2(7)(a) and 2(7)(d) in schedule 6 to LGFA mutually exclusive?

(iii) If the answer to (ii) is yes, was the substance of the appellant's proposal to do with the hereditament rather than the locality? If so, does the appeal fail because the appellant cannot demonstrate a material change of circumstances in a matter falling within para. 2(7)(a)?

(iv) Whether the appellant's case offends the uniformity principle;

(v) The proper construction of para. 2(7)(d);

(vi) If the appellant's construction of para. 2(7)(d) is correct, whether the evidence relied upon by the appellant demonstrates that a material change of circumstances occurred.

Issue (i) - Is the proposal concerned with any characteristic of the hereditament or locality?

75. This issue arises irrespective of the answers to be given under issues (ii) and (iii) below. In other words, irrespective of whether paras. 2(7)(a) and (d) are mutually exclusive, and irrespective of whether a circumstance affecting the hereditament can also fall within para. 2(7)(d), the issue arises whether the change in circumstances relied upon by the appellant is an "essential" or relevant characteristic of either the hereditament or its locality.

76. In our judgment, it is plain that this fundamental question must be answered in the negative.

77. In para. 8 of its Statement of Case, the appellant accepted full responsibility for the accident and pleaded guilty in the Crown Court to offences involving breaches of s. 3 of the Health and Safety at Work, etc Act 1974 (see also para. 6 of the judgment of the VTE). In our judgment, it is plain that the crash and the public's reaction to it are matters concerned with the way in which the leisure park business was operated on the hereditament. The failings under the 1974 Act, or any other failings, which resulted in the crash taking place, are attributes of the actual occupier of Alton Towers. Such personal attributes are not characteristics of the hereditament for which a rateable value had to be assessed.

78. The appellant has not sought to provide any evidence to show that the crash involved some attribute of the hereditament itself (that is rateable property), or to show that the crash had nothing to do with the way in which the appellant operated the ride or conducted its business at the park. This fundamental flaw in the appellant's case was referred to in paras. 36 to 38 of the respondent's Statement of Case. The appellant has failed to respond. Instead, it has sought to disguise the true nature of its case, by presenting it as a reduction in traffic in the locality of the hereditament (and visitors to the Park) resulting from an adverse reaction of potential customers to the crash.

79. It is plain from long-established principles summarised in paras. 43 to 45 above that the circumstances upon which the appellant seeks to rely were irrelevant because they were simply concerned with the way in which it operated its business on the hereditament and the reaction of potential customers thereto. They had nothing to do with any intrinsic or essential characteristic of the hereditament itself or the locality in which it was set. It should be recalled that those principles also protect a ratepayer against an attempt to increase the rateable value of his property, whether in the compilation of the list or its subsequent alteration, by virtue of his personal success in running his business. Such success (or failure) is no more than an attribute of the actual occupier and not a characteristic of the property being valued or of the locality in which it is set.

80. We recognise that different considerations *may* sometimes arise when a specialist type of property involves a "monopoly of supply" and/or the actual occupier is the only likely bidder for the hypothetical letting, and there is adequate evidence that such matters affect the intrinsic profit-earning potential or capacity of the hereditament. But no such case has been advanced in this appeal.

81. *Kendrick* provides no assistance to the appellant on issue (i). Indeed, we note that it was suggested that the decline in footfall or usage of the airport lounges was linked in part to trading difficulties being experienced by some of the occupiers (see [17]-[18]).

82. Parts of the respondent's skeleton argument (eg. para. 55) suggested that the appeal should fail because it involved relying on a decline in, or damage to, that business resulting from the negligence in the running of that business. Submissions along these lines implied that the valuation officer might be seeking to apply the maxim *nullus commodum capere potest de iniuria sua propria* (no one should be allowed to profit from his own wrong - Bennion on Statutory Interpretation (7th Edition) section 26.6) to the issue of statutory construction in this appeal. However, we are not aware of that maxim being applied in the construction of legislation for the assessment of rateable value and no authority on that aspect was cited to us. Ms McCarthy QC confirmed that she was not advancing that approach. Instead, the legal position is much more straightforward. The appeal must fail because, by reference to the fundamental principles summarised in paras. 43 to 45 above, it is misconceived.

83. Because the answer to issue (i) is "no", the appeal must be dismissed in any event, irrespective of the answers to be given under the remaining issues. However, these matters have been argued at some length and we consider that it is necessary for the Tribunal to decide them.

Issue (ii) - whether paragraph 2(7)(a) and 2(7)(d) of schedule 6 are mutually exclusive

84. Mr Ormondroyd submitted for the appellant that sub-paras. (a) and (d) of para. 2(7) are not mutually exclusive, in the sense that a hereditament also forms part of its locality for the purposes of sub-para. (d). He submitted that in this case the hereditament is extensive and forms "a large part" of its locality. However, we note that the Tribunal was not provided with a map or description of what is said by the appellant to comprise either the hereditament or its locality.

85. We do not accept Mr Ormondroyd's construction of the legislation. Paragraphs 2(7)(a) to (cc) are concerned with matters affecting the physical state or physical enjoyment or the use of the hereditament on the relevant day. Paragraph 2(7)(e) refers to "the locality of the hereditament" in terms of "other premises" within that area. In that provision the term "locality" plainly excludes the "hereditament" being valued, as Mr Ormondroyd accepted. There is no reason to think that in para. 2(7)(d), Parliament used "locality" in a different sense so as to include the hereditament. The phrase, "the locality in which the hereditament is situated" is consistent with the manner in which "locality" is used in para. 2(7)(e).

86. This analysis is reinforced by comparing the wording of sub-paras. (a) and (d) of para. 2(7). Both provisions employ the phrase "matters affecting the physical state" in relation to both the hereditament and its locality. The appellant accepts that in the present case the proposal could not fall within sub-para. (a). The appellant is unable to rely upon a matter affecting either the "physical state" or the "physical enjoyment" of the hereditament. Likewise, it accepts that the matter relied upon did not affect the "physical state" of the locality. Sub-para. (d) provides, however, that although a matter does not affect the "physical state" of the locality, it is relevant if it is "physically manifest" there. However, that language is not to be found in sub-para. (a). If the term "locality" in sub-para. (d) includes the hereditament, Parliament's decision to limit sub-para. (a) to matters affecting the hereditament's physical state or physical enjoyment would be circumvented.

87. It is also to be noted that when the term "locality" was introduced by s. 17 of the Local Government Act 1966, which then became re-enacted in s. 20 of the consolidating statute, the General Rate Act 1967, the legislature plainly treated the concept of a "locality" as an area falling

outside the hereditament. There is nothing in LGFA 1988 to suggest that when Parliament enacted the current rating regime it intended "locality" to include the hereditament being valued.

88. For these reasons we conclude under issue (ii) that para. 2(7)(a) and para. 2(7)(d) of schedule 6 to LGFA 1988 are mutually exclusive. The term "locality" refers to an area external to the hereditament being valued for rating purposes.

Issue (iii) - Was the Appellant's proposal in substance to do with the hereditament rather than its locality?

89. The proposal given on 24 March 2016 referred to a decline in the value of the hereditament resulting from the crash on the Smiler ride which occurred on 2 June 2015. This has been elaborated in the preliminary issue agreed by the parties to make it clear that it is not the crash itself which is said to represent a material change of circumstances. Rather, it is the adverse reaction of the public because of the crash to thrill rides in general, and to thrill rides at Alton Towers in particular, which is said to have caused a reduction in the number of visitors to the hereditament and a consequential reduction in its rateable value.

90. Of course, it is the proposal which delimits the ambit of any appeal to the VTE and thence to this Tribunal (*Ryde on Rating and the Council Tax* [115.24]). The true question is what, as a matter of substance, does the proposal identify as, for example, a material change in circumstances. Where there is a dispute about that matter it would normally be the first of any preliminary issues to be determined because it would go to the jurisdiction of the VTE or this Tribunal. This is an issue which a tribunal might raise of its own motion.

91. Here, the proposal did not explicitly rely upon any change in the locality of the hereditament, although plainly it should have done. Both parties, in the appeals to the VTE and to this Tribunal, have proceeded on the basis that the proposal sought to rely upon changes falling within para. 2(7)(d). They turned out to be reductions in traffic levels, the closure of two premises providing accommodation for visitors and a decline in car hire services. Even if a proposal might be taken to comprise matters which although not explicitly stated are nonetheless *necessarily* implicit in the language actually used, we are doubtful as to whether this proposal could properly be treated as having referred to a change involving the application of para. 2(7)(d), let alone the changes actually relied upon. The respondent has effectively conceded that the proposal should be interpreted so that its scope is treated as covering the agreed preliminary issue. That approach might be described as over-generous to the appellant and is not one which this Tribunal would condone. Accordingly, this decision should not be cited as a precedent in relation to this aspect.

92. We should point out straight away that no survey evidence was presented to show that there was an adverse reaction amongst members of the public to thrill rides because of the Smiler crash, or that visits to those leisure parks with thrill rides were affected by any such reaction. Instead, the focus of the appellant's evidence was on the decline in visits to Alton Towers after 2 June 2015.

93. Mr Wilford produced evidence to show that during the period 2008 to 2014 the hereditament attracted several million visitors a year. The appellant describes Alton Towers as a destination attraction. No doubt the leisure park draws customers from across the country and indeed elsewhere. Mr Wilford sought to treat the public's reaction to the crash, and an assumed change in attitude to thrill rides, as a decline in the number of visitors travelling on the roads in

the locality of Alton Towers. But in our judgment, this was a change effectively within the hereditament itself and simply expresses a reduction in the attraction of Alton Towers, or a reduced demand to visit and use the leisure park.

94. The object of the witness statement provided by Mr Ian Crabbe, the Divisional Director of Alton Towers Resort, was to explain "what changes were observable in the Park and in the surrounding areas following the Smiler incident". In summary, he sought to show that traffic volumes in the locality have reduced, the usage of the Resort's car parks have reduced, the queuing times for rides reduced and local businesses have been adversely affected.

95. That last matter refers to the closure of two local, independent bed and breakfast businesses in Alton village and a decline in the usage of local hire car services. Ms McCarthy QC rightly points out that those closures, if relied upon by the appellant, ought to have been described as a change in the use or occupation of other premises in the locality, under para. 2(7)(e) of schedule 6. But, unsurprisingly, the appellant has not relied upon these matters as a material change of circumstances, calling for an alteration in the rateable value of the Alton Towers hereditament. The decline in the usage of hire car services and the closure of bed and breakfast accommodation simply reflects the drop in the number of visitors to the hereditament itself.

96. The same point applies to the other matters relied upon by Mr Crabbe. Over 80% of visitors to Alton Towers arrive by car, the remainder arriving and departing by coaches, taxis and shuttle buses. He says that that traffic on local roads has reduced by 27.5% as an overall average "which correlates to the *on-park* data captured for car parking" (our emphasis). In relation to queuing times for rides Mr Crabbe says that these "have reduced by some 26% on average since the Smiler incident *illustrating the reduction in visitor volume"* (our emphasis).

97. It is important to note that the appellant's case is not that traffic in the vicinity of Alton Towers has declined materially because, for example, of some alteration made to the highway network which has made the hereditament substantially less accessible to its potential customers. In substance the appellant's case simply amounts to saying that because the number of visitors attracted to the hereditament has declined, the volume of traffic in the locality outside that property has also reduced.

98. Thus, it is plain that the appellant's case has nothing to do with a change in the locality as such. On the appellant's own case, the changes it describes in the area outside the hereditament, along with the decline in usage of car parks and accommodation within the resort, are all concerned with a reduction in *demand* to visit the hereditament because of a change in public attitudes to thrill rides resulting from the Smiler crash. They are one and the same for the purposes of para. 2(7) of schedule 6.

99. The appellant accepts that the decline in visitor numbers and usage of the leisure park, resulting from the public's reaction to the crash, are not matters affecting the physical state or physical enjoyment of the hereditament and therefore do not qualify as a material change of circumstances falling within para. 2(7)(a).

100. On the appellant's own case, the reduction in customer demand was simply a reaction to an event which occurred within the hereditament. In our judgment, the appellant cannot circumvent the limitation on what changes to a hereditament may give rise to a right to a revaluation as a "material change of circumstances" by dressing up a change in the attraction of

the hereditament itself (or the business conducted therefrom) as a change in the volumes of traffic (or other mode of transport) travelling to the hereditament through its locality and thus falling within para. 2(7)(d). Furthermore, the change upon which the appellant seeks to rely does not represent an alteration in the characteristics of the locality any more than it represents a change affecting the hereditament.

101. The appellant placed reliance upon the Tribunal's decision in *Kendrick*. There the Tribunal held that the effect of the terrorist attacks in the USA on 11 September 2001, in particular the reduced usage of lounges at Heathrow for "economically important passengers", did not fall within para. 2(7)(d) of schedule 6 because the effect was masked by other factors and was not "physically manifest" in the locality of the lounges. Even where that evidential hurdle can be overcome, *Kendrick* is not authority for the proposition that a circumstance arising in the hereditament itself, and affecting the attraction of the use conducted thereon, is capable of falling within para. 2(7)(d), albeit that it cannot fall within para. 2(7)(a).

102. For all those reasons, we answer issue (iii) by deciding that the appellant's proposal was in substance to do with the hereditament rather than its locality. Indeed, it was to do with the conduct of the appellant's business on the hereditament. It did not fall within para. 2(7) of schedule 6 to LGFA, in particular para. 2(7)(d). The appeal must fail on this ground alone.

Issue (iv) - whether the Appellant's case offends the uniformity principle

103. Ms McCarthy QC submitted that the appellant's case was also flawed because it would involve a breach of the principle that all ratepayers should be treated in an equal or uniform manner. This submission begs the question, how is "equality" to be defined or identified for rating purposes?

104. It was submitted that a ratepayer would be treated differently and unfairly if it were to be held that a decline in trade manifested physically in the locality falls within para. 2(7)(d). For example, a business dependent on visitors travelling by road would be able to argue for a reduction in rateable value, whereas a business reliant upon orders placed on the internet would not. A land use or property valued by a method based upon notional receipts and expenses or a fair maintainable trade would be able to rely upon a reduction in visitor numbers to obtain a reduction in rateable value, whereas a property valued on the comparative method would not.

105. We do not find it necessary or possible, on the submissions we received, to reach conclusions on this subject in order to determine this appeal. At first blush, the respondent's argument appears to elide the question whether circumstances have arisen triggering the VO's power to revalue, or the ratepayer's right to a revaluation, with issues to do with how any such revaluation is to be carried out. On the other hand, issues concerning the ambit of any of the factors in para. 2(7) may directly affect the valuation of all hereditaments when a list is initially compiled.

106. It is unnecessary to go further into such matters in this appeal. The straight forward point, as set out at the beginning of para. 6 of the respondent's speaking note is that a change which *simply* results from a ratepayer's unsuccessful trading performance, for whatever reason, cannot be taken into account compatibly with the principles laid down in *Dawkins* and related authorities. We have determined that point under issue (i) above.

Issue (v) - the proper construction of paragraph 2(7)(d)

107. Mr Ormondroyd submitted that in para. 2(7)(d): -

> "matters...which, though not affecting the physical state of the locality, are nonetheless physically manifest there"

include economic or intangible matters which *result* in changes in the locality which are physically manifest there. Even if his construction of this provision were to be correct, that could not alter the outcome of this appeal. As we have explained, this appeal must fail in any event for the reasons already given under issues (i) and (iii), looking at those issues either separately or together. However, bearing in mind that the Appellant's case was entirely based on Mr Ormondroyd's construction of para. 2(7)(d), the arguments raised and that issue (v) occupied most of the time taken in this appeal, we should give our conclusions on it. To do so, it is necessary to retrace the steps which led to the enactment of para. 2(7)(d) and then to consider subsequent decisions dealing with that provision.

General Rate Act 1967

108. Before the LGFA 1988, rating legislation did not specify a valuation date for the purposes of compiling a valuation list. In *R v Paddington Valuation Officer ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380, 405 Lord Denning MR considered that there must be a common valuation date for rating valuations, namely the date on which the list was compiled. That was later confirmed to be correct by the House of Lords in *K Shoe Shops Ltd v Hardy* [1983] 1 WLR 1273. Unlike the 1988 Act, the 1967 Act did not provide for an antecedent valuation date when compiling the list. On the other hand, if a proposal was served, whether by a ratepayer or by a local authority, the date of the proposal was treated as being the valuation date and matters governed by the reality principle were taken to be those subsisting on that same date (*Barratt v Gravesend Assessment Committee* [1941] 2 KB 107). The House of Lords confirmed this to be correct in *Baker Britt & Co Ltd v Hampsher* [1976] RA 169.

109. This scheme created a potential for unfairness as between different ratepayers, if, for example, a proposal were to be made to deal with a property constructed or altered some time after the valuation date for the current valuation list and by the date of that proposal property values had risen considerably. This was addressed by the "tone of the list" amendment introduced by s. 17 of the Local Government Act 1966. This was re-enacted in s. 20 of the 1967 Act as follows:-

> "(1) For the purposes of any alteration of a valuation list to be made under Part V of this Act in respect of a hereditament in pursuance of a proposal, the value or altered value to be ascribed to the hereditament under section 19 of this Act shall not exceed the value which would have been ascribed thereto in that list if the hereditament had been subsisting throughout the year before that in which the valuation list came into force, on the assumptions that at the time by reference to which that value would have been ascertained—
>
> (a) the hereditament was in the same state as at the time of valuation and any relevant factors (as defined by subsection (2) of this section) were those subsisting at the last-mentioned time; and

(b) the locality in which the hereditament is situated was in the same state, so far as concerns the other premises situated in that locality and the occupation and use of those premises, the transport services and other facilities available in the locality, and other matters affecting the amenities of the locality, as at the time of valuation.

(2) In this section, the expression " relevant factors " means any of the following, so far as material to the valuation of a hereditament, namely—

(a) the mode or category of occupation of the hereditament;

(b) the quantity of minerals or other substances in or extracted from the hereditament; or

(c) in the case of a public house, the volume of trade or business carried on at the hereditament;

and in paragraph (c) of this subsection the expression " public house " means a hereditament which consists of or comprises premises licensed for the sale of intoxicating liquor for consumption on the premises where the sale of such liquor is, or is apart from any other trade or business ancillary or incidental to it, the only trade or business carried on at the hereditament.

(3) References in this section to the time of valuation are references to the time by reference to which the valuation of a hereditament would have fallen to be ascertained if this section had not been enacted.

(4) …..

(5) ….. ”

110. The effect of s. 20 was that if a valuation for the alteration of a list applying the normal principles under s. 19 (i.e. a valuation as at the date of the proposal) produced a higher rateable value than the figure arrived at under s. 20, then the latter was the amount to be entered in the list as the rateable value. Section 20 imposed a ceiling value, by requiring the assumption to be made that certain matters relating to the hereditament and the locality on the date of the proposal had subsisted on the valuation date for the list. Those matters related to “the state” of the hereditament and its “mode or category of occupation”. It was also to be assumed that the “locality” was in the same “state” as regards firstly other premises in the locality and their use and occupation, secondly “transport services and other facilities available in the locality” and thirdly “other matters affecting the amenities of the locality”. At that stage the term “state” was not qualified by “physical”. It is important to note that sub-para. (1)(b) required an assumption to be made about certain characteristics *of the locality*. The opening words of that provision:-

“the locality in which the hereditament was situated was in the same state, ….”

make it plain that the focus of the statutory assumption was the locality itself. The words which followed simply defined the relevant characteristics *of the locality* to which the assumption applied. Section 17 of the 1966 Act (and its re-enactment in s. 20 of the 1967 Act) was the first

time that Parliament enshrined the reality principle in legislation. The approach it took was entirely in line with the leading authorities which laid down the reality principle, including *Poplar* and in due course *Dawkins*.

111. Under the 1967 Act a proposal to alter a rateable value shown in a compiled valuation list could be made at any time by any person who was "aggrieved" by (inter alia) "any value ascribed in the list to a hereditament" (s. 69(1)). A valuation officer was also able to make a proposal under s. 69(2). Unlike LGFA 1988, the 1967 Act enacted the reality principle solely as a set of valuation assumptions for the ascertainment of rateable value, and not also to delimit the circumstances in which a right to a revaluation would arise.

Addis v Clement – Court of Appeal

112. In *Addis Ltd v Clement* (1986) 85 LGR 489 a proposal was made to reduce the rateable values of five industrial or commercial premises to reflect the decline in market values between 1973 and 1981 in the locality in which they were situated attributable to the designation of an enterprise zone nearby. That designation conferred a number of fiscal and administrative benefits on occupiers of new premises within the zone (including an exemption from rates and 100% allowances of capital expenditure against corporation tax) which were not available to occupiers of properties in the locality in which the appeal premises were situated. By 1981 the value of those premises had increased relative to their 1973 value, if the effects of the enterprise zone were to be disregarded (p. 494). But the issue was whether the word "state" in s. 20(1)(b) allowed those effects to be taken into account in the valuation, thereby reducing the rateable values arrived at under the ceiling provision in s. 20.

113. In the Court of Appeal, Woolf LJ held that s. 20(1) gave the strong impression of being primarily concerned with "physical matters" (p. 500). Whilst the word "state" can have different meanings in different contexts and could be of very wide application, in s. 20(1)(a), it applied to the structural state of the hereditament and in s. 20(1)(b) its application was restricted by the words "so far as concerns":-

> "…with the result that regard can only be had to other premises, the occupation and use of those premises, transport services, other facilities and other matters affecting the amenities of the locality".

114. He continued: -

> "While the word "amenities" can be of wide ambit and it is capable of applying to the business climate of the locality, which would include its designation as a development zone, I regard "amenities" as being used in a sense where it applies to those *aspects of the locality* which are capable of affecting all the hereditaments in the locality and not merely a category of hereditaments such as commercial premises. I am cautious about adopting the same approach to the construction of the word "facilities". However, in relation to both amenities and facilities I do recognise that the effects of an area being designated as a development zone, as happens with a smokeless zone, can result in changes in the facilities and the amenities *of the locality* which can be taken into account." (our emphasis)

115. On this construction of s.20(1) Woolf LJ held that the effect on property values attributable to the designation of an enterprise zone was not a matter which could be taken into account when arriving at the ceiling value provided for by s. 20 of the 1967 Act. In *Addis* the designation of an enterprise zone and the fiscal and administrative benefits conferred on occupiers within that zone were simply intangible matters. No physical changes had occurred in the locality.

116. However, Mr Ormondroyd relied upon two other passages in the judgment of Woolf LJ, firstly at p.500: -

> "In broad terms the way section 20(1) is intended to operate is that you value the hereditament and any building upon it as it exists at the date of the proposal in the setting in which it is situated (with that setting having the actual *characteristics of the locality* as they would be observed at that date if the locality was to be inspected) on the basis of its 1973 value. For the purposes of carrying out that valuation, it is the economic climate, both local and national, of 1973 which has to be considered and not that at the date of the proposal *except to the extent that alterations in the economic conditions result in changes in the locality which are capable of being observed "on the ground" in the locality*."

At p.501 Woolf LJ stated: -

> "I should however emphasise that I do not accept Mr Fletcher's submission that because a consideration is of a financial nature it cannot be considered as it exists at the date of the proposal because it is incapable of being converted into 1973 values. I would therefore regard it as perfectly appropriate in considering the quality of transport services to take into account the level of fares charged for the services as this could materially affect an assessment of the quality of the service. Likewise, if the existence of a development zone affects the prosperity of an area *in a manner which is manifest and can be observed, this should be taken into account*. *The features* which demonstrate a change in prosperity in this way could be properly taken into account *as part of the setting* in which the valuation at 1973 values is to be made." (our emphasis).

117. It is important to note that the first of these two passages preceded and the second followed the section of the judgment to which we have referred in paras. 113-4 above. It should also be noted that the second passage was only addressing a particular difficulty suggested by the valuation officer, namely the conversion of "financial matters" into 1973 values, or values on the relevant valuation date. The court's answer was that the supposed problem did not arise, because it would only be matters which were physically manifest in a locality which would be assumed to have existed as at the valuation date.

118. It is on the basis of the two passages set out in paragraph 116 above that Mr Ormondroyd submits that the Court of Appeal's approach was that (1) economic and other non-physical factors at the valuation date could not be reflected in a s. 20 valuation unless (2) they were manifest and observable in the locality. However, he then proceeded to assert that point (2) was not only a *necessary* but also a *sufficient* basis for an intangible matter itself to fall within the ambit of the word "state" in s. 20(1)(b) of the 1967 Act (see eg. paras. 38 to 39 of his skeleton). Indeed, his argument proceeds on the basis that it is sufficient if an economic or other intangible factor can be identified which has *resulted* in a physical change to the locality. We do not think that the Court

of Appeal's judgment can be read as providing authority for Mr Ormondroyd's proposition. The two passages he cited should not be read in isolation. They must be read as part of the judgments of the Court of Appeal as a whole. As the judgment of Woolf LJ made clear, the ambit of s. 20(1)(b) was restricted to the matters set out after the words "so far as concerns". Thus, he held that the physical manifestation had to concern (1) other premises in the locality or their use and occupation, or (2) transport services and facilities available in the locality, or (3) other matters affecting the amenities of the locality.

119. Mr Ormondroyd cannot derive any support for his argument from the other judgments in the Court of Appeal. Sir George Waller agreed with the judgment of Woolf LJ. He added that when interpreting s. 20(1)(b) it was necessary to consider the matters which Parliament had stated should be taken into account. "Occupation" of "premises" would be part of their physical state and "use" would be associated with that. "Transport services" and other "facilities" in the locality, "although not a *physical part* of the locality, would be *associated physically* with the locality" (our emphasis). "This would also apply to other matters affecting the amenities of the locality". It is in that context that the following passage in the next paragraph of the judgment must be understood: -

> "The enterprise zone in due course may create physical changes which would be *relevant* to the state of the locality." (our emphasis).

It was the physical change which would be relevant to the state of the locality. Thus, the judgment of Sir George Waller at p. 504 was entirely consistent with that of Woolf LJ properly understood. O'Connor LJ agreed with the judgments of both Woolf LJ and Sir George Waller.

120. The Court of Appeal made it plain that if the facilities or amenities of a locality changed, that circumstance was not to be disregarded under s. 20 simply because it had resulted from, or been caused by, an economic or financial factor. That change would still qualify to be taken into account under s. 20(1)(b). "Features which demonstrate a change in prosperity" or a "physical change which would be relevant to the state of the locality" could fall within that provision, even if they had resulted from something intangible, such as the designation of an enterprise zone. It would be the "feature" or the "physical change" itself which would satisfy the wording of s. 20(1)(b). It is that feature or physical change which would represent an essential or intrinsic characteristic of a locality, and not the economic or financial or other intangible factor which had been the cause, or one of the causes, of that change. This accords with the straightforward point that in s. 20 Parliament enacted the reality principle as regards both the hereditament and its locality (see para. 110 above).

Addis v Clement – House of Lords

121. The decision of the Court of Appeal was reversed by the House of Lords ([1988] 1 WLR 301). The ratepayers argued, basing themselves upon *Dawkins*, that the word "state" in s. 20(1)(a) and (b) was not limited to physical factors affecting the physical enjoyment of the hereditament or other premises in the locality, but also advantages and disadvantages resulting from legislation. The "state" of a hereditament, or of a locality, included opportunities and disabilities to which they were subject by virtue of legislation or the exercise of statutory powers p. 305B-E).

122. Lord Keith held that the broad purpose of s. 20 was to secure that a hereditament which "for one reason or another" fell to be valued at a time after the valuation list had come into force,

should be valued "on the basis of the general level of values prevailing when the list was made up" (p. 305F). He considered that if any of the circumstances which would normally be taken into account under the *rebus* or reality principle were to be disregarded, the result would to some extent be artificial and no good reason had been advanced to support that approach. Section 20(1)(a) could be read as referring to the "whole state of affairs affecting the hereditament" without straining the language (p. 305G). But he accepted that the effect of s. 20(2) made that construction difficult and it would mean that s. 20(1)(b) would become *unnecessary* (p. 305H).

123. The House of Lords decided that because there was "no readily perceptible reason for limiting the application of the *rebus sic stantibus* rule, the word "state" should … be given a wide construction, so as to include intangible as well as physical advantages and disadvantages". "State" also had to be given that same wide meaning in s. 20(1)(b) as in s. 20(1)(a) (pp 305H to 306B). Thus, the House of Lords differed from the Court of Appeal on whether the specific language used in s. 20(1)(b) should be treated as delimiting the scope of that provision. The House of Lords did not decide that the Court of Appeal's construction of that provision was incorrect. Instead, it preferred a wider construction of the word "state", albeit that rendered the specific language of s. 20(1)(b) "unnecessary".

Local Government Finance Act 1988 – Parliamentary materials

124. The decision of the House of Lords in *Clement v Addis* was issued on 11 February 1988. Less than a month later, on 9 March 1988, the Secretary of State for Environment made an announcement that he would bring forward amendments to the Local Government Finance Bill, which, if enacted, would have effect from midnight in order to revert to the law as it was understood to be before the decision in the House of Lords. Counsel have not identified any authority as being relevant to that issue other than the decision of the Court of Appeal in *Clement.*

125. The relevant part of the Secretary of State's announcement reads as follows: -

> "First, it is central to the rating system that the value of a hereditament should reflect the physical condition of the property and the "state of the locality" at any particular time. But the basis for the valuation should be the property market conditions as they were at the date of the last revaluation.
>
> For many years now the view has been that the expression "state of the locality" related to its physical state and its amenities, and that in order to make a case for a change in rateable value appellants had to show that there had been physical changes to the property or its locality. This view was recently tested in the case of Addis v Clement, which turned on whether a factory on the borders of the Lower Swansea Valley enterprise zone could rely on the introduction of the EZ to seek a reduction in rateable value. The Court of Appeal upheld the traditional view by holding that the establishment of an EZ was not a change affecting the state of the locality. The House of Lords, however, took the opposite view.
>
> Following that judgment, it appears that ratepayers may obtain changes in rateable value to reflect changes in market conditions since 1973. Many thousands of new proposals may result. In my view, changes in economic circumstances should be taken into account at the general revaluation in 1990.

I therefore propose to bring forward amendments to the Local Government Finance Bill so that, with effect from midnight tonight, proposals to amend current rateable values will be determined according to the law as it was understood to be prior to the decision in the Addis case. This means that changes will be taken into account only in so far as they relate to the physical state of the hereditament and its locality. Changes in economic factors will be taken into account in the 1990 and subsequent revaluations."

126. The relevant amendment to the Bill, No 184B, was introduced in the House of Lords on 14th June 1988 by the Minister of State, the Earl of Caithness: -

"Amendment No 184B deals with another recent decision, that of Clement v Addis. Your Lordships' House considered the different but important question of what changes are to be taken into account when a property is revalued between general revaluations. Previously it had long been accepted that any valuations made between general revaluations should take account of the physical condition and state of locality at the time of valuation, but the general market conditions were to be assumed to be those ruling at the time of the last general revaluation.

It was generally accepted that the expression "state of the locality" in Section 20 of the General Rate Act related to physical state and amenities of a property and that in order to make a case for a change in rateable value, appellants had to show that there had been some physical changes to the property or to its locality. This view was recently tested in the *Addis* case which turned on whether a factory on the borders of the Lower Swansea Valley enterprise zone could rely on the introduction of the enterprise zone to seek a reduction in rateable values on the grounds that the "rate holiday" in the enterprise zone reduced demand for premises just outside it. The Court of Appeal upheld the traditional view by holding that the establishment of an enterprise zone was not a change affecting the state of the locality. Your Lordships' House took the opposite view.

Following that judgment, it appears that ratepayers generally, and not just those near enterprise zones, may obtain changes in rateable value to reflect changes in market conditions since 1973. Although the losses in rate income from cases directly linked to *Addis* have so far been limited, that could in time lead to many thousands of cases being determined in this way and could lead to a continuing – and I might say almost "rolling" – revaluation as economic circumstances change.

In the Government's view that is not appropriate. Changes in economic circumstances are properly dealt with at the time of revaluation. Under the Bill, there will be a general revaluation in 1990 and every five years thereafter; therefore, there will be no risk of ratepayers having to wait as long as they have in the past for new assessments which take account of changed market circumstances and their effect on rentals.

Amendment No. 184B, which applies to the valuations made under Section 20 of the General Rate Act 1967, sets the law back to what it was previously held to be for the remaining life of that Act. On Report, we shall be tabling a further

amendment to Schedule 6 of the Bill to ensure that this principle of valuation is carried through into the new legislation."

127. It can be seen that the Ministerial statement made when the amendment to the Bill was introduced, to amend s.20 of the 1967 Act, was to the same effect as the earlier statement made on 9 March 1988. No doubt the earlier statement had been made to justify the inclusion in the Bill of provisions which, when enacted, would have a retrospective effect, back to 10 March 1988. Amendment 184B became s.121 of LGFA 1988 without any material amendment. It is common ground that essentially the same language used in s.121 to amend the reality principle as expressed in s. 20 of the 1967 Act, was carried through to paras. 2(7)(a) and 2(7)(d) of schedule 6 to LGFA 1988 for the new rating regime. Neither party has suggested that there was any material difference in the approach taken by the legislature to the statutory formulation of the reality principle.

128. On 4 July 1988, the Minister of State introduced amendments to the Bill which became para. 2(7)(a), (d), and (e) of schedule 6 to LGFA 1988: -

> "The first two amendments in this group, Amendments Nos 174 and 175, fulfil that commitment. Broadly speaking, they do the same as those we discussed in Committee; that is, they provide that where a property is valued between general revaluations, for example because it has been altered, the valuer will take account of its actual physical state and the physical state of the neighbourhood as it now is but will take economic factors, including the general level of market rents, as they were at the time of the last general revaluation.
>
> I wish to explain two points. The first is the reference to "matters which, though not affecting the physical state of the locality, are nonetheless physically manifest here" [sic]. To cast a light on that, I would give the simple example of a bus service. A bus service is physically manifest in an area. What we are seeking to rule out are changes based on purely economic or market-related factors that have no effect on the value the occupier derives from his property. Thus, for example, it should not be possible for the valuation officer to argue for an increase in rateable values when office rents in the City of London went up before "Big Bang", nor for a ratepayer to seek a reduction if they fell when the stock market fell. Those are the sort of matters which we think can be sensibly dealt with only at a general revaluation.
>
> In drafting these further amendments, we gave some more thought to their precise wording, and came up with something slightly different from the words we had used in Clause 133. There is no material difference in the meaning. However, in order to avoid any inference that, because different words were used, there must be some difference in meaning intended, we decided to carry our second thoughts about Schedule 6 back into Clause 133. This is done by the fourth and fifth amendments in group Amendments Nos 235 and 236."

Principles of statutory interpretation

129. The "golden rule" of statutory construction is that statutory words and phrases are to be understood according to their natural and ordinary meaning, in their context and according to the

"linguistic register" used, without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case the natural and ordinary meaning may be modified so as to obviate such injustice, etc, but no further (*Stock v Frank Jones (Tipton) Limited* [1978] 1 WLR 231 at p. 235H). Lord Simon added that where there is ambiguity in the drafting, then it is open to the court to choose between potential meanings by various tests which throw light on the intention of the legislature (at p. 236B-G), the "purposive" rule.

130. In *R v Secretary of State for the Environment ex parte Spath Holme* [2001] 2 AC 349 Lord Nicholls stated (at p. 396) that ascertaining the "intention of Parliament" as expressed in the language used in the legislation is an objective, not a subjective, exercise. The phrase is shorthand for the intention which the court reasonably imputes to the legislature in respect of the language it used. It does not refer to the subjective intention of the persons promoting the legislation or of the draftsman. The court may use non-statutory material, or external aids, to assist in identifying the purpose of the statute, including any mischief it was intended to cure, and also to assist in seeing whether the statutory language used is either clear or ambiguous. But given that citizens should be able to regulate their affairs on the basis of what has been enacted in legislation, and that external aids do not form part of the language through which Parliament has expressed its intention, a cautious approach to the use of such aids is necessary (at pp. 397D to 398D).

131. In *Spath Holme* the House of Lords emphasised the need for strict adherence to the rules defining the circumstances in which a court may rely on Parliamentary materials as an aid to construction. This is only permissible where three requirements are all met: (a) the legislation being construed is ambiguous or obscure or would lead to an absurdity (b) the material consists of one or more statements by a Minister or other promoter of the Bill (together with such other material as may be necessary to understand those statements and their effect) and (c) the effect of such statements is clear (p. 31G). Unless Parliamentary statements are unequivocal, the court is likely to be drawn improperly into comparing one statement with another, appraising the meaning and effect of what was said and what was not said and why (p. 32C). Lord Nicholls pointed out that the ambiguity, obscurity or absurdity referred to in the first rule need not be of any particular type. *Pepper v Hart* material is admissible to identify the *purpose* of a statutory provision, just as much as to assist on the interpretation of a particular word or phrase (p. 39A -C). But he added that admissible ministerial statements are simply part of the legislative background. They cannot "control" the language used in the legislation itself. It is for the court to decide what weight to give to such statements when determining what was the intention of Parliament in using the language of the statute (p. 39G-H).

132. Here, there is ambiguity in the wording of para. 2(7)(d) of LGFA 1988 as regards the phrase "matters …. which, though not affecting the physical state of the locality, are nonetheless physically manifest there". The appellant advances a very broad construction of this language, so as to embrace any matter, including any intangible or economic matter, so long as it produces or results in a consequence which is physically manifest in the locality. There is a tension between that construction on the one hand and on the other, the statutory principles that (a) revaluations are to take place every five years and (b) rateable values for those general revaluations (and any alterations in the interim) are to be assessed by reference to a common valuation date and economic circumstances subsisting on that date. How is the boundary to be drawn between those statutory matters which represent the reality principle and define the subject matter of a valuation, essentially the hereditament in the setting or context of its locality, and the application of the

statutory valuation formula to those factors? Mr Ormondroyd relies on Parliamentary materials to show that it was the intention of Parliament to re-establish the law as had been stated by the Court of Appeal in *Addis.* He also relies on subsequent authorities which have followed this approach, which we consider below.

133. The Secretary of State and the Minister of State unequivocally stated that the *purpose* of the changes made to the 1967 Act and of what became schedule 6 to the LGFA was the same, namely to re-establish the law as it had previously been held to be by the Court of Appeal in *Addis.* This explicit statement of the purpose of the amendments to the 1988 Bill is analogous to the intention imputed to the legislature when the *Barras* principle is applied, (see eg. Bennion on Statutory Interpretation (7th edition) section 24.6). It should be taken to have included the essential reasoning of the Court of Appeal. As we have explained, that reasoning (1) rejected the notion that the statutory enactment of the reality principle in s. 20 applied to a mere change in economic circumstances, or other intangible matter, in the locality of a hereditament, but (2) accepted that s. 20 applied to something which was physically manifest in a locality as regards (a) other premises in that area or their use and occupation, or (b) transport services and facilities in that area or (c) other matters affecting the amenities of that area. The Court of Appeal did not accept that s. 20(1)(b) applied to any economic or intangible cause which has led to a physical change in the locality. It was the physical change in the locality to which s. 20(1)(b) (or the reality principle) applied, irrespective of the nature of the cause (or causes) which had led to that change. The appellant's argument is incompatible with the express and essential reasoning of the Court of Appeal and with the clearly stated purpose of the amendments made to the 1988 Bill.

134. The Secretary of State and the Minister of State also explained that the object of the legislation was to ensure that physical changes to the hereditament or its locality would be taken into account, but not changes in economic factors or in market conditions, or in the general level of market rents. The statement made on 4 July 1988 repeated that it was the purpose of the amendment to the 1988 Bill to confirm the position that "economic factors including the general level of market rents" would be taken as they were at the time of the last general revaluation. He then added an explanation of the new language in the Bill, "matters which, though not affecting the physical state of the locality, are nonetheless physically manifest there". He gave the "simple example" of a bus service as something which is "physically manifest" in an area. That accords with the way in which s. 20 of the 1967 Act had explicitly been drafted and with the reasoning of the Court of Appeal in *Addis*. The Minister then went on to explain that the Government was seeking to rule out changes "based on purely economic or market-related factors that have no effect on the value the occupier derives from his property". The examples he then gave dealt with changes in general market rents and conditions, in contrast to a physical change in the locality which affects the value of the benefit which a ratepayer derives from occupying his premises.

135. The Parliamentary material is admissible under *Pepper v Hart* to identify the purpose of s. 121 and para. 2(7) of schedule 6 to LGFA 1988. The statements are clear. The object was to use this part of the statutory reality principle to identify the physical attributes of a hereditament and its locality and changes in those attributes, in line with the decision of the Court of Appeal in *Addis.* In any event, the Parliamentary material contradicts the appellant's broad proposition that any economic or intangible matter is relevant under para. 2(7)(d) so long as it has some effect which is physically manifest in the locality.

Chilton-Merryweather v Hunt

136. In *Chilton-Merryweather v Hunt* [2009] PTSR 568, the Court of Appeal had to decide whether an increase in the volume of traffic on a neighbouring motorway was a change "in the physical state of the dwelling's locality" entitling affected householders to a revaluation under the Local Government Finance Act 1992 for the purposes of council tax. In considering the ambit of this phrase, the Court of Appeal contrasted the wider language of para. 2(7)(d) of LGFA 1988, embracing something which is "physically" manifest in a locality without affecting its physical state, and held that the change in the volume of motorway traffic was not a change in the "physical state of the locality", the narrower language used in council tax legislation. The "physical state" in the 1992 Act was only concerned with "the essential fabric and character of house and locality, but not with other matters which go to their enjoyment, use, occupation or activity", such as the volume of traffic on a road ([39]).

137. Mr Ormondroyd sought to rely upon the judgment of Rix LJ at [21], [23] and [42] in order to advance two propositions: (1) that the LGFA 1988 had enacted the reasoning and decision of the Court of Appeal in *Addis* and therefore (2) any economic or intangible matter (or alteration thereof after the list date) which results in a change in the locality capable of being observed on the ground, falls within para. 2(7)(d). However, he did not refer to paragraph 25 in which Rix LJ referred to the relevance of the language used in s. 20(1)(b) of the 1967 Act which both Woolf LJ and Sir George Walker had "stressed", namely "transport services and other facilities available in the locality" and "other matters affecting the amenities of the locality" (see also [44]). Accordingly, although the Court of Appeal confirmed Mr Ormondroyd's proposition (1), their reasoning involved the rejection of his proposition (2).

138. Read properly, therefore, *Chilton-Merryweather* lends no support to the appellant's legal argument. It is not an authority for the broad proposition that para. 2(7)(d) of LGFA 1988 applies to any economic or intangible matter, so long as it has a consequence which is physically manifest in the locality.

In the Appeal of Kendrick

139. In *Kendrick* [2009] RA 145, Mr George Bartlett QC, President, stated that he was prepared to accept that a change in attitude of air passengers to air travel as the result of the events on 9/11 could qualify as a para. 2(7)(d) matter if that was physically manifest in the locality of the airline lounge ([16]). He based himself on paragraph 42 of the judgment of Rix LJ in *Chilton-Merryweather*, cited by the President at [15]. However, he did not, with respect, address other relevant parts of that judgment, notably paragraph 25, to which we have referred. For the reasons set out above, *Chilton-Merryweather* does not support the broad proposition referred to in *Kendrick* at [16].

140. In any event, at [17], the President made it plain that he was only proceeding on the basis of an *assumption* that the attitude of air passengers to air travel was capable of falling within para. 2(7)(d). He did not decide that point and *Kendrick* should not be treated as authoritative on it.

141. The President then went on to consider whether any change in this attitude of airline passengers had been "physically manifest in the locality". The ratepayer's case was based on changes in the number of passengers using the lounges. But he decided that it failed on the facts because that evidence "could not reveal anything about the factors that had caused the numbers to

be as they were". The level of movements must inevitably have been the result of a wide range of economic and other factors. The VTE had accepted that the actual impact of 9/11 "in isolation from other intangible factors" would have been "masked" by the wider recession that had affected the global economy at the time, as well as other factors. Accordingly, the Tribunal decided that the "physically manifest" test was not satisfied. Because the "effect" was "masked", it was not manifest ([18]). We note that the ratepayer in that case did not respond to the valuation officer's appeal.

Discussion

142. The argument in the present case has focused on whether the change relied upon by the appellant (as defined in the preliminary issue) is relevant for the purposes of para. 2(7)(d). We consider that this issue should be placed into its proper context.

143. As we have observed, the question of what matters do or do not fall within the ambit of that provision applies when the list is compiled and not merely to the issue whether a change has occurred so as to permit the hereditament to be revalued. A "material change of circumstance" can only relate to a matter which, as a matter of law, could have been taken into account under para. 2(7)(d) when the list was compiled. In other words, the question is whether it would have fallen within the scope of the statutory reality principle, which identifies the subject-matter of the valuation, if it had subsisted on the date when the list was compiled?

144. When a list is compiled, it is plain that para. 2(7) requires the valuer to take into account as at the date of that list matters affecting the physical state of the hereditament and of the locality, the use of the hereditament, and the use or occupation of other premises in the locality. Those factors representing the intrinsic, physical characteristics of the hereditament define what is to be valued, taking into account also the intrinsic, physical characteristics of the locality.

145. Paragraph 2(7)(d) extends that exercise to include: -

> "matters….which, though not affecting the physical state of the locality, are nonetheless physically manifest there"

146. This provision does not simply refer in isolation to "any matter which is physically manifest in the locality". Rather, this phrase has been carefully embedded as an extension to the preceding language of para. 2(7)(d). It applies to matters which, though not *themselves affecting a locality's physical state, nonetheless* are "physically manifest there". The colour and meaning of this phrase is influenced by its neighbours, or context (*noscitur a sociis* – Bennion on Statutory Interpretation (7th ed) section 23.1). When a rating list is compiled this extension of the reality principle only applies to matters which are *themselves* physically and obviously present in the locality. This language is descriptive of the physical attributes, or characteristics of the locality itself. It does *not* allow the valuer or tribunal to take as at the date when the list is compiled some economic or other intangible matter which has changed since the AVD simply because that matter has caused or resulted in some physical change in the locality since the AVD. Paragraph 2(7)(d) applies to a physical characteristic of the locality. It must be a matter which itself is physically manifest in the locality, or as Sir George Waller put it in *Addis*, "something associated physically *with the locality*" (our emphasis). Paragraph 2(7)(d) operates so as to take that physical matter as it was on a date postdating the AVD. When a list is compiled, the valuer should simply take the physical characteristics of the locality as they were on that date. He does not need to go further

and investigate the economic causes of those matters as at the same date. Paragraph 2(7)(d) does not allow him to assume that those economic factors also subsisted at the AVD, if different from those which did in fact exist on the AVD. The legal approach is no different when it is necessary to determine whether a material change of circumstances has occurred in a para. 2(7)(d) matter after the list has been compiled.

147. Further difficulties with the "economic cause" approach became apparent during oral argument. Initially, Mr Ormondroyd contended that, in order to fall within para. 2(7)(d), the intangible matter relied upon would have had to be the *sole* cause of some physically manifest effect in the locality of a hereditament. Subsequently, he altered his stance to contend that it would be sufficient if the physically manifest change in a locality upon which the appellant relies (here the change in the number of vehicle trips on local roads) was caused by a number of factors, of which the *cause* upon which the appellant relies (a change in public attitudes towards thrill rides) was only one, provided that its contribution was more than *de minimis* (para. 67 above). As Ms McCarthy QC submitted, once this position is reached, it does not matter what the cause or causes of the physically manifest change were. What is crucial is whether the matter upon which the appellant relies was itself the change which was physically manifest in the area. This leads back to our conclusion that the approach set out in para. 146 above is correct.

148. Understood in this way, the second limb of para. 2(7)(d) is substantially to the same effect as s. 20(1)(b) of the 1967 Act as interpreted by the Court of Appeal in *Addis*, which referred not only to the state of other premises in the locality but to transport services and other facilities available in and other matters affecting the amenities of the locality. The first limb of para. 2(7)(d) now covers the physical state of other premises in the locality. Transport services, facilities and amenities do not necessarily affect the physical or structural state of a locality (see *Addis*), but they qualify under the second limb as matters which themselves are nevertheless physically manifest there. If a new transport facility, such as a bus service or bus interchange, is introduced into a locality with the effect of improving its accessibility, the application of the second limb of para. 2(7)(d) does not require the valuer to begin by identifying some intangible or economic cause for that event, whether a purely commercial cause or something involving the intervention of an authority using public funding. That is so whether the new facility or service is created just before the compilation of a rating list, or at some time during the lifetime of that list.

149. Similarly, where the increasing prosperity of a locality results in physical changes to that area, for example new development or facilities improving its physical environment, the Court of Appeal in *Addis* stated that those physical changes would be taken into account when applying the reality principle set out in s. 20 of the 1967 Act. But the court did not suggest that that would depend upon the cause or causes of that change being identified, for example, the stimulation of investment attributable to an enterprise zone. All the Court of Appeal was at pains to point out was that the legislation did not permit such a change to be disregarded simply because its ultimate cause or causes were economic or intangible. The simple point remains that the second limb of para. 2(7)(d) is only referring to a matter which, although not affecting the physical state of the locality, is nonetheless *itself* physically manifest there.

150. Typically, an economic factor will produce consequences of one kind or another, possibly a range of consequences. Some of those consequences may themselves be physically manifest in a locality. But it would be unusual for a purely economic factor *itself* to be *physically* present in a locality in some way, let alone obvious. The Court of Appeal in *Addis* did not suggest otherwise.

For example, the attitude (or attitudes) of the public in reaction to a disaster is an intangible matter which may affect market demand to fly in airplanes or to visit thrill rides. It can also be said to be an economic factor. However described, we find it difficult to see how that attitude, or any significant change in that attitude, is *itself* physically manifest in the properties or their localities which may experience the effects of that demand. It is not something which represents a physical characteristic of a property or its locality or is physically associated with either (see the submission for the valuation officer in *Kendrick* at [11]). It does not form part of the subject, the *res*, which is to be valued. Instead, that demand forms part of the level or system of values which are applied in the valuation of that subject, using the tool of the hypothetical letting.

151. The particular change in public attitude relied upon in this appeal is simply one factor affecting market demand amongst others. The public's attitude towards thrill rides or leisure parks may change for other reasons. Market demand can also fluctuate because of changes in levels of employment or spending power, whether nationally or more locally. A change in market demand is something present in the minds of people who make up the market (or part of the market). The consequence that those people choose either to visit or not visit a particular hereditament does not make public attitude a physical characteristic of a locality, whether in relation to persons present or absent from that locality. It remains simply one aspect of market demand.

152. This approach is in line with *Dawkins v Ash*, where the House of Lords saw the reality principle as describing the essential, or intrinsic, or non-accidental, characteristics of a hereditament and its locality. So, the fact that a motorway or other highway or airport is introduced to a locality is likely to change its accessibility. Likewise, the transport services provided on that infrastructure are also matters which themselves are physically manifest in that area and are relevant to its accessibility. This could be a factor making one retail locality more valuable than another because of its "superior facility for carrying on business there" (see the well-known reference by Blackburn J to the shops in Cheapside in *Mersey Docks Board* [1873] LR 9 QB 84, 97).

153. Traffic on a road network or airplanes on flight paths may produce noise or other emissions to the environment which represent an integral part of the presence of such traffic in a locality. Such matters themselves may be said to be physically manifest in a locality. On that aspect we do not think that Ms McCarthy QC was correct to submit that something is only "physically manifest" if it is apparent visually (or for that matter to any of the other senses), as distinct from a change which is measured or even calculated or estimated. For example, noise measurements or calculations to show the effect of changes in the level of traffic on a road may assist a tribunal when assessing the degree of change in that factor, rather than being restricted to subjective descriptions.

154. In any event, a hypothetical valuation, such as one carried out for rating purposes, assumes that the hypothetical parties would behave just as reasonable people would do if they were transacting for the property in real life. That means that the hypothetical tenant, or rather parties bidding to secure the hypothetical tenancy, would make "proper enquiries" about the property, and also the locality (see eg. *Gray* [1994] STC 360 at p. 372; *Telereal Trillium* [2018] 1 WLR 3463 [34]). The more complex the hereditament or land use, for example, the greater the degree of scrutiny, or due diligence, that might reasonably be expected. We return to the point that the rating hypothesis is only a mechanism or tool to enable a valuer or tribunal to arrive at the annual occupation value of a hereditament.

155. In many instances it will be obvious whether a matter affects the physical state of a locality or is otherwise physically manifest there. But sometimes it may not be clear at first sight whether a matter which is physically present in a locality has anything to do with its characteristics. In such cases it may sometimes be appropriate to examine what has caused or led to a physical change as an evidential tool to see whether that change is truly a characteristic of the locality, or instead is something "accidental" to it. Here, the appellant relies upon a reduction in the level of traffic in the locality of Alton Towers. But on examination it turns out that the appellant's case is not concerned with the level of traffic as such, but rather with the cause of that reduction in traffic. It is concerned with the reduction in demand from members of the public to visit Alton Towers because of the Smiler crash and hence a reduction in the number of visitors in vehicles on the roads running through the locality of the hereditament. As we have explained, that is not an intrinsic characteristic of the locality.

156. The matter upon which the appellant relies is broadly similar to footfall in an airline's lounge at an airport (*Kendrick*) or to footfall in a town centre. Changes in footfall can reflect different types of change. Footfall may decrease or increase because, for example, a railway line serving the town is built or closed down or because the train services on that line are increased or reduced. Likewise, footfall may alter because of changes in bus services or because a highway or pedestrian route is created or stopped-up, or is made more or less attractive to traffic. Changes of this kind may not involve a significant change in the physical structure or state of the locality. But they are nonetheless matters which themselves are physically manifest in a town centre as something which determines one of its intrinsic qualities, namely its accessibility. Such a change would generally fall within para. 2(7)(d) and would therefore fall to be taken into account as at the date when the list is compiled, or on the material day if the relevant event occurred subsequently. It is the change in transport services or accessibility which constitutes the matter falling within para. 2(7)(d) and which may therefore amount to a material change in circumstances calling for a revaluation.

157. The addition (or subtraction) of retail floorspace in the locality of a town centre may also fall within para. 2(7). Such a change may have a beneficial or adverse effect on existing retail hereditaments in a town centre (see eg. *GPS (Great Britain) Ltd v Bird* [2013] UKUT 527 (LC); [2014] RA 145). Out of centre floorspace may abstract trade from town centre shops, whereas the insertion of a new shopping mall in the heart of a town's main retail area may considerably strengthen the attraction of existing shop units. It is the change in the provision of retail floorspace which represents the para. 2(7)(d) matter to be assessed as at the date on which the list is compiled, or subsequently on any relevant material day. Paragraph 2(7)(e) may also be engaged.

158. No doubt para. 2(7)(d) changes such as these may also produce consequential changes, for example, in footfall or traffic flows on particular roads in a centre and these may be taken into account in any valuation which the legislation requires to be carried out. But it seems to us that it is likely to be misleading or unwise to focus on a change in footfall *per se* as a para. 2(7)(d) factor. Such a change may have nothing to do with any physical change in the state of the hereditament or its locality, or in services, facilities, amenities or other matters physically manifest in that area. Changes in footfall may simply be the product of changes in economic matters which are not themselves physically manifest in a town centre, such as changes in unemployment or spending power, whether on a national, regional or local basis. It is plain from the statutory framework of the LGFA 1988 that Parliament intended that matters of that kind be

taken into account in the quinquennial, general revaluations as at the antecedent valuation date, and not as at the date when the list is compiled (or the date of any subsequent alteration).

159. We do not accept the suggestion made by Mr Ormondroyd that the respondent's case involves unfairly or improperly discriminating between those land uses which operate as destination attractions and others which depend, wholly or in part, upon passing trade. For either type of use, only those matters which truly fall within one of the factors in para. 2(7) are to be taken as at the date on which a rating list is compiled or on a subsequent material day. All other matters, including intangible matters falling outside the scope of that provision, are taken into account as at the AVD. The volume of passing trade may be a relevant factor for valuation purposes provided that some relevant physical change in the locality takes place. A failure to adhere to that fundamental distinction would undermine the statutory principles of quinquennial revaluations and the uniform or equal treatment of ratepayers by reference to a common valuation date.

160. For completeness we should add that we agree with Ms McCarthy QC that the approach taken by courts in Scotland to legislation in that jurisdiction could not be applied here so as to avoid the appellant's construction having too wide an effect (see paras. 66 and 72 above). The language used in the English legislation would not permit that approach, effectively an "exceptionality test", to be taken.

161. For all these reasons, under issue (v) we reject the appellant's broad submission that any economic or intangible matter falls within para. 2(7)(d) merely if it results in some effect which is physically manifest in the locality of the hereditament. Instead, the matter relied upon must itself be something which is physically manifest in that area. If that test is satisfied, there is no legal requirement to identify a cause to which that matter can be attributed in order to satisfy para. 2(7)(d).

The status of the witness statement of Mr Wilford

162. Mr Wilford explains that he has advised the appellant and its predecessors on business rates for all their attractions for the 1995, 2000, 2005, 2010 and 2017 rating lists. He says that he therefore has a longstanding and detailed personal knowledge of the operational characteristics of the UK theme park market as a whole and Alton Towers specifically (para. 6). He has also paid numerous visits to Alton Towers at various times of the year, both before and after the Smiler crash and says that he was "therefore uniquely placed to assist the tribunal with factual matters relevant to whether the impacts of the Smiler crash are capable of being reflected in the rating valuation of Alton Towers as a matter of law" (para. 7). He stated that variations from day to day in the numbers of visitors should be seen as "normal fluctuations in trading patterns of a theme park in terms of rating" and added: "… implicit in any rating valuation is the assumption that the hypothetical parties are not concerned with day-to-day fluctuations in visitor numbers."

163. As those introductory paragraphs suggested and as the substantive text of the witness statement confirmed, Mr Wilford did not confine himself to factual evidence. He sought to draw inferences and express opinions on the conclusions to be derived from the data he presented. His object was to show that a decline in visitor numbers beginning in 2015 was attributable to the Smiler crash and not to other causes which have been suggested. As we noted in para. 22, he sought to put this into the context of the method used when valuing leisure parks for rating, explaining that some fluctuations in conditions are not taken into account, but other changes are

and may result in changes in rateable value (paras. 8 to 10 of his witness statement). The appellant relied upon this material to demonstrate that, on its reading of para. 2(7)(d), a material change of circumstances had occurred (paras. 35-6 and 41-3 of appellant's skeleton). He also explained why, in his judgment, the appellant would be the only candidate for the hypothetical letting, although this aspect did not feature in the appellant's legal submissions. We have no doubt that as a matter of substance his witness statement contained expert opinion evidence which he was chosen to give because of his expertise as a surveyor in dealing with the rating valuation of hereditaments such as Alton Towers.

164. It is necessary to outline some procedural history in this appeal, of which we only became aware when we revisited the Tribunal's case file after the hearing. This contained matters which were not drawn to our attention during the hearing by either party.

165. The Tribunal's order of 25 June 2018 provided for the submission of witness statements of fact. On 2 July 2018, the Solicitors acting for Merlin made an application, with the agreement of the respondent, for the order to be varied to allow Mr Crabbe's evidence as a witness of fact, and Mr Wilford's evidence in the capacity of an expert witness.

166. The Tribunal responded on 3 July:

> "The sole issue determined by the Valuation Tribunal was the preliminary issue identified in paragraph 8 of the decision of [the President]. The Tribunal understands that both parties agree that that issue should be determined as a preliminary matter.
>
> It is not clear to the Tribunal on what basis it is thought that expert evidence is required in this appeal. The Valuation Tribunal reached its decision without any reference to expert evidence (although Mr Wilford is said to have given evidence in paragraph 18). Although the appellant indicated in its notice of appeal that it wished to call more than one expert witness it gave no indication of the name or fields of expertise of those witnesses. The respondent has indicated that it regards the issue as "a legal one alone" and does not intend to call any evidence.
>
> To enable the Tribunal to consider the request for permission to rely on expert evidence the appellant is invited to explain what issue that evidence will go to and to provide a copy of the expert's report relied on before the Valuation Tribunal. If the issues which the appellant wishes the expert to give evidence to the Tribunal are different, an explanation of the additional matters to be dealt with should also be provided"

167. Merlin's solicitor replied on 4 July:

> "Expert Evidence
>
> The appellant seeks to rely on expert evidence to address two matters which are central to the determination of the agreed preliminary issue. First, how would a landlord and tenant regard daily fluctuations in visitor numbers at a theme park? Second, what was the cause of the reduction in visitor numbers observed at Alton Towers after the Smiler crash?

> The first of these matters goes to the question of whether, as the VO says, it is relevant to look at visitor numbers on individual days in isolation or whether, as the appellant contends and the VTE found, a longer term view is appropriate. As the matter is to be considered from the perspective of the hypothetical parties, *the Tribunal may be assisted by expert evidence as to how (a) actual operators and (b) rating valuers (who seek to reflect the attitude of the hypothetical parties) regard day-to-day fluctuations in visitor numbers.*
>
> The second matter relates to a question of causation, namely whether the reduction in visitor numbers etc. observed at and around Alton Towers after the crash was the result of a change in attitudes to thrill rides caused by the crash. On the face of it, it seems clear that it was. Nevertheless the VO (and the VTE) have raised a number of other potential causes of the changes observed, albeit without producing any evidence in support of those contentions. *In that context, the Tribunal may be assisted by expert evidence which considers all the causes which have been posited and assesses which was the operative cause(s).*
>
> The VO has said that the issue is "a legal one alone"; however, in his statement of case addressing the preliminary issue the VO makes very clear that he disputes the appellant's factual case on the above two matters (see paragraphs 14, 31, 33). He has not, for example, sought to agree the factual basis of the appellant's contentions for the purposes of resolution of the preliminary issue. In the light of this, and the grounds for the VTE's decision, the appellant seeks to call lay and expert evidence to assist the Tribunal with the factual basis for the decision it is asked to make.
>
> A copy of Mr Wilford's evidence at the VTE is attached. This would need to be expanded slightly to deal with the new matters raised by the VO and VTE. *Although it was originally presented as factual evidence, on reflection it is more properly characterised as expert evidence* and, in any event, will certainly need to advance opinions if it is to deal with the new alternative 'causes' relied on by the VO.
>
> The course proposed by the appellant would therefore essentially replicate the process followed before the VTE, where legal and factual questions in relation to the preliminary issue were considered together. The hearing was dealt with comfortably within a day. In practice this is likely to be the most expeditious way to resolve the matter, as otherwise there would potentially need to be one hearing to resolve contested legal matters in respect of the preliminary issue and a further hearing to resolve contested factual matters. …" (our emphasis)

This request was repeated in an email from the appellant's solicitor sent on 25 July.

168. On 30 July, the Tribunal wrote to the parties, indicating that the Deputy President had read the witness statement of Mr Wilford before the VTE, and that there appeared to be very little evidence in it which would not also be within the knowledge of Mr Crabbe. Nevertheless, if the appellant wished to rely on the evidence of Mr Wilford, including additional material addressing matters raised by the VTE or in the statements of case on the appeal, it could do so provided the evidence has been filed and served by 31 August. Accordingly, the appellant's application to rely upon Mr Wilford's evidence as an expert was granted.

169. The Tribunal's decision in *Gardiner & Theobald LLP v Jackson* [2018] UKUT 253 (LC); [2018] R.V.R. 289, concerning the incompatibility of an expert's remuneration on a contingency or success-related fee basis with their duties to the Tribunal, was published on 3 August 2018.

170. On 31 August, Merlin's solicitor filed and served the witness statements of Mr Crabbe and Mr Wilford, indicating that "we had sought permission to rely on the evidence of Charles Wilford as expert evidence and permission was granted on 30 July 2018. On reflection we have concluded that it would not in fact be necessary for Mr Wilford's evidence to be given as expert evidence. His evidence has now been limited to evidence of fact". Neither the email nor the statement of Mr Wilford said anything to indicate that his firm's fees were dependent on the outcome of the appeal.

171. We were unaware of this correspondence when, at the outset of the hearing, we felt obliged to raise the status of Mr Wilford's statement. We indicated that if we should adhere to our provisional view that it was in substance an expert report, we would direct the filing of an addendum the following day containing RICS declarations as an expert witness. Mr Ormondroyd then stated that that would not be possible because Mr Wilford's firm had entered into a conditional fee arrangement with the appellant dependent upon the outcome of the appeal. We indicated that we would receive Mr Wilford's statement and oral evidence *de bene esse* and would consider in this judgment how it should be treated. The parties were given an opportunity to make any further submissions they wished to make on this aspect during the hearing.

172. In his oral evidence to the Tribunal Mr Wilford stated that he was well aware of *Gardiner* and its implications for his own evidence in this appeal when he signed his statement on 31 August 2018. Consequently, he took both internal advice from a compliance officer and external advice from the appellant's legal team as to how his statement should be treated. Although we have not been shown any written evidence about these communications, we were led to understand that the view taken was that the statement could be treated as a witness statement as to fact. That stance has been maintained in the further representations we have received (see below). That view is misconceived for the reasons we have explained.

173. We have now had the opportunity of comparing Mr Wilford's statement to the VTE with his witness statement to this Tribunal, which we are now being asked to treat as evidence of fact. With the exception of new sections which "deal with new matters raised by the VO and VTE", there are striking similarities between the two documents.

174. Given that permission had been sought by the appellant and granted for Mr Wilford's evidence to be given as an expert, and given also that both he and his firm considered the implications of *Gardiner* for the giving of that evidence, there does not appear to be any possible reason for him to have changed tack and purported to give evidence on a purely factual basis, other than to circumvent the effect of the decision in *Gardiner*, including the important requirement to inform the Tribunal (and any other party) about any relevant contingency fee arrangement. In these circumstances, we formed the provisional view that this was an abuse of the Tribunal's process. But because the correspondence referred to above was not mentioned during the hearing, we invited further representations from the appellant or its team solely on that additional material. We received representations from Mr Wilford and from the appellant's solicitor which went beyond the scope of that invitation. Although these representations would appear implicitly to waive privilege, the appellant has not provided to the Tribunal any of the

documents to which reference is made or other relevant contemporaneous material. Nevertheless, we have taken all of the points made into account and have altered the draft previously made available to the parties where we consider that appropriate.

175. It now appears that when the decision in *Gardiner* was issued:-

> "The Appellant acknowledged that it was highly likely that any expert view presented by Mr Wilford whilst he was acting on what was ultimately a conditional fee basis would either be declared inadmissible or given no weight by the Tribunal. The Appellant therefore took the view that for Mr Wilford to give useful expert evidence, he would have to change his fee basis such that it was no longer conditional on success. This was not acceptable to the Appellant. The Appellant also considered that there would be no need to amend the fee arrangements if Mr Wilford were giving factual evidence only ….".

The appellant suggests that the steps it then took were designed to *comply* with *Gardiner*. Instead, we take the view that it is plain they were taken to avoid the effect of that decision, knowing full well that a relevant conditional fee arrangement was in place. The object was to avoid disclosing that arrangement to the Tribunal in case that might affect, for example, the weight to be given to that evidence. In the circumstances, we see no reason to modify our provisional view that this attempt to present Mr Wilford's witness statement as purely factual evidence was an abuse of its process.

176. In the light of *Gardiner*, the potential sensitivity of the contingency fee payable to Mr Wilford's firm, and the procedural history referred to above, we are surprised and dismayed that the appellant's team did not raise these issues with the Tribunal before the hearing. If the Tribunal had not referred to the matter before Mr Wilford gave evidence, there is no reason to suppose that it would have been made aware of the fact that the firm in which he is a partner has an interest in the outcome of this appeal, and in particular its success.

177. It should be recalled that the concerns raised in *Gardiner* about the duty of independence owed by an expert related not just to the opinion evidence that he or she gives but also the factual and other material that he or she provides, whether by way of disclosure or evidence (see eg. [73]). It should have been plain from the reasoning in *Gardiner* that that decision affected experts, such as surveyors, disclosing information and giving evidence on factual issues and not simply matters of expert opinion.

178. It is unusual for an expert to provide a purely factual witness statement and to be remunerated in that capacity, certainly within those fields which fall within the jurisdiction of this Tribunal. Nevertheless, if that should occur, and particularly where an expert uses his expertise to assemble and/or analyse factual information and data, he still owes the duty of independence to the Tribunal which was discussed in *Gardiner*. In this context, there is no real distinction between an expert assembling information and data to assist a court or tribunal in deciding an issue, and an expert giving opinion evidence for that same purpose. The evidence sought to be adduced in this case illustrates the point. Expert opinion evidence often depends upon an expert identifying and assembling the factual material upon which his or her expert opinion is based. The danger of non-disclosure of relevant information, and the risk of that being influenced by the financial interest of an expert, or his firm, in the success of the client's case, is common to both situations and potentially affects the ability of the court or tribunal to place reliance upon that expert's evidence,

in relation to either fact or opinion. As a matter of principle, it seems to us that it cannot be right for an expert to present even purely factual evidence, whether contested or not, without disclosing to the court or tribunal (and to other parties), that he is, or may become, entitled to remuneration dependent on the outcome of the proceedings in which that evidence is given, irrespective of the precise services to which that fee relates.

179. We consider that ordinarily the Tribunal should refuse to receive evidence from an expert where such an abuse of its process has occurred. However, on a wholly exceptional basis, we will address Mr Wilford's evidence to see whether, in conjunction with that of Mr Crabbe, the appellant would succeed under issue (vi).

180. It follows that we consider that we should draw the attention of the President of the Royal Institution of Chartered Surveyors to this decision. The Institution should have the opportunity to consider the implications of what happened in this case for the review it is carrying out of its Code of Conduct and Practice Statement for Surveyors acting as Expert Witnesses. The RICS may wish to consider the extent to which its Practice Statement in relation to, for example, conditional fee arrangements applies, or should apply, to a surveyor who provides a factual witness statement in litigation, and who does so acting in that capacity. We would expect professional bodies representing other experts who give evidence before this Tribunal to be addressing these issues as well. The Institution may also wish to consider whether the stance taken by Gerald Eve in this case involved a breach of its Code of Conduct or Practice Statement, having regard to the reasoning in *Gardiner*.

Issue (vi) – assuming the Appellant's construction of paragraph 2(7)(d) to be correct, whether the evidence demonstrates that a material change of circumstances occurred

181. For the purposes of issue (vi), we assume Mr Ormondroyd's construction of para. 2(7)(d) to be correct and so an economic or intangible matter resulting in a change which is physically manifest in the locality falls within Regulation 4(1)(b) of SI 2009 No. 2268 (see para. 36 above). The change which is said to have been physically manifest is the reduction in visitor numbers, and

182. Undoubtedly the numbers of visitors and their vehicles did decline in 2015 and 2016 relative to 2014 and earlier years. But Mr Wilford's data demonstrated that in other years there had also been decreases in visitor attraction, namely a reduction of 9.3% in 2011 followed by a further reduction of 11.2% in 2012. Mr Wilford says that these reductions were attributable not to changes in public attitudes to thrill rides, or other rides, but to other matters, such as competing attractions. This only serves to emphasise how important it is that, on its construction of para. 2(7)(d), the appellant must adduce sufficient evidence to demonstrate that the material change it relies upon is properly attributable to the cause it relies upon. In this appeal the issue we are asked to determine is whether the reduction in the numbers of visitors or their vehicles is properly attributable to a change in the attitude of members of the public to thrill rides, and to thrill rides at Alton Towers in particular, as a result of the Smiler crash.

183. We accept Mr Ormondroyd's submission that an analysis by comparing one hour with another hour, or even one day with another, is both uninformative and inappropriate. It is, for example, unhelpful to compare a particular date in one year with the same date in another year. In one year that date might have fallen on a bank holiday or within a holiday period and not in the other year, or the same date in successive years might be affected by radically different weather conditions or differences in other factors. What is required instead is an assessment as at the

material day (24 March 2016) of whether visitor numbers had materially changed over longer periods of time, so as to disregard changes attributable to irrelevant, short term effects.

184. There was some discussion as to the likelihood of the weather having played a part in the fall in visitor numbers, but the evidence on the point was scant. Both Mr Wilford and Mr Crabbe agreed that weather can be a factor, but Mr Wilford did not present any meaningful evidence on the point and Mr Crabbe, whilst acknowledging that Merlin kept weather records, relied only upon his recollection that there was no prolonged period of exceptionally good or bad weather between 2015 and 2017. Despite this dearth of evidence, it seems to us to be unlikely that weather played a part in the general fall in numbers, since the appellant refers to a drop over a long period of time, rather than say a week or month in which there might have been exceptional weather conditions.

185. However, where the appellant's case ran into great difficulty was Mr Wilford's attempt to show that factors such as wider economic conditions, pricing, and marketing activity made no significant contribution to the decline in visitor and vehicle numbers.

186. As regards the wider economy, we derived no assistance at all from Mr Wilford's table summarising data apparently extracted from two reports published by Visit England, "Visitor Attraction Trends in England 2015" and "Visitor Attraction Trends in England 2016". He accepted that he had not provided information to show that any of the data related to properties comparable to Alton Towers. The table provided only very general information from a wide variety of attractions (see para. 31 above). In our judgment the data was presented at such a high level of abstraction as to be of no real value. We accept Ms McCarthy's submission that the table does not show that wider economic conditions played no material part in the fall in visitor numbers at Alton Towers or to parks with thrill rides. It is of no use for Alton Towers to be compared with visitor attractions of all types, whether in England as a whole or in "the East Midlands". Those figures would be influenced, for instance, by the contributions made by visitors from overseas and by variations in the performance of different types of visitor attractions and the regions. Some attractions charge for admission, applying a variety of charging policies, and others are free. Even the data for leisure and theme parks includes all such businesses across the country and of all types and sizes.

187. Mr Wilford also sought to compare changes in the volumes of visitors to the four theme park attractions operated by the appellant. Once again, the comparisons were made at a high level of abstraction for what are very sophisticated businesses involving substantial capital investment. Even so, Legoland, a park without any thrill rides suffered a slight decline over the period 2014-16. Chessington World of Adventures, predominantly focused on the family market and with only a "limited number of thrill rides", suffered a 11% decline in 2014-15 and a 10% decline over the period 2014-16. This data is rather different from that obtained from Visit England and plainly suggests that business of this nature are subject to a range of economic influences.

188. We also found Mr Wilford's evidence concerning pricing policy to be of little assistance because it was based upon the lead price at the various locations. But Mr Crabbe's evidence was that only a tiny proportion of visitors actually pay the lead price, and there was no evidence before us as to the extent to which other theme parks operate identical, or even similar, discount schemes, so as to show that there is some consistency in pricing policy. Mr Wilford accepted in cross-examination that there was no evidence to show that the apparent rise in visitor numbers at

alternative locations, compared with the decline at Alton Towers was not related to pricing policy. There was nothing before us to show that the appellant's decision not to reduce prices, or to increase its two-for-one or similar deals, did not cause visitor numbers to decline.

189. As for marketing activity, Mr Crabbe accepted "absolutely" that marketing had an impact on visitor numbers – it was "the lifeblood" of the business. He accepted that publicity was "toned down" in the aftermath of the crash, and that the second tranche of television advertising in 2015 did not occur. Whilst we accept Mr Ormondroyd's submission that it was too late, post-crash, to arrange a further promotional deal for 2015, and that some marketing continued unabated, we find it highly significant that, for a park in which thrill rides played a prominent part, the marketing of those rides effectively ceased after the crash.

190. Looking overall at the material placed before the Tribunal, we are not persuaded that the appellant has provided anywhere near sufficient evidence to demonstrate that the reduction in the numbers of visitors or their vehicles in the locality of the hereditament is properly attributable to a change in the attitude of members of the public to thrill rides, and to thrill rides at Alton Towers in particular, as a result of the Smiler crash. The change defined by the appellant was not something which was "physically manifest" in the locality at the material day.

191. An analogy may be drawn between the circumstances of this appeal and the factual observations of the President in *Kendrick*. Essentially, the appellant here is relying upon a change in "footfall" or visitor rates which is related to consumer demand. Changes in visitor rates, especially for sophisticated businesses of this nature seeking to attract discretionary expenditure in the leisure market, are "the outcome of a vast range of economic and other factors" and so, in that sense, it may properly be said that the cause of a change upon which the appellant relies is "masked" by those other causes. That only serves to emphasise that the rather superficial analysis carried out in the present case could not be expected to demonstrate the line of argument upon which the appellant has sought to rely.

192. Accordingly, the appellant's case also fails under issue (vi).

Practical guidance for surveyors and tribunals

193. In most cases it is relatively straightforward to identify whether something falls within para. 2(7) of LGFA 1988, either when a list is compiled or subsequently when a material change of circumstances occurs. Where the issue is not straightforward, it may be helpful to consider issues in the order set out below, whether dealing with circumstances as at the compilation of the list or subsequently during the lifetime of that list:-

(i) Does the matter concern an intrinsic characteristic of the hereditament or of the locality, or is it an extraneous matter, for example, something to do with the personal attributes of the actual occupier or the way in which a party conducts its business? If the latter, then generally it will not fall within para. 2(7);

(ii) Does the matter concern a characteristic of the hereditament? If so the issue is whether it falls within para. 2(7)(a) or (b) (or either (c) or (cc) in the case of minerals or waste deposit hereditaments);

(iii) If the matter does not concern a characteristic of the hereditament, does it concern a characteristic of the locality in which the hereditament is situated? If so, does it fall within para. 2(7)(d) or (e)?

(iv) If the matter concerns a characteristic of the locality, but does not affect the physical state of the locality or concern the use or occupation of other premises there, does it nonetheless fall within the second limb of para. 2(7)(d)? Under that limb the question is whether the matter is *itself* physically manifest in the locality.

Of course, it should not be thought that this guidance is necessarily exhaustive as to all of the issues which may arise from time to time.

Conclusion

194. For the reasons given above this appeal fails under each of issues (i), (iii), (v), and (vi) and must therefore be dismissed.

Dated: 11 December 2018

The Hon. Sir David Holgate

Mr Peter McCrea FRICS