Neutral Citation Number: [2024] UKUT 356 (LC)

Case No: LC-2023-767

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE VALUATION TRIBUNAL FOR ENGLAND
VTE appeal number: CHG100663555

Royal Courts of Justice
Strand, London WC2A
15 November 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – ALTERATION OF RATING LIST – whether premises temporarily incapable of beneficial occupation due to water penetration to be removed from rating list (or value reduced to £1) – repair assumption – whether remedial work was "repair" to be assumed to have been successfully completed – para 2(1)(b), Sch 6, Local Government Finance Act 1988 – appeal dismissed

BETWEEN:

CAREY GROUP PLC

Appellant

-and-

MR A RICKETTS
(VALUATION OFFICER)

Respondent

1 Hand Axe Yard,
London WC1X 8QF

Martin Rodger KC, Deputy Chamber President and Mark Higgin FRICS FIRRV

8 October 2024

Cain Ormondroyd, instructed by Charles Russell Speechlys, for the appellant
Matthew Donmall, instructed by HMRC Solicitors' Office, for the respondent

The following cases are referred to in this decision:

Benjamin v Anston Properties Ltd [1998] 2 EGLR 147
De Silva and Another v Davis (VO) [1983] 1 EGLR 211
Elmcroft Developments Ltd v Tankersley-Sawyer [1984] 1 EGLR 47
Gibson Investments Ltd v Chestertons plc [2002] 2 P & CR 494
Johnson (VO) v H&B Foods Ltd [2013] UKUT 539 (LC)
London Borough of Hounslow v Waaler [2017] EWCA Civ 45; [2017] 1 WLR 2817
Post Office v Aquarius Properties Ltd [1987] 1 All ER 1055
Quick v Taff-Ely BC [1986] QB 809
Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] QB 12
Sinclair Gardens Investments (Kensington) Ltd. v Franks (1998) 76 P. & C.R. 230
SJ &J Monk v Newbigin [2015] 1 WLR 4817
SJ & J Monk v Newbigin [2017] UKSC 14; [2017] 1 WLR 851
Sole v Henning (V.O.) [1959] 3 All. E.R. 398
Wellcome Trust Ltd. v Romines [1999] 3 E.G.L.R. 229
Woolway v Mazars [2015] UKSC 53; [2015] 1 AC 186

Introduction

1. Should a hereditament which was temporarily incapable of beneficial occupation be removed from the rating list or, for administrative convenience, have its rateable value reduced to a nominal £1?

2. In *SJ & J Monk v Newbigin* [2017] 1 WLR 851 the Supreme Court held that the rating list could be changed in that way where office premises were being radically altered by extensive works, so that their mode or category of occupation could no longer be described as "offices and premises" and, in reality, had become a "building undergoing reconstruction". The statutory valuation assumption that the hereditament was in a state of reasonable repair (paragraph 2(1)(b) of Schedule 6, Local Government Finance Act 1988) did not require that that reality be ignored.

3. This appeal concerns office premises (the Property) on the lower floors of a newly constructed building which, it is agreed, were incapable of beneficial occupation between March 2020 and April 2021. The cause of that condition was not, as it had been in *Monk*, a programme of works undertaken by the owner of the building. Instead, the premises were rendered unoccupiable when water penetrated the basement through a joint in the exterior wall and ponded beneath the raised office floor, creating damp conditions in which mould and fungi flourished, giving rise to an unacceptable hazard to health. The problem was solved, and the hereditament returned to use, by remedial work to seal the joint.

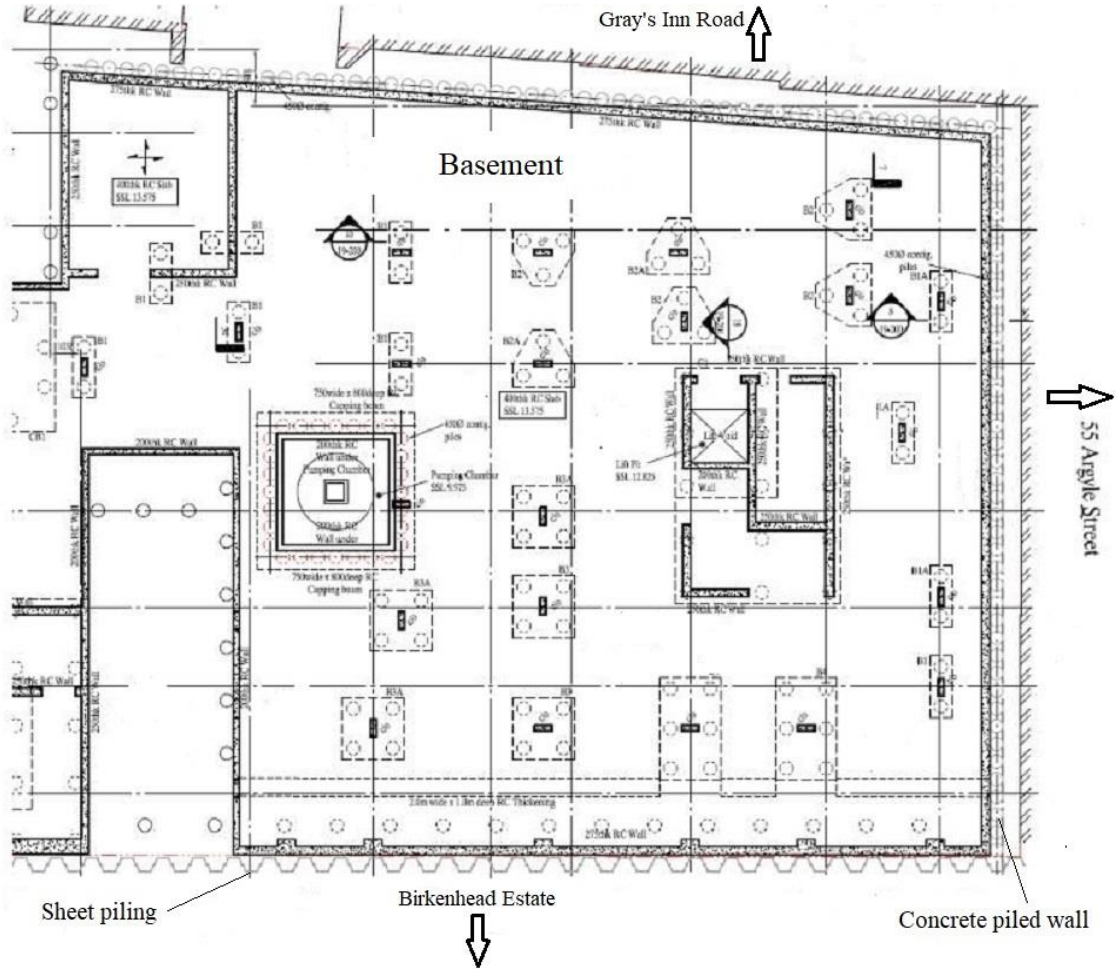
4. It has not been argued that the admitted fact that the Property was incapable of beneficial occupation was enough, by itself, to justify its removal from the rating list, and we are not required to address that issue. The ratepayer's case, presented by Mr Cain Ormondroyd, is that the remedial works which were necessary to prevent the ingress of water are not capable of being described as "repair", and that there is therefore no basis on which the real condition of the premises can be ignored when determining their rateable value. The valuation officer, represented by Mr Matthew Donmall, disagrees and contends that the statutory assumption concerning the state of repair of the hereditament is engaged, that the remedial work was work of repair, and that it must therefore be taken to have been carried out at the date of the ratepayer's proposal to reduce the rateable value in the 2017 list to £1.

The facts

5. As we saw on our inspection, Hand Axe Yard is an office and residential development completed in 2018. It is situated about 200 metres south-east of Kings Cross railway station with entrances from Gray's Inn Road and St Chad's Street. The residential element contains three-storey townhouses and apartment blocks of up to six storeys. The Property is the only commercial element in the scheme and occupies the ground and basement levels at the southern end of the development. Access to all parts of the scheme is by an elongated central courtyard.

6. In order to create the basement accommodation, the developer excavated below ground level. At the eastern side of the site where the development abuts the Birkenhead Estate

the basement perimeter was formed using sheet piling of interlocking steel sections. Viewed from above sheet piling has a corrugated appearance. The following plan shows the general layout of the basement but not the precise extent of the hereditament.



7. Internally the Property comprises modern office accommodation including raised floors and air conditioning, meeting rooms and breakout space, kitchens and tea points, IT rooms and storage. Apart from the disabled facilities, the toilets and showers are in the basement. Internally the walls are plastered, and the ceiling is the underside of the floor slab for the floor above. The mechanical and electrical servicing is attached to the slab and is visible and accessible. The Property amounts to 765.8 m^2 of floorspace split between 302.8 m^2 on the ground floor and 463.0 m^2 at basement level.

8. The appellant was granted an occupational underlease of the Property on 8 December 2017 and after fitting out works were completed took up occupation in October 2018. Mr Sugrue of the appellant's management team explained that significant drainage and water ingress issues had been experienced between the grant of the lease and the commencement of fitting out. These included ponded water on the concrete floor in the basement, which appeared to be coming through the joint between the floor and the basement walls. As part of the developer's snagging works a water proofing resin was injected into this joint in March 2018 and the area was allowed to dry out. The problem appeared to have been solved by the time fitting out began.

9. In early February 2020 further water ingress became apparent. Mr Sugrue observed moisture build up in various parts of the lower ground floor, including a meeting room and the southern part of the offices. Mould was also affecting the lift lobby in the basement of the adjoining residential area of the development.

10. An inspection on 24 February 2020 revealed water ingress through the structural wall, as well as drainage smells and a fly infestation. Mr Sugrue recorded that the basement sump pump was not working, mould was apparent in corridors and on doors, fungus was growing on skirting boards, water was penetrating through the ceiling above the gym, and the foul drainage was cross venting through the mechanical ventilation system.

11. To identify the causes of the various problems the appellant engaged Mr Simon Levy FRICS, a chartered building surveyor, who visited the Property on 26 February and provided a written report. He found substantial water ponding in the void below the raised floor in the basement. He estimated that the water was between 25 and 40 mm deep. Moisture readings taken in meeting room 3 revealed high levels of moisture in the perimeter concrete walls. Mr Levy confirmed the presence of damp and mould on the plaster finishes.

12. Mr Levy advised that contrary to normal good building practice there was no 'kicker' at the base of the main walls surrounding the basement. A kicker is an upstand built into the floor slab to which the walls are attached. In this case there was simply a corner joint at the junction between the concrete floor and vertical wall. Mr Levy suggested that a construction joint of this type has a greater susceptibility to seepage than a 'kicker' arrangement. He noted that the water in the floor void was odourless so was unlikely to have resulted from a sewage overflow or similar and that the sump pumping system which assisted in ground water drainage and had been inoperable for some time was back in operation. He concluded that the ponded water and resultant damage to plasterwork were caused by seepage through the structure of the building with which the sump pumping system appeared unable to keep pace. He suggested that the mould presented a hazard to respiratory health and the ponding water could create electrical safety issues.

12. Mr Levy recommended that the raised floor in the basement be lifted to expose the entirety of the perimeter walls. It would also be necessary to pump out any standing water and to dry the floor. Some form of patching or tanking could be appropriate, but he did not propose a specific remedial scheme.

13. The Property had remained in the appellant's beneficial occupation from the completion of fitting out in October 2018 until the problems became acute at the beginning of 2020. After receiving Mr Levy's report the appellant concluded that there was a risk to the safety and welfare of its employees. A decision to close the office was taken on the morning of 23 March and notified to all staff later the same day. By 27 March it had been vacated. Mr Sugrue explained that although this closure coincided with the work from home instructions issued by the Government on the evening of 23 March at the start of the Covid-19 pandemic, that was simply a coincidence, and the office would have had to close in any event because of its insanitary condition.

14. On 30 March 2020 the appellant made an insurance claim under a latent damage policy. In it the presence of water on the floor slab was described and it was reported that "the water penetration has caused rising damp which has damaged the plasterboard throughout the lower ground floor". The work which was thought to be necessary was said to be to repair the structural wall where it was allowing water penetration and to remedy the damage to the internal partition walls.

15. A much later report by a health and safety consultancy produced for the appellant in February 2021, a year after the problems were first reported but before they had been remedied, confirmed that at that time the Property remained in an unsuitable condition for the appellant's workforce to work in.

16. The appellant then commissioned Pringeur James, consulting engineers who had been involved in the design of the development, to inspect the Property. They produced a short report on 19 May 2020 which included a plan showing details of the basement construction and photographs taken during the construction phase of the project. The report provided some background detail relating to the scheme of construction and suggested that the sheet piled wall adjacent to the Birkenhead Estate should have been removed after the installation of the basement reinforced concrete box but was still present. Plywood shutters in front of the sheet piled wall also remained in place and this arrangement left a significant void between the concrete wall and the sheet piles which effectively formed a 'sump' where ground water could collect.

17. At the base of the concrete wall adjacent to the Birkenhead Estate locations were observed where remedial pressure grouting had taken place. These retrospective steps suggested to Mr Pringeur James that waterproofing measures had failed. The pressure grouting appeared not to have been completed and water flow was occurring through the wall construction joint line. The report concluded that the presence of the 'sump' and the water in it may be the reason for the water ingress.

18. A more detailed report was provided for the claimant by Ove Arup and Partners Ltd on 6 November 2020. The author of the report was John Read MEng, CEng, MICE, MIStructE, an Associate Director with 33 years' experience in the design, construction inspection and appraisal of buildings who inspected the Property on 5 September 2020 and had sight of plans and specifications for the construction phase of the development as well as the previous reports.

19. Mr Read noted several manholes and a pumping chamber below the raised floor in the basement and recorded that the pump/control unit serving the chamber had failed in December 2019 causing back flow into the basement. He noticed a lack of an adequate seal on the pumping chamber cover and attributed the fly infestation to this deficiency.

20. At the time of his visit Mr Read saw no obvious signs of any ongoing/significant water penetration through the wall which would lead to continuing dampness in the underfloor void. He did, however, find evidence of past leaks and of remedial grouting. He found no evidence of ongoing seepage (weeping or beading water) although he did discern some surface dampness but not in clearly defined damp patches which would be indicative of significant ongoing leaks. He came to the same conclusion as Mr

Pringeur James that the leaks were closely associated with wet weather, when 'perched' water (essentially a 'pocket' of water situated above ground water level) external to the wall adjacent to the sheet piling had found its way into the basement. In particular this was apparent in the area near the neighbouring residential basement. The water table had been detected at a depth of 14.5 metres, well below the area where the leakage was occurring, and Mr Read concluded that the problem was not related to the performance of the drainage system but was a consequence of a defect in the waterproofing of the basement wall.

21. After reviewing the plans of the wall sections, Mr Read commented on a narrowing of the basement wall thickness at exactly the location at which the leaks appeared to be occurring above the floor level behind the plasterboard lining. Such a narrowing would have an impact on the waterproofing design, and he noted that no waterproofing membrane was shown on the plans available to him although they may have been shown on the waterproofing specialist's details. He saw no evidence that a membrane had been used on the outside of the wall, and it appeared to him that the sole waterproofing measure employed had been an additive to the concrete. He recommended monitoring any seepage, especially following heavy rainfall.

22. The developer was given a copy of Mr Read's report and in January 2021 Rascor, specialist waterproofing contractors, were asked to provide proposals for remedial works to deal with the leak. Following an inspection, Rascor described the main source of the groundwater ingress as "a failed waterstop on the construction joint between the basement floor slab and the liner wall at the kicker over a distance of approximately 25 linear metres". They proposed injecting the leaking joint with a hydrophilic waterproofing resin and then overbanding the joint with a flexible polymer cementitious waterproof coating up the basement wall to a height of a metre and extending over the floor slab to a distance of 350mm. The raised floor pedestals (to which the floor surface attaches) within the 350mm coating zone would be treated with a polyurethane waterproof coating.

23. These works were completed in April 2021 and took three to four weeks. Their cost is unknown and they are assumed to have been undertaken at the expense of the developer or one of its contactors.

The rating proceedings

24. This appeal has its origins in a 'Check' submitted by the appellant's representative, Mr James Winbourne MRICS of Winbourne Martin French. The 'Check' submission was made on 8 September 2020 and stated that the Property was incapable of beneficial occupation and had been vacated on 27 March 2020 due to flooding and drainage problems. The Property had a 2017 rating list assessment of rateable value £372,500 effective from 1 October 2018 and the submission proposed that it should be taken out of the list from the date of vacation; presumably as an alternative to that course it also sought an assessment of the rateable value as £1 and a description of the Property as a 'building undergoing construction/repair'.

25. Mr Winbourne's 'Challenge' submission of 19 March 2021 took a slightly different approach and suggested there had been a material change of circumstances namely that 'the property is incapable of benefitable occupation as a consequence of an inherent defect manifested by flooding, raw sewage and infestation, mould'. The Valuation Officer did not agree and confirmed the rating list entry by a decision issued on 22 February 2022.

26. By its decision of 24 October 2023, the Valuation Tribunal for England dismissed the appellant's appeal against the valuation officer's decision, and it is against that dismissal that this appeal is brought.

The applicable legal principles

27. Non-domestic rates are a tax on property and the unit of property which is the subject of tax is the 'hereditament'. Section 64(1) of the Local Government Finance Act 1988 (the 1988 Act), defines a hereditament by reference to the definition in section 115(1) of the General Rate Act 1967, which provided that:

> '"hereditament" means property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list.'

28. An important consideration in determining whether a unit of property is liable to be shown as a separate item in the valuation list, and is therefore a hereditament, is whether it is capable of beneficial occupation. As Lord Sumption JSC noted at the start of his judgment in *Woolway v Mazars* [2015] UKSC 53, historically, local authority rates were payable in respect of the rateable occupation of hereditaments, and that continues to shape the law in this area even though non-domestic rates are also now imposed on unoccupied hereditaments.

29. Schedule 6 of the 1988 Act contains provisions about valuation for the purposes of non-domestic rating. Paragraph 2(1) provides that the rateable value of a hereditament is taken to be equal to the rent at which it might reasonably be expected to let from year to year if let on the material day on certain assumptions. The second assumption, in paragraph 2(1)(b), 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". The third assumption, in paragraph 2(1)(c), 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 agreed rent.

30. In *SJ & J Monk v Newbigin*, which we mentioned at the start of this decision and to which we will now refer simply as *Monk*, Lord Hodge considered the relationship between the repairing assumption in paragraph 2(1)(b) of Schedule 6, 1988 Act, and the two limbs of the reality principle i.e. the fundamental principle that a hereditament is to be valued as it in fact existed at the material day, both as to its physical state and its use. To illuminate that relationship he first reviewed the legislative history of the repairing assumption, at paragraphs [16] to [22].

31. We were taken through many of the same cases in the course of argument but, in view of the way in which the appellant's case narrowed it is not necessary for us to refer to them in any detail. In summary, before the enactment of the 1988 Act the assessment of rateable value was undertaken on an assumption that the hypothetical landlord would bear the cost of repairs. Case law interpreted this assumption as entailing that the landlord must be taken first to have put the premises into repair at the start of the notional new letting. In making that assumption, the cases distinguished between a mere lack of repair, which did not affect rateable value because of the hypothetical landlord's obligation to repair, and redevelopment works which made a building uninhabitable.

32. That settled state of the law was disrupted by paragraph 2(1) of Schedule 6 to the 1988 Act, in its original form, which reversed the previous assumption and required that the hypothetical tenant be taken to undertake to bear the cost of repairs. In view of this change, the Lands Tribunal determined in *Benjamin v Anston Properties Ltd* [1998] 2 EGLR 147 that it could no longer be assumed that the landlord would remedy any existing disrepair before letting the premises to a new tenant, with the result that the rateable value would fall to be determined on the basis that the hereditament was in its actual condition on the material day, and not in any different assumed state of repair.

33. Paragraph 2(1) of Schedule 6 to the 1988 Act was amended by section 1 of the Rating (Valuation) Act 1999 to reinstate the previous assumption that the hereditament was in a state of repair at the commencement of the notional letting. As Lord Hodge pointed out, the amended repair assumption is concerned only with the physical state of the hereditament and does not address the second limb of the reality principle, which requires that the hereditament be valued in its current mode of occupation. He explained, at paragraph [20]:

> "The 1999 Act, by introducing the assumption of reasonable repair at the outset of the hypothetical tenancy ("the repair assumption"), is not addressing the question of whether the premises were capable of beneficial occupation, which, in the context of a building undergoing redevelopment, is a logically prior question. Thus the repair assumption (para 2(1)(b)) applies to matters affecting the physical state of the hereditament (para 2(7)(a)) but not to the mode or category of occupation of the hereditament (para 2(7)(b))."

34. At paragraph [21] Lord Hodge derived support for his view of the relationship between the repair assumption and the reality principle from the speech of the promoter of the 1999 Act who had explained to Parliament that the sole purpose of the legislation was to reverse the effect of *Benjamin v Anston Properties* and to reinstate the former principle. Lord Hodge then observed:

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

35. At paragraph [22], Lord Hodge then referred to an approach suggested in submissions received from the Rating Surveyors' Association and the British Property Federation, which he considered helpful, namely:

> "[T]hat, where works were being carried out on an existing building, the correct approach was to proceed in this order: (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament, (ii) if the property is a hereditament, to determine the mode or category of occupation and then (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. The first two stages of that process involve the application of the reality principle. At the third stage the valuation officer applies the statutory assumption in para 2(1)(b) if the reality is otherwise. In my view, this is a helpful approach where a building is undergoing redevelopment."

36. In order to distinguish between premises "undergoing reconstruction rather than simply being in a state of disrepair" the subjective intentions of the person undertaking the works were not relevant and the physical state of the premises must be assessed objectively. If, as was the case in *Monk*, "the premises were in the process of redevelopment and no part of them was capable of beneficial use", the repair assumption could not be applied to override the reality principle and to create a hypothetical tenancy of the previously existing premises in a reasonable state of repair. As Lord Hodge explained, at paragraph [23]:

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

37. Despite the clarity of the reasoning in *Monk*, a question mark may remain over the relationship between the reality principle and the repair assumption where premises are rendered incapable of beneficial occupation for reasons other than a programme of radical alterations. The appellant's case before the VTE was supported by representations settled by Mr Ormondroyd which asserted, on the basis of the analysis at paragraph [23] of *Monk*, that if the property is not capable of rateable occupation it is not a hereditament and thus there can be no question of applying the repairing assumption. Support for that broad proposition could be found in *Ryde on Rating*, in which, at paragraph [297], the learned author suggests that, following *Monk*:

> "It now appears that, where works are being carried out on an existing building, a series of tests need to be applied. First, taking the property *rebus sic stantibus*, one has to assess whether it is capable of rateable occupation. If it is not, then it is not a hereditament, and the second assumption of paragraph 2(1) of Schedule 6 is not engaged."

38. Lord Hodge's reasoning was anchored in the facts of *Monk* as is clear from paragraph [20] where he considered the scope of the repair assumption "in the context of a building undergoing redevelopment", and at paragraph [22] where he recorded the interveners'

submission as applying "where works were being carried out on an existing building" but qualified his approval of it by saying that "this is a helpful approach where a building is undergoing redevelopment". The passage from *Ryde* quoted above appears to adopt the interveners' submission in its original form, without Lord Hodge's apparent limitation to buildings undergoing redevelopment.

39. The only case to which we were referred in which *Monk* has been applied was the Tribunal's decision in *Jackson (VO) v Canary Wharf Ltd* [2019] UKUT 136 (LC), which concerned office premises undergoing reconstruction which had been stripped back to a shell condition and which were awaiting agreement with a new tenant before they would be fitted out. There was no doubt that, by reason of their undergoing redevelopment, the premises were incapable of beneficial occupation, and that was enough to dispose of the appeal on the basis that they were not a hereditament. But that case goes no further than *Monk* and does not assist when considering the role of the repair assumption where premises are incapable of occupation because they are in disrepair.

40. It should also be noted that, before 1988, the well-established distinction between a building undergoing alteration and modernisation and a building in need of repair appears to have been maintained irrespective of the effect which the disrepair had on the capacity of the building for beneficial occupation. One of the cases to which Lord Hodge referred as an illustration of that distinction was *De Silva and Another v Davis (VO)* [1983] 1 EGLR 211, which concerned a maisonette on two floors in a state of serious disrepair such that the accommodation was not capable of occupation. Although the owner intended to convert the maisonette either into offices or into a number of flats, no work had yet been undertaken. The owner proposed that the rateable value should be reduced to a nominal sum, but the Lands Tribunal applied the repair assumption and valued the premises as a maisonette.

41. In the event, the question whether, after *Monk*, premises rendered incapable of beneficial occupation by reason of disrepair should not appear in the rating list at all because they are not a hereditament, is not one which we have been asked to determine in this case. Mr Ormondroyd's submission was a more limited one, which assumed that, in principle, the repair assumption applied to the appeal premises and focused on whether the remedial work required to render them capable of occupation was repair within the meaning of paragraph 2(1)(b) of Schedule 6.

42. As Lewison LJ observed in giving the leading judgment in the Court of Appeal in *SJ &J Monk v Newbigin* [2015] 1 WLR 4817, at paragraph [17]: "… what is or is not repair is to be decided according to the common law that applies as between landlord and tenant". In support of that proposition he referred to *Camden LBC v Civil Aviation Authority* [1980] RA 369 in which the Court of Appeal applied conventional common law principles in upholding a decision of the Lands Tribunal that extensive remedial work required to strengthen the structure of a building containing high alumina cement was not work of repair and so could not be assumed to have been carried out by the hypothetical landlord before the material day.

43. For an up to date summary of the common law principles on the meaning of an obligation to repair, reference can be made to *London Borough of Hounslow v Waaler*

[2017] EWCA Civ 45 at paragraph [14], where Lewison LJ identified a number of propositions about the meaning of "repair" as it applies between landlord and tenant:

> "14. I do not believe that the following propositions are controversial in the context of contractual liability:
>
> i) The concept of repair takes as its starting point the proposition that that which is to be repaired is in a physical condition worse than that in which it was at some earlier time: *Quick v Taff-Ely BC* [1986] QB 809.
>
> ii) Where the deterioration is the product of an inherent defect in the design or construction of the building the carrying out of works to eradicate that defect may be repair: *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12.
>
> iii) Prophylactic measures taken to avoid the recurrence of the deterioration may also be repair: *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* at 22, *McDougall v Easington DC* (1989) 58 P & CR 201, 206.
>
> iv) In principle where there is a choice of methods of carrying out repair, the choice is that of the covenantor provided that the choice is a reasonable one: *Plough Investments Ltd v Manchester CC* [1989] 1 EGLR 244.
>
> v) At common law there is no bright line division between what is a repair and what is an improvement: *McDougall v Easington DC* at 207.
>
> vi) The use of better materials or the carrying out of additional work required by building regulations or in order to conform with good practice does not preclude works from being works of repair: *Postel Properties Ltd v Boots the Chemist* [1996] 2 EGLR 60.
>
> vii) Where a defect in a building needs to be rectified, the scheme of works carried out to rectify it may be partly repair and partly improvement: *Wates v Rowland* [1952] 2 QB 12."

44. A particularly relevant illustration of Lewison LJ's first proposition is provided by *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055, the facts of which are close to those of this case. An office building was let to a tenant which covenanted to keep it "in good and substantial repair and condition". The building had a basement which was originally dry but which later became wet after the water table in the locality rose. The water entered the basement and lay ankle deep on the floor as a result of a defectively constructed kicker joint between the walls and the floor. The joint was found to be in the same condition as it had been when it was constructed, and there was no evidence that the presence of the water had resulted in any damage to any part of the building. At first instance the Judge had determined the case by considering whether, as a matter of degree, any of the schemes of work to remedy the water penetration were repair, as contrasted with work of alteration. The Court of Appeal decided that that was the wrong starting point. Ralph Gibson LJ said:

> "I see no escape from the conclusion that if, on the evidence, the premises demised are and at all times have been in the same physical condition … as they were when constructed, no want of repair has been proved for which the tenants could be liable under the covenant."

Slade LJ agreed, adding: "a state of disrepair, in my judgment, connotes a deterioration from some previous physical condition."

45. In his judgment in the Court of Appeal in *Monk*, at paragraph [26], Lewison LJ cited *Post Office v Aquarius* as authority for the further proposition that: "If it is shown that property is worse than it was at some earlier time, it does not matter whether the deterioration resulted from error in design, or in workmanship, or from deliberate parsimony or any other cause." In applying the repair assumption to the facts of *Monk* it therefore did not matter that the hereditament had come to be in a worse condition than before because of a deliberate decision to strip out the interior.

46. The critical question in *Monk* was the extent to which the repair assumption displaced the reality principle. In this appeal the critical question is whether the consequence of applying the repair assumption is that the defective joint must be assumed to have been remedied and the basement to have been dry on the material day. That requires that remedying the defect must involve "repair" and not some different activity.

47. One other aspect of Lewison LJ's first proposition in *Hounslow v Waaler* should be noted. As already explained, an inherent defect in design or workmanship, such as the defective kicker joint in *Post Office v Aquarius*, does not require "repair" until the defect results in damage. But not every instance of damage will be sufficient to trigger an obligation to repair. As Lewison LJ explained, it is necessary for "that which is to be repaired" to be in a physical condition worse than it was at some earlier time. In other words, in the context of a covenant to repair in a lease, the subject of the covenant (that which is to be repaired, and not some other thing) must be in a state of disrepair before the repairing obligation will be engaged. That can be illustrated by the decision in *Quick v Taff-Ely BC* [1986] QB 809.

48. In *Quick* a local authority landlord was bound by the statutory repairing covenant in section 11, Landlord and Tenant Act 1985, to keep the structure and exterior of a house in repair. Although the house had been built in compliance with the building standards of the time, uninsulated concrete window lintels, single glazed metal frame windows and an inadequate central heating system caused severe condensation on the walls, windows and metal surfaces in all of the rooms. The condensation caused fungus and mould and an offensive smell of damp; it also caused some plaster to crumble and damaged some woodwork, particularly inside and behind fitted kitchen cupboards but also some of the wooden surrounds into which the metal windows frames were set. There was no damage to the frames themselves, or to the lintels.

49. The County Court judge ordered the landlord to remedy the condensation problem by replacing the window frames with wooden or PVC frames and by insulating or replacing the concrete lintels. The landlord appealed to the Court of Appeal and the appeal succeeded on the basis that there was no damage to the subject matter of the covenant (the structure and exterior of the house) which required such extensive works. Dillon LJ said this:

> "In my judgment, the key factor in the present case is that disrepair is related to the physical condition of whatever has to be repaired and not to questions

> of lack of amenity or inefficiency. … Where decorative repair is in question one must look for damage to the decorations, but where, as here, the obligation is merely to keep the structure and exterior of the house in repair, the covenant will come into operation only where there has been damage to the structure and exterior which requires to be made good."

50. Lawton LJ said that the trial judge should first have identified the parts of the exterior and structure of the house which were out of repair and then have gone on to decide whether, to remedy those defects, it was "reasonably necessary" to replace the concrete lintels and the single-glazed metal windows, which were probably the major causes of excessive condensation in the house. Neill LJ recognised that the only damage to the structure and exterior was to some of the wooden surrounds and to some of the plaster but considered that "a realistic way of effecting those repairs" did not require the replacement of the metal window frames with wooden or PVC frames.

51. Under the statutory rating hypothesis, the repair assumption applies to the whole of the hereditament, not simply to the structure and exterior. It follows that if, as a result of defective design or poor workmanship or some other latent defect, any part of the hereditament has become damaged, and the only realistic way of remedying that damage is to carry out additional work which goes further than putting it back into its original condition, (and assuming it is not work which a reasonable landlord would consider uneconomic) the repair assumption requires that the rateable value of the hereditament be determined on the basis that those works have been carried out at the material day.

52. Finally, it is relevant to mention one point of tribunal procedure. Appeals to the Tribunal in rating cases proceed as re-hearings, as they formerly did before the Tribunal's statutory predecessor, the Lands Tribunal. As the Tribunal (Sir Keith Lindblom, Chamber President and Mr A.J. Trott F.R.I.C.S.) explained in *Johnson (VO) v H&B Foods Ltd* [2013] UKUT 539 (LC), at paragraph [64], when it considers an appeal by way of a rehearing, the Tribunal does not disregard the decision of the tribunal below, in this case, the VTE. The appellant is required to satisfy the Tribunal that the decision appealed against was wrong (see the decision of the Court of Appeal in *Sole v Henning* (V.O.) [1959] 3 All. E.R. 398 at 399H, and the decisions of the Lands Tribunal in *Sinclair Gardens Investments (Kensington) Ltd. v Franks* (1998) 76 P. & C.R. 230, at pp.234-5, and *Wellcome Trust Ltd. v Romines* [1999] 3 E.G.L.R. 229, at pp.230-3). The practical consequence of this rule is that, on the re-hearing, the burden of proving matters of fact falls on the appellant.

The parties' submissions in outline

53. In his skeleton argument Mr Ormondroyd submitted that the same basic approach as had been applied in *Monk* should be applied at least to all cases which, viewed objectively, involve works of "renewal, refurbishment or improvement" or works of "reconstruction" rather than works of repair such as might be done pursuant to a repairing obligation in an occupational lease. It should therefore be applied to cases where a building is subject to works to correct structural defects or defects of design or construction which produce a better building than the one which existed when it was first constructed.

54. Mr Ormondroyd made a second submission in writing to the effect that if a property is not capable of rateable occupation it is not a hereditament and thus there can be no question of applying the repairing assumption. He suggested that the Tribunal's decision in *Jackson v Canary Wharf* supports this application of the reasoning in *Monk*, and said that the Tribunal held in that case that if premises are not capable of beneficial occupation they are not a hereditament. The repair assumption should not be applied to premises which are incapable of beneficial occupation unless objective evidence shows that the cause of that condition is what Mr Ormondroyd called "simple damage, rather than forming part of any intentional plan to change or improve the premises".

55. In his oral submissions Mr Ormondroyd shied away from the second of these submissions and placed no reliance on *Jackson v Canary Wharf.* He conceded that the simple fact that a building is incapable of beneficial occupation is not sufficient on its own to mean that the repair assumption does not apply. He nevertheless submitted that where works are being undertaken and the hereditament is incapable of beneficial occupation it should appear in the list as a building undergoing reconstruction with a nominal rateable value. He also placed reliance on *Post Office v Aquarius* which he said was analogous as there was no evidence of damage to the structure of the Property. In the absence of a state of disrepair, the statutory repair assumption did not require that the defect which permitted water to enter the Property should be assumed to have been rectified.

56. For the respondent VO, Mr Donmall submitted that the repair assumption applied on 28 March 2020 because the building had been in a state of disrepair and had experienced damage in that, after a dry period following the resin injection carried out in 2018 the water had returned, indicating there had been a failure of the previous repair and a deterioration from the 2018 condition. This had given rise to extensive mould and fungi which represented a risk to health and had caused damage to partition walls. The existence of damage was sufficient to distinguish this case from *Post Office v Aquarius* and it should therefore be assumed that the remedial work had been carried out by the material day.

Discussion and conclusion

57. There was some initial uncertainty whether the material day for the purpose of the proposal to alter the list was 27 March 2020, the date on which the Property was vacated or 8 September 2020, the date on which Mr Wimbourne submitted his proposal. Nothing now turns on that debate as Mr Donmall informed us at the start of the hearing that the valuation officer concedes that the Property had been incapable of beneficial occupation on each of those dates.

58. The Property was vacant between 27 March 2020 at the latest and a date in April 2021 at the earliest. Structurally its condition remained more or less constant until the commencement of remedial works towards the end of that period, but the evidence suggests that the environment within the building fluctuated. The water which lay on the basement concrete floor in February 2020 had gone when Mr Read visited in November. We do not know whether between those dates the ingress of water ebbed and flowed repeatedly or whether a one-off incursion necessitating the evacuation of the Property then subsided or was pumped away.

59. The other unknown concerns the efficacy of the remedial work carried out after the appellant had signed its lease. It is possible that this was the incomplete work which Pringeur James saw when they inspected in May 2020, or it may be that the injection holes they observed were evidence of an earlier effort at waterproofing the joint. Mr Sugrue was unable to assist on that point. We are therefore left uncertain whether the water which entered the basement at the end of 2017 did so because previous remedial works had failed. Nor can we be sure whether the snagging works which were then carried out by the developer before fitting out began were initially successful, but then deteriorated and eventually failed, or whether they were ineffectual from the outset with their inadequacy only becoming apparent at the beginning of 2020. The route by which water entered the basement was certainly through the joint between floor and wall and the mechanism seems likely to have been an overflow of perched water which had built up in or around the space from which the sheet piling ought to have been removed, but we cannot say whether these incursions were frequent or infrequent.

60. It is common ground that the Property was incapable of beneficial occupation due to the propensity for water to enter the basement between March 2020 and April 2021. The length of that period should not be allowed to create an impression that the solution to the problem was complex or required extensive works. The concrete joint was identified as the likely source of the problem by March 2020. The remedial work was relatively simple in its design, took only a few weeks to complete and is unlikely to have been particularly expensive. The evidence did not focus on the causes of the lengthy delay in carrying out the work, and we make no findings about that, but there appear to have been two likely explanations, namely, disagreement over who was responsible for carrying the works out and the impact of the pandemic.

61. It is also agreed that some of the defects at the Property should be disregarded. The broken pump and the poorly sealed manhole cover in the basement both contributed to the insanitary conditions, but they were unconnected to the structural issue with the concrete joint. There can be no doubt that the remedial work to return the pump to a functioning condition and to re-seal the manhole to prevent smells and flies from escaping was work of repair. It was also obviously work which no reasonable landlord would consider to be uneconomic. Whatever the material day it must therefore be assumed to have been carried out.

62. The only issue concerns the joint between the concrete floor and the concrete wall through which water could, and did, penetrate, and the consequences of that water penetration. Was the work to seal that joint which was carried out by Rascor in April 2021 a "repair" within the meaning of paragraph 2(1)(b) of Schedule 6, 1988 Act, or was it something other than a repair?

63. Once the appeal is reduced to that relatively simple question the answer is not in doubt.

64. For a hereditament to be assumed to be in a state of reasonable repair, as the statutory repair assumption dictates, any deterioration of the hereditament must have been arrested and corrected and it must have been restored to a former, better condition from which it had declined. Repair is the converse of disrepair, as Lewison LJ put it in *Monk* in the Court of Appeal, at [26]. Counter-intuitive though it may appear, although the basement in *Post Office v Aquarius* was functionally inadequate it was not in a state of disrepair

and it did not require repair because it had not deteriorated from a previous condition; the kicker joint had always been inadequate due to poor workmanship or poor design and there was no evidence that any part of the defective building had suffered deterioration since its original construction. If the repair assumption had been applied to that structure, it would have been assessed in its actual condition, ankle deep in water, because the work to correct that condition was not repair. If the work was not repair, the repair assumption would not have required that it be assumed to have been carried out so as to leave the hereditament in a state of repair.

65. For the reason we have already explained at paragraph 53 above, the burden of proving that the basement was not in a state of disrepair falls on the appellant. But we do not base our decision on the burden of proof.

66. Nor do we base our decision on the fact that at least one previous attempt had been made to seal the joint which had been unsuccessful. Mr Donmall submitted that the remedial work carried out by the developer at the end of 2017 had succeeded, and that the waterproof grout injected into the joint had subsequently deteriorated and failed. That was said to be demonstrated by the fact that the basement had been left for six weeks to dry out after which the appellant had been satisfied that the problem had been cured and had commenced its own fitting out works. But the evidence does not show that the original remedial work succeeded; it shows only that there was no further water penetration for a period of time, possibly for more than two years, and that the problem was not observed again until early in 2020. The evidence does not show whether that was due to the temporary success of the remedial work or whether the repair was ineffectual but water accumulated in sufficient quantity to reach and then penetrate the joint only in specific conditions which occurred infrequently. If the latter explanation is correct the case would be analogous to *Post Office v Aquarius*, at least as far as the joint itself was concerned. If the joint had never been effectively sealed, whether initially or as a result of an ineffective attempt to remedy it, future work to seal it would not be work of repair.

67. The only evidence suggesting that the joint may once have been watertight but subsequently failed is contained in the brief observations of Rascor following their visit in January 2021. They diagnosed the problem as "a failed waterstop on the construction joint", a description which might suggest the deterioration of a building component. But Rascor were not addressing the question we are currently considering and may simply have been referring to the failure of the previous resin injection to resolve the problem.

68. Despite the absence of detailed evidence about the joint itself, we are not in doubt that the penetration of water through it gave rise to a state of disrepair. At the very least this included damage to the internal partitions in the basement of the Property, as Mr Levy recorded and as the appellant reported to its insurers on 30 March 2020. The photographs we were provided with did not show this damage, because the partitions had been removed by the time they were taken, but it would be a natural consequence of the partitions having become wet. In his report of 27 February Mr Levy stated that "ponded water has affected the interior of meeting room 3". He also recorded moisture seepage and mould growth in the adjoining residential basement area including a lift lobby and stairwell. He regarded the presence of mould as hazardous to health and as creating a risk of respiratory disease. It is clear that these conditions were present within

the hereditament, especially in meeting room 3. They were also present within the residential area, outside the hereditament, where Mr Levy observed "water damage to the lower sections of the dry lined plasterboard walls, skirtings and … carpets are also stained".

69. Damaged plasterboard can be replaced, and mould can be wiped from the surface of a wall; if the same damage recurs periodically, it can be treated in the same way again. A question therefore arises about the scope of the statutory repair assumption. Does paragraph 2(1)(b) require only that it be assumed that the damaged parts of the hereditament have been repaired by the material day, or does it also require an assumption that the leaking joint has been rectified in the manner eventually achieved in April 2021. If the joint itself was not in a state of disrepair, but was in its original condition, does the fact that damage was caused by the water to other parts of the hereditament mean that the design or workmanship issues must also be assumed to have been solved by sealing the joint?

70. The principles identified by Lewison LJ in *Hounslow v Waaler* show that repair need not simply involve returning a damaged element to its former condition. It may include eradicating an inherent defect, such as the absence of expansion joints which had caused Portland stone cladding to fall from the face of Campden Hill Towers in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12. It may also include prophylactic measures to avoid the recurrence of the deterioration. Where there is a choice of methods of carrying out repair, it is for the person with the obligation to decide which method to adopt.

71. Relevant examples of the application of these principles can be found in other cases. In *Elmcroft Developments Ltd v Tankersley-Sawyer* [1984] 1 EGLR 47, a basement flat suffered from damp penetration which caused the plaster on the walls to perish. The landlord was obliged to repair but it suggested that its obligation was limited to carrying out patch repairs to the plaster as and when it became perished and did not extend to inserting a damp-proof course which would have cured the problem once and for all. The Court of Appeal disagreed, because, as Ackner LJ explained:

> "The patching work would have to go on and on and on, because, as the plaster absorbed (as it would) the rising damp, it would have to be renewed, and the cost to the appellants in constantly being involved with this sort of work, one would have thought, would have outweighed easily the cost in doing the job properly. I have no hesitation in rejecting the submission that the appellants' obligation was repetitively to carry out futile work instead of doing the job properly once and for all."

72. *Stent v Monmouth DC* (1987) 54 P & CR 193 is to the same effect. A house on an exposed site had been built with a wooden front door. Water frequently penetrated through or under the door, causing it to rot. Over the years the landlord had carried out a variety of works to address the problem, including cutting out rotten parts of the door and replacing it entirely from time to time with a new wooden door. Eventually the landlord installed a weatherproof aluminium self-sealing door, which solved the problem. The tenant then claimed damages, saying that the landlord had breached its repairing obligation by failing to install the weatherproof door years earlier. The Court of

Appeal agreed that the landlord had failed to carry out the necessary repairs and that the periodic patching and replacement with similar doors had not fulfilled its obligation. Stocker LJ said this:

> "Accordingly, in my view … the obligation under the covenant in this case was one which called upon the appellants to carry out repairs which not only effected the repair of the manifestly damaged parts but also achieved the object of rendering it unnecessary in the future for the continual repair of this door."

73. Paragraph 1(2)(b) requires that the hereditament be assumed to be in a "reasonable" state of repair, so it is also relevant to bear in mind the general standard of repair which the law requires. In *Monk* in the Court of Appeal, Lewison LJ explained, at [24]:

> "Whether property is in a state of reasonable repair is traditionally described as such repair as, having regard to the age, character, and locality of the property, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it."

To the same effect, in *Gibson Investments Ltd v Chestertons plc* [2002] 2 P & CR 494, Neuberger J said that:

> "Good and substantial repair means more than just that the building must be capable of occupation. It means in this case that the building must be in a state of repair which is appropriate for a high class office building in a prime office location in Birmingham."

74. Having regard to those statements of principle, and the nature of these premises, we do not consider that putting the Property into a reasonable state of repair after the damage caused to it by the ingress of water in early 2020 could be achieved simply by removing and replacing the damaged partitions and cleaning off the mould. The building would have remained vulnerable to future incursions of water, which would have caused the same type of damage to the replacement partitions and the same risk to the health of the occupants. Although we cannot say how frequently those short term measures would have needed to be repeated, because the frequency of the water penetration is not established, the evidence shows that the problem had been experienced at least twice in a period of less than three years. We bear in mind also the relatively limited scale of the works required to produce a permanent solution, and we are satisfied that no competent building owner or engineer would have contemplated anything less than the comprehensive remediation which was eventually achieved.

75. In the rating context, the usual principle that the person who has the repairing obligation is entitled to choose between different types of work may not apply. Under paragraph 1(2)(b) the assumed repairing obligation falls on the notional tenant, but all repairs are to be assumed to have been undertaken other than those which "a reasonable landlord would consider uneconomic". It may therefore be appropriate to assume a scheme of works such as a reasonable landlord would not consider uneconomic, even if that involved more substantial work than a reasonable tenant might choose to do at their own

expense. But as this is not a borderline case, and as we are satisfied that the repeated replacement of damaged partitions would not be repair, we do not need to consider that thought further.

Disposal

76. For these reasons we are satisfied that the repair assumption requires that the Property be valued on the basis that, at the material day, damage to the basement which had been caused by the ingress of water had been repaired and that the repair included sealing the joint between the basement floor and the adjoining wall so that it no longer allowed the entry of water into the premises.

77. The appeal is accordingly dismissed.

Martin Rodger KC,
Deputy Chamber President

Mark Higgin FRICS FIRRV

15 November 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.