REPAIRS, REFURBISHMENT AND REDEVELOPMENT

By Christopher Lewsley

1.1 Until the introduction of unoccupied property rating in 1966, the rating of premises undergoing building works was relatively uncontroversial because liability for rates depended on occupation and it was established early in the evolution of rating that occupation by builders was not the kind of occupation which was rateable.

1.2 As there was no liability during building works, then valuation during building works was not generally controversial either.

2.0 STATUTORY FRAMEWORK

Unoccupied property

2.1 The statutory framework for rating unoccupied property is in s 45 of the Local Government Finance Act 1988. There are four conditions.

(a) none of the hereditament is occupied,

(b) the ratepayer is the owner,

(c) the hereditament is in the rating list

(d) the hereditament falls within a prescribed class

2.2 The prescribed class is in the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008.

2.3 The prescribed class consists of all "relevant non-domestic hereditaments" other than those described in reg 4.

2.4 The phrase "relevant non domestic hereditament" is defined as any non-domestic hereditament consisting of, or of part of, any building, together with any land ordinarily used or intended for us for the purposes of the building or part".

2.5 So unoccupied property rating does not apply to open land, land with ancillary buildings, or other hereditaments not in the nature of buildings, eg pipelines, cables, masts. An example is *Enfield LBC v Hutchinson 3G UK Ltd* [2013] RA 429.

2.6 The exemptions include, reg 4 (1) (c), a hereditament "whose owner is prohibited by law from occupying it or allowing it to be occupied".

Repairs

2.7 Since the amendment introduced by the Rating (Valuation) Repairs Act 1999, the relevant valuation provisions in the Local Government Finance Act 1988, sch 6, para 2 (1), have

stated that the valuation must be based on three assumptions including,

> "(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;
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> (c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above."

3.0 THE REPAIRING COVENANT

3.1 In rating property should be valued in its existing state subject only to the possibility of minor alterations, except where statute requires otherwise, *Scottish and Newcastle Retail Ltd v Williams (VO)* [2000] RA 119. One instance in which statute requires otherwise is repairs, where economic repairs must be assumed carried out.

3.2 There is a line of cases on the interpretation of the "repair" in a landlord and tenant context, and in general these cases apply to rating.

3.3 One would expect there to be some pre-existing disrepair. Works of repair may include elements of renewal, and works may be repair even though they involve some improvement or modernisation, for example the replacement of worn out parts by their modern equivalent.

3.4 The ususal method of estimating wether the repairs are economic, is to compare the cost of the repairs to a number of years of the rent obtainable for the repaired hereditament. The number of years is a judgment for the valuer and is influenced by such factors the type of property, the use, the location and local economic circumstances, *16/18 Princes Street (Ipswich) Ltd v Bond (VO)* [2002] RA 212

4.0 ON-GOING BUILDING WORKS - THE LESSONS OF HISTORY

4.1 In *Easiwork Homes Ltd v Redbridge London Borough Council* [1970] RA 227 a Divisional Court of the High Court held that rates on an unoccupied block of flats were chargeable to unoccupied property rates even though in the case of each flat the plumbing work had been removed, toilet fittings were being replaced, water supplies, gas appliances, electrical wiring were being renewed, and in some cases flooring was being relaid, as part of a systematic modernisation of the whole block of flats. Each of the flats was the subject of a separate entry in the rating list and was therefore a hereditament. The rateable value had not been reduced. Bridge J gave a judgment with which the other members of the court agreed. He referred to the fact that under rating law the valuation list was conclusive evidence of the rateable values (p 232). He added (p 235) that he reached his conclusion "not without reluctance" because "it may well be that the [relevant legislation] as so construed will produce cases of hardship".

4.2 It should be noted that *Easiwork* was a rate recovery case, not a valuation case. In valuation the position was more hopeful from the ratepayer's perspective.

4.3 In the same year in *Hounslow v Rank Audio Visual Ltd and Bryant (VO)* [1970] RA 535

an industrial building undergoing substantial internal alterations and installation of sanitary fittings was held to have a nominal value. It was held that the probability of the completion of the alterations could not be taken into account because it depended on a building contract personal to the real world parties which could not be assumed to be in place in the hypothetical valuation world. Therefore the hereditament had to be valued as it was.

4.4 A few years later (by which time Bridge J had been promoted), the Court of Appeal (Lord Denning MR, James and Bridge LJJ) in *Ravenseft Properties Ltd v Newham London Borough Council* [1975] RA 410 considered the *Easiwork Homes* case. Lord Denning said (p 414) that *Easiwork Homes* was correctly decided. Bridge LJ said at p 419,

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

4.5 And in the years that followed, that is how it was done.

4.6 Meanwhile the common law of rating had developed to establish that in general in valuation economic repairs must be assumed carried out. In *Civil Aviation Authority v Langford (VO) and Camden London Borough Council* [1979] RA 1, upheld in the Court of appeal at [1980] RA 369, the Lands Tribunal held that certain works being carried out at the proposal date were works of repair which must be deemed carried out by the hypothetical landlord. Therefore it was right to assume that those defects had been remedied at the proposal date and so the works of repair which were actually going on had to be ignored. However, the Lands Tribunal said that the other substantial works going on at the proposal date were not works of repair and therefore could not be assumed to have been carried out.

4.7 The Rating (Valuation) Repairs Act 1999 was about a problem which had emerged in *Benjamin (VO) v Anston Propertires Ltd* [1998] RA 53 as to the application of the rule that in valuation, economic repair must be assumed carried out.. The 1999 Act was intended to address that specific problem, and not to change the law on the broader point of valuation during on-going building works.

4.8 This is clear from the speech of Baroness Farrington in the House of Lords on the 5th May 1999 when the Rating (Repairs) Act 1999 (which is referred to in more detail below at para 5.20) was being considered. In particular, she said,

> "In a programme of extensive alterations, the works required to make the property capable of beneficial occupation are clearly not repairs. In many cases, properties are stripped back to the shell so that substantial reconstruction or improvement work can be carried out. In such cases, the property will be considered in its actual state on the material day and if it is incapable of beneficial use, removed from the rating list."

4.9 Nevertheless, following that Act the practice at the VOA and at Valuation Tribunals seemed to move away from allowing nominal value or deletion during on-going building works, leading to more instances where unoccupied property rates have been payable during

those works. Examples in VTE decisions are The Hare and Tortoise - 503014461112/058N05/10, Exchequer Court - 503014527688/058N05/1, Avalon House - 452519130401/539N10/35, and New Bridge House - New Bridge House - 503019103395/539N10.

5.0 ON-GOING BUILDING WORKS - THE PENDULUM SWINGS

5.1 The pendulum began to swing back in a council tax case. Valuation for council tax and valuation for rating have some similarities and some differences. In council tax valuation there is an assumption of reasonable repair but it is not limited to economic repairs. In *Wilson v Coll (LO)* [2012] RA 45 the High Court held that the Valuation Tribunal for England had confused the two concepts of the existence of a hereditament on the one hand, and the distinct question of the proper valuation of a hereditament on the other hand. In particular the assumption of a state of reasonable repair in reg 6 (2) (e) of the Council Tax (Situation and Valuation of Dwellings) Regulations 1992 was to be made for the purpose of valuation and did not help answer the question of whether there was a hereditament. The significance of *Wilson* is that the distinction between identifying the hereditament and valuing it was clearly identified in the context of building works. The High Court said that in council tax as a general matter of law the crucial distinction for the purposes of deciding whether there was a hereditament which should be shown in the valuation list should focus upon whether the property was capable of being rendered suitable for occupation by undertaking a reasonable amount of repair works or whether it was a truly derelict property which was incapable of being repaired to make it suitable for its purpose. If one applies the equivalent reasoning to non-domestic rates the result would be that property in disrepair should be included in the rating list provided repairs are economic.

5.2 In *Monk (SJ & J) v Newbigin* [2014] UKUT 0014 (LC) The Upper Tribunal (Lands Chamber) held that a hereditament where building works were being carried on was affected by a material change of circumstances and the rating list must be altered to show a nominal (£1) value with a description of "building undergoing reconstruction". The hereditament was the first floor of a multi-storey office building.

> The first floor was vacant.
>
> Majority of the ceiling tiles and suspended ceiling grid and light fittings had been removed.
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> About 50% of the raised floor had been removed.
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> The comfort cooling system including all internal and external plant had been removed
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> The sanitary fittings had been removed
>
> Block walls to the wcs had been demolished
>
> Electrical wiring was stripped out.
>
> Plasterboard partitions had been erected and plastered.

First fix electrical installations had been completed.

Alterations hade been made to the drainage.

5.3 The ratepayer's argument that whereas works of repair were subsumed within the statutory assumption contained in para 2 (1) (b) of sch 6 to the (as amended by the Rating (Valuation) Act 1999), works of alteration were not and therefore could not be assumed to have been undertaken was not accepted because there was no statutory basis for distinguishing repairs and alterations in that way since it did not matter why the hereditament was in its actual physical state at the material day, as all that the legislation required was to take the hereditament as it was at the material day and assume that it was in a state of reasonable (economic) repair.

5.4 The valuation officer's argument that para 2 (1) (b) of sch 6 required the assumption (provided the cost was not uneconomic) that the hereditament had been reinstated from its actual physical state on the material day to its former physical state prior to the commencement of the works that gave rise to the proposal was not accepted.

5.5 At the material day the hereditament was not capable of beneficial occupation as an office and premises due to its actual physical state the details of which were substantially agreed, and in particular the hereditament had been stripped out to such an extent that to replace major building elements such as an entire electrical circuit and heating and air conditioning systems would go beyond the meaning of repair, regardless of whether such works were economic.

5.6 The hereditament was assumed to be in a state of reasonable repair but this assumption did not extend to the replacement of systems that had been completely removed,

5.7 A hypothetical tenant would not pay more than a nominal amount for the hereditament in its assumed physical state under para 2 (1) (b) of sch 6 at the material day,

5.8 There was an alternative analysis which produced the same result, namely, (i) the starting point was that para 2 (1) (b) of sch 6 did not apply unless and until there was a hereditament that was capable of beneficial use and the alterations had rendered the appeal hereditament incapable of such use, (ii) it would not be correct to read para 2 (1) (b) as, in effect, changing the law by imposing an assumption that a hereditament that was incapable of beneficial occupation was to be assumed capable of beneficial occupation if it could be made so at reasonable cost because if that was what was meant then the Rating (Valuation) Act 1999 could have said so plainly and the use of the words "reasonable repair" suggested a more limited objective, and (iii) in common English usage the word "repair" had a meaning that was not appropriate in circumstances such as those in this appeal where the subjects of repair had effectively ceased to exist, eg electrical circuitry, heating and air conditioning.

5.9 This alternative approach seems to align with the *Wilson* case in that it recognises the distinction between identifying the hereditament which is predominantly a real world exercise, and valuing it where the rating hypothesis comes fully into play.

5.10 The *Monk* case is useful, but it will be surprising if it is the last word on this topic.

6.0 ENTRIES IN THE RATING LIST

6.1 In *Hodgkinson (VO) v Strathclyde Regional Council* Superannuation *Fund* [1996] RA 129 at pp 135 - 139 the Lands Tribunal considered whether premises should be entered in the rating list and held that this depended on whether they were capable of rateable occupation. The Lands Tribunal added (p 130) that a practice of not including in the rating list premises to which a nil value would be attributed if they were so included was sensible.

6.2 This is consistent with the approach taken by the Lands Tribunal in *Leda Properties Ltd v Howells (VO)* [2009] RA 165 at p 175. And with Baroness Farrington's statement in the House of Lords.

6.3 In *Porter* in analysing case law, the Lands Chamber said at para 59 (referring to the 1980's), "it was the practice of VO's, as, before 1949 it had been the practice of the rating authorities responsible for maintaining valuation lists, to include in the valuation list as hereditaments assessed at nominal value premises that were incapable of occupation because they were undergoing works of alteration or refurbishment. There was good reason to do this when valuation lists were maintained manually in order to ensure that such premises were not lost site of and could be restored to a full rateable value when they became capable of occupation again." The implication is that it would have been more correct to delete them from the list.

6.4 Where property is in disrepair it would seem that the test for inclusion in the rating list is the same - is the property capable of occupation ? At this point in the process there is no statutory provision requiring an assumption of reasonable repair, as there is with valuation of a hereditament where one exists.

6.5 There is a parallel here with council tax. In *Wilson v Coll (LO)*the High Court held that as a general matter of law the crucial distinction for the purposes of deciding whether there was a hereditament which should be shown in the valuation list should focus upon whether the property was capable of being rendered suitable for occupation by undertaking a reasonable amount of repair works or whether it was a truly derelict property which was incapable of being repaired to make it suitable for its purpose. If one applies the equivalent reasoning to non-domestic rates the result would be that property in disrepair should be included in the rating list provided repairs are economic.

6.6 Therefore, the test as to whether property is a rateable hereditament and should be included in the rating list is whether it is capable of occupation for the purpose for which it is designed to be occupied. Premises undergoing works of construction, or alteration incompatible with such occupation, should not be included in the rating list for any period during which those premises are not capable of occupation.

7.0 EXEMPTION

7.1 There are a number of exemptions, but the most controversial in the exemption which applies to a hereditament "whose owner is prohibited by law from occupying it or allowing it to be occupied".

7.2 Putting aside those exemptions which relate to time periods or rateable value ((a), (b), (g)), it is worth noting that the general flavour of these exemptions has two aspects. First ((c) - (f)) use of public law powers by an authority, and second ((h) - (m)) insolvency.

7.3 In determining whether an exemption applies, there is no statutory provision (or case law) requiring it to be assumed that premises are in a physical condition different from their actual physical condition, as there is with valuation.

7.4 Prohibited by law was not argued in *Easiwork*, but the High Court remarked (p 233) that the exemptions "are, to put the matter quite generally, properties subject to some legal disability".

7.5 In *Tower Hamlets London Borough Council v St Katherine by the Tower Ltd* [1982] RA 261 the High Court held that no unoccupied rates were payable by the owner of a hereditament which did not have a satisfactory means of escape in the case of fire because occupation was prohibited by s 34 (4) of the London Building Act (Amendment) Act 1939 until a fire escape was provided and a fire certificate issued. In the course of the judgment, the Judge considered a submission on behalf of the rating authority that "if the construction for which the [owner] contends were correct, it would mean that an owner whose hereditament did not comply with s 34 (1) could avoid payment of unoccupied property rates by the simple expedient of not putting the premises into a condition which complied with that subsection." In response the High Court said it had considered but rejected as unworkable, the possibility that Parliament intended to introduce considerations of reasonableness.

7.6 It is not clear why the judge regarded as 'unworkable' the possibility that the exemption might apply only for the period of time which a reasonable owner would require to carry out the works. After all, this is a familiar concept in completion notice cases. The Judge recognised that his interpretation did not sit easily with *Easiwork* and *Ravenseft*.

7.7 It is worth noting that in *St Katherine* the work that was required was not repair or refurbishment, or the completion of a newly erected building. It was a significant alteration. What was required was something which the hereditament had never had and which was quite substantial, ie a fire escape for the fourth floor. It is not clear whether provision of the fire escape involved the acquisition of rights from a third party. It is clear that a fire escape was provided in due course and it was not suggested that the time taken was unreasonable.

7.8 In *Hailbury Investments Ltd v Westminster City Council* [1986] RA 187 it was held that although planning restrictions prevented use for office purposes of hereditaments described in the rating list as "offices", the hereditaments were not exempt because the occupation of the hereditaments was not prevented, but only limited, by he planning restrictions.

7.9 A hereditament was held exempt from unoccupied property rates in *Regent Lion Properties Ltd v Westminster City Council* [1990] RA 121 because occupation was prohibited by law following the service of a notice under the Health and Safety at Work Act 1974 which prohibited the further execution of refurbishment works until certain remedial works had been carried out on the grounds that brown asbestos was present. The Court of Appeal held

that although the notice did not expressly prohibit occupation, it inevitably had that effect.

7.10 The prohibition notice stated that "the following activities, namely, the execution of building refurbishment works ..... involve an imminent risk of serious personal injury. I am further of the opinion that the said matters involve contravention of the following statutory provisions : Health and Safety at Work Act 1974, s 4 (1) and (2) because of the presence of defective cladding, lagging or other lining material and associated dust/debris containing amosite (brown asbestos) in an area where persons are engaged in painting and other refurbishment works or have to visit in the course of employment, and I hereby direct that the said activities shall not be carried on by you or under your control immediately unless the said contraventions and matters included in the attached schedule, which forms part of this notice, have been remedied." The schedule itemised remedial works including the removal of the asbestos.

7.11 It is worth noting that, apart from the time taken to deal with the asbestos, it was not suggested that the exemption applied during the refurbishment works.

7.12 In *Pall Mall Investments Ltd v Leeds City Council* [2013] RVR 330 a warehouse was unoccupied and vandalised leaving it in poor condition (para 7). Exemption was claimed on the ground that occupation was prohibited by law due to the poor and unsafe condition (para 8). The application was supported by expert evidence of the condition of the property (para 9). In the magistrates court the single issue was whether the owner was prohibited by law from occupying the property (para 11). In refusing the claim for exemption and making the liability order, the magistrates referred to *St Katherine and* quoted from *Easiwork Homes* and concluded that (para 39),

> "We accept that [the property] is in poor condition but consider that if the property were to be let out then the necessary repairs will be part of the contract between the lessee and the lessor. We are persuaded by the argument that an unoccupied property need not be kept in the state required for occupation but also think its poor state does not exempt the owner from rates for an unoccupied property."

7.13 On appeal the High Court said (para 41) that the "decision of the magistrates court, for the reasons given, was entirely correct". This seems to mean that there is a real world practical test to be applied in a search for the effective cause of the un-occupation.

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