Landmark CHAMBERS

Buildings Undergoing Refurbishment after the Supreme Court Decision in Monk

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The issue

- Should a commercial building in the course of redevelopment have to be valued as if it were still a useable office?
  - Valued in repair …….but as what?
  - Relationship between statutory repair assumption and the rebus/reality principle

Relevant background

- Pre LGFA 1988 statutory hypothetical tenancy of non-industrial property required that landlord bear the costs of repairs
- Wexler v Playle (1960) – landlord to put in repair
- Saunders v Maltby (1976) – landlord's obligations did not extend to uneconomic repairs which were disproportionate to value of property

Relevant background (2)

- 1988 Act – recasts repairing assumption for non-domestic hereditaments by reference to hypothetical tenancy in which tenant bears repairing assumption
- Benjamin v Anston (1998) – LT decides that the change is significant (on the statute as it then applied) such that rateable value would be adversely affected by a state of disrepair

Relevant background (3)

Rating (Valuation) Act 1999 amends 1988 Act

"the rateable value of a non-domestic hereditament… 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 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… "

Relevant Background (4)

- Speech of Baroness Farrington to Grand Committee of the House of Lords during passage of the 1999 Bill
  - Address lacuna in statutory provision that no reference to state of repair
  - Government reversing Benjamin v Anston
  - Seeks to "reinstate" existing practice
  - "buildings undergoing alterations and refurbishment" where "extensive works required to make the property capable of beneficial occupation" and in many cases "stripped back to shell" should be "considered in actual state" and "if it is incapable of beneficial use, removed from the rating list"

Monk – facts

- Vacant office property (long term)
- Renovation contract in place
- As at material day: extensive stripping out had occurred (majority of ceiling tiles; suspended ceiling grid; light fittings; 50% of raised floor; electrical wiring)

Monk - Rating History

- Proposal to alter list to reduce RV to £1 as "building undergoing reconstruction"
- VT identifies material date as 6/1/12 and dismisses appeal as concludes nothing to prevent economic repair of premises
- UT(LC) confirms MD as 6/1/12 – but holds that RV should be reduced to £1 as building undergoing reconstruction that is incapable of beneficial occupation

Monk - Court of Appeal's Decision

- VO appeals to CA
- CA allows appeal – decides:
  - Rebus/reality principle can be replaced by contrary instructions in statute – and para 2(1) "is a required assumption which is potentially counter-factual" (para 7)
  - Description of property in rating list is "natural starting point" (para 24); here "offices and premises"
  - At material day – property not in reasonable repair as office and premises (para 25)
  - Need to assume that work which "can properly be described as work of repair" has been carried out provided not uneconomic (para 25) (NB - did not accept VO argument that "state" of deemed repair" is what matters so that does not matter how works are categorised)

Court of Appeal's Decision (2)

- Ask: is property worse than it was at earlier time? (para 26)
- Approach to whether stripped out elements can be described as repair-
  - 3 tests from Easington (1989) 58 P&CR 201 (para 28)
  - Ask in respect of hereditament not component part – so replacement of old and worn out air conditioning is repair even if old had been removed from property by material date (paras 34/5)
  - don't look at intention of actual tenant but objective nature of works (rejection of "scheme" approach – para 36)

Monk – position after the CA decision

- Centrality of whether notional works are "repair"
- Look back to "list description"
- Law does not reflect the way either party argued the case
- Unclear how workable in practice CA's approach is during the process of transformation of property
- Cannot be reconciled with past practice or legislative intention as recorded in Baroness Farrington's speech

Monk - The Supreme Court Litigation

- Ratepayer's appeal
- Intervention by RSA/BPF in support of appeal

- UKSC unanimously allow appeal and restored decision of the Upper Tribunal … for somewhat different reasons to those given by the UT(LC)

- Single judgment delivered by Lord Hodge JSC

Monk - What the Supreme Court decided

- *Rebus/reality* remains a fundamental principle in rating
- The repairing assumption does not displace *rebus*, or at least not in the way the Court of Appeal thought
- 1999 Act intended to, and did, preserve the pre-LGFA distinction between disrepair and works of redevelopment (para 20)

Monk - What the Supreme Court decided (2)

- repairing assumption is only concerned with a property's physical state – it cannot require the hereditament's mode or category of occupation to something other than it is *rebus* (para 20)

NB - Supreme Court looked carefully as legislative history; position under the 1967 Act before the 1988 Act came into effect and what was said to parliament by Baroness Farrington when the Rating (Valuation) Act 1999 was enacted.

Tested VO' statutory interpretation argument against the relevant legislative history and practice over time

Monk - What the Supreme Court decided (3)

- Proper analytical approach (para 22):
  - Is the building capable of rateable occupation at all? If not, not a hereditament
  - If it is a hereditament, what is its mode or category?
  - Is it in a state of reasonable repair for use consistent with that mode or category?

(NB – think about all 3 questions; eg if what is not capable of occupation only because normal repairs being undertaken?)

- First two questions must be answered *rebus*

(so answer to VO's case that must assume it to be in a state of repair; is the need to answer the question "as what?")

Monk - What the Supreme Court decided (4)

- Question whether a building is undergoing redevelopment, or is merely in disrepair, must be answered objectively (i.e. subjective intentions of the owner/occupier are irrelevant)
- But in answering that question, legitimate to have regard to a programme of works in fact being undertaken (para 23)

  "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" (para 23)

Monk - What the Supreme Court decided (5)

- Repairing assumption might apply to a part of a building undergoing redevelopment, where that part becomes capable of beneficial occupation for its new use (and thus becomes a hereditament with a new mode or category of occupation).
- But …

  "[the repairing assumption] neither deems the development to be complete nor assumes that the building in whole or in part is in a state of repair to be let as [its former use]" (para 24)

Monk - What the Supreme Court decided (6)

- Alterations to a building radical enough to render it unoccupiable may justify a proposal to alter the Rating List.
- Nothing in s. 46A(5) of the LGFA (i.e. the completion notice regime for alterations to buildings) requires otherwise
- Alterations can justify a proposal whether or not they are structural (para 30)

Monk - What the Supreme Court decided (7)

- Supreme Court endorsed the practice of treating hereditaments undergoing reconstruction, and consequently incapable of beneficial occupation, as hereditaments with the mode or category of "building undergoing reconstruction" and a nominal RV, rather than outright deletion.
- "*No basis*" for limiting such an alteration to cases where restoration to previous condition has become uneconomic (para 31)

Monk - What the Supreme Court decided (8)

- Supreme Court did not regard its interpretation as giving rise to risk of abuse (para 32):
  - First, the sanctioned approach has worked for years before the Court of Appeal decision, with no suggestion that it was ineffective.
  - Parliament has given the Secretary of State the power to make anti-avoidance regulations (s. 66A of the LGFA). The fact this power has not been exercised suggests that there is not a serious problem with avoidance.
  - In any event, if a problem arises, it can be solved by exercising s. 66A

Monk - Implications of the decision

- Decision has largely restored the position pre-***Monk*** in CA
- Focus of proposals shift away from considerations of what is or is not repair in the landlord and tenant sense (i.e. the ***McDougall v Easington*** test), and more towards consideration of capability for beneficial occupation
- Similarly, proposals less likely to focus on economics of repair, where a scheme can be shown
  - End of the practical significance of ***Barber (VO) v CEREP III***?

Monk - Implications of the decision (2)

- **When** does a building undergoing redevelopment become incapable of beneficial occupation?
  - Clear that there is no longer a need for works to be structural
  - But Lord Hodge retained the language of "radical" change, as per ***Easiwork***
  - Boundary to be worked out through subsequent cases. i.e - Is the removal of toilets enough? Windows? Electrical wiring? Lifts?

Monk - Implications of the decision (3)

- What evidence will the VO/tribunals accept as demonstrating the objective existence of a scheme of reconstruction?
- Points to think about:
  - Contract for works
  - Commencement of works, and stage reached
  - Planning status. What if not required (e.g. if redevelopment carried out under PD rights)?
  - Marketing
  - Finance

Monk - Implications of the decision (4) – completion of parts of building under the scheme

- Supreme Court recognised that parts of a building undergoing works may become capable of beneficial occupation before other parts
- Repairing assumption can apply in such cases … but cannot deem an incomplete building to be complete
- Issues to be resolved as to relationship between repair assumption and completion notices in situations where works undertaken to parts of building at different rates

Monk - Implications of the decision (5) – completion of parts of building under the scheme

- Where is the line between capability of beneficial occupation and completion (in the ***Porter***; ***Aviva*** sense)? How do these regimes now interact?
- Interaction of ***Monk*** with ***Mazars*** – can a part only become capable of beneficial occupation if it is sufficiently self-contained to meet the geographical test?
- Implications for design and sequencing of works carried out under a scheme of redevelopment

Monk – concluding thoughts

- Supreme Court decisions restores position to much more recognizable orthodoxy than CA
- Recognition of concessionary arrangements for buildings undergoing refurbishment (consistent with Baroness Farrington)
- Practical issues to be worked out in guidance and tribunal decisions
- May be particular issues in respect of parts of buildings
- Anti-avoidance measures? (clear indication matter for regulations not revision of valuation/rating principles)