Neutral Citation Number: [2021] EWCA Civ 969

Case Nos: C3/2020/1020, C3/2020/2062

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Martin Rodger QC, Deputy President and Martin Rodger QC, Deputy President and P D McCrea FRICS
[2020] UKUT 58 (LC) and [2020] UKUT 238 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE ARNOLD

- -

Between :

AVISON YOUNG LIMITED	**Appellant**
- and -	
DAVID JACKSON (VALUATION OFFICER)	**Respondent**

And between :

JO MOORE (VALUATION OFFICER)	**Appellant**
- and -	
GREAT BEAR DISTRIBUTION LIMITED	**Respondent**

- -
- -

Luke Wilcox (instructed by **Mills & Reeve LLP**) for **Avison Young Ltd**
George Mackenzie (instructed by **General Counsel and Solicitor to Her Majesty's Revenue and Customs**) for **Mr Jackson**
Matthew Donmall (instructed by **General Counsel and Solicitor to Her Majesty's Revenue and Customs**) for **Mrs Moore**
Daniel Kolinsky QC (instructed by **Mills & Reeve LLP**) for **Great Bear Distribution Ltd**

Hearing dates : 23-24 June 2021

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Approved Judgment

Lord Justice Arnold:

Introduction

1. These appeals from the Upper Tribunal (Lands Chamber) raise issues as to the scope of the power of the Valuation Tribunal for England ("the VTE") under regulation 38(7) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 (SI 2009/2269, "the VTE Regulations") to require an alteration to a rating list that it is ordering to be limited to the duration of the circumstances giving rise to the alteration, and as to how that power should be exercised.

2. The appeals to the VTE in these and many other cases were stayed while an appeal from the Court of Appeal to the Supreme Court was pending in the case of *S J & J Monk v Newbigin (VO)* [2017] UKSC 14, [2017] 1 WLR 851. This delay not only explains why the VTE's decisions in these cases were made so long after the events which gave rise to the alterations in question, but also has contributed to the significance of the issues identified in the preceding paragraph. I will endeavour to explain why this is so later in this judgment.

Avison Young Ltd v Jackson

3. This appeal concerns the third floor and part of the second floor of an office building at 10 Aldermanbury, also known as 65 Gresham Street, London EC2 6NQ ("10 Aldermanbury"). On 3 June 2014 GVA Grimley Ltd, now known as Avison Young Ltd ("AY"), entered into an agreement to take a lease of 10 Aldermanbury which included an obligation on the landlord to carry out works to fit them out to Category A standard and an obligation on AY to install an internal staircase linking the two floors.

4. At that time, 10 Aldermanbury had a total floor area of about 4,598 sqm. It was entered in the 2010 non-domestic rating list with a rateable value of £1,830,000.

5. On 1 September 2014 works were commenced at 10 Aldermanbury, the effect of which was to render 10 Aldermanbury incapable of beneficial occupation. The works were finished on 23 January 2015, and AY entered into occupation of the premises on 9 February 2015.

6. On 3 October 2014, during the currency of the works, AY submitted a proposal to alter the rating list ("the AY Proposal"). The AY Proposal sought a reduction in 10 Aldermanbury's rateable value to £1 with effect from 1 September 2014. The AY Proposal was made on the ground that circumstances affecting 10 Aldermanbury had changed on that date. The detailed reasons for the AY Proposal were stated as being that "a refurbishment/fit out, including structural alterations, is ongoing and the part second and thrid [sic] floors are incapable of beneficial occupation as offices during construction works".

7. Following the conclusion of the works, 10 Aldermanbury had a floorspace of about 4,551 sqm, approximately 50 sqm smaller than it had been before the scheme, primarily due to the installation of the internal staircase. Nevertheless, AY submitted no proposal that the entry for 10 Aldermanbury in the list be altered to reduce its

rateable value with effect from 23 January 2015 as a result of a material change in circumstances.

8. On 1 May 2016 the Valuation Officer issued a notice reducing the rateable value of the hereditament to £1,800,000 with effect from 1 April 2015. (Subsequently the Valuation Officer changed his mind about this, and succeeded in persuading the Upper Tribunal that there had in fact been no reduction in the rateable value of 10 Aldermanbury, but that must be disregarded for present purposes.)

9. It is common ground that the Valuation Officer was precluded from back-dating the reduction in rateable value any further by virtue of regulation 14(2)(b) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (SI 2009/2269) ("the ALA Regulations 2009") as amended by the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2015 (SI 2015/424) ("the ALA Regulations 2015").

10. By the time the matter came before the VTE on 22 February 2019, it had been agreed that the rateable value of the hereditament should be reduced to nil for the period from 1 September 2014 to 23 January 2015. The Valuation Officer contended that the rateable value should be restored to £1,830,000 with respect to the period from 23 January 2015 to 31 March 2015. AY disputed this.

11. M.F. Young, the Vice-President of the VTE, held in a decision dated 15 April 2019 that regulation 38(7) of the VTE Regulations empowered the VTE to order the Valuation Officer to amend the entry in the rating list for 10 Aldermanbury to "premises under reconstruction" with a rateable value of nil for the period from 1 September 2015 to 23 January 2015 and that it was appropriate to make that order.

12. The effect of this order was that 10 Aldermanbury remained in the list with a rateable value of £1,830,000 from 23 January 2015 to 31 March 2015. The difference in the rates payable by AY as a consequence of the rateable value being shown as £1,830,000 rather than £1,800,000 was roughly £2,000.

13. On an appeal by AY against that decision, the Upper Tribunal (Lands Chamber) (Martin Rodger QC, Deputy President) held in a decision dated 20 February 2020 ([2020] UKUT 58 (LC), [2020] RA 239) that regulation 38(7) empowered the VTE to make the disputed order, that the Vice-President was entitled to exercise his discretion in the way he did and that, if it fell to the Upper Tribunal to exercise the discretion afresh, it should be exercised in the same way. The Upper Tribunal subsequently granted AY permission to appeal to this Court.

14. AY's case is that the rateable value of 10 Aldermanbury should remain nil in respect of the period from 23 January 2015 to 31 March 2015, thus relieving AY of the obligation to pay rates for that period, because the VTE had no power under regulation 38(7) temporally to restrict the alteration in the rating list in the way that it did. AY does not challenge the way in which the VTE exercised its discretion if it did have such power.

Moore v Great Bear Distribution Ltd

15. This appeal concerns a warehouse on an industrial estate located at 4 Freeston Drive, Nottingham NG6 8UZ ("Freeston Drive"). Great Bear Distribution Ltd ("GBD") acquired Freeston Drive on 16 June 2014, and undertook works to it between 23 June and 3 October 2014 which included the demolition of a small office block which adjoined the warehouse and alterations to the dock levellers. It is common ground that Freeston Drive was incapable of beneficial occupation during the course of those works. GBD resumed beneficial occupation on 4 October 2014 after the completion of the works.

16. The rateable value of Freeston Drive was shown in the 2010 rating list as £825,000 prior to the works, and it remained in that list at £825,000 until the 2010 list was replaced by the 2017 list on 1 April 2017.

17. On 2 February 2015, after the completion of the works, GBD submitted a proposal that the entry in the 2010 list be deleted with effect from 16 June 2014 on the ground that the property had been demolished or no longer existed ("the GBD Proposal"). GBD's detailed reasons stated that the assessment should be deleted "as a result of building works".

18. Although the works had been completed by that time, no proposal was submitted by GBD that the entry for Freeston Drive in the list should be altered to reduce the rateable value with effect from 4 October 2014 on the ground of a material change of circumstances.

19. By the time the GBD Proposal came before the VTE on 3 October 2019, the Valuation Officer was prepared to accept that the rateable value of Freeston Drive should be reduced to nil for the period from 23 June to 3 October 2014 because the property was incapable of beneficial occupation during that period. Furthermore, the Valuation Officer accepted that, as a result of the works, the rateable value of the hereditament had been reduced to £745,000. The Valuation Officer contended that the entry for Freeston Drive in the 2010 rating list should be altered to that value with effect from 4 October 2014, alternatively that the rateable value should revert to £825,000 with effect from that date. GBD disputed this.

20. It is common ground that:

    i) GBD lost the opportunity to make any proposals in respect of the period prior to 1 April 2015 on 31 March 2015 by virtue of paragraph 14(2)(a) of the ALA Regulations 2009 as amended by the ALA Regulations 2015.

    ii) The Valuation Officer lost the opportunity to alter the rating list other than to give effect to a proposal for a period earlier than 1 April 2015 on 31 March 2016 by virtue of paragraph 14(2)(a) of the ALA Regulations 2009 as amended by the ALA Regulations 2015.

    iii) GBD lost the opportunity to make proposals to alter the rating list with effect from 1 April 2015 on 31 March 2017 by virtue of regulation 5 of the ALA Regulations 2009 as amended by the ALA Regulations 2015 and preserved by regulation 22 of the Non-Domestic Rating (Alteration of Lists and Appeals

(England) (Amendment) Regulations 2017 (SI 2017/155) ("the ALA Regulations 2017").

21. For these reasons, it is common ground that, if the order deleting Freeston Drive from the 2010 list is not limited in time to 3 October 2014 under regulation 38(7), then the effect of the deletion will continue until 31 March 2017.

22. M.F. Young, the Vice-President of the VTE, held in a decision dated 7 November 2019 that regulation 38(7) empowered the VTE to order the Valuation Officer to amend the entry in the list for Freeston Drive so as to delete the entry in the list only until 3 October 2014, but declined to exercise that power on the ground that the effect of doing so would be to return Freeston Drive to the list at a rateable value of £825,000 although it was known that the true rateable value was £745,000. Accordingly, the VTE ordered the Valuation Officer to delete Freeston Drive from the 2010 list with effect from 23 June 2014 on the ground that the property had ceased to be capable of beneficial occupation on that date.

23. The consequence of the VTE's decision not to restore Freeston Drive to the 2010 list with effect from 4 October 2014 was to relieve GBD of a rates liability of roughly £900,000; whereas the consequence of Freeston Drive being restored to the 2010 list with effect from 4 October 2014 at a rateable value of £825,000 rather than £745,000 would be to expose GBD to a liability to pay excess rates of roughly £90,000.

24. The Upper Tribunal ((Martin Rodger QC, Deputy President and P.D. McCrea FRICS) dismissed the Valuation Officer's appeal in a decision dated 31 July 2020 ([2020] UKUT 238 (LC), [2021] RA 1). The Upper Tribunal subsequently granted the Valuation Officer permission to appeal to this Court.

25. The Valuation Officer's case is that the VTE was wrong to decline to exercise its power under regulation 38(7). GBD contends by a respondent's notice that the VTE had no power to make the order sought by the Valuation Officer, and in the alternative contends that the VTE was correct, or at least entitled, to exercise its discretion in the way in which it did.

The legal framework

26. Non-domestic rates, or "rates" for short, are a tax on property used for business and commercial purposes. The modern law of rating is contained in the Local Government Finance Act 1988 as amended ("the 1988 Act"), the secondary legislation made thereunder, and a body of case law which has developed over many years. The salient features of the legal framework for the purposes of these appeals are as follows.

Hereditaments

27. Rates are levied on hereditaments. A hereditament is a unit of property, defined under section 64(1) of the 1988 Act by reference back to the General Rate Act 1967, section 115(1) of which defined a hereditament as:

> "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. Property which is not capable of beneficial occupation is not a hereditament at all: see *Monk v Newbigin* at [22]. This is subject to the qualification that, where a property is undergoing reconstruction which renders it incapable of occupation for a period of time, the Valuation Officer can alter the description of the hereditament in the rating list to "building undergoing reconstruction" and reduce its rateable value to a nominal amount for that period (rather than removing the property from the list for that period, as would be strictly correct): see *Monk v Newbigin* at [31] and *Jackson (VO) v Canary Wharf Ltd* [2019] UKUT 136 (LC), [2019] RA 411 at [36]. It is common ground that, at least for the purposes of these appeals, there is no difference in effect between reducing the rateable value of a property to a nominal value (as was proposed in *Avison Young*) and removing the property from the list (as was proposed in *Great Bear Distribution*).

The duty to maintain a list

29. Under section 41 of the 1988 Act, the Valuation Officer is under a duty to compile, and then maintain, local non-domestic rating lists. Lists are normally compiled every five years, but amendments to section 41 modified this requirement for England so that the lists compiled on 1 April 2010 were succeeded by lists compiled on 1 April 2017 rather than on 1 April 2015. The duty to maintain the list does not cease following the expiry of the period for which it is in force: see section 41(7).

30. This is in substance a duty to maintain an accurate list: see *BMC Properties and Management Ltd v Jackson (VO)* [2015] EWCA Civ 1306, [2016] RA 1 at [18]. The extent of the Valuation Officer's duty to maintain an accurate list is constrained, however, by statutory limitations on how alterations can be made and by limitation periods applicable to when lists can be changed: see *National Car Parks Ltd v Baird (VO)* [2004] EWCA Civ 967, [2004] RA 245 at [42].

31. Section 42 requires that a local non-domestic rating list show, for each day in each financial year for which it is in force, each hereditament that fulfils the stipulated conditions, and its rateable value.

Rateable values

32. The rateable value of a hereditament is to be assessed in accordance with section 56 of and Schedule 6 to the 1988 Act. Schedule 6 paragraph 2 provides, so far as relevant:

> "(6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.
>
> (6A) For the purposes of sub-paragraph (6) above the material day shall be such day as is determined in accordance with rules prescribed by regulations made by the Secretary of State.
>
> (7) The matters are—

> (a) matters affecting the physical state or physical enjoyment of the hereditament,
>
> (b) the mode or category of occupation of the hereditament,
>
> (c) the quantity of minerals or other substances in or extracted from the hereditament,
>
> (cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,
>
> (d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and
>
> (e) the use or occupation of other premises situated in the locality of the hereditament."

A daily tax

33. Rates are a daily tax. The operative provisions of the scheme in respect of rates for occupied hereditaments (section 43) and rates for unoccupied hereditaments (section 45) focus on whether the statutory conditions for liability are satisfied in relation to the day in question. The scheme properly applied produces a single correct answer for any given day in respect of the following questions:

    i) Is there a hereditament shown in the rating list on that day?

    ii) What is its rateable value?

    iii) Are the conditions for the imposition of either occupied or unoccupied rates satisfied?

Alterations to the list

34. Broadly speaking, the entry for a hereditament in a rating list can be altered in either of two ways. The first way is for the ratepayer to make a proposal for an alteration to the Valuation Officer. If the Valuation Officer agrees with the proposal, they must make the alteration. If the Valuation Officer considers that the proposal is either invalid or not well-founded, the ratepayer can challenge that assessment before the VTE. The second way is for the Valuation Officer to take unilateral action to make an alteration. If the ratepayer disagrees with an alteration made by the Valuation Officer, it can propose a different alteration. The procedure for making alterations is governed by the ALA Regulations 2009.

35. Before turning to the detail of the ALA Regulations 2009, two important points should be noted. The first is that a ratepayer is able to make a number of proposals, including proposals in the alternative, or which are contingent upon the determination

of another proposal. By contrast, the Valuation Officer is not able unilaterally to make contingent alterations to the list.

36. The second point is that the ability of both the ratepayer and the Valuation Officer to make alterations to the list is, as mentioned above, constrained both by limitations on how alterations can be made and by limitation periods which govern when alterations can be made.

The ALA Regulations

37. Section 55 of the 1988 Act empowers the Secretary of State to make regulations concerning the alteration of rating lists by Valuation Officers. Section 55(2)-(4) and (6) provide:

> "(2) The Secretary of State may make regulations about the alteration by valuation officers of lists which have been compiled under this Part, whether or not they are still in force; and subsections (3) to (7) below shall apply for the purposes of this subsection.
>
> (3) The regulations may include provision that where a valuation officer intends to alter a list with a view to its being accurately maintained, he shall not alter it unless prescribed conditions (as to notice or otherwise) are fulfilled.
>
> (4) The regulations may include provision—
>
> (a) as to who (other than a valuation officer) may make a proposal for the alteration of a list with a view to its being accurately maintained,
>
> (b) as to the manner and circumstances in which a proposal may be made,
>
> (c) as to the period within which a proposal must be made,
>
> (d) as to the procedure for and subsequent to the making of a proposal, and
>
> (dd) as to the circumstances within which and the conditions upon which a proposal may be withdrawn
>
> (e) requiring the valuation officer to inform other prescribed persons of the proposal in a prescribed manner.
>
> …
>
> (6) The regulations may include—
>
> (a) provision as to the period for which or day from which an alteration of a list is to have effect (including provision that it is to have retrospective effect);
>
> (b) provision requiring the list to be altered so as to indicate the effect (retrospective or otherwise) of the alteration;
>
> (c) provision requiring the valuation officer to inform prescribed persons of an alteration within a prescribed period;

(d) provision requiring the valuation officer to keep for a prescribed period a record of the state of the list before the alteration was made."

38. The ALA Regulations 2009 were made in the exercise of (among other provisions) the powers conferred by section 55(2)-(6) of the 1988 Act. As originally made, these provided so far as relevant:

"**2. Interpretation: general**

(1) In these regulations—

…

'appeal' means an appeal under —

(a) regulation 8 or 13 .

…

3. Interpretation of Part 2

In this Part—

…

'material change of circumstances', in relation to a hereditament, means a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the Act;

…

4. Circumstances in which proposals may be made

(1) The grounds for making a proposal are—

…

(b) the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled;

…

(d) the rateable value shown in the list for a hereditament by reason of an alteration made by a VO is or has been inaccurate;

…

(h) a hereditament shown in the list ought not to be shown in that list;

…

(3) No proposal may be made—

(a) by reference to more than one ground unless, for each ground relied on, the material day and the effective date are the same;

(b) by an IP [interested person], where—

(i) that person (or a person having a qualifying connection with that person), acting in the same capacity, has made a proposal to alter the same list in relation to the same hereditament on the same ground and arising from the same event;

(ii) a proposal to alter the list in relation to the same hereditament and arising from the same facts has been made by another person (excluding a person having a qualifying connection with the IP) and has been considered and determined by a valuation tribunal, the VTE, the Lands Tribunal or the Upper Tribunal;

(c) on the ground set out in paragraph (1)(d), to the extent that the alteration in question gives effect to the decision of a valuation tribunal, the VTE, the Lands Tribunal, the Upper Tribunal or a court determining an appeal or an application for a review in relation to the hereditament concerned.

(4) In paragraph (3)—

'effective date' means the day from which the alteration, if made, would have effect in pursuance of this Part;

'event' means the compilation of the list, a material change of circumstances or an alteration of the list by the VO; and

'material day', in relation to a hereditament, means the day determined as regards that hereditament in accordance with rules prescribed by regulations under paragraph 2(6A) of Schedule 6 to the Act.

5. Periods in which proposals may be made: 2005 list and subsequent lists

(1) Subject to paragraph (2), a proposal to alter a list compiled on or after 1st April 2005 may be made at any time before the day on which the next list is compiled.

(2) A proposal on the ground set out in—

(a) regulation 4(1)(d) or (f) may only be made before the day on which the next list is compiled or within six months of the date of the alteration, whichever is the later;

…

6. Proposals: general

(1) A proposal shall be made by notice sent to the VO which shall—

…

(c) identify the property to which the proposal relates;

(d) identify the respects in which it is proposed that the list be altered; and

(e) include—

(i) a statement of the grounds for making the proposal;

…

(iii) in the case of a proposal made on the ground set out in regulation 4(1)(b), a statement of the nature of the change in question and of the date on which the proposer believes the change occurred;

…

8. Disputes as to validity of proposals

(1) Subject to paragraphs (2) and (3), where the VO is of the opinion that a proposal has not been validly made, the VO may, at any time after receiving the proposal, serve notice (an 'invalidity notice') on the proposer that the VO is of that opinion and stating—

(a) the reasons for that opinion, and

…

(9) An appeal against an invalidity notice shall be made by the proposer sending a notice of disagreement to the VO.

…

10. Proposals agreed by VO

Where the VO is of the opinion that a proposal is well-founded, he shall as soon as reasonably practicable alter the list accordingly.

…

12. Agreed alterations following proposals

(1) Where, following the making of a proposal, all the persons mentioned in paragraph (2) agree on an alteration of the list in terms that comply with the requirements of this Part but differ from those contained in the proposal, and that agreement is signified in writing—

(a) subject to paragraph (4), the VO shall, not later than two weeks after the day on which the agreement was made, alter the list to give effect to the agreement; and

(b) the proposal shall be treated as having been withdrawn.

…

13. Disagreement as to proposed alteration

(1) Where—

(a) the VO is of the opinion that a proposal is not well-founded, and

(b) the proposal is not withdrawn, and

(c) there is no agreement under regulation 12,

the VO shall refer the disagreement to the VTE as an appeal by the proposer against the VO's refusal to alter the list.

…

14. Time from which alteration is to have effect: 2005 and subsequent lists

(1) This regulation has effect in relation to alterations made on or after 1st October 2009 to a list compiled on or after 1st April 2005.

(2) Subject to paragraphs (3) to (7), where an alteration is made to correct any inaccuracy in the list on or after the day it is compiled, the alteration shall have effect from the day on which the circumstances giving rise to the alteration first occurred.

…

(7) An alteration made to correct an inaccuracy (other than one which has arisen by reason of an error or default on the part of a ratepayer)—

(a) in the list on the day it was compiled; or

(b) which arose in the course of making a previous alteration in connection with a matter mentioned in any of paragraphs (2) to (5),

which increases the rateable value shown in the list for the hereditament to which the inaccuracy relates, shall have effect from the day on which the alteration is made.

(8) Where an alteration needs to be made after the first anniversary of the day on which the next list is compiled, it shall have retrospective effect only if it is made to give effect to a proposal."

39. The ALA Regulations 2009 were amended with effect from 28 March 2015 by the ALA Regulations 2015. Although regulation 4 of the ALA Regulations 2015 amended regulation 5 of the ALA Regulations 2009, the amendments are not material for present purposes. Regulation 7 of the ALA Regulations 2015 amended Regulation 14 of the ALA Regulations 2009 so as to substitute the following paragraphs (and paragraph (2B), which is not relevant) for paragraph (2):

"(2) Subject to paragraphs (2A) to (7), where an alteration is made to correct any inaccuracy in the list on or after the day it is compiled, the alteration shall have effect—

(a) from the day on which the circumstances giving rise to the alteration first occurred, if the alteration is made—

(i) before 1st April 2016 otherwise than to give effect to a proposal;

(ii) in order to give effect to a proposal served on the VO before 1st April 2015;

(iii) on or after 1st April 2016 where the circumstances giving rise to the alteration first occurred on or after 1st April 2015 and the alteration is made otherwise than to give effect to a proposal;

(iv) in order to give effect to a proposal served on the VO on or after 1st April 2015 where the circumstances giving rise to the alteration first occurred on or after that date;

(b) from 1st April 2015 if the circumstances giving rise to the alteration first occurred before that date and the alteration is made on or after 1st April 2016 otherwise than to give effect to a proposal;

(c) from 1st April 2015 if the alteration is made in order to give effect to a proposal served on the VO on or after that date and the circumstances giving rise to the alteration first occurred before that date.

(2A) Where—

(a) an alteration (alteration A) is made on or after 1st April 2015 in order to give effect to a proposal made on the ground set out in regulation 4(1)(d) or (f); and

(b) the proposal was served on the VO within 6 months of the alteration which gave rise to the proposal (alteration B)

alteration A shall have effect from the day on which alteration B had effect."

40. The ALA Regulations 2009 were further amended with effect from 1 April 2017 by the ALA Regulations 2017 in respect of local lists compiled on or after that date, but regulation 22(1) of the ALA Regulations 2017 provides that the ALA Regulations 2009 as they were prior to the amendments continue to apply to lists compiled before 1 April 2017.

The jurisdiction of the VTE, Upper Tribunal and Court of Appeal

41. The VTE's jurisdiction arises from regulation 8 (dispute over the validity of a proposal) or regulation 13 (where the Valuation Officer decides that a proposal is not well-founded) of the ALA Regulations 2009.

42. Regulation 38 of the VTE Regulations as amended provides, so far as relevant:

"(4) After dealing with a NDR appeal, the VTE may, subject to paragraph (6), by order require a VO to alter a list in accordance with any provision made by or under the 1988 Act.

(5) Subject to paragraph ([6]), where it is decided that a disputed rateable value should be an amount greater than—

(a) the amount shown in the list at the date of the proposal; and

(b) the amount proposed by the appellant,

the VTE must order the VO to alter the list with effect from the day on which the VTE Panel made the decision.

…

(7) Where it appears that circumstances giving rise to an alteration ordered by the VTE have ceased to exist, the order may require the alteration to be made in respect of such period as appears to the VTE to reflect the duration of those circumstances.

…

(10) An order under this regulation may require any matter ancillary to its subject matter to be attended to."

43. Provision for appeals to the Upper Tribunal is made by regulation 42 of the VTE Regulations. Regulation 42(5) provides:

> "The Upper Tribunal may confirm, vary, set aside, revoke or remit the decision or order, and may make any order the VTE could have made."

44. In general, an appeal from the VTE to the Upper Tribunal is by way of a full rehearing, and not merely a review of the VTE's decision: see *Cardtronics UK Ltd v Sykes (VO)* [2020] UKSC 21, [2020] 1 WLR 2184 at [4]. In the Upper Tribunal's decision in *Avison Young* the Deputy President inclined to the view that an appeal against a discretionary decision under regulation 38(7) of the VTE Regulations should be a review of the VTE's decision, but did not decide the point. This issue is not before this Court. I note, however, that regulation 38(7) is expressed to confer a discretion on the VTE, which may support the Deputy President's tentative view. Given that the issue is not before the Court, however, I shall adopt the course taken by the parties of focussing on the way in which the Upper Tribunal exercised the discretion rather than on the way in which the VTE did, although it would not make any material difference if the latter approach were adopted given that, in both cases, the two tribunals exercised the discretion in the same way and for largely the same reasons.

45. For its part, the Court of Appeal's powers on an onwards appeal are provided for by sections 13 and 14 of the Tribunals, Courts and Enforcement Act 2007. If the Court of Appeal finds that the UT made an error on a point of law, it may set aside that decision, and can either remit the case to the Upper Tribunal or VTE with directions for reconsideration, or it may "make any decision which the Upper Tribunal could make if the Upper Tribunal were re-making the decision" (section 14(4)).

<u>The scope of the VTE's power under regulation 38(7)</u>

46. As noted above, the first issue before this Court, which arises in both appeals, is as to the scope of the VTE's power under regulation 38(7). In a nutshell, AY and GBD contend that the VTE did not have power under regulation 38(7) to limit the duration of the alterations to the respective lists made pursuant to their Proposals because the hereditaments had changed at the end of the period in question, and so had their rateable values (referred to by counsel as an A-B-C case). AY and GBD contend that the power is only available where the hereditament and its rateable value are the same at the end of the period in question as they were prior to that period (referred to as an

A-B-A case). In other words, the power can only be used to restore the *status quo ante* which existed prior to the alteration of the list.

The language of regulation 38(7)

47. The starting point in considering this contention is the language of regulation 38(7) itself. This states that where "circumstances giving arise to an alteration … have ceased to exist", the order may require the alteration to be made "in respect of such period as appears … to reflect the duration of those circumstances". On the face of it, this language is perfectly apt to apply to the present cases. In both cases the properties were subject to building works which meant that they were incapable of beneficial occupation for a period of time, meaning that they did not qualify as hereditaments during that period. Accordingly, at the beginning of that period circumstances gave rise to an alteration in the list, in one case a reduction in the rateable value to a nominal amount and in the other a removal of the property from the list, and at the end of that period those circumstances ceased to exist.

48. Counsel for AY, who undertook the main burden of arguing this part of the case, referred the court to a body of case law on what amounts to a "material change of circumstances" within regulation 4(1)(b) of the ALA Regulations 2009, and placed particular reliance upon *Merlin Entertainments Ltd v Cox (VO)* [2018] UKUT 406 (LC), [2019] RA 101. I do not consider that this case law is of any assistance in the present context, however, given that counsel for AY accepted that the "circumstances" referred to in regulation 38(7) were capable of being wider than the "circumstances" which amounted to a "material change of circumstances" within regulation 4(1)(b).

49. Counsel for AY was on somewhat firmer ground in submitting that it was necessary to identify with precision the "circumstances" which gave rise to the alteration. He argued that the "circumstances" in the present cases were the works on the buildings that were undertaken. The fact that the properties were incapable of beneficial occupation was a consequence of those works, and not a "circumstance" justifying a list alteration. I do not accept this. The reason why alterations to the lists were justified was that 10 Aldermanbury and Freeston Drive had temporarily ceased to be hereditaments because they had ceased to be capable of beneficial occupation for the duration of the works. As counsel for AY himself pointed out, in *Colour Weddings Ltd v Roberts (VO)* [2019] UKUT 385 (LC), [2020] RA 41 at [32], the Upper Tribunal correctly identified the issue before it as being "at what date was the property first rendered incapable of beneficial occupation as a result of works". But in the present cases the circumstances which rendered the properties incapable of beneficial occupation ceased to exist when the works were finished.

50. Counsel for AY's principal submissions on the language of regulation 38(7) concerned the words "ceased to exist". He argued that: (i) a one-off event could not cease to exist, but only an ongoing event; and (ii) in any event, the cessation of the works in the present cases had not resulted in the hereditaments resuming the physical state which they had had before the works, but rather had resulted in the hereditaments having a different physical state which required a fresh entry in the list (or at least, a different alteration to the list).

51. So far as both arguments are concerned, counsel drew a contrast between building works of the kind that had been undertaken in these cases and, for example, a temporary closure of a nearby road or the erection of scaffolding outside the building, which reduced the rateable value of the hereditament. Such a road closure or presence of scaffolding was, he argued, a continuing event which could properly be said to "cease to exist" when it came to end. Furthermore, it was not one which changed the character of the hereditament once it was finished. By contrast, stripping out a property at the commencement of a programme of building works was a one-off event which could not be said to "cease to exist". Even if that was wrong, the physical state of the property was different at the end of the programme, and thus it had a different rateable value.

52. I do not accept these arguments. So far as the first is concerned, I cannot see that a programme of building works is any more of a one-off event, or any less of a continuing event, than a road closure or the presence of scaffolding. These are all events that endure for a period of time. The artificiality of AY's approach is highlighted by its contention that the cessation of the building works on 23 January 2015 was another one-off event.

53. As for the second argument, this seems to me to confuse the circumstances giving rise to an alteration in the list to reduce the rateable value to a nominal amount, or to remove the hereditament from the list, with the circumstances giving rise to an alteration in the list to change the rateable value of the hereditament. While the building works are being carried out, the property is incapable of beneficial occupation, and therefore does not qualify as a hereditament. This justifies an alteration to the list to reflect that lack of qualification for the period during which the works are being carried out. The result of the building works when finished is to change its physical state, and hence its rateable value. That justifies a different alteration to the list to reflect the change in rateable value for the period after the completion of the works. The distinction between the two sets of circumstances may be illustrated by considering a scenario in which the property is redecorated: the redecorating works may mean that the property is incapable of beneficial occupation for their duration, and yet there is no change to the rateable value of the hereditament at their conclusion.

54. Counsel for GBD advanced an ontological version of the arguments which was not available to counsel for AY. He submitted that, in the *Great Bear Distribution* case, the effect of the GBD Proposal was to recognise that the hereditament, as a hereditament, had ceased to exist when the works commenced. Thus the circumstances justifying the alteration of the list had ceased to exist as soon as the hereditament ceased to exist. What had happened at the end of the works was that a new and different hereditament came into existence, which had to be entered into the list for the first time. This way of putting the arguments is an ingenious one, but it makes no difference to the analysis. The fact of the matter remains that Freeston Drive only ceased to be a hereditament temporarily as a result of building works. This is precisely why the Supreme Court in *Monk v Newbigin* sanctioned the practice for administrative convenience of altering the description and rateable value of the hereditament for the duration of the works. After the conclusion of the works, the hereditament remained the same hereditament as it was before the commencement of the works, but its physical state and rateable value had changed as a result of the

works. Of course, if the whole of the building had been demolished (as the GBD Proposal inappositely suggested), then the consequences would be quite different.

The legislative context

55. It is common ground that, when interpreting regulation 38(7), account should be taken of its legislative context. In this regard, counsel for AY made a number of submissions which I will consider in turn.

56. First, he submitted that regulation 38(7) was an exception to regulation 38(4), and therefore should be narrowly interpreted. I am prepared to accept the premise of this submission, but I do not accept that this justifies interpreting regulation 38(7) more narrowly than its wording suggests. As counsel for the Valuation Officer submitted, it is on its face a provision of limited ambit anyway.

57. Secondly, counsel for AY pointed out that the VTE only had jurisdiction where the ratepayer had made a proposal and that the VTE's jurisdiction was limited to the issues raised by the proposal: see *Hughes v York Museums and Galleries Trust* [2017] UKUT 200 (LC), [2017] RA 3002 at [81]. He submitted that it followed that the VTE's power under regulation 38(7) had to be exercised within the limits of the jurisdiction so conferred upon it. I have no difficulty in accepting this, but I do not consider that it bears upon the scope of the VTE's power under regulation 38(7) in a way that is relevant to these appeals. It supports the proposition that one must identify with precision the "circumstances" which justify alteration of the list, but for the reasons explained above that does not assist AY and GBD.

58. Thirdly, counsel for AY relied upon the undisputed proposition that it is not possible under the ALA Regulations 2009 for a ratepayer to submit a single proposal for both (a) alteration of the list so as to reduce the rateable value of the hereditament to a nominal value or remove the property from the list for the duration of the works and (b) an alteration of the list so as to change the rateable value of the hereditament with effect from the conclusion of the works. I do not consider that this supports a narrow interpretation of regulation 38(7), however. As counsel for AY accepted, there is nothing to prevent a ratepayer from submitting separate proposals for (a) and (b). He submitted that, in practice, a ratepayer might have to submit multiple proposals to cover the possibility of dispute as to the duration of the works and further submitted that this could not in practice be achieved by a single document containing multiple proposals. Even assuming that these practical points are well-founded, however, they do not in my view detract from the point of principle that a ratepayer can protect itself by making separate proposals.

59. Fourthly, counsel for AY submitted that the correct approach on appeals to the VTE was to consider the correctness of the list at a single point in time, the material day, and not to consider the correctness of the list after that point in time. I have no difficulty in accepting that the VTE's primary task is to consider whether alteration of the list is well-founded on the material day. Given that rates are a daily tax, however, it would not be surprising to find that the VTE had power to consider whether alteration of the list should have effect for the remainder of the life of the list (subject to any subsequent alteration) or for some lesser period of time. On its face, this is precisely what regulation 38(7) does.

60. Fifthly, counsel for AY relied upon the fact that regulation 38(7) gives the VTE a discretion. He submitted that it would be surprising in a taxation context if the taxpayer's liability could be adversely affected by the exercise of a discretion, and that this supported interpreting regulation 38(7) as having a confined scope. What this submission overlooks, however, is that regulation 38(7) gives the VTE discretion not to limit the duration of the alteration to the period of the circumstances giving rise to the alteration, rather than, as might be expected, mandating the VTE to do so. As the present cases illustrate, this is a discretion which can be exercised to the ratepayer's benefit.

61. Sixthly, counsel for AY submitted that regulation 38(7) could not have been intended to enable the VTE to order Valuation Officers to make alterations to the list which the Valuation Officers were prevented from unilaterally making themselves due to time bars. In my judgment, however, regulation 38(7) does no such thing. This submission confuses the VTE's power under regulation 38(7) to order the Valuation Officer to alter the list to reduce the rateable value of hereditament to a nominal value, or to remove the hereditament from the list, only for so long as circumstances exist which justify that alteration, with the power of either the ratepayer to make a proposal, or the Valuation Officer unilaterally to make an alteration, to reduce the rateable value of the hereditament for the succeeding period. The fact that the ability of both the ratepayer and the Valuation Officer to exercise the latter powers may be prevented by time bars affords no reason to interpret the scope of the former power restrictively.

62. It is fair to say that it is probably only where the Valuation Officer's power of unilateral action is time-barred that this issue matters, because otherwise the Valuation Officer can deal with the problem in that way. This may explain why there has apparently been no judicial consideration of regulation 38(7) (or its predecessors) before now (with the exception of *Arnold v Dearing (VO)* [2019] UKUT 224 (LC), [2019] RA 479, which was not concerned with the situation which arises in these appeals). It is only the combined effect of the backlog of a considerable number of appeals to the VTE as a result of *Monk v Newbigin*, together with the finite resources of Valuation Officers when it comes to taking consequential action, that has shone a spotlight on the issue. This cannot dictate the interpretation of regulation 38(7), however.

63. Seventhly, counsel for AY submitted that it could not have been Parliament's intention that regulation 38(7) could be used in a manner which resulted in the introduction of inaccuracies into rating lists given that the whole purpose of the statutory scheme was to ensure that lists were as accurate as possible. I do not accept that the way in which the VTE exercised its power under regulation 38(7) in the *Avison Young* case did any such thing, however. In restricting the alteration to the entry for 10 Aldermanbury in the list to the period for which the property was incapable of beneficial occupation, the VTE accurately reflected the duration of the circumstances which justified the alteration. The inaccuracy in the list for the succeeding period was not caused by the VTE exercising its power under regulation 38(7): it was caused by the failure of either party to take the steps necessary to alter the list to reflect the change in rateable value of the hereditament as a result of the works in time. Contrary to the submission of counsel for AY, it is immaterial that the Valuation Officer was under a duty to ensure the accuracy of the list whereas the

ratepayer was not. I shall return to this point when considering the exercise of discretion in the *Great Bear Distribution* case.

64. Eighthly, counsel for AY relied upon the fact that regulation 14(7) of the ALA Regulations 2009 and regulation 38(5) of the VTE Regulations were provisions which protected ratepayers. He submitted that the VTE was faced in these cases with a choice between competing inaccuracies (namely, in the *Avison Young* case, a rateable value of £1,830,000 for the period 23 January to 31 March 2015 or a rateable value of nil for that period), and that, faced with that dilemma, the VTE's power under regulation 38(7) could only be properly used in a way which protected the position of the ratepayer. I do not accept this submission either. Regulation 14(7) of the ALA Regulations 2009 and regulation 38(5) of the VTE Regulations are different provisions with different purposes to regulation 38(7). The fact that they are clearly intended to protect ratepayers does not justify a restrictive interpretation of regulation 38(7), which is not designed purely to protect ratepayers, although it can be used in that way.

65. For his part, counsel for the Valuation Officer relied upon the power of the VTE to make a consent order under regulation 35(1), which it is common ground would enable the VTE to make an order of the kind it made in *Avison Young*. Counsel for the Valuation Officer argued that it would be surprising if the VTE could not achieve by judicial decision what it could achieve by a consent order. I agree with counsel for AY, however, that this is not a reliable indicator of the scope of the VTE's power under regulation 38(7). It is not uncommon in other contexts for courts and tribunals to be able to make orders by consent which they lack the power to make through judicial decision.

66. Finally under this heading, I should mention for completeness that it is common ground that regulation 38(10) of the VTE Regulations cannot be used to alter the rateable value of a hereditament from date B if the proposal before the VTE pursuant to which the VTE is making an order is to reduce the rateable value to a nominal value, or delete the hereditament from the list, from date A: see *Leda Properties Ltd v Howells (VO)* [2009] RA 165 at [20].

The purpose of regulation 38(7)

67. It is also common ground that it is necessary to consider the purpose of regulation 38(7). There is little to be said under this heading that I have not already said above. It seems to me that the purpose of regulation 38(7) is perfectly clear from its wording: it is to enable the VTE to ensure that its order for alteration of the list has effect only for the duration of the circumstances which justify that alteration, but to give the VTE a discretion not to do so. For the reasons I have explained, I consider that the present cases fall squarely within the scope of this power.

Conclusion

68. For the reasons explained above, I consider that the VTE and the Upper Tribunal were correct to conclude that regulation 38(7) empowered the VTE to make the order that it made in the *Avison Young* case and to make a similar order in the *Great Bear Distribution* case.

The exercise of discretion in *Great Bear Distribution*

69. In the *Great Bear Distribution* appeal the Valuation Officer challenges the exercise of discretion by the lower tribunals. Given that this is a challenge to an exercise of discretion, the Valuation Officer must establish that the discretion was exercised in a manner which was legally flawed. The test for this is very well known and not in dispute, and therefore it is not necessary to elaborate upon it, save to acknowledge that the Upper Tribunal is a specialist tribunal and therefore this Court should be slow to conclude that it has erred: see *Cardtronics v Sykes* at [4].

70. Although there is no challenge to the way in which the lower tribunals exercised their discretion in the *Avison Young* case, it is convenient to begin with this. The Upper Tribunal agreed with the VTE that the discretion should be exercised so as to limit the effect of the order to the period 1 September 2014 to 23 January 2015 for reasons which the Deputy President expressed at [40] as follows:

> "Both counsel acknowledged that, because the list can no longer be altered with effect from a date earlier than 1 April 2015, it will be inaccurate however the discretion under regulation 38(7) is exercised. The appellant will either be assessed for rates for a period from 23 January to 31 March 2015 on a rateable value of £1.83m rather than £1.8m, or it will be assessed on a rateable value of nil for the same period. The discrepancy against the ratepayer is modest but not insignificant if the power to limit the alteration only to the period of the works is exercised. It is very significant (albeit in favour of the ratepayer) if the list remains unaltered after the reduction in rateable value to nil. I also take into account that the appellant was in a position to protect itself against the risk of this inaccuracy arising by making a proposal to enter an appropriate rateable value after the completion of the works. In all these circumstances the appropriate order is the one made by the VTE which I decline to disturb."

71. By contrast, in the *Great Bear Distribution* case, the Upper Tribunal agreed with the VTE that the discretion should *not* be exercised so as to limit the effect of the order to the period 23 June to 3 October 2014 for reasons which the Upper Tribunal expressed at [47] as follows:

> "The Vice President considered that he did not have power to order an alteration in the rateable value and he declined the valuation officer's alternative invitation to restore the original entry at its original value of £825,000. He took the view that to do so would neither be in the public interest nor in accordance with the ratepayer's rights under Article 1 of the First Protocol to the European Convention on Human Rights. Mr Kolinsky did not seek to support the second of those considerations but emphasised instead that the VTE was right not to make an order which would result in the list being significantly inaccurate when it had been within the power of the valuation officer to enter an accurate valuation and he had failed to do so

> within the period allowed. We agree with that submission and we therefore decline to make an order restoring the hereditament to the list at its original rateable value. That value is about 10% higher than the parties agree the altered hereditament is worth."

72. As counsel for the Valuation Officer submitted, it is a striking feature of the Upper Tribunal's reasoning in *Great Bear Distribution* that it did not take into account the two key factors which it had relied upon in *Avison Young*, namely (i) the discrepancy in rateable value against the ratepayer was modest if the power was exercised, but the discrepancy in favour of the ratepayer was very significant if the power was not exercised, and (ii) the ratepayer could have protected itself by making a proposal after the completion of the works, and it did take into account a factor which it had not taken into account in *Avison Young*, namely that it had been within the power of the Valuation Officer to enter an accurate valuation, but he had failed to do so within the period allowed. This in itself suggests that the Upper Tribunal's reasoning was flawed in one of the decisions. It is a basic principle of justice that the law should be uniformly applied, that is to say, that like cases should be treated alike. The fact that the magnitude of the figures involved is much greater (in both directions) in *Great Bear Distribution* than in *Avison Young* cannot justify the differences in reasoning and outcome between the two cases.

73. The Valuation Officer contends that the Upper Tribunal's exercise of the discretion in *Great Bear Distribution* was flawed on five grounds:

i) the Upper Tribunal failed to take account of the absence of a hereditament from the list if the order to delete was not temporarily made;

ii) the Upper Tribunal impermissibly had regard to the rateable value of the hereditament after the end of the temporary period;

iii) the Upper Tribunal misdirected itself that the possible order was one of "restoration" to the list;

iv) the Upper Tribunal impermissibly failed to consider the relevant fact that the ratepayer was in a position to protect itself against the risk;

v) the Upper Tribunal unlawfully adopted an approach to the discretionary power under regulation 38(7) which would empty it of purpose.

74. GBD disputes that the Upper Tribunal made any error in the exercise of its discretion.

75. It is convenient to begin with the Valuation Officer's second ground. In my judgment the Upper Tribunal was entitled to take into account the rateable value of the hereditament at the end of the period justifying the alteration. The VTE, and the Upper Tribunal on appeal, is not merely entitled, but obliged, to take into account all considerations which are relevant to the exercise of the discretion. I am not persuaded that the rateable value of hereditament at the end of the period justifying the alteration is an irrelevant consideration.

76. I consider that the Valuation Officer's first, third and fourth grounds are all well-founded, however. So far as the first ground is concerned, the GBD Proposal was to delete Freeston Drive from the list. Deletion from the list was justified because the property was temporarily incapable of beneficial occupation due to building works. But those circumstances ceased to exist on 3 October 2014. That being so, the starting point should have been that the power would be exercised unless there was a good reason not to do so in the exercise of the tribunal's discretion, because failure to exercise the power would mean the hereditament continued to be deleted from the list after the circumstances justifying that deletion had ceased to exist.

77. As for the third ground, the Upper Tribunal was not being asked to restore the hereditament to the list, whether at its original rateable value or otherwise. Freeston Drive was already in the list with a rateable value of £825,000. The GBD Proposal sought removal of the property from the list because the property was temporarily incapable of beneficial occupation due to building works. What the Upper Tribunal was being asked to do by the Valuation Officer was to limit the temporal effect of the order to the period when the circumstances which justified it existed. Contrary to the argument of counsel for GBD, the Upper Tribunal was not being asked to facilitate an inaccurate entry in the list. The inaccuracy in the list with effect from 4 October 2014 had arisen separately and for a different reason (namely, that there had been a different material change of circumstances, but no-one had taken the steps necessary to alter the list to reflect that change).

78. Turning to the fourth ground, I consider that the Upper Tribunal was right to take the ability of the ratepayer to protect itself into account in *Avison Young* and wrong not to do so in *Great Bear Distribution*. Counsel for GBD argued that the ratepayer was under no duty to maintain the accuracy of the list, whereas the Valuation Officer was under such a duty. I accept both of these propositions, but I do not agree that they support the approach taken by the Upper Tribunal in *Great Bear Distribution*. The fact that the ratepayer is under no duty to maintain the accuracy of the list does not justify the ratepayer relying upon its own failure to make a proposal which would have protected its position when the VTE is asked to exercise its discretion in the ratepayer's favour under regulation 38(7). I do not suggest that the Valuation Officer's failure to take unilateral action is an irrelevant consideration, but in my judgment it is a factor of significantly less weight because the ratepayer will know what works have been carried out and when the works were completed long before the Valuation Officer can find that out.

79. I would add that I am puzzled by the Upper Tribunal's statement that temporally limiting the order was not "in the public interest". By exercising its discretion in the way in which it did, the Upper Tribunal favoured the interests of one ratepayer, GBD, over the interests of other ratepayers in the relevant area (if they are required to make up the shortfall) or over the interests of persons who benefit from the public expenditure which is financed by rates (if other ratepayers are not required to make up the shortfall). This seems a strange conception of the public interest. As I understand it, what the Upper Tribunal meant was that it was not in the public interest for GBD to be overcharged. But, as discussed above, this ignores the fact that GBD could have avoided being overcharged by taking appropriate action.

80. Having reached the conclusion that the first, third and fourth grounds are well-founded, it is not necessary to consider the fifth ground.

81. Given that the Upper Tribunal exercised its discretion in a flawed manner in *Great Bear Distribution*, it is open to this Court to exercise the discretion afresh. In my judgment it is clear that the discretion should be exercised in the same manner as the Upper Tribunal exercised it in *Avison Young*, and for essentially the same reasons.

Disposal

82. For the reasons given above, I would dismiss AY's appeal in *Avison Young* and allow the Valuation Officer's appeal in *Great Bear Distribution*.

Lord Justice Peter Jackson:

83. I agree.

Lord Justice Henderson:

84. I also agree.