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# FTB Rating Webinar (Part 1)

2 February 2022





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# ASPECTS OF THE RATING HYPOTHESIS

Richard Glover QC





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## Paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988

“... the amount equal to **the rent at which it is estimated the hereditament might reasonably be expected to let from year to year** on these three assumptions:

- a) ...the tenancy begins on the day by reference to which the determination is to be made;
- b) ... 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 tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above”.



## The paragraph 2(7) matters

- (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



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## The principle of reality

“The statutory hypothesis ... does not entitle the valuer to depart from the real world further than the hypothesis compels”.

Schiemann LJ

*Hoare (VO) v National Trust* [1998] RA 391



## Universal application

“... rating seeks a standard by which every hereditament in this country can be measured in relation to every other hereditament. **It is not seeking to establish the true value of any particular hereditament, but rather its value in comparison with the respective values of the rest.** Out of various possible standards of comparison it has chosen the annual letting value”.

Lord Pearce

*Dawkins v. Ash Brothers & Heaton*, [1969] 2 AC 366



## Purpose

**“...the supposition of a tenancy is only a mode of ascertaining the existing value of the occupation to the existing occupier”**

**Lord Denman CJ R. v. Grand Junction Railway Company(1844) 4 QB 18**

“the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purpose of assessment”

Lord Buckmaster Poplar Assessment Committee v. Roberts[1922] AC 93

“The function of rating valuation is to ascertain the value to the existing occupier ... the hypothesis of the imaginary tenant is intended to help and not to hinder the just enforcement of the primary obligation: if it hinders, it must pro tanto be treated as inapplicable”

Scott LJ Townley Mill Co (1919) Ltd v Oldham Assessment Committee [1936] 1 KB 585



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## Cross-boundary, an aside on *Woolway* and large hereditaments

- Cross-boundary – past tense but instructive
- *Woolway* – unit of occupation or unit of property
- Large hereditaments – taken literally the hypothesis cannot bear the burden.







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## Vacant and to let

### Different strokes

- *Edmondson v. Teesside Textiles*
- *Humber Ltd v Jones*
- *Hong Kong Electric*



## Tenancy from year to year

**“...the possibility of [the tenancy’s] longer duration is one of the surrounding circumstances which the tenant from year to year would take into account”.**

**Great Eastern Rail Co. v. Haughley, (1866) LR 1QB 666, per Sir Alexander Cockburn CJ**

Wrong to say “that because it is probable that before long cotton mills will be in full work again, and a man taking one for a term of years might reasonably expect that he would make large profits out of it, the rate should be made on an estimate of the rent which he would give. But this ... cannot be maintained without altering the language of the Act ... from ‘let from year to year’ to ‘let for a reasonable term of years’”.

Staley v Castleton Overseers (1864) 5 B&S 503, Blackburn J

“Though my landlord at the end of six months may give me six months’ notice, he is very unlikely to do so, and if he does not do so I will have the right to occupy for eighteen months ... judging by the probabilities and the way business is conducted in matters of this sort ... I do not think he will give me six months’ notice; that he will let me go on a little longer”.



## *Hardman v British Gas Trading Limited*

**“In the case of some forms of hereditament the exercise may be perfectly straightforward and the prospect of continuance may have little or no role to play in the valuation. In the case of hereditaments that involve a considerable initial investment, such as canals and railways in the old cases and power stations in modern times, the facts and circumstances may well provide powerful evidence upon which the valuer will conclude that the hypothetical parties would contemplate a tenancy from year to year with a lengthy prospect of continuance”**

“The valuation hypothesis is preserved by assuming that, as reasonable parties, the hypothetical landlord and the hypothetical tenant would view the prospect of continuance in the light of the rent that was agreed; if the hypothetical rent is assessed on the basis of a tenancy from year to year with a prospect of continuance of several years it is rational to assume that the reasonable hypothetical tenant and the reasonable hypothetical landlord contemplate a prospect of continuance that bears a fair relationship to the rent to be paid and is the same likely period in the minds of both of them”.



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# The Rating (Coronavirus Etc.) Act 2021

George Mackenzie





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## Context

- Government responses to Coronavirus.
- Discretionary relief scheme £16 bn for occupied retail, leisure, hospitality businesses (“expanded retail discount scheme”)
- Grants for low value hereditaments (below £50,999)
- Some properties/businesses did not qualify for targeted relief, notably:
  - Unoccupied properties
  - Other properties whose occupation was prohibited by law during pandemic
  - Mixed use properties
  - Higher value hereditaments
- Led to the prospect of many thousands of MCC proposals. So:
  - The Rating (Coronavirus Etc.) Bill was introduced
  - The Valuation for Rating (Coronavirus) (England) Regulations 2021 were made with prospective effect (dogs dinner - repealed by December)
  - next revaluation changed to 1 April 2023 (based on rental values at 1 April 2021) to reflect the impact of the pandemic.



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# Rationale

- Ministerial Statement 25 March 2020:

“A number of businesses that do not qualify for our existing reliefs have sought to challenge their business rates liability by seeking reductions to their property’s value through this Material Change of Circumstances provision.

Relying on this system to help businesses that need further support from the pandemic is not the right mechanism. These appeals would seek to reduce rate bills, and funding for local councils, based on the estimated impact of COVID-19 on the market value of a property, and not on the economic circumstances of the business. This system was not designed to address the challenges we face and would mean significant amounts of taxpayer support going to businesses based in offices – like banks, large online retailers and technology businesses, law firms and consultancy firms – many of whom have been able to operate successfully throughout the pandemic.

The process of resolving these appeals and litigation through the courts could take years and would not provide the support now when it is most needed. It would also expose local authorities to uncertainty about their financial position – including whether they would need to return money spent on their response to COVID-19, and how much.”



- Explanatory Memorandum:

“5 Matters such as the impact on rental values of coronavirus or interventions in response to coronavirus are part of the general market conditions and, as such, should where necessary be reflected in updated rateable values at each revaluation. If it were otherwise, the Valuation Office Agency would have to constantly reassess all hereditaments and rateable values with every coronavirus-related intervention or change in intervention regarding the use or enjoyment of property or the locality.

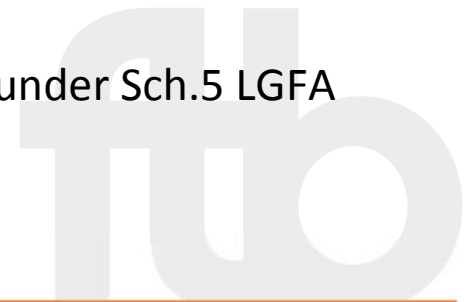
6 The Government does not believe that changes to rateable values through challenges to the rating list or the removal of hereditaments from the rating list is the right mechanism to help businesses that need support during the pandemic.”





# Application

- Came into force on 15 December 2021 with retrospective and prospective effect.
- Section 1(2): Relevant determinations:
  - Determining *for the purposes of compiling or maintaining a list* whether a H should be shown in the list – i.e. is the property a hereditament?
  - Determining for the purposes of maintaining the 2017 list the rateable value of a hereditament.
- Section 1(3): Irrelevant determinations:
  - Determining whether all or part of a hereditament is domestic or non-domestic property.
  - Determining whether all or part of a hereditament is exempt under Sch.5 LGFA 1988.





## Operation

- Section 1(4): “In making a relevant determination, no account is to be taken of any matter (whether arising before or after the passing of this Act) that is directly or indirectly attributable to coronavirus.”
- Section 1(6): Non-exhaustive list of matters attributable to Coronavirus. Anything done by a person-
  - With a view to complying with any legislation concerning the incidence or spread of Coronavirus;
  - With a view to complying with any legislation for reasons relating to the incidence or spread of Coronavirus;
  - In response to, or in consequence of, any advice or guidance given by a public authority relating to the incidence or spread of coronavirus.





- Section 1(5): The section 1(4) disability does NOT apply to these matters which therefore can be taken into account in making relevant determinations even where the matter *is* attributable to Coronavirus:
  - **Para. 2(7)(a) and (b) factors.** Physical state of the hereditament including where that state affects mode or category of occupation (e.g. changes of use).
  - **Para. 2(7)(c) and (cc) factors.** Quantity of minerals extracted and quantity of refuse and waste brought onto the hereditament.
- But, remember that what is important is changes in the essential or intrinsic character of the hereditament (as opposed to changes in the business operated within the hereditament). See *Merlin Entertainments Group Ltd v Cox* [2019] RA 101.





- Note that the s.1(5) matters only concern the physical state of the hereditament itself and not the locality.
- The material day factors in Sch. 2 para. 7(d) and (e) are not within s. 1(5) and accordingly, so far as they are attributable to Coronavirus, cannot be taken into account in making a relevant determination.
- Those factors are:
  - (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.





## Implications

- Prevents MCC proposals being made on the basis that there has been a material change in:
  - The physical state of the locality
  - Anything physically manifest in the locality
  - The use or occupation of other premises situated in the locality of the hereditament

Which is attributable, directly or indirectly, to Coronavirus.

- Seems comprehensively drafted.
- Odd that section 1(5) says that a change of use of a hereditament (mode or category) can be taken into account in an MCC proposal relating to that hereditament, but the same change of use apparently cannot be taken into account in an MCC proposal for other hereditaments in the locality.



# Interpretation

- What does “attributable” mean? No case law on the 2021 Act.
- Section 9 LCA 1961 – disregard of depreciation “attributable to” indication that land will be compulsorily acquired.
- In *Trocette Property Co Ltd v GLC* (1974) 28 P&CR 408 the Court of Appeal held that the phrase “attributable to” was used to provide greater scope for flexibility than other phrases such as “caused by”.
- In the 2021 Act this is a fortiori the case given the clear legislative intent to deal with Coronavirus entirely through revaluations and the additional language in s. 1(4) to the effect that the matter need only be “directly or indirectly” attributable to Coronavirus.
- There needs to be some causal nexus of course. In another s.9 case, *Jelson Ltd v Blaby DC* (1977) 34 P&CR 77 the Court of Appeal saw “flowing from” as a useful synonym for “attributable to”.
- Litmus test – if an MCC proposal needs to mention “Coronavirus” then the MCC is likely statutorily irrelevant (except in a mode/category/physical state case).



## Issues

- Can an event, comprising an MCC, with multiple causes be said to be “attributable to Coronavirus”?
- Given s.9 case law, if Coronavirus is a contributing factor (directly or indirectly) then the event is likely to be capable of being “attributable”. Does not need to be *mainly or solely* attributable.
- What about events which would have happened anyway, but in the event happened as a result of Coronavirus? These are clearly attributable to Coronavirus – there is no carve out for such things.
- There is a *Re. Kendrick* [2007] RA 59 “masking” issue here. Evidentially, difficult to see how it would ever be possible to show that an event was not masked by a matter attributable to Coronavirus.



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