Easter Term
[2019] UKSC 23
On appeal from: [2018] EWCA Civ 26

JUDGMENT

Telereal Trillium (Respondent) *v* Hewitt (Valuation Officer) (Appellant)

before

Lord Reed, Deputy President
Lord Carnwath
Lady Black
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

15 May 2019

Heard on 21 February 2019

Appellant	*Respondent*
Hui Ling McCarthy QC Hugh Flanagan (Instructed by HMRC Solicitor's Office (London))	Richard Glover QC Cain Ormondroyd (Instructed by DLA Piper UK LLP (Sheffield))

LORD CARNWATH: (with whom Lord Reed and Lord Lloyd-Jones agree)

Introduction

1. The issue in the appeal is the correct approach to determination of the rateable value of an office building ("Mexford House"), in circumstances where the evidence showed at the relevant time a general demand in the area for comparable office buildings, but no actual tenant willing to pay a positive price for the building itself.

2. I can conveniently take the factual background from Henderson LJ's judgment in the Court of Appeal: [2018] 1 WLR 3463, para 2.

> "Mexford House is a substantial three-storey block of offices in the North Shore area of Blackpool. It was purpose-built in 1971, and was occupied continuously as Government offices from 1972, in part by the Department of Work and Pensions ('the DWP') and in part by the Commissioners for Her Majesty's Revenue and Customs ('HMRC'). By the material date, however, the property was vacant. Both HMRC (on 29 February 2008) and the DWP (on 13 March 2008) had given notice of their intention to vacate the property, and it was formally handed back to the lessor on 31 March 2009. It is uncertain when the process of vacating the premises was finally complete, but there is no dispute that the property was empty by 1 April 2010, that being the date on which the 2010 non-domestic rating list for the area of Blackpool Borough Council first came into force by virtue of section 41(2) of the Local Government Finance Act 1988 ('the 1988 Act')."

3. The valuation was made for the purposes of the new rating list, which came into force on 1 April 2010 ("the material date"). But the rateable value had to be determined by reference to the "antecedent valuation date" (or "AVD") two years earlier, that is 1 April 2008: 1988 Act Schedule 6 paragraph 2(3), Rating Lists (Valuation Date) (England) Order 2008 (SI 2008/216) article 2.

4. The rateable value initially entered by the valuation officer with effect from 1 April 2010 was £490,000. This reflected his view that there were in the area other office buildings of similar age and quality, occupied by public sector tenants at rents of the same order. As became common ground in the course of the appeal, the most

closely comparable was Hesketh House in Fleetwood, a building of 8,403 square metres built in 1966. That had been assessed for rating purposes at £59 per square metre, which was taken also as the basis for the valuation officer's final valuation before the Upper Tribunal at £370,000 (see below).

Basic principles

5. The basis of the valuation is set by paragraph 2 of Schedule 6 to the 1988 Act, which provided:

> "(1) 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 certain assumptions, including] …
>
> > (a) … that the tenancy begins on the day by reference to which the determination is to be made …"

6. Although the valuation was at the AVD, paragraph 2(5) of Schedule 6 provided that certain matters, listed in paragraph 2(7), were to be "taken to be as they are assumed to be" on the "material date" (1 April 2010). Those matters include:

> "(a) matters affecting the physical state or physical enjoyment of the hereditament,
>
> (b) the mode or category of occupation of 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 none the less physically manifest there, and
>
> (e) the use or occupation of other premises situated in the locality of the hereditament."

7. The underlying principle is not in doubt. The valuation must be based on an estimate of the rent at which the hereditament "might reasonably be expected to let from year to year …". In short, the valuer must imagine a hypothetical negotiation between a willing landlord and a willing tenant and arrive at the rent which best represents the resulting compromise:

> "You must assume a landlord willing to let, and a tenant willing to take by the year; and having done so, you must get in the best way you can at the rent which, under an agreement brought about by the compromise of the conflicting interests of the man who wants to receive as much as he can and the man who wants to pay as little as he can, would be arrived at under such circumstances." (*Smith v The Churchwardens and Overseers of the Poor of the Parish of Birmingham* (1888) 22 QBD 211, 219 per Wills J)

In similar terms in *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee* [1937] KB 445, 470, Scott LJ said:

> "The rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the valuer or the tribunal, come to terms as a result of bargaining for that hereditament, in the light of competition or its absence in both demand and supply, as a result of 'the higgling of the market'. I call this the true rent because it corresponds to real value."

8. More contentious is how to apply those principles in a case where there is no evidence of actual demand for the particular property, by which to conduct this hypothetical exercise. I shall return to the authorities in more detail, having outlined the course of the proceedings below.

The proceedings below

The Upper Tribunal

The hearing

9. The Valuation Tribunal for England having reduced the rateable value to £1, the valuation officer appealed to the Upper Tribunal, before which the matter was

dealt with by way of a full re-hearing on fact and law. Both sides were then represented by the same counsel as have since appeared before the Court of Appeal and this court: Ms Hui Ling McCarthy QC (as she has since become) for the valuation officer, and Mr Richard Glover QC for Telereal. Expert evidence was presented to the tribunal in the form of written statements by Mr Hewitt himself, and Mr Baldwin for Telereal.

10. On the first day of the hearing (28 April 2016), Mr Hewitt gave evidence and was cross-examined. The tribunal summarised his evidence (UT paras 19-30). In his view, the building was "not obsolete either in a functional or in a locational sense" for reasons he explained. That Telereal had shared that opinion, he said, was shown by the fact that in 2002 they had taken a reversionary lease to run from September 2014 to March 2018, and that on the September 2007 rent review their own surveyor had put the rent at £341,000. However, in the course of his cross-examination, as the tribunal recorded, he accepted -

> "… that as at the AVD he could not identify in the real world any person who would put in a bid for a tenancy of Mexford House on the statutory terms; that there was no demand for such accommodation from the private sector; and that all public sector demands as at the AVD were being met by the occupation of other premises which the public sector already enjoyed. He accepted the opinion expressed by Mr Baldwin [Telereal's surveyor] in paragraph 11.1 of Mr Baldwin's first report, namely that 'vacant and to let' at the AVD there would be no demand for Mexford House." (UT para 24)

11. On the other hand, he pointed to the fact that "there did exist at the AVD demand for other (occupied) properties which were comparable to Mexford House". He maintained his view that a substantial rateable value was appropriate, for reasons he explained:

> "Leaving aside any detailed comparisons (some favourable some unfavourable) between Mexford House on the one hand and Hesketh House and the other comparables on the other hand, [Mr Hewitt] expressed the view that there was a quantity of broadly comparable office accommodation which was in beneficial occupation and for which substantial rents were paid at the AVD. He said that the fact that as at the AVD there was in the real world no demand for Mexford House (because all the demand had been absorbed in the other comparable properties) was not because of any intrinsic lack of merit (or obsolescence) in Mexford House as compared with these other

> properties but because Mexford House could be considered as 'unlucky' not to have occupants in beneficial occupation when comparable office premises did have occupants in beneficial occupation." (UT para 29)

On this basis, his final assessment of the rateable value of Mexford House was £370,000.

12. Following the completion of Mr Hewitt's evidence, counsel for both parties informed the tribunal of their view that, in the light of his evidence, the issue between them could be decided "as a matter of law upon an agreed basis of fact" (UT para 31). No other evidence was heard; in particular, Mr Baldwin was not called or cross-examined. Following legal argument the hearing concluded, but the tribunal directed that the agreed position should be reduced to writing.

13. Accordingly, on 3 May 2016 the parties lodged an agreed statement ("the Joint Position Paper" or "JPP") in the following terms:

> "1. The parties are content that the issue can be decided as a point of law.
>
> 2. The respondent [Telereal] contends that the correct approach requires the valuer to consider whether, had the subject hereditament been on the market at the AVD (1 April 2008), anybody would have been prepared to occupy the property and pay a positive price.
>
> 3. The parties agree that had the subject hereditament been on the market at the AVD (1 April 2008), nobody in the real world would have been prepared to occupy the property and pay a positive price. Thus, if the correct approach under the rating hypothesis is as formulated in para 2 above, the appeal should be dismissed and the decision of the [VTE] confirmed.
>
> 4. The [Valuation Officer] accepts that there was nobody in the real world who would be prepared to pay or bid a positive price for Mexford House at 1 April 2008.
>
> 5. If, however, the correct approach is, as the [Valuation Officer] contends, that (notwithstanding the absence of

anybody who would be prepared to pay or bid a positive price for Mexford House at 1 April 2008), the rating hypothesis:

> (a) requires the existence of a hypothetical tenant to be assumed and;
>
> (b) requires the rateable value to be assessed by reference to the 'general demand' as evidenced by the occupation of other office properties with similar characteristics,

then the parties agree that the appeal should be allowed and the [rateable value] determined at £370,000.

6. The respondent accepts the proposition at 5(a) but does not accept the proposition at 5(b).

7. If the [Valuation Officer] is right, [his rateable value] of £370k is confirmed.

8. If the respondent is right, the respondent's [rateable value] of £1 is confirmed."

Footnotes to paragraphs 2 and 3 noted that the factors in paragraph 2(7) of Schedule 6 were to be taken as they were at 1 April 2010.

14. As the Court of Appeal observed (paras 25-26), the tribunal seems to have gone out of its way to make sure that the basis of the agreement was not in doubt. It commented on the state of the evidence at that point:

> "We have received Mr Hewitt's evidence which has been cross-examined before us. We have received Mr Baldwin's written evidence but he did not give any oral evidence and hence was not offered for cross examination. We pointed out that if we proceeded as invited we could not properly resolve any dispute of fact in so far as such was revealed in the evidence before us. The parties were both content with this position and considered that, in the light of the factual agreements contained in the Joint Position Paper, there was no

> need for any such resolution of disputed matters save for the point of law which they had identified." (para 33)

15. It also mentioned the kind of factual matters on which (absent agreement) it would have expected to be addressed: including "what steps were taken when and by whom to let Mexford House upon what terms"; and whether Mexford House could have been let at a much lower rent, for example if the DWP or HMRC might have chosen to consolidate there "on the hypothetical statutory terms at such a very much lower rent". It was told that these points did not need to be investigated, since the valuation officer "did not seek to argue that in the real world Mexford House could at the AVD have been let at a positive price" (UT paras 34-35). On the other side it was confirmed by Mr Glover for Trillium that it was unnecessary to explore differences between the comparables and Mexford House since -

> "… it was accepted that if, as a matter of principle, the rateable value of Mexford House was to be assessed by reference to the 'general demand' as evidenced by the occupation of other office properties with similar characteristics, then the respondent accepted that £59 per square metre was correct." (para 36)

The tribunal's reasoning

16. I would pay tribute to the tribunal's judgment, which is a painstaking review of the relevant principles, and their application to the present case on the limited basis permitted by the JPP. For present purposes it is unnecessary to set it out in full. The tribunal had conducted a detailed review of a number of authorities, to which I will need to return in more detail later in this judgment. It started its "discussion" by stating two propositions derived from that review (paras 96-97):

> "It must be assumed that a hypothetical landlord and a hypothetical tenant will agree terms for such a letting. It is not permissible to conclude that no bidder can be found to take the tenancy."

> "It is well established that the basic question to ask is: is the occupation (ie the occupation under the hypothetical tenancy) such as to be of value? A valuation for rating purposes is based upon the concept of the value of the occupation."

As indicated by cross-references to earlier paragraphs, the latter proposition was derived from various authorities, starting with *London County Council v Church Wardens and Overseers of the Poor of the Parish of Erith in the County of Kent* [1893] AC 562 (the "*Erith case*"); the former more specifically from *Hoare (Valuation Officer) v National Trust* [1998] RA 391, 422 per Sir Richard Scott VC.

17. The core of the tribunal's reasoning comes in the following paragraphs:

> "102. Having regard to the Joint Position Paper we are not concerned with any detailed comparisons between Mexford House on the one hand and Hesketh House and other comparables on the other hand. We proceed on the basis that as at the AVD there existed several broadly comparable office premises which were beneficially occupied and for which substantial rents were being paid. There is no reason to conclude that the public sector occupants of those comparable premises, if not already accommodated in those premises, would have been unable to enjoy beneficial occupation of Mexford House and find such occupation of substantial value.
>
> 103. It is necessary to consider the hypothetical negotiations for the tenancy on the statutory terms between the hypothetical landlord and the hypothetical tenant in circumstances where the hereditament was not intrinsically valueless and where comparable premises were being beneficially occupied at substantial rents. In such circumstances we do not consider a hypothetical landlord and hypothetical tenant, each acting prudently and making the best use it could of its bargaining position, would agree upon a rent of £1.
>
> 104. We consider the flaw in the respondent's argument to be as follows. The respondent correctly accepts that it is not open to it to say that no hypothetical tenant would be prepared to take any tenancy at all. The respondent accepts that there has to be a tenancy granted on the statutory terms between the hypothetical landlord and the hypothetical tenant after negotiations. However, the respondent then (incorrectly in our view) attributes to the hypothetical tenant a characteristic which is not justified, namely the characteristic of not wanting the tenancy at all. The respondent seeks to justify this by saying that in the open market as a matter of fact no-one would have been prepared to pay any positive price for Mexford House. We consider that it is only permissible to attribute this

> characteristic to the hypothetical tenant where the hereditament is intrinsically valueless (struck with sterility) or where the responsibilities are such that no beneficial occupation is possible in a commercial sense. It is impermissible to attribute this characteristic to the hypothetical tenant when the premises are capable of beneficial occupation and where comparable premises are beneficially occupied at substantial rents.
>
> 105. Mexford House was capable of beneficial occupation as at the AVD. It was in fact still occupied (anyhow partially) at that date. The property has its drawbacks having regard to its age of construction and parking provision and location but is deemed to be in repair in accordance with the statutory provisions. It is necessary to ask the question identified in [the *Erith* case] namely whether the occupation (ie occupation under the hypothetical tenancy) be such as to be of value? We conclude that the only answer that can be given to that question is: yes, the occupation is such as to be of value.
>
> 106. Once that answer is reached we conclude it is impossible to find that the yearly tenancy on the statutory terms would be granted in return for a nominal rent. Instead we conclude that the tenancy would be granted at a rent which was more than a nominal rent and which was a rent which represented the value of the occupation. This rent would be negotiated between the hypothetical tenant and the hypothetical landlord by reference to the 'general demand' for such properties as evidenced by the occupation of other office properties with similar characteristics. Having regard to the Joint Position Paper it is not appropriate for us (or indeed open to us) to examine how such negotiations would go and whether the hypothetical tenant might be able to agree a rent at less than £370,000."

18. The tribunal accordingly fixed the rateable value at the agreed figure of £370,000. Permission to appeal was granted by the tribunal itself on 3 August 2016 in the following terms:

> "The appeal raises an issue of principle which is likely to recur in connection with substantial vacant buildings with significant rateable values. Where the evidence shows that there is no demand to occupy a hereditament which is capable of occupation, does the rating hypothesis require the valuer to assume demand that does not in reality exist?"

The Court of Appeal

19. Telereal appealed to the Court of Appeal, which allowed the appeal and restored the VTE's assessment. Giving the sole judgment, Henderson LJ reviewed the authorities. He cited in particular (at paras 34-35) the judgment of Hoffmann LJ in *Inland Revenue Comrs v Gray* [1994] STC 360, for the proposition that "[a]lthough the yearly letting is hypothetical, the open market in which it is assumed to take place is real", adding the comment:

> "It can be seen, therefore, that the hypothetical purchaser, or in the present context the hypothetical lessee, 'embodies whatever was actually the demand for that property at the relevant time', and that the valuation is a 'retrospective exercise in probabilities, wholly derived from the real world."

20. He referred also (para 36) to *Hoare v National Trust* [1998] RA 391 in which the Court of Appeal, overturning the decision of the Lands Tribunal, had ascribed only a nominal rateable value to two historic houses (Petworth House and Castle Drogo) owned by the National Trust. The court had emphasised "the need to depart from reality no further than the statutory hypothesis requires": that is "the principle of reality" in the words of Peter Gibson LJ. He added:

> "Peter Gibson LJ did not need to consider the more extreme position where, as in the present case, there was *no* potential bidder for the hypothetical lease; but the logic of the reality principle would appear to dictate that, in such circumstances, no hypothetical lease at a positive rent could have been concluded."

21. In the light of the principles established by the authorities, he saw "no real doubt about the answer in the present case":

> "On the agreed factual basis that nobody in the real world would have been prepared to occupy Mexford House at the AVD and to pay a positive price for doing so, it is in my judgment impossible to say that there was any actual demand in the market for such occupation. In the absence of any actual demand, there is no principle of law which requires such demand to be assumed. The only relevant assumption inherent in the rating hypothesis is that an agreement will be reached between the notional lessor and the notional lessee, but this requirement is satisfied by assuming a letting at a nominal rent.

> It would be contrary to the reality principle, and to the repeated emphasis in the authorities on the need to examine the actual balance between supply and demand in the real market, if the requirement to assume a concluded letting were elevated into a requirement to assume such a letting at a substantial rent which nobody in the real world would ever have been willing to pay. The existence of any such supposed principle of law would also be impossible to reconcile with the cases which show that, in an appropriate factual context, application of the rating hypothesis to premises which are capable of beneficial occupation can nevertheless yield a rateable value of nil or a nominal amount." (para 41)

22. He acknowledged the existence of "broadly comparable office properties … occupied by public sector tenants at rents comparable to that for which Mr Hewitt contended". However, there was "no surplus public sector demand" which would have enabled Mexford House to be re-let; in other words "the relevant market was saturated" (para 42). Ms McCarthy's arguments glossed over "the critical point … the saturation of the relevant market and the absence of any potential tenants in the real world for Mexford House". He added:

> "In a saturated market, there is still a proper basis for a substantial rateable value while the existing tenant remains in occupation and pays a substantial rent for the hereditament; but that situation changes once the property becomes vacant, because there is no longer a potential tenant available to take it on the statutory terms required by the rating hypothesis." (para 43)

23. He identified four respects in which the Upper Tribunal had erred (paras 46-50):

> "First, the Upper Tribunal were wrongly influenced by passages in the speech of Lord Herschell LC in [the *Erith* case] which were directed to the logically prior question of whether the premises were in rateable occupation at all, which is not in issue in the present case, rather than by the guidance given by Lord Herschell LC about the rating hypothesis itself at p 588 …"

> "Secondly, although the Upper Tribunal quoted at length from the judgment of Hoffmann LJ in *Inland Revenue Comrs v Gray*, … their actual reasoning appears to be inconsistent with the

concept of the actual open market described by Hoffmann LJ …"

"Thirdly, at para 102, the Upper Tribunal considered that the public sector occupiers of the comparable premises, if not already accommodated in them, would have been able to enjoy beneficial occupation of Mexford House, and to find such occupation 'of substantial value'. That may have been so, but the actual position was that the other public sector tenants were already accommodated elsewhere, and they would not have been available as potential tenants for Mexford House on the actual market which existed at the relevant time. Furthermore, the effect of paragraphs 2(5) and (7) of Schedule 6 to the 1988 Act is that the valuer must assume that all the comparable properties were occupied and used on the material date by their existing tenants."

"Fourthly, the Upper Tribunal appear to have taken the view that a nominal rateable value is only permissible in law where the hereditament is either intrinsically valueless ('struck with sterility') or where the tenant's responsibilities are so onerous that no beneficial occupation of the property is possible in a commercial sense. … I can find no warrant for treating these categories as exhaustive, or as precluding the same conclusion in a case where the evidence drawn from the market is that there was no tenant who would pay a positive rent for the relevant hereditament."

The issues in the appeal

24. The main issue in the appeal, as in the Upper Tribunal and the Court of Appeal, is narrowly constrained by the terms of the JPP. It is common ground that at the AVD "nobody in the real world would have been prepared to occupy the property and pay a positive price", but that the "rating hypothesis" requires "the existence of a hypothetical tenant to be assumed". The question is whether, against that agreed legal and factual background, the same hypothesis -

"… requires the rateable value to be assessed by reference to the 'general demand' as evidenced by the occupation of other office properties with similar characteristics."

If the answer is yes, it is agreed that the correct rateable value was £370,000; if no, £1.

25. The submissions of the parties in this court largely repeat their submissions below, and are sufficiently indicated by the two judgments reviewed above. However, it is convenient at this point to deal with one possible difference between their respective interpretations of the JPP.

26. In his written submissions, Mr Glover commented on the apparently conflicting views of the two valuers on the issue of "obsolescence". As he explained, the view of his witness, Mr Baldwin, was that given the size, age and location of Mexford House and "the clear evidence that the market had moved away from offices of that size, age and location", the hereditament had "reached the end of its economic life" and was "economically obsolete". In support he took us to parts of Mr Baldwin's written evidence (paragraphs 11.4-11.5) where he had spoken of the public sector being "in the process of downsizing their estate in the Fylde", with the result that -

> "second hand office complexes dating from the 1960s and 1970s that became empty between 2000 and 2014 were either
>
> - Demolished …;
> - completely refurbished or redeveloped … or
> - remained empty pending lease expiry."

He put Mexford House in the last category.

27. Mr Glover noted the apparently contrasting view of Mr Hewitt that Mexford House was "still physically capable of use as offices and had a general specification not too dissimilar from occupied buildings", and that it was neither "functionally" nor "locationally" obsolete. Mr Glover suggested that these uses of the term "obsolete" were not mutually contradictory:

> "The qualifying adjective is critical. It was not a necessary part of the ratepayer's case to show that Mr Hewitt's propositions were wrong; so he was not cross-examined on them. Similarly, after the agreement of the JPP, counsel for the valuation officer

> did not feel the need to challenge Mr. Baldwin on his proposition." (written submissions para 17)

28. This submission, in my view, runs up against a difficulty inherent in the JPP itself. The bare agreement that "nobody in the real world" would have been prepared to pay "a positive price" to occupy the building tells one nothing about the reasons for that position. Mr Glover's summary highlights what in my view was a significant difference between the explanations given by the two valuers. Had Mr Baldwin been called as a witness, his alternative valuation of £1 would have been explored. The tribunal would no doubt have wished to examine the hypothetical possibilities mentioned in its judgment. There would also have been room for cross-examination on the comparison with the valuation proposed by Telereal's surveyor on the rent review. As it was, those differences were necessarily left unresolved.

29. The tribunal recorded the valuation officer's view that the property was not "obsolescent" in either sense, and that the lack of demand was due simply to "all public sector demands" being met by other properties; or as he put it later "because all the demand had been absorbed in the other comparable properties … not because of any intrinsic lack of merit (or obsolescence) …". That was the limited context of his agreement with Mr Baldwin's paragraph 11.1. (see paras 10-11 above, citing UT paras 24 and 29). His acceptance of the proposition in that paragraph cannot be read as extending to the matters set out in the following paragraphs of Mr Baldwin's evidence. Apart from mentioning his report, the tribunal made no further reference to Mr Baldwin's evidence, on this or any other issue. That was entirely understandable in view of the terms of the JPP.

30. As far as concerned the submissions as recorded by the tribunal, the same limited view of Mr Hewitt's concession was repeated and relied on in Ms McCarthy's submissions (UT para 71). On the other side, there was no indication in Mr Glover's submissions (UT paras 82ff) that the issue of "obsolescence", or Mr Baldwin's views on it, formed any part of his case on behalf of Telereal following the JPP. Similarly, as has been seen (para 21 above), the Court of Appeal's judgment proceeded on the basis that the lack of a tenant was due, not to "obsolescence" in any sense, but "saturation" of the relevant market.

31. In this court, in my view, we must take the JPP as it stands. We cannot look beyond it to evidence which was not referred to by the tribunal, nor attempt to resolve issues which were by agreement left unresolved. However, that does not mean that the JPP has to be looked at in a vacuum. In so far as there are differences as to its interpretation we are entitled to look at the context in which it was arrived at, and the state of the evidence as recorded by the tribunal at that time. That includes, but does not go beyond, the agreement arrived at in the course of Mr Hewitt's cross-examination.

The authorities

General principles

32. The tribunal took it as established by the authorities, first that -

> "It must be assumed that a hypothetical landlord and a hypothetical tenant will agree terms for such a letting. It is not permissible to conclude that no bidder can be found to take the tenancy." (para 96)

and secondly that -

> "… the basic question to ask is: is the occupation (ie the occupation under the hypothetical tenancy) such as to be of value? A valuation for rating purposes is based upon the concept of the value of the occupation." (para 97)

As indicated by their cross-references, the first proposition was derived from *Hoare v National Trust* [1998] RA 391, 422 per Sir Richard Scott VC (see UT para 62); the second from a number of authorities, including the *Erith* case, but perhaps most clearly stated in *Poplar Metropolitan Borough Assessment Committee v Roberts ("Poplar")* [1922] 2 AC 93 HL (UT paras 48). I will need to look in more detail at the *National Trust* case, which was relied on by the Court of Appeal, and also by Mr Glover in submissions. It is convenient to refer first to the *Poplar* case, which provides an authoritative and, I believe, uncontentious statement of the general approach.

33. The *Poplar* case concerned the rating of a tied house (including living accommodation) which was subject to statutory rent control, with the effect that the maximum recoverable rent was less than the value entered in the valuation list. The ratepayer appealed on the basis that the figure should be reduced to the maximum rent so recoverable. The House of Lords dismissed the appeal. It is sufficient for present purposes to refer to Lord Parmoor's discussion of some of "the fundamental principles which permeate the whole system of our rating law" (pp 118ff). As he explained actual rents agreed between tenant and landlord are not the test of value for rating purposes, this being one aspect of the "fundamental principle of equality":

> "It has long been recognized, as a matter of principle in rating law, that to make actual rentals the basis of rateable value

> would contravene the fundamental principle of equality, both between the rate contributions from individual ratepayers, and between the totals of rate contributions levied in different contributory rating areas. In effect the result would be to make the amount on which the occupier of property is liable to pay rates dependent in many cases on the contractual relationship between a particular landlord and tenant, whereas it is dependent in all cases on a statutory direction applicable on the same principle to all hereditaments, and intended to insure equality of treatment as between the occupiers of rateable property and the rating authority." (p 119)

As he acknowledged, it could be "notoriously difficult" in some instances to ascertain the correct figure, but the duty of the assessment committee was -

> "… in all cases, to ascertain for this purpose as accurately as may be, the value of the beneficial or profitable occupation of the particular property, and then to make the statutory deductions."

For that purpose account should be taken of "all that can reasonably influence the judgment of an intending occupier" (p 120).

34. The underlying principle of equality (or the "common yardstick", in Ms McCarthy's words) was stated in similar terms more recently by Lord Pearce:

> "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 … So one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some estimate of what value should be attributed to a hereditament on the universal standard, namely a letting 'from year to year'…" (*Dawkins (VO) v Ash Brothers and Heaton Ltd* [1969] 2 AC 366, 381-388)

35. It is right also to note the necessary qualification to that principle stated by Scrutton LJ in a familiar passage in the *Ladies Hosiery* case [1932] 2 KB 679. Having referred to the "vital principle" that the valuation should be "fair and equal"

as between "different classes of hereditaments, and as between different hereditaments in the same class", he added:

> "but in my view there is a third important qualification, that the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error." (*Ladies Hosiery and Underwear Ltd v West Middlesex Assessment Committee* [1932] 2 KB 679, 688)

The Erith case

36. For the application of these principles to a case where there was no general market for the use in question, the tribunal relied on the *Erith* case [1893] AC 562, from which it extracted the proposition that in such a case "the true test is whether the occupation is of value", contrasting the case where the land was "struck with sterility in any and everybody's hands" (para 43). The Court of Appeal thought that in this respect the tribunal had been wrongly influenced by passages directed to the "logically prior question whether the premises were in rateable occupation at all …" (see para 23 above). In my view that criticism is misplaced. To understand why, it is necessary therefore to look in a little more detail at the case and its factual context.

37. The *Erith* case concerned pumping stations and other installations occupied by the LCC, as part of the metropolitan sewerage system. The appeal proceeded by case-stated on the basis that the net rateable value was fixed at £10,000 subject to resolution of the question of law identified in the case. It was agreed that, as used by the LCC they were incapable of yielding a profit; that if they had been in private ownership, the LCC would have been prepared to pay a rent sufficient to support the rateable value as fixed; but if disconnected from that system and "in the hands of a tenant applied to any other use" the rateable value should be £2,143 (p 565). The principal questions before the House were, first, whether they were rateable at all, and secondly, if so, whether for the purpose of assessing rateable value the LCC was to be considered as a possible hypothetical tenant. Both questions were answered in the affirmative.

38. In the leading speech Lord Herschell LC dealt first with the authorities on the issue of rateability, concluding that the relevant law was "in a most unsatisfactory condition". However the decision of the House in *Jersey v Mersey Docks* (1865) 11 HLC 443, "mark[ing] an epoch in the law of rating", had "exploded" the basis of some of the early authorities, by determining that "the circumstance that land is held by a public body for public purposes does not affect its rateability"; land is "rateable whenever its occupation is of value" (pp 584-585).

39. Having dealt with the issue of rateability, he turned then to consider that of assessment: "upon what principle the assessment ought to be made, and what considerations are proper to be taken into account", questions which in his mind were "involved in much greater difficulty" (p 586). Having referred to the statutory definition of rateable value, designed for "uniformity in the assessment of rateable property in the metropolis" (p 587) he said:

> "It has never been doubted that the rent which is actually being paid by the occupier does not necessarily indicate what is the rent which a tenant might reasonably be expected to pay, or that an owner who is in occupation, and who may not be willing to let on any terms, is none the less rateable. The tenant described by the statute has always been spoken of by the court as 'the hypothetical tenant'. Whether the premises are in the occupation of the owner or not, the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them?" (p 588)

40. It was in this context that (at pp 590-592) he discussed the use in some of the earlier authorities of the expression "struck with sterility". For example, in *R v School Board for London* (1886) 17 QBD 738, 942 (concerning rateability of a school), Bowen LJ had said:

> "If land is by law struck with sterility when in any and everybody's hands, so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor. But if the school-house is not used by this school board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands."

Lord Herschell commented:

> "Now, if land is 'struck with sterility in any and everybody's hands', whether by law or by its inherent condition, so that its occupation is, and would be, of no value to any one, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable, and at what amount they should be assessed; and I do not think that a building in the hands of a school board is incapable of being beneficially occupied by them, and is not so occupied because

> they are prohibited from deriving pecuniary profit from its use."

He cited with approval the words of Fry LJ, in the same case (at 17 QBD, p 770):

> "The term 'sterility' has been introduced into the cases because, as a general rule, a profit is produced; but it does not by any means follow that because there is no profit there is no value …"

and commented:

> "I think the learned judge here points to the true test; whether the occupation be such as to be of value … and I have already said that the possibility of making a pecuniary profit is not in my opinion the test whether the occupation is of value." (p 591)

41. It is clear in my view from a review of the speech as a whole that Lord Herschell was seeking to clarify the principles not only of rateability but also of assessment. The rateable value in his case was directly dependent on whether the LCC could be considered as a hypothetical tenant, since it was only on that basis that it would be appropriate to take account of the use of the pumping stations as part of the metropolitan sewerage system, rather than as a detached installation in private hands. As has been seen, they were the respective bases of the agreed alternative valuations.

42. Accordingly, with respect, Henderson LJ was wrong to criticise the tribunal's reliance on passages from this speech as directed solely to the issue of rateability. That may be true of its first reference (UT para 39) to his statement that land is rateable "whenever its occupation is of value". However the tribunal went on to cite passages specifically directed to the issue of assessment, including the contrast with land "struck with sterility" and Lord Herschell's adoption of Fry LJ's "true test", that is "whether the occupation is of value". Indeed, in this as in other early authorities, the considerations relevant to rateability and valuation may often overlap (see eg *Mersey Docks and Harbour Board v Birkenhead Union Assessment Committee* [1901] AC 175, 184-185 per Lord Davey).

The Court of Appeal authorities

43. I turn first to *Hoare v National Trust* [1998] RA 391, on which both parties relied. As already noted this case concerned the assessment of rateable value of two historic houses (Petworth House and Castle Drogo) owned by the National Trust. I can conveniently adopt the present tribunal's summary of the issue (UT para 62):

> "The National Trust had produced figures to show that no profits could be made from the properties. They argued therefore that no hypothetical tenant would be prepared to offer any rent for them and that their rateable value was therefore nil. The Lands Tribunal broadly accepted that no profit could be made from the properties, but held that an overbid would be made by the National Trust, who could be treated as a hypothetical tenant, to reflect the great historical and cultural values of the houses notwithstanding that there was no money to be made out of being a tenant of them. The Tribunal calculated the amount of the rent by taking 3% of the gross receipts at each property."

The Court of Appeal disagreed holding that a hypothetical tenant (whether regarded as the National Trust itself, or, as Sir Richard Scott V-C thought preferable, "a hypothetical person standing in as a hypothetical National Trust") would not "have been prepared to make any overbid".

44. As the tribunal noted at para 62, the court had "recognised that the statutory formula demands that the hypothetical negotiations for the yearly tenancy should be successful". It cited the words to that effect of the Vice-Chancellor (p 422):

> "If only one potential bidder has been identified, a conclusion that the bidder would not be willing to take the yearly tenancy is not one that is permissible. The statutory formula insists that the tenancy is taken up."

noting that the other judgments (of Schiemann and Peter Gibson LJJ) were to similar effect.

45. As to the substance of the decision the tribunal cited the leading judgment of Schiemann LJ, but it might also have referred to the concurring judgment of the Vice-Chancellor where the critical point is to my mind expressed most clearly:

> "The question for the Tribunal was not, in my judgment, what annual rent the National Trust would have been willing to pay for the two properties, but what rent a hypothetical organisation whose purposes were the preservation of historic houses and whose resources were adequate for taking on these properties would have been prepared to pay. The answer to this question would have to take into account in respect of each property the net annual receipts that could be obtained from a reasonable exploitation of the property's potential and the annual expenditure that would have to be undertaken in the maintenance, repair and general preservation of the property. It is, in my opinion, important to notice that the statutory formula, unlike its predecessor in section 19 of the General Rate Act 1967, places the burden of repair and maintenance on the hypothetical tenant. Each of the properties with which we are concerned appears to require an annual expenditure on repair and maintenance which would leave the hypothetical tenant heavily out of pocket.
>
> The facts as found by the Tribunal, regarding the annual receipts that might be obtained from each property and the annual expenditure currently being spent on the maintenance and repair of each property, make it quite unreal, in my judgment, to suppose that the hypothetical tenant would be prepared to pay any rent at all. The hypothetical tenant, the hypothetical National Trust, would be accepting the obligation to meet a considerable annual deficit. Why should any hypothetical tenant be willing to add to that deficit by paying a positive rent? Why would not the hypothetical landlord be willing to grant the yearly tenancy at a nil rent in order to escape the annual deficit resulting from the cost of keeping the property in repair?" (pp 23-24)

46. The tribunal saw that case as exemplifying the proposition that a nil value may be appropriate where occupation of the hereditament may be beneficial in the physical sense but -

> "where the responsibilities of a tenancy are so great as to result in the occupation being burdensome rather than beneficial in the commercial sense." (UT para 99)

I agree.

47. Henderson LJ thought this decision supported the opposite conclusion to that reached by the tribunal. He referred (para 37) to Schiemann LJ's observation that the hypothetical landlord would be faced with a situation where "there are no other bidders for the tenancy", pointing as he said "to a nominal hypothetical rent". Henderson LJ thought that the same conclusion "would seem to follow, a fortiori, if there were no potential bidder for the tenancy in the real world". However, that ignores the different context of Schiemann LJ's observation. The lack of alternative bidders in that case was the consequence of the inherently burdensome nature of the property. Unlike the present case, there were no other comparable properties let at substantial rents.

48. For similar reasons I do not consider that any assistance is to be gained from an earlier Court of Appeal authority to which Henderson LJ referred (para 38): *Tomlinson v Plymouth Argyle Football Co Ltd* (1960) 175 EG 1023. That concerned the respondent's football ground, for which the Football Club was the sole potential tenant. Henderson LJ cited Pearce LJ's warning against assuming hypothetical tenants for the hereditament "if there is in respect of that particular hereditament no reasonable possibility of such tenants existing". However, that again was in the context that the absence of an alternative tenant was due, not to a surplus of similar properties in the market, but to the particular quality of the property and the heavy cost of maintenance (see p 703).

49. Finally I should refer to the passage in Hoffmann LJ's judgment in *Inland Revenue Comrs v Gray* [1994] STC 360, on which Henderson LJ placed some reliance. That concerned a different statutory regime, relating to the valuation of an estate for the purposes of capital transfer tax under the Finance Act 1975. Section 38 of that Act required the value at any time of any property to be taken as "the price which the property might reasonably be expected to fetch if sold in the open market at that time". The court's reliance on this authority was perhaps more understandable if, as Henderson LJ recorded (para 33), the parties were in agreement that the open market to be assumed under that section was "materially identical to the open market posited by the rating hypothesis".

50. However, in my view the comparison was potentially misleading. I note that in *Hoare v National Trust*, Peter Gibson LJ mentioned this case as raising a "similar requirement of a hypothetical transaction" (p 18). That may be true, but it is only part of the story. There are at least two important differences. First, section 38 was expressly concerned with an imaginary sale in the "open market"; the 1988 Act calls simply for an estimate of the rent "reasonably (to be) expected", without any reference in terms to a "market" (although such language can be found in some of the cases: eg "the higgling of the market" - para 7 above). More importantly, the 1984 Act was concerned with the valuation of a single asset for capital transfer tax. There is no necessary comparison with any other properties or assets. By contrast, as has been seen, the purpose of rating assessment is much wider. It is to achieve a

fair standard for comparable properties across the country as a whole. It is unnecessary to decide whether every part of Hoffmann LJ's analysis was accurate in the statutory context to which it was directed. In the present context, however, in so far as it suggests that the identification of the hypothetical tenant is limited by "whatever was the actual demand for that property at the relevant time", it is my view inconsistent with the statutory test, and the authorities to which I have referred.

Lands Tribunal cases

51. Of more direct relevance, as the tribunal rightly held, were two decisions of highly experienced surveyor members of the Lands Tribunal, which were not mentioned by the Court of Appeal. They were *Lambeth London Borough v English Property Corpn Ltd and Shepherd (Valuation Officer)* [1980] RA 279 LT (Mr J H Emlyn Jones FRICS) (see UT paras 55-57); and *Shiel (Valuation Officer) v Borg-Warner Ltd* [1985] RA 36 LT (C R Mallett FRICS) (UT paras 58-60). They addressed directly the distinction depending on whether the lack of a tenant was attributable to an inherent characteristic of the property, or to a surplus in the market of comparable properties for which there was a general demand.

52. The *Lambeth* case concerned the annual value for rating of a warehouse (Bridge House) which had been purpose-built in 1933 with seven storeys but was unoccupied at the relevant date. The ratepayers argued that at the relevant date the warehouse had outlived its use and was unsuitable for warehousing purposes; that a tenant could have been found at the relevant date who would make use of the ground floor and some limited use of the first floor, but that the upper parts would have been surplus to requirements. The rating authority argued that the building could be let in the open market as a multi-storey warehouse. The tribunal accepted that the evidence supported the tenant's assessment of the potential use of the building, and that there was no demand for multi-storey use or other valuable uses of the upper floors.

53. The tribunal made clear that this conclusion did not depend on the fact that the upper parts of the building were unoccupied at the time:

> "I accept the argument put forward by the appellant rating authority that the mere fact that premises are unoccupied does not of itself justify a lesser value than that applicable to similar premises which are occupied. As counsel for the rating authority expressed it, in a parade of shops where one shop remains unoccupied one would expect to find similar values applicable to all shops possessing similar characteristics. I think in principle that must be right, but that presupposes that the hereditaments are broadly identical …" (p 313)

The member went on to explain why the other properties relied on by the authority were not truly comparable.

54. This passage was applied by the Lands Tribunal in the second case, *Shiel*. The case concerned a large factory which was no longer required by the original occupiers and which was empty because an alternative occupier had yet to be found. The valuation court had reduced the assessment of rateable value to £50,000, but the Valuation Officer had appealed to the Lands Tribunal arguing for a figure of £200,000. The appeal failed. Citing the *Lambeth* case, the member accepted that "the mere fact that premises are unoccupied does not of itself justify a lesser value than that applicable to similar premises which are occupied", and referred again to the example of a parade of shops where one shop remains unoccupied (p 43). However, he accepted the ratepayer's case on the evidence that the appeal premises in their existing state had "reached the end of their economic life", and that their future use "appears to depend upon the creation of a hereditament, or hereditaments, different from the existing". As he put it, "in rating terms the premises have ceased to have any value" (p 45).

55. I would respectfully endorse the distinction drawn in those decisions between a property which is unoccupied merely because of a surplus between supply and demand in the market, and a property which has "reached the end of its economic life". I did not understand Mr Glover to argue otherwise.

56. I may add that this is not an unfamiliar issue in rating practice, nor necessarily an easy one to resolve. Ms McCarthy referred to us to the Valuation Office Agency's document, "Rating Manual section 3: valuation principles", issued in May 2017. Section 5, headed "No demand - obsolescence" states that:

> "5.1 Existing buildings and hereditaments can become obsolete: technology moves on, demand changes, replacement buildings are constructed. Rating is a tax on rental value. Just because a hereditament exists does not mean it has a rental value - demand may have gone."

Having noted that this issue is to be considered by reference to the AVD subject to the statutory exceptions taken at "the material date", it draws attention (para 5.4) to the possible difficulty for valuation officers "in judging whether a property is actually obsolete or simply has not (yet) let". It lists a number of relevant considerations, including:

- was the property occupied at AVD? This is primary evidence of demand

- are there other similar properties in the locality that are occupied? Does this mean that the subject property has simply been 'unlucky', rather than there being no demand for the type and locality of the accommodation? A terrace of five shops or offices can be envisaged with four occupied. It may be there is only demand for four. This does not mean that the demand for the fifth, vacant one should be regarded as nil. It is the general demand for the mode and category of occupation in the locality that needs to be considered - not the specific."

57. The accuracy in law of that guidance is not of course before us in this case. In so far as it clearly relies on the approach of the Lands Tribunal in the two cases I have mentioned, it does not appear contentious. It does however usefully highlight the issues of fact which may become relevant in drawing the distinction in particular cases, but which, by agreement, the tribunal in the present case was not required to resolve.

58. This important distinction seems with respect to have been overlooked by Henderson LJ when he said:

> "In a saturated market, there is still a proper basis for a substantial rateable value while the existing tenant remains in occupation and pays a substantial rent for the hereditament; but that situation changes once the property becomes vacant, because there is no longer a potential tenant available to take it on the statutory terms required by the rating hypothesis." (para 43)

Whether the hereditament is occupied or unoccupied, or an actual tenant has been identified, at the relevant date is not critical. Even in a "saturated" market the rating hypothesis assumes a willing tenant, and by implication one who is sufficiently interested to enter into negotiations to agree a rent on the statutory basis. As to the level of that rent, there is no reason why, in the absence of other material evidence, it should not be assessed by reference to "general demand" derived from "occupation of other office properties with similar characteristics".

59. Finally, for completeness I should mention Henderson LJ's reliance for support of his approach on the requirement in paragraph 2(7)(e) of Schedule 6 to assume that "all the comparable properties were occupied and used on the material date by their existing tenants". As I understand it, he saw this as relevant to the extent that:

> "the other public sector tenants were already accommodated elsewhere, and they would not have been available as potential tenants for Mexford House on the actual market which existed at the relevant time." (para 49)

60. Ms McCarthy criticises this use of paragraph 2(7)(e) as broadening its scope in a way which is incompatible with its purpose in the statutory scheme. As she submits, it is not dealing with the issue of demand in the hypothetical market, but is an aspect of the *rebus sic stantibus* principle, which requires physical condition and use to be taken as at the material day, both in respect of the hereditament itself and the locality: "the actual conditions affecting the hereditament at the time when the valuation is made" (see the cases reviewed by Lord Hodge in *S J & J Monk (a firm) v Newbigin* [2017] 1 WLR 851, paras 12ff). I did not understand Mr Glover seriously to quarrel with that submission. However, as he rightly said, this point was not essential to the Court of Appeal's reasoning.

61. For these reasons I would allow the appeal and restore the decision of the Upper Tribunal.

LORD BRIGGS: (dissenting) (with whom Lady Black agrees)

62. I would have dismissed the appeal. This is not because I differ from Lord Carnwath upon any aspect of the applicable legal principles. It is only because I have come to a different conclusion about the meaning and consequences of the highly artificial agreement about the facts made between the parties before the Upper Tribunal ("UT"), as set out in the JPP. This was that, although there was sufficient general demand for comparable properties in the locality to justify a substantial rateable value for them (para 5), there was nonetheless nobody in the real world who would be prepared to pay or bid a positive price for Mexford House as at the AVD (paras 3 and 4). The UT was in no doubt about the artificiality of that agreement about the facts. As they said (at paras 34(b) and 103-104), in the real world the existence of comparable properties at substantial rents would ordinarily have compelled an examination of the question whether one or more of the tenants in those properties would have been prepared to re-locate to the subject property at a lower, but still more than nominal, rent.

63. The JPP also required the UT to make a rather unreal choice between two supposedly conflicting principles of law, namely (i) that the valuer is only required to consider whether, had the subject hereditament been on the market at the AVD, anybody would have been prepared to pay a positive price, with a nil rateable value if not, or (ii) that, even if nobody would be prepared to pay a positive price, the rateable value is nonetheless to be assessed by reference to the 'general demand' as evidenced by the occupation of other properties with similar characteristics (para

5(b)). It was, mercifully, common ground that, as a matter of law, the rating hypothesis required the existence of a hypothetical tenant to be assumed (paras 5(a) and 6). It is an unreal choice because, in the real world, the existence of evidence of general demand for comparable properties in the relevant locality will almost invariably lead to the conclusion that there will be someone prepared to pay at least some more than nominal rent for the subject property, even if actually (rather than merely hypothetically) vacant as at the AVD.

64. I would summarise the legal principles applicable to the present unusual problem as follows. I do so briefly because I do not believe that they are in dispute, although I will expand upon them in due course:

a. In following the express statutory requirement to identify the "rent at which it is estimated the hereditament might reasonably be expected to let from year to year" as at the AVD, the valuer is required to make a real world assessment of the demand in the market for a letting of the subject premises, departing from the real world only when the rating hypothesis compels the valuer to do so: *Hoare v National Trust; Tomlinson v Plymouth Argyle*.

b. The rating hypothesis does require a hypothetical tenant to be assumed, willing to negotiate for a yearly tenancy, but this does not require it to be assumed that the tenant will pay more than a nominal rent. The concept of the hypothetical tenant prepared to pay only a nominal rent is the safety valve by which the necessary hypothesis that there is such a tenant is reconciled with a real world in which there may be, in fact, no demand for a letting of the property at all: *Hoare v National Trust*.

c. The requirement to abide by the principle of equality does entail the same principles being applied to each property in the rating list, but not uniformity of outcome, where the evidence (or, I would interpolate, agreement about the facts) demonstrates otherwise: the *Poplar* and *Ladies Hosiery* cases.

65. The ordinary approach of the valuer is to look at reliable evidence of rentals agreed for comparable properties (if there are any), and then to adjust them (or discount their evidential weight) by reference to relevant differences between the comparable and the subject properties. Those differences may typically be locational, or physical, and the passage of time between the date when a rental was agreed for a comparable and the AVD may require further adjustment or discount, where for example there has been a general movement in the market between the two dates.

66. Thus the fact that a particular rent is still being paid for the comparable property as at the AVD may be of limited value if, for example, it was negotiated some time previously but is being paid (as it usually is) under a lease for a term of years, from which it would be impossible for the tenant to escape without payment of a prohibitive surrender premium. In valuers' language, the comparable is simply over-rented. It does not necessarily mean that there is demand even for the comparable property as at the AVD at the then passing rent, or at any particular rent, or even in some extreme cases at more than a nominal rent. If there has been a fall in the market since the rent for the comparable property was freely agreed, (ie otherwise than at an upward-only rent review in a lease without a tenant's break clause) then the fact that the agreed rent is still being paid tells you little about the continuing market for the comparable property as at the AVD.

67. All these factors are then input into the assessment of the demand (if any) for a yearly letting of the subject property as at the AVD. They are not in any way part of some separate analysis of general demand which may in some way trump an evidence-based or agreed conclusion that there is in fact no real world demand at all for the subject property at more than a nominal rent. In the overwhelming majority of cases a conclusion that there is demand for comparable properties which may be described as general will be sufficient evidence to prove to a reasonable valuer that there is some demand for the subject property at a more than nominal rent, if only because there will usually be a level of discounted rent which will be likely to tempt the tenant of an occupied comparable property to re-locate, if free to do so without paying a prohibitive surrender premium. That is why the mere fact that the subject property is vacant at the AVD (eg in a row of identical properties all the rest of which are occupied) does not mean that the vacant property has only a nominal rental value. Demand for a letting of a particular property is not normally a binary, yes or no, question. The real question is, demand at what rent?

68. In the present case the parties solemnly agreed that, even though there was general demand for comparable properties at a substantial rent, nonetheless (however improbably) there was no real world demand at all for a letting of the subject property as at the AVD, at anything more than a nominal rent. That is in my view what the phrase "nobody in the real world who would be prepared to pay or bid a positive price" actually means. This is also how the UT understood the JPP, as is apparent from the way in which, at the respondent's invitation, the UT defined the appealable issue of law. They said:

> "Where the evidence shows that there is *no demand* to occupy a hereditament which is capable of occupation, does the rating hypothesis require the valuer to assume *demand that does not in reality exist* (my italics)."

69. The appellant tried long and hard in this court to submit that this was not what the JPP meant. It was submitted that all it meant was that the parties were unable to identify an actual tenant who would be prepared to take a tenancy on the AVD itself. But the UT was best placed to construe it, since it was agreed in the middle of a contested hearing in which they had read all the relevant evidence, and heard part of it cross-examined. A reading of that evidence confirms the UT's interpretation, although a transcript of the cross examination of Mr Hewitt was sadly lacking. As both the UT and Lord Carnwath explain, it followed a cross examination of Mr Hewitt in which he had, flatly contrary to his written evidence, agreed with paragraph 11.1 of Mr Baldwin's expert report, which stated:

> "The findings described in previous sections of this statement lead to the unequivocal conclusion that as 'vacant and to let' at the AVD, there would be *no demand* for Mexford House (my italics)."

This paragraph followed a detailed examination of the market, the relevant comparables (including Hesketh House) and the reasons why, notwithstanding its locational and physical similarity, a tenant would not be found in the real world for Mexford House at more than a nominal rent. A primary reason for Mr Baldwin's conclusion appears to have been that there had been a significant recent contraction in the requirement for office space in the locality on the part of the only (governmental) tenants likely to find it suitable for their needs, and that this requirement was fully accommodated in other premises. He regarded Mexford House as being economically obsolete.

70. The agreement recorded in the JPP was not merely that there was no evidence to prove real world demand for a letting of Mexford House, but that the evidence positively showed that there was none. This flowed naturally from the fact that paragraph 11.1 of Mr Baldwin's report (with which Mr Hewitt had agreed in cross examination) was itself based on detailed evidence. I do not mean that the JPP thereby amounted to an agreement about the reasons why there was no demand, but it was an agreement made in the context of evidence, rather than in an evidential vacuum. I therefore respectfully disagree with Lord Carnwath's premise (in para 8) that this is a type of case where there is merely no positive evidence of demand for the particular property. In such a case, evidence about demand for comparable properties (usually in the form of recently negotiated agreements) will be compelling, and usually conclusive.

71. The UT's answer to the problem that it had been agreed that the evidence proved that there was no real world demand for a letting of Mexford House at more than a nominal rent was to conclude that the rating hypothesis required them to conclude otherwise, by a departure from the real world and the substitution of an

assumed demand for the subject property, derived purely from an assessment of demand for the comparable properties. This appears from paras 100 to 106 of their carefully reasoned Decision. In their view the statutory requirement to assume a hypothetical tenant meant that, provided only that the premises were capable of beneficial occupation, taking into account the burdens of upkeep, it had to be assumed that the tenant would be prepared to pay more than a nominal rent, regardless of real world evidence or, as in this case, agreement to the contrary.

72. I can find nothing in the authorities which supports this legal analysis. In short, it assumes a requirement to depart from the real world which is not justified by the statutory scheme. All that the scheme requires is an assumption that somebody would agree to take a yearly tenancy, but not necessarily at more than a nominal rent. In a case where the valuer is not hamstrung by an improbable agreement between the parties about the complete absence of demand (at more than a nominal rent) the real world will easily provide an evidential basis for a conclusion that the hypothetical tenant would pay something of substance, for all the reasons which I have set out above.

73. Both the UT and Lord Carnwath rely upon a number of authorities in which a distinction is made between properties which lack intrinsic value, where a nil valuation may be justified, and those which have some intrinsic value to somebody, which therefore command some more than nominal hypothetical rent. I broadly agree with Lord Carnwath's analysis of them, including where it departs from that of the Court of Appeal. But in none of those cases was there a departure from a real world assessment of rental value, nor does the reasoning in any of them justify doing so in the present case.

74. In the *Erith* case, the outcome turned on a real world conclusion that, if it needed to rent the pumping station from a private owner, a hypothetical LCC would be prepared to pay a substantial rent because it would be able to connect the pumping station with its sewage system, even though, viewed on its own, the pumping station could not be operated at a profit. The phrase "struck with sterility" was not being approved as a label for an exclusive class of case within which, alone, a nil rental value could be assessed. Rather, this important case is supportive of the requirement to assess demand, as far as possible, on a real world basis, rather than to depart from it. Lord Herschell's conclusion that the use of the subject premises would be of value (even if not on its own profitable) was a stepping stone to a conclusion that, in the real world, there was demand for the pumping station at a more than a nominal rent. It was not a licence to depart from the real world assessment of demand required by the statute, in a case where it is proved or (as here) agreed that there was no demand at more than a nominal rent.

75. I agree with Lord Carnwath that *Hoare v National Trust* was not a case in which there were comparable properties let at a substantial rent. In the absence of comparables the Court of Appeal therefore had to conduct a real world assessment of the economics of being a tenant of each of the stately homes in question, which proved that the hypothetical tenant would only pay a nominal rent. It contains a trenchant statement of the need not to depart from the real world further than the rating hypothesis compels (per Schiemann LJ at p 381). The Court of Appeal overruled the Lands Tribunal precisely because it departed from the real world, under the mis-apprehension that the law required it to assume some kind of overbid, contrary to the facts. The case is a good example of the operation of the nominal rent as the safety valve which accommodates the statutory requirement to assume a willing tenant with the absence of any real world demand for the premises at more than a nominal rent. It is powerful authority against, rather than for, the proposition that where the evidence (or, as here, an agreement about the evidence) demonstrates that there is no such demand, the law requires the valuer to depart from the real world so as to create one which does not in reality exist.

76. It is in my view no answer to say of the *Hoare* case that there were no comparables, or that the absence of demand was proved by reference to the economics of running the two buildings. That is true, and those economics were the real world reasons why there was nobody who would bid more than a nominal rent for either property. In this case that conclusion is an agreed fact, and the reasons for it do not therefore matter.

77. I would make the same observation about *Tomlinson v Plymouth Argyle Football Co Ltd*. Pearce LJ's warning against assuming hypothetical tenants where there is no real possibility of such tenants existing may have been based upon real world facts about the football ground, but it is a perfectly general and in my view correct statement of the law. In this case the absence of any such possibility (ie tenants prepared to pay more than a nominal rent) is an agreed fact, and the law does not compel the valuer to go behind it, into the non-real world, merely because there is some general demand for other comparable properties.

78. Again, I agree with Lord Carnwath that *Inland Revenue Comrs v Gray* is about a different kind of statutory valuation, but rating valuation is surely no less about an open market than the valuation of an estate for tax purposes. In my view the concession recorded by Henderson LJ in the Court of Appeal that the two valuation processes are substantially the same was rightly made. At p 372, speaking generally, Hoffmann LJ said:

> "The valuation is thus a retrospective exercise in probabilities, *wholly derived from the real world* …"(my italics).

Nor do I accept as a sufficient distinguishing characteristic the fact that rating valuation seeks to value numerous properties as at the same date, whereas estate valuation is a one-off. It would be no less unusual (and potentially unsatisfactory) for identical houses in a terrace to receive hugely different values for IHT purposes when their owners died at roughly the same time, than apparently comparable properties in a rating list. But the statutory criterion in both cases is uniformity of the principles applied, not uniformity of outcome. Where as here the parties actually agree that, in fact, there is such a disparity in demand, the law does not require recourse to some non real world principle to trump or remove it.

79. Turning to the Lands Tribunal cases, both *Lambeth London Borough v English Property Corpn Ltd and Shepherd (Valuation Officer)* and *Shiel (Valuation Officer) v Borg-Warner Ltd* exemplify the plainly correct proposition that the mere fact that the subject property is unoccupied as at the AVD does not of itself mean that there is no real world demand for it. Both make use of the familiar example of the parade of shops, with one empty and the others in use. The conclusion that there is nonetheless some demand for the empty shop is a reasonable conclusion of fact which would be reached by most valuers, even in a saturated market where there are, say, five comparable properties, demand for only four, and the subject property is the only one which is vacant. But nothing in those cases suggests that where the facts show or (as here) it is agreed, for whatever reason, that there is in truth no demand at all for the empty shop, the law requires some notional general demand for comparable properties to be substituted. The agreement in the JPP was not merely that no hypothetical tenant could actually be identified as at the AVD, but that there was no demand at all for Mexford House.

80. Nor does the passage in the Rating Manual, relied upon by Ms McCarthy and quoted by Lord Carnwath at para 56, take the matter any further. Read as a whole, all it advises is that general demand will usually be probative of specific demand for the subject property, and that the valuer should not become too focussed upon the subject property being vacant. It does not say that where the evidence (including that of general demand) shows, or it is agreed, that there is nonetheless no demand at all for the subject property, the general demand must be substituted for that evidence or agreement. I am however cautious about the reliability of the advice that occupation of the subject property as at the AVD is "primary" evidence of demand. It may well be prima facie evidence, but the continuing occupation may be attributable to a reason other than demand, such as the existence of a lease for a term of years from which the tenant has no economical means of escape.

81. I am, like Lord Carnwath, puzzled by the view of the Court of Appeal about the effect of a property becoming vacant in a saturated market. As noted above, the fact that there is a tenant in a property paying a substantial rent may not be reliable evidence for open market demand for it, and certainly not at the then current rent, if the market has become saturated only after that rent was agreed, and the tenant has

no economic means of escape from the tenancy. But I can envisage a situation where demand for a group of comparable properties has collapsed, and where the departure of one of a very small number of potential tenants from one of them, due to its reduced requirement for space of that type in the locality, renders the subject property economically obsolete. Even then that would only exceptionally mean that there was no demand for it at anything above a nominal rent, but that is what was agreed as a fact in the present case.

82. The following familiar example illustrates the point. A shopping centre may have a row of shops whose economic viability is entirely dependant upon the presence of a nearby anchor tenant, such as a major supermarket or department store. The anchor tenant leaves, and there is no prospect of another anchor tenant being found. The row of shops will immediately become economically obsolete (ie no longer viable to a hypothetical incoming tenant at more than a nominal rent), but they will not all immediately fall vacant. For as long as leasehold terms continue, their tenants may be locked in, and only able to leave at the end of their terms. The row of shops will be subject to a lingering economic death. In such a case the evidence that rent is still being paid for some of them will not justify the inference that there is demand for those which have fallen vacant.

83. In conclusion the question of law for which the UT gave permission to appeal in this case is: "Where the evidence shows that there is no demand to occupy a hereditament which is capable of occupation, does the rating hypothesis require the valuer to assume demand that does not in reality exist". I would answer it in the negative. It will be a very rare case indeed where the evidence really does show that there is no demand at all for the subject property where there are comparables in the locality let at substantial rents. But if that is what the evidence shows, or that is what the parties have agreed, then the rating hypothesis does not require a departure from that real world conclusion, merely because the subject property is in theory capable of beneficial occupation.