

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 166 (LC)
Case No: RA/57/2018**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – valuation - material change in circumstances – effect of redevelopment schemes in the locality of office premises – evidence of allowances agreed elsewhere for retail premises – requirement to “stand back and look” – appeal allowed – rateable value reduced by 25%

**IN THE MATTER OF AN APPEAL FROM
THE VALUATION TRIBUNAL FOR ENGLAND**

BETWEEN :

HOSTSOHO LIMITED

Appellant

- and -

**DAVID JACKSON
(VALUATION OFFICER)**

Respondent

**Re: 1st – 4th Floors
8 Berwick Street
London
W1F 0PH**

Peter D McCrea FRICS

**Royal Courts of Justice
on
17 April 2019**

Ms Kiki Kendrick and Mr Robin Smith for the Appellant
Mr Karl List DipRating MRICS for the Respondent

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The following cases are referred to in this Decision:

Lotus and Delta Ltd v Culverwell (VO) and Leicester City Council [1976] 239 EG 287

Timothy Taylor Ltd v Mayfair House Corporation [2016] EWHC 1075 (Ch)

DECISION

Introduction

1. Ms Kiki Kendrick and her husband Mr Robin Smith own a business called Hostsoho Ltd (“the appellant”). Since July 2013 it has been based in offices in the first to fourth floors of 8 Berwick Street (“the appeal property”) in the heart of Soho, and as its name might imply the company offers accommodation on a per desk basis to start-up and fledgling businesses.
2. HostSoho Ltd appeals against a decision of the Valuation Tribunal for England (“VTE”) dated 15 May 2018 in which the VTE dismissed HostSoho’s appeal, which arose out of a proposal to alter the 2010 Rating List entry for the appeal property made on 27 May 2016. The proposal was founded on a material change in circumstances owing to significant building work in the locality of the appeal property.
3. Ms Kendrick and Mr Smith represented the appellant. The respondent was represented by Mr Karl List DipRating MRICS, complex case and appeals manager at the Valuation Office Agency, who called Mr Russell Shaw MRICS to give expert evidence. The appeal was heard under the Tribunal’s simplified procedure.
4. On 16 April 2019 I made an unaccompanied external inspection of the appeal property and the environs of Berwick Street.

Facts

5. From a statement of agreed facts, the evidence and my inspection, I find the following facts.
6. The appeal property is located on the eastern side of the pedestrianised section of Berwick Street, Soho, which runs north from Peter Street to Broadwick Street. There is a street market for six days of the week.
7. The appeal property comprises offices totalling 175.6 sq metres spread more or less evenly over the first to fourth floors, with its own access from Berwick Street. It is of brick construction under a pitched tiled roof, does not have a lift, is not air conditioned but has heating. The metal framed windows to the front elevation are single glazed.
8. Soho has seen extensive development in the last ten years, much of which is ongoing. Kemp House, at 90-104 Berwick Street, is immediately opposite the appeal property, and extends along much of the western side of this section of the street. Built in 1959, it comprised a three storey “podium” block, comprising retail and commercial uses, and a 17-storey residential tower at the southern end of the block. Prior to redevelopment, the occupiers included a Co-op store at the Peter Street end of the block. Planning permission for a mixed-use scheme was granted in June 2014. It involves alterations to the existing structure to form new retail units, a hotel, new residential units, roof terraces and associated landscaping, car parking etc. The existing residential tower was unaffected. An amendment to the planning permission to increase the

extent of the demolition and further alterations was granted on 27 May 2015. A further amendment, which involved more structural alterations at basement and ground floor levels, a further 17 hotel bedrooms and other alterations was granted on 5 April 2017. Enabling works commenced in Summer 2015, demolition began in February 2016, and construction commenced in September 2016.

9. The next closest development to the appeal property is at Walkers Court, at the southern end of Berwick Street. The site encompasses 4-10 Brewer Street, 6-12 Walkers Court, and 27 Peter Street. Planning permission was granted in May 2014 for a mixed-use scheme which involved the revival of the famous Boulevard theatre, new shops and restaurants, improved public realm, and new headquarters for Soho Estates. Between September 2015 and June 2016, Phase 1 was carried out, encompassing demolition, piling, drainage and ground floor construction.

10. Accordingly, at the material day (27 May 2016) the demolition phases in both schemes were in progress. At the time of my inspection works on both schemes were continuing, although Walkers Court was in its final stages.

11. There have been a number of other developments in the locality, including the demolition of Trenchard House, located on Hopkins Street, behind Kemp House, but some of these had been completed at the material day.

12. The appellant entered into a lease with Shaftesbury Soho Ltd for a term of 10 years from July 2013 at a rent of £75,400 pa, drawn on internal repairing terms and contracted out of the security of tenure provisions of Part II of the Landlord and Tenant Act 1954. There was a rent review and a tenant's break clause at the start of the fifth year, but the rent remained unaltered and the appellant did not operate the break clause. Several four-month rent free periods were agreed, taking effect from the start of the lease, the start of the third year, and the start of the fifth year. Subsequently, two further ad hoc three-month rent-free periods have been agreed.

13. The appeal property was entered into the 2010 rating list described as offices and premises with a rateable value of £52,500 with effect from 25 July 2013, subsequently amended to an effective date of 15 August 2013. The rateable value was reduced to £45,000 with effect from 29 April 2014, to reflect works at 103-109 Wardour Street. It appears that this reduction was mistakenly generous – while it included 5% for the Wardour Street works, it also allowed 10% for road resurfacing in Berwick Street which didn't in fact commence until 1 September 2014.

14. The rateable value increased to £47,500 with effect from 1 September 2014.

15. The appellant's proposal was made on 27 May 2016, on the basis that "circumstances affecting the rateable value of the property changed on 22 February 2016". It is helpful to reproduce the detailed reasons for the appellant's belief that the entry in the rating list was inaccurate:

"The works at the Kemp House demolition site immediately opposite us on Berwick Street started on 22/2/16 and the munching, jack hammering, drilling, dirt and dust continues to make it difficult and sometimes impossible to work or concentrate. We have lost business

and will continue to do so, as we know from when the road was taken up. In fact a client has walked out, blaming impossible working conditions as the reason. This comes on top of the road works and constant developments in Broadwick Street, particularly Trenchard House and other redevelopments in Walkers Court that have made Berwick Street an extremely unpleasant place to run a business. Our quality of life as well as peaceful enjoyment is seriously compromised. The works are incessant and cannot have been thought through, unless the idea is to continue to close down independent businesses through constant and interminable disruption. The noise alone constitutes torture. The dirt and dust are a health hazard, we are watching as concrete is being smashed and dropped on the floor like thunder, with debris spreading far and wide. It is quite extraordinary that the site has not been covered and we [are] all exposed to an MCC that is much worse than it ever needed to be. This is sloppy, a nuisance, and potentially hazardous.”

The statutory basis of valuation

16. The basis on which the rateable value of a non-domestic property in England and Wales is determined is set out in Schedule 6 to the Local Government Finance Act 1988. It is to be assumed that the property is let on a tenancy from year to year, subject to certain assumptions about the terms of the notional letting and the date on which and circumstances in which it is taken to occur. For the purposes of this appeal, it is to be assumed that the appeal property was let at 1 April 2008 (the antecedent valuation date), but certain matters are assumed to be as they were at the material day (which in this appeal is the date of the proposal, 27 May 2016).

17. For the purposes of this appeal, these material day matters are: the physical state or physical enjoyment of the property; 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 the use or occupation of other premises situated in the locality of the appeal property.

18. So in essence the valuation exercise is to determine the rent at which a hypothetical landlord and tenant would agree on a letting of the appeal property on 1 April 2008 assuming that, at that date, the physical circumstances were as they are described above, namely, as they were in fact on 27 May 2016.

The appellant’s case

19. Ms Kendrick and Mr Smith produced a significant volume of written material and both gave evidence. I mean them no disservice by not repeating much of it. It is unnecessary for me to do so, largely because the valuation officer very fairly accepted much of Ms Kendrick’s evidence about the extent of the work, which caused considerable disruption, as vividly described in the proposal form.

20. At the hearing, Ms Kendrick played a video clip which was taken around the material day from which the noise of demolition and construction was highly noticeably and very intrusive. She also submitted photographs showing the dust and debris inside the property. She stressed that owing to Kemp House having a concrete frame, the demolition work involved the use of jack hammers and a technique known as “munching” (where a mechanical device is used to “munch through” the solid concrete floors). The site was insufficiently contained - the limited

hoardings that were erected soon began to tear and flap in the wind. As a result, there was significant dust and dirt in the general environment and a layer of dust within the appeal property, covering desks etc. Mr Smith said that owing to the very close proximity of the buildings in Soho, construction vehicles had on many occasions blocked Berwick Street.

21. The nutshell of the appellant's case was summed up by Mr Smith. He said that because there were about eight buildings being separately developed in the vicinity, the appellants were faced with "uncoordinated multi-development including major scale demolitions that completely changed the neighbourhood".

22. The appellants considered that owing to the disruption, a reduction of 40% to the rateable value was warranted, resulting in a rateable value of £31,500.

The respondent's case

23. Mr List called Mr Russell Shaw DipSurv MRICS to give evidence. Mr Shaw is a lead valuer in the Inner London non-domestic rating unit of the VOA. His evidence followed the hierarchy suggested in *Lotus and Delta Ltd v Culverwell (VO) and Leicester City Council* [1976] 239 EG 287, in that he considered rental evidence in the first instance followed by assessment evidence and finally other evidence. At the hearing, Mr Shaw said that he placed most weight on his rental evidence.

24. Mr Shaw's rental evidence comprised six transactions – five shops on Berwick Street (which in each case comprised basement and ground floor space) and one shop in Walkers Court. Briefly, they were as follows:

(a) 9 Berwick Street

A rent review with effect from 1 May 2016. A stepped rent was agreed: £45,000 in years 1 & 2; £47,500 in years 3-4; and £49,000 in year 5.

(b) 1 Berwick Street

A rent review with effect from 27 December 2016 at £107,000 – an increase of 78.33% on the previous rent of £78,000.

(c) 2 Berwick Street

A new letting with effect from 26 June 2015 at £60,000 – an increase of 57.89% on the previous rent of £38,000.

(d) 4 Berwick Street

A rent review with effect from 1 November 2015 at £75,000 – an increase of 87.5% on the previous rent of £40,000.

(e) 14 Berwick Street

A lease renewal with effect from 1 September 2014 at £60,000 – an increase of 40% on the previous rent of £43,200.

(f) 5A Walkers Court

A landlord's rent abatement of 10% owing to the Walkers Court redevelopment. The occupier is a tattooist.

25. Mr Shaw's assessment evidence comprised examples of reductions in rateable values agreed with ratepayers or their agents in respect of shops and offices affected by works, all in the vicinity of the appeal property. In respect of the works at Kemp House, the VO had agreed reductions of 10% for the basement and ground floor units of 2 and 14 Berwick Street (comparables (c) and (e) above).

26. As a result of the Walkers Court redevelopment, a reduction of 11.5% was agreed for upper floor offices at 87-91 Wardour Street.

27. Reductions for works to adjacent properties had also been agreed: First floor 1 Peter St/101 Wardour Street – 7.5% agreed for noise, vibration, dust etc; second floor, 22 Soho Square – 10% agreed for noise, vibration, disturbance and impeded access. A former police building known as Trenchard House was redeveloped over a two-year period. Reductions of 5%, 6.5%, 8% and 10% were agreed for nearby properties (St Lawrence House, Ingestre Court, 22 Broadwick Street, and 13 Ingestre Place).

28. Mr Shaw also referred to a decision of the VTE in respect of 136 Charing Cross Road, affected by Crossrail where a reduction of 30% was awarded. Finally, he referred to a decision of the High Court (*Timothy Taylor Ltd v Mayfair House Corporation* [2016] EWHC 1075 (Ch)), in which damages of 20% was awarded for a breach of the claimant tenant's quiet enjoyment by carrying out redevelopment work above the tenant's art gallery.

29. Mr Shaw said that the existing allowance of 10% sufficiently reflected the effect of the works on the rateable value of the appeal property and contended for a rateable value of £47,500.

30. I should add that this appeal was originally part of a group appeal involving other properties. It is relevant to my discussion below to note (with my emphasis) that, in an addendum to his report, Mr Shaw requested that:

“...if the Tribunal is minded to determine an end allowance which is greater than 10%, ... this case is not used as a test case to apply the Tribunal's determination to the cases listed...which I believe do not warrant any allowance. *This is because [one of the other properties] is [in] a different mode or category of use, a store and premises.....*”

Discussion

31. It is convenient to deal with the appeal by analysing the respondent's evidence. In my judgment Mr Shaw's rental evidence is susceptible to a number of criticisms.

32. First, it is limited to retail properties which, while being close to the appeal property, are in a different mode or category of occupation to it. In the addendum to his report, Mr Shaw

hinted at the difficulty that can arise in applying a discount for the effect of works on one type of property to their effect on another. Taking an extreme example for illustration, the effect on value of say roadworks on a major road causing traffic to slow to a crawl at rush hour might be different depending on the type of property. The value of an advertising hoarding might well increase, whereas that of a distribution warehouse would likely fall. While the difference between those two types of rateable hereditament is striking, and that between a shop and an office is more nuanced, it cannot, in my view, be ignored. An office occupier is more likely to have employees who work in or at the property for most of the day, whereas for a shop, customers are highly unlikely to spend the same amount of time in the shop as an office worker would at their desk, breakout area etc. In my judgment the effect on the rent that a retailer would be prepared to pay as a result of works akin to those in this appeal would be less marked than in the case of an office occupier.

33. Secondly, there is the nature of the transactions. Three were rent reviews, which Mr Shaw very fairly accepted were relatively low down the hierarchy of useful evidence. I agree. We do not have details of the rent review provisions of each lease, and crucially what is to be assumed for the purposes of each rent review, for instance the assumed length of the hypothetical letting, or any “disregards” which might have had an effect on rent. There is a difference, in my view, between assuming say a ten-year term at rent review, and assuming a tenancy from year to year with a reasonable prospect of continuance. I should add that whilst the parties debated at some length how the stepped rent at 9 Berwick Street should be analysed, and the interpretation of the agent acting for the ratepayer in that case, for the reasons I have given I place little weight on it in any event.

34. The lease renewal at 14 Berwick Street is potentially of more relevance, since the tenant could have walked away rather than committing to a new lease, but the effective date of 1 September 2014 was a year before work began on Walkers Court, and nearly 18 months before demolition began at Kemp House. Similarly, the transaction that falls within the top bracket in the hierarchy of evidence – the letting at 2 Berwick Street in June 2015 – was again some time before work started.

35. That leaves the voluntary rent abatement of 10% by the landlord of 5A Walkers Court. I place little weight on this. It appears that the tenant was unrepresented and simply took what the landlord was offering. The Valuation Officer was sufficiently sceptical about it to give what Mr Shaw termed a “more generous” allowance of 15% (an example of pragmatism triumphing over prescription).

36. In his oral evidence, Mr Shaw confirmed that he placed most weight on his rental evidence, and was less reliant on his assessment evidence. Since I have reservations about his rental evidence generally, I must turn to his assessment evidence, upon which I place some weight, although my comments above concerning retail property apply equally here. Ms Kendrick gave unchallenged evidence, which I accept, concerning Trenchard House – that it was a brick building that was less complicated to demolish – it didn’t require “munching” for instance, and was therefore less disruptive. I am satisfied that any allowances given owing to the Trenchard House redevelopment would be less than those for the combined effect of Kemp House and Walkers Court.

37. I place little weight on the VTE's decision in respect of 136 Charing Cross Road, decided on the facts of that case and not binding on me. Similarly, the Chancery Division's determination of damages for a breach of quiet enjoyment is, with respect, only of passing note.

38. In my judgment, the Valuation Officer's approach in this case has been prescriptively formulaic. But even under that formula, as Mr Shaw accepted in cross examination, all his comparable evidence was in respect of only one "set" of works, whereas the appeal property was affected by multiple developments.

39. What Mr Shaw hasn't done, in my view, is to "stand back and look". We are to put ourselves in the shoes of the hypothetical parties in the physical circumstances on 27 May 2016, standing in Berwick Street negotiating a rent. Behind them, as Ms Kendrick's video showed and Mr Shaw accepted, would be considerable noise and vibration, flapping hoardings, etc. In the appeal property, a layer of dust would be present, and noise from "munching" and demolition.

40. In negotiating a tenancy from year to year, is it credible that the hypothetical tenant, wishing to occupy the appeal property as an office, would only be able to negotiate a reduction of 10% in the rent? In my view it is not. The parties are more likely to have agreed a significant reduction in rent for a period of time, reverting to the headline rent when the effect of the work had abated. While I would not go as far as the appellant's 40% reduction, in my judgment a discount of 25% would be appropriate in this case. The agreed valuation before any discount was £52,827. I therefore determine a rateable value in this case of £39,620.25, say £39,500 RV.

Determination

41. The appeal succeeds in part. I determine that the appeal property shall be entered into the non-domestic rating list at £39,500 RV with effect from 22 February 2016.

42. The appeal was heard under the Tribunal's simplified procedure, under which costs are only awarded in exceptional circumstances. The parties confirmed there were no such circumstances, and I therefore make no order for costs.

Dated: 17 June 2019

Peter D McCrea FRICS

