COPY

THE HIGHLAND & WESTERN ISLES VALUATION APPEAL COMMITTEE

Inverness, 29 November 2018

Subjects	Reference Number
Offices, Nevis House, Beechwood Park, Inverness, IV2 3BW	**06/34/092105/6**
The Appellants **H & P Dow** Represented by **Charlie Barbour, Surveyor**	For the Respondent **Assessor** Represented by **Brian Gill, Advocate**

INTRODUCTION

This was an Appeal based on a claimed material change in circumstances in relation to the subjects. The Appellants sought a reduction in the Rateable Value of the subjects from £87,000 to Nil with effect from 25 September 2017. They asserted that from that date the subjects were, and remain, a property to be regarded as premises under reconstruction.

DESCRIPTION OF SUBJECTS

The subjects comprise a two storey detached office block built in 1997. They are situated at the north end of the Southern Distributor Road, Inverness within Beechwood Business Park.

EVIDENCE FOR THE APPELLANTS

Evidence was given for the Appellants by Mr Barbour, surveyor, and by Mr Henry Dow, one of the principals of the Appellant firm. The Appellants have owned the subjects from when they were built in 1997. The Appellants let out the subjects as office premises. The last

Lease expired on 1 April 2017. Prior to, and in anticipation of, the termination of that Lease, the Appellants decided not to offer the subjects for let again in their then present condition. Instead they planned to generally renovate the subjects and render them compliant with the requirements of the Disability Discrimination Act 2010, including the installation of a lift.

By Notice of 25 April 2017 the Highland Council granted the Planning Permission Application the Appellants had submitted.

By Notice of 29 August 2017 the Highland Council granted a Building Warrant allowing the works to proceed.

By e-mail of 6 September 2017 a building surveyor acting for the Appellants issued instructions to a firm of civil engineering contractors to undertake certain enabling works. Those works comprised fitting a triangle of Heras panels across the bell-mouth entrance to the subjects preventing unauthorised parking; the provision of "a brief construction phase H & S Plan for enabling works", including a Plan showing the extent of Heras and skip locations; the removal of internal doors with the exception of the doors to the electric cupboards at the ground and first floor level and the door to the under stair cupboard; the isolation of all electrical circuits before work started and the removal of ceiling tiles. These works were then undertaken by the contractors and completed within the following month.

By Notice of 31 October 2017 the Highland Council granted an Application for Planning Permission Amendment and by Notice of 12 June 2018 the Highland Council issued an amendment to the Building Warrant previously granted, pursuant to the Amended Planning

Permission Application. The essence of the Amended Planning Permission Application and Building Warrant was to sub-divide the subjects into four distinct units.

By Notice from the Highland Council to Whitbread plc of 1 October 2018, Planning Permission was granted to turn the subjects into hotel bedroom accommodation. This planning application was submitted pursuant to missives having been concluded for the sale of the subjects by the Appellants to Whitbread plc, subject to the grant of Planning Permission. Following the grant of Planning Permission the sale to Whitbread plc was concluded on 7 October 2018. The works necessary to convert the subjects to hotel accommodation were being undertaken on behalf of Whitbread plc, the anticipated completion date being in the first half of 2019.

Since April 2017, an application for Planning Permission and an application for amendment thereof and a separate application for Planning Permission by Whitbread plc had been made in relation to the subjects. These were evidence that the Appellants were actively looking, throughout the period, to divest themselves of the subjects, initially by way of a Lease, latterly by way of a sale. This was not an attempt by the Appellants, by having relatively minor enabling works carried out in or around September 2017, to avoid their obligation to pay Rates.

Mr Dow was a property investor and developer with over 20 years' experience. The Appellants had a property portfolio worth between £4,000,000 and £4,500,000. They had spent around £63,000 on professional fees in relation to their evolving development plans for the subjects. During the period the subjects were empty and in their ownership – April 2017

to October 2018 – the Appellants had been carrying monthly running costs for the subjects of between £3,500 and £4,000.

Mr Barbour spoke to several comparisons of which he was aware in Inverness.

There was an office building known as Spey House. The building extended to some 2,000 square metres and had a Rateable Value of £127,000. A demolition warrant having been obtained, demolition work started. A Housing Association then expressed interest in the main building for housing and acquired the subjects for that purpose. The transformation from office to residential accommodation is still ongoing. The Assessor had agreed to a nil value in that case during the construction stage.

Office premises at 47-49 Academy Street, Inverness were transformed into a backpackers hostel. Originally, during the transformation phase, the Assessor had resisted reducing the valuation of those subjects to nil but then agreed to do so for a period of 4 months.

21-23 Church Street, Inverness were a combination of shop and office premises which were acquired by a hotel group for conversion to a hotel. During the conversion period they were entered in the Roll at nil value. The Assessor had agreed to that amendment from the date work physically commenced on the subjects.

Work had started on these subjects on 25 September 2017 and from that date their value was clearly nil and the entry for the subjects in the Roll should be amended accordingly.

At the start of his evidence, being questioned specifically on the point, Mr Barbour had indicated that he was acting in a dual role – that of advocate for the Appellants and expert witness. In cross-examination, and with reference to the regulations of the Royal Institution of Chartered Surveyors in relation to expert witnesses, he was questioned as to his awareness of the duties incumbent upon surveyors giving expert witness evidence – i.e. opinion evidence. He was asked if he had signed a written statement confirming his compliance with the RICS requirements. He indicated he was unaware of that requirement. He was asked about his remuneration arrangements and Counsel for the Assessor made reference to Mr Barbour's firm's website and to the offer of a "no win/no fee" service in relation to rating appeals. Mr Barbour confirmed that he had such an arrangement with the Appellants in this case. It was put to him that there was therefore a clear conflict of interest between, on the one hand, his duty to the Committee as an expert witness and the financial interest which he had in the outcome of the Appeal. He responded that he understood he was free to come to whatever remuneration arrangement he wished with his clients.

He stated that the subjects were a hive of construction activity today and that activity had, in effect, begun on 27 September 2017 at the start of the enabling works. That is when carpet tiles, ceiling tiles and doors were removed. He agreed that there had been no structural changes until after the Appellants sold the subjects to Whitbread plc.

He conceded that the enabling works did not include removal of all carpet and ceiling tiles and doors. There had been only partial removal of these. Thereafter there was no physical change in the building for about a year. There was no change in the internal partitions, toilets, windows and the building remained wind and water tight.

In relation to the comparisons to which he had referred it was put to him that there had been a continuous programme of activity in relation to those subjects. Mr Barbour accepted that in relation to the comparisons, when the works began there was already permission for change of use in place.

In his evidence Mr Henry Dow explained he was an experienced property developer and investor and had been since around 1997. The total value of his property portfolio was between £4,000,000 and £4,500,000. The first Planning Permission Application in relation to these subjects had been made in April 2017. Initially he had looked at marketing as one office building. However, the building was "tired" and was not compliant with the requirements of the Disability Discrimination Act 2010 having no lift and the toilet facilities were poor. He had never considered leasing it in the condition it was in and so he first thought of refurbishing the building but keeping it as one office. Knowing that his previous tenant was not likely to renew the Lease the process of planning what next to do with the subjects had started well in advance of the end of that tenancy.

In the condition in which the subjects were rendered after the initial enabling work was carried out he was clear that the subjects could not command an annual rent of £87,000, their value in the Valuation Roll.

He was carrying costs of between £3,500 and £4,000 per month and doing that was an indication that his Appeal was not simply an attempt to avoid rates. Asked if he had deliberately delayed the project he indicated he had not. He was surprised at the resistance of the Assessor to the idea of a nil value being attributed to subjects during the redevelopment phase.

Under cross-examination, Mr Dow confirmed that his assertion that the subjects in their condition after the initial enabling works had been carried out would not command a rent of £87,000 was his opinion as a businessman not an opinion which took account of the statutory hypothesis.

He also confirmed that having obtained Planning Permission and having carried out certain enabling works, before agreeing to sell the subjects to Whitbread plc, the subjects were still being actively marketed for let and he had decided not to carry out any other works until a prospective tenant had been found.

EVIDENCE FOR THE ASSESSOR

Evidence for the Assessor was taken from Fiona Rostock MRICS who helpfully produced a precognition to which she spoke and the precognition was accompanied by appendices of paginated productions. She spoke to her awareness of, and compliance with, the RICS requirements relating to the duties of expert witnesses giving evidence.

Following receipt of this material change of circumstances appeal and the provision by the Appellants of photographs of the works which had been undertaken to the property as at 1 July 2017, Mrs Iredale, a Valuer in the Assessor's Office, visited the subjects on 9 November 2017. That inspection noted carpet flooring tiles had been removed from the concrete floor slab, suspended ceiling tiles had been partially removed, doors had been removed from their hinges and stacked against the wall but all internal partitions, plasterboard wall and partition linings, electrical wall heaters and fluorescent light units remained in place. In the kitchen areas, the units, taps and counters remained in place and the toilets were intact. There was no

evidence of any structural work having been carried out. There were no workmen on site at the time of the inspection. The stairwell, windows and external doors remained in place and the building was wind and watertight and capable of being made secure.

Following the inspection the Appellants' previous surveyor agent was advised that it was appropriate that the entry in the Valuation Roll for the subjects remain unchanged. The property retained the character and nature of office premises, albeit they had been subject to a minimum amount of soft stripping of some fittings and fixtures, work which was non-structural in nature and affected only the cosmetics of the interior of the building. It was noted that the work appeared to have been commenced and stopped between the end of the previous Lease and the amending Planning and Building Warrant Applications in October 2017. Having come to that conclusion Mrs Rostock referred to the Scottish Assessors Association Basic Principles Committee draft Guidance Note in relation to properties subject to repair, refurbishment and reconstruction. These guidelines, although still in draft, served to reinforce the decision which she had taken in relation to these subjects. Paragraph 5.1 of that Practice Note states "A nil value entry should only be considered where the works are substantial and dictate that the premises are not capable of beneficial occupation."

Paragraph 5.5 states "It has become common place for varying degrees of "soft strip" works to be carried out, with the actual redevelopment work happening many months, or sometimes many years, down the line. Under no circumstances should a subject have a nil value attributed to it where the only works done are soft stripping of the existing subject."

Under cross-examination by Mr Barbour, Mrs Rostock confirmed that the Planning Application for the subjects was granted on 28 April 2017 and that indicated that Planning

Permission has been applied for some six months before that. She confirmed that the drawings submitted in relation to the Planning Permission Amendment Application were different from the original drawings. She was not disputing the changes in plans over the period. The original Application and the Amendment Application both involved the subjects remaining as office premises. Her office had received a material change of circumstances appeal on 25 September 2017 advising that works had already been carried out. That was the first notification to the Assessor's Department. The inspection, previously referred to in Mrs Rostock's evidence, was then carried out in November. The date when substantial work started would be the date of any material change of circumstances. The plans or intentions of the Appellant were not relevant. The change of ownership from the Appellants to Whitbread plc was not a material change of circumstances. She accepted, though, that the transition from an office to hotel accommodation, under the ownership of Whitbread plc may give rise to a material change of circumstances but that was outwith the ambit of this Appeal. This Appeal related to a material change of circumstances which, by definition, must have taken place by the time the Appeal was submitted on 25 September 2017.

The draft Practice Note to which she had referred, while setting out recommended procedures, was not a re-write of either the law or practice in this matter. It was merely a recodification of existing practice and procedures with reference to relevant case law. Mrs Rostock's approach to material change of circumstances appeals such as this is not different now to any stage during the past fifteen years of her career.

SUBMISSIONS FOR THE APPELLANTS

In Mr Barbour's submission this was a material change of circumstances affecting value. He posed the following questions:-

(a) When does a building become a building site?

(b) When did the work start?

(c) When was Planning Permission received?

(d) When was a Building Warrant received?

(e) Where there is a lull in the works what is a reasonable time for the overall works to take?

In this case Mr Dow had genuinely made an effort to redevelop and has now achieved a change of use to hotel accommodation.

The Practice Note says there must be genuine redevelopment and there has been here but it was an evolving picture. It is a redevelopment which will have lasted between eighteen months and two years by the time the change to hotel accommodation has been achieved. That started in September 2017 when the contractors moved in to undertake the enabling works.

The comparisons referred to by Mr Barbour where the Assessor had accepted the start of works marking the material change in circumstances pointed to the allowance of the Appeal in this case.

He was aware there are RICS rules and regulations regarding the giving of expert witness evidence and he acknowledged his shortcomings in failing to complete paperwork, namely a signed written Statement of Compliance with the RICS requirements. He did not want the Appeal to turn on any shortcomings on his part and he apologised for any such shortcomings. He thought he could come to whatever arrangement he wanted with his clients as regards fees and did not consider that there was a conflict of interest between, on the one hand, his duties

to the Committee and, on the other, the financial interest which he had in the outcome of the Appeal.

SUBMISSIONS FOR THE ASSESSOR

Mr Gill sought dismissal of the Appeal. It was a material change of circumstances Appeal based on the premises being under reconstruction with effect from 25 September 2017. The Appellants sought a reduction in rateable value from that date to nil. The onus to establish the material change of circumstances was on the Appellants. The Appellants had failed to do so on the law and on the facts.

Mr Gill offered critical comment on the evidence of Mr Barbour. He invited the Committee to disregard all of his evidence. Mr Barbour had admitted he did not understand the concept of the privilege afforded to expert witness evidence and the duties incumbent on experts to Valuation Appeal Committees to whom they were giving their evidence. There was more to the shortcomings of Mr Barbour than a mere "technical error" in a failure to properly complete the paperwork. He had admitted to a direct pecuniary interest in the outcome of the Appeal. In stating that he thought he was free to come to whatever feeing arrangement he wishes with his clients, he was confusing general rating practice with the specific duties incumbent upon a surveyor witness giving evidence before a Valuation Appeal Committee. The fact that he was not aware of his duties was not an excuse – it compounded his difficulties. He had, in effect, disqualified himself as an expert witness.

As an advocate for the Appellant, if he was unsure as to how to present a case he should have declined to accept instructions from the Appellants.

Mr Gill referred the Committee to Armour on Valuation for Rating, paragraph 18-23.

He referred the Committee also to the decision in the case of Assessor for Tayside Joint Valuation Board -v- M, [2017] CSIH 64, in particular the Opinion of the Court as delivered by Lord Doherty. Mr Gill made particular reference to paragraphs 24 to 26 of Lord Doherty's Opinion.

The Committee was also referred to decisions of the Lanarkshire Valuation Appeal Panel of 13 December 2011 relating to offices at Dalziel Workspace, Motherwell and of Lothian Region Appeal Panel dated 4 November 2014 relating to a Research Centre at Riccarton, Currie.

Mr Gill submitted that the Scottish Assessors Association Basic Principles Committee draft Guidance Note amounted to a sensible summary of principles consistent with case law and reflected the approach which Mrs Rostock had taken in considering this Appeal, even although she was not aware of the existence of that Practice Note at that time. When she learned that a Practice Note was in contemplation she postponed her final decision until she had had the opportunity to see the Practice Note. When she saw it, it confirmed that her approach had been consistent with the recommendations in the draft Practice Note. There was nothing radical, new or unfair about the terms of the Practice Note. It was simply a codifying measure.

Any notion that these subjects were incapable of beneficial occupation as at September 2017 was fanciful. All that had happened up until that point had been in the way of a "soft strip".

The circumstances of the comparables referred to by Mr Barbour were easily distinguishable from the circumstances of this case.

DISCUSSION AND DECISION

The principal facts as to the nature and extent of the works which had been carried out and the timing of those works were not in dispute. The issue for the Committee to determine was whether those works amounted to a material change of circumstances affecting value. The onus lay on the Appellants to establish a material change of circumstances. In the opinion of the Committee the Appellants failed to discharge that onus and so the Appeal is refused.

According to the authorities cited, the principal focus in such cases has to be on the nature, extent and timing of the works physically undertaken on the subjects. In this case the works relied upon by the Appellants fell readily into the category of "soft strip". They were non-structural, largely cosmetic and had been undertaken within a period of a few weeks. No works at all were undertaken before the date when this appeal was lodged and therefore by when the Appellant alleged a material change had already taken place. During the time the Appellants retained an interest in the property those works had not rendered the subjects incapable of beneficial occupation nor did the works point inevitably to a change of use.

It is incumbent upon Appellants in such cases to proceed with reasonable expedition. The period of inactivity from September 2017 until October 2018 when there was little, if any, physical work carried out on the subjects was therefore a relevant consideration. So too was Mr Dow's concession that, before he had agreed to sell the subjects to Whitbread plc and it remained his intention to seek a new tenant or tenants for the subjects, he decided not to undertake further works until a prospective tenant or prospective tenants had been found.

This militated against the submission by Mr Barbour that the works relied upon in this Appeal formed part of a steady, linear progression of a redevelopment.

As for the comparisons referred to by Mr Barbour, these were of no assistance to the Appellants. He provided insufficient detail as to the facts of those cases to enable the Committee to determine whether or not they were apt comparisons. In any event, these Appeals all turn on their own facts.

The Committee considered, with some regret, that the observations made by Mr Gill as to the way in which Mr Barbour had undertaken his dual role of advocate for the Appellants and expert witness before the committee, were well made. Fortunately, the Appeal did not turn on these deficiencies.

If parties lead evidence from witnesses, who they seek to have accepted by the Committee as expert witnesses, Committees of this Panel will expect those witnesses to know the requirements of expert witnesses when giving evidence and to follow those requirements. The requirements are set out in RICS Professional Statement and Guidance Note for surveyors acting as expert witnesses in Scotland. A thorough and careful reading of this Professional Statement and Guidance is commended to all such witnesses appearing before Committees of this Panel.