**UPPER TRIBUNAL (LANDS CHAMBER)**

**Neutral Citation Number: [2016] UKUT 258 (LC)**
**Case No: RA/84/2014**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***RATING – Valuation –– non- domestic hereditament – Local Government Finance Act 1988 schedule 6 – appeal to Upper Tribunal raising a point of law upon agreed facts – agreement that had the subject office hereditament been on the market at the relevant date nobody in the real world would have been prepared to occupy the property and pay a positive price – other comparable office properties in occupation at substantial rents at relevant date – whether a nil (or nominal) rateable value to be entered in valuation list .. appeal allowed.***

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND**

**BETWEEN:**

**KEVIN HEWITT** **Appellant**
**(VALUATION OFFICER)**

**- and -**

**TELEREAL TRILLIUM** **Respondent**

**Re: Mexford House, Mexford Avenue, Blackpool, FY2 0XN**

**Hearing dates: 28-29 April 2016**

**Before: His Honour Judge Huskinson and Mr P D McCrea FRICS**

**Royal Courts of Justice, London WC2A 2LL**
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*Hui Ling McCarthy*, instructed by HMRC Solicitor for the Appellant
*Richard Glover QC*, instructed by Bilfinger GVA for the Respondent

The following cases are referred to in this Decision:

*London County Council v Church Wardens and Overseers of the Poor of the Parish of Erith in the County of Kent* [1893] AC 562

*London County Council v Erith & West Ham* [1893] AC 562

*Poplar Metropolitan Borough Assessment Committee v Roberts* [1922] AC 93

*Ladies Hosiery and Underwear Limited v West Middlesex Assessment Committee* [1932] 2 KB 679

*Robinson Bros (Brewers) Limited v Assessment Committee for the No. 7 or Houghton and Chester-le-Street Area of the County in Durham* (1937) 2 KB 445

*Fir Mill Limited v Royton UDC and Jones* (1960) 7 RRC 171

*British Transport Commission v Hingley (Valuation Officer)* [1961] 2 QB 16

*Inland Revenue Commissioners v Gray* [1994] STC 360

*Lambeth London Borough v English Property Corporation Ltd and Shepherd (Valuation Officer)* [1980] RA 279

*Sheil (Valuation Officer) v Borg-Warner Limited* [1985] RA 36

*Commissioners of Inland Revenue v Gray* [1994] STC 360

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

*Scottish & Newcastle Retail Ltd v Williams* [2001] EGLR 157

*Williams (VO) v Scottish and Newcastle Retail Ltd* [2001] RA 41

*Leda Properties Ltd v Howells (VO)* [2009] RA 165

The following further cases were referred to in argument:

*Sole v Henning* (1959) RRC 195

*Burns Stewart Distillers Plc v Assessor for Lanarkshire Valuation Joint Board* 27.2.2001, LTS/VA/1999/17 & 18

*Gallagher v Church of Jesus Christ of Latter-Day Saints* [2006] RA 1

*Trunkfield v Camden LT* [2011] RA 1

## DECISION

### Introduction

1. This is an appeal by the Valuation Officer, Mr Kevin Hewitt ("the appellant") against a decision of the Valuation Tribunal for England ("the VTE") dated 10 October 2014, in which the VTE determined that the rateable value of Mexford House, Mexford Avenue, Blackpool, FY2 0XN ("the appeal property" or "Mexford House") was £1 with effect from 1 April 2010. The appeal to the VTE arose from a proposal made on behalf of Telereal Trillium ("the respondent") against the compiled 2010 rating list assessment of £490,000.

2. The appellant was represented by Ms Hui Ling McCarthy of counsel, who called the appellant to give valuation evidence. The respondent was represented by Mr Richard Glover QC. Mr Anthony Baldwin MRICS submitted written valuation evidence for the respondent, but as we explain below, did not give oral evidence at the hearing.

3. The Antecedent Valuation Date ("AVD") is 1 April 2008. The Material Day is 1 April 2010.

### Facts

4. In the light of the evidence and a statement of agreed facts, we find the following facts.

5. Mexford House is located within the North Shore area of Blackpool, approximately two miles from the town centre and 4.5 miles from junction 4 of the M55. It is situated between three main roads: the A587 Plymouth Road and the B5124 Devonshire Road, which are connected by the B5265 Warbreck Hill Road. There are local amenities within a five-minute walk, on Devonshire Road. The local bus stop is 200m away on Warley Road. Layton railway station is a ten-minute walk away, and has a regular service to Blackpool North station, and to the west coast main line at Preston. The immediate location is primarily residential, but with an educational academy to the north and east boundaries.

6. Mexford House is a detached, three-storey, office block, purpose-built in 1971 of rustic brick elevations, having a concrete frame and flat roof. It extends to 5,878 sqm, arranged in an "F" formation. It is DDA compliant, has partial air-conditioning, suspended ceilings with Cat II lighting, and replacement double-glazed uPVC windows.

7. The internal configuration is a combination of open plan and cellular office space. There are kitchen, toilet and shower facilities on each floor. The main access at the front of the building has a reception area, from which a 10-person passenger lift and staircase gives access to the upper floors, with additional staircases in each wing of the building.

8. There are 149 marked car parking spaces including seven garages, to the front and side of the building, within a site bounded by security fencing.

9. At the AVD, the property was the subject of a lease to the Secretary of State for the Environment, which was granted for 42 years from September 1972, but which had been the subject of a virtual assignment in 1998 to Trillium PRIME Ltd (now the respondent, Telereal Trillium) under which Trillium took commercial ownership of the lease, and responsibility for the rent, running the property, and acting as the tenant in any rent review negotiations.

10. The lease had a seven year rent review pattern. At the September 2000 rent review, the rent was set at £417,000. At the 2007 rent review, the rent remained at this figure, determined by an Independent Expert. In submissions to the Expert the landlord's surveyor considered the open market rent under the terms of the lease to be £488,250 per annum. The respondent's surveyor's view was £341,000. The details of those submissions, and the Independent Expert's determination, were not submitted to us, and evidence was not submitted from either surveyor. Tenant's improvements were ignored for the purposes of rent review, including the replacement of window frames with uPVC units, the installation of partial air-conditioning, upgraded lighting and computer cabling.

11. In 2002, a reversionary lease was granted to the respondent, to run from the expiry of the original lease on 29 September 2014 until 31 March 2018, when the PRIME contract expires.

12. At the AVD, Mexford House was occupied or partially occupied by HMRC and the DWP, both of which had used the offices continuously since 1972. On 29 February 2008, HMRC announced that it would be vacating a number of buildings from spring 2009, including Mexford House. On 13 March 2008, the DWP gave notice to vacate the property under the terms of the PRIME contract with the respondent. Hence by the AVD, both occupiers had indicated its intention to vacate.

13. It is not certain when the vacation process was fully completed, but the property was formally handed back on 31 March 2009 and was unoccupied at the Material Day.

14. Mexford House was initially shown in the 2010 rating list having a rateable value of £490,000 from 1 April 2010.

15. A proposal was made by the respondent's agent, GVA, on 24 October 2011, on the grounds that the assessment was inaccurate on the day that the list was compiled. Negotiations proved fruitless, and the resulting appeal was heard by the VTE on 12 September 2014.

**The VTE's Decision**

16. In its decision of 10 October 2014, the VTE determined that the rateable value of Mexford House should be reduced to £1 with effect from 1 April 2010. The Panel found that by the AVD, the decision had been taken to vacate Mexford House by the occupier[s], and that the evidence showed that there was no demand from the market, either as a whole, or on a floor by floor, or wing by wing basis. As Valuation Officers had placed nominal values on other large offices where there was no demand, the panel granted the appeal, and ordered the reduction of the assessment of Mexford House to £1 RV.

**Statutory Framework**

17. Section 56 of the Local Government Finance Act 1988 ("the Act") gives effect to Schedule 6 to the Act which sets out the statutory basis on which the rateable value of a non-domestic hereditament is determined. The statutory assumptions for determining rateable value are set out in paragraph 2 of Schedule 6, as follows:

> "2(1) The rateable value of a non-domestic hereditament none of which consists of domestic property and none of which is exempt from local non-domestic rating 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 these three assumptions –
>
> (a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
>
> (b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from the assumption any repairs which a reasonable landlord would consider uneconomic;
>
> (c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above.
>
> ….
>
> (6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in

force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.

….

(7) The matters are—

(a) matters affecting the physical state or physical enjoyment of the hereditament;

(b) the mode or category of occupation of the hereditament;

….

(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there; and

(e) the use or occupation of other premises situated in the locality of the hereditament."

**Case for the Appellant**

18. Mr Kevin Hewitt BA Hons (MRICS) is a chartered surveyor and a rating team leader in the Lancaster Valuation Office. He has 36 years' experience in the north west of England and has been familiar with Blackpool and the Fylde area for many years. He considered that the Valuation Tribunal incorrectly treated this appeal property as being obsolete and of nominal value. He said that this was inconsistent with the statutory rating regime.

19. Mr Hewitt said that just because a property is unoccupied does not of itself justify a lesser value than that applicable to similar premises that are occupied. At the AVD the appeal property was occupied and continued to be so until March 2009 which he said was evidence of both demand and value.

20. Mr Hewitt noted that Telereal had entered into a reversionary lease in 2002, to run from September 2014 to March 2018 which he said showed that Telereal did not consider that the property was becoming obsolete or of no value at that time.

21. He noted that the rent passing at the AVD was £417,000, which would not reflect the tenants' improvements, and that when the nil increase review was determined at this figure, with effect from 29 September 2007, the respective surveyor's opinions of rental value were £341,000 from the tenant's surveyor, and £488,250 from the landlord's surveyor. Had there been no demand, the respective party's surveyors would have valued the property at nil. He did not consider that the terms upon which the rent review were concluded were materially different from that required under statute for the

hypothetical letting for rating purposes. The valuation date of the review was September 2007 and he did not consider that supply and demand for comparable property within the locality was significantly different at the valuation date, just 6 months later. In this respect he considered that the Fylde is the appropriate locality for rating purposes – a 20km square shaped peninsular bounded by Morecambe Bay to the north, the Ribble estuary to the south, the Irish Sea to the west and the Bowland hills to the east.

22. In contrast to the period between the rent review date and the AVD, Mr Hewitt understood that the property was marketed from spring 2009, some 12 months after the AVD, during which time market conditions had deteriorated substantially. In support of this he referred to a Valuation Office Agency economic context.

23. Mr Hewitt expressed the opinion that Mexford House was not obsolete either in a functional or in a locational sense. In paragraphs 9.10 and 9.11 of his first report he stated as follows:

> "Functional obsolescence - the appeal hereditament was constructed in 1971 as an office block. It was built to a design and standard typical of the period and (t)he property has had some improvements over the years including replacement uPVC double glazed window frames, installation of partial air-conditioning, upgraded lighting, installation of computer wiring. It is typical of many other office blocks of the period, many of which remain usefully occupied and I have referred to a schedule of other similar or older or poorer offices in the locality (which) were occupied at the AVD to support my opinion that the hereditament was not functionally obsolete at that date.
>
> Locational obsolescence - the location of the subject hereditament is not unusual for the Fylde, which has a dispersed stock of office hereditament's many in residential locations. I have referred to a schedule of comparable hereditaments in similar locations in support of my opinion that the appeal hereditament does not have locational obsolescence."

24. During the course of his cross examination Mr Hewitt 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 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.

25. However, Mr Hewitt pointed to the fact that there did exist at the AVD demand for other (occupied) properties which were comparable to Mexford House. As a result of the parties' agreement at the end of day one of the hearing – see paragraph 32 – it is unnecessary for us to outline in detail the nature of those comparables. In broad terms,

Mr Hewitt relied on a schedule of 24 comparable transactions, all of which were office buildings with a floor area of over 2,000 $m^2$, and which ranged from pre-WW1 to modern buildings and in terms of quality from 1940's single storey prefabricated 'H-blocks', to modern full specification offices. At the AVD none of the comparables were vacant which he said demonstrated demand for large office buildings at the valuation date. He accepted in cross examination that the smaller properties were less relevant when the notional demand of the hypothetical tenant was being considered.

26. Of these properties Mr Hewitt referred to eight which he said were of similar age and specification to Mexford House. Seven of the 24 provided rental evidence, which ranged from £70.84 per $m^2$ for Hesketh House, Broadway, Fleetwood to the ITSA Control Centre building at Brunel Way, Blackpool at £198.70 per $m^2$

27. In terms of assessment evidence Mr Hewitt considered the most comparable to the appeal properties were Birkenhead House, Lytham; Hesketh House, Fleetwood; Progress House, Blackpool; and Petros House, St Anne's; which were all assessed at £59 per $m^2$, and AXA Insurance and Aegon UK plc, both at Ballam Road, Lytham both assessed at £78 per $m^2$. Poorer hereditaments ranged from £51 - £61 per $m^2$, with the single storey H block poor quality office at £30 per $m^2$.

28. Mr Hewitt's main comparable property was Hesketh House. This was a building of 8,403 sqm, built in 1966. Mr Hewitt said that it offered a similar, or if anything poorer, standard to Mexford House. Prior to a facelift in 2015, it had a poor external appearance.

29. He considered that the existence of demand for such other comparable properties (which he referred to as a "general demand") demonstrated that there was, for the rating hypothesis, a sufficient demand for Mexford House as to require the conclusion that Mexford House should not be rated at nil but should instead be rated at a value obtained by reference to the level of rents paid for such other comparable office premises. 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, he 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.

30. Mr Hewitt's valuation, after a small alteration at the hearing, was as follows:

| Floor level | Description | Area $M^2$ | $M^2$ or Unit | Total |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| Ground Floor | Offices | 1941.90 | £59.00 | £114,572 |
| First Floor | Offices | 1968.41 | £59.00 | £116,136 |
| Second Floor | Offices | 1968.41 | £59.00 | £116,136 |
| Additions | | | | |
| | Partial Air-conditioning | | 2.5% of £346,844 | £8,671 |
| Ground Floor | Car spaces | 149 | £100 | £14,900 |
| | | | Total | £370,415 |
| | | | Rateable value say: | **£370,000** |

**The parties' agreement as to procedure: the identification of the point of law**

31. At the conclusion of the first day of the hearing Mr Hewitt had completed his evidence, subject only to certain questions regarding the comparables which the Tribunal was provisionally minded to put to him and potential questions in re-examination (if any). However, on the morning of the second day of the hearing the parties informed the Tribunal that, having regard to the position of the appellant as revealed through Mr Hewitt's evidence the previous day, and particularly the matters referred to in paragraphs 24 above, the parties were of the view that the issue between them could be decided as a matter of law upon an agreed basis of fact. We indicated that we would wish this agreed basis to be put into writing. The parties were given time to do this but were unable to finalise the wording on the second morning of the hearing. We therefore heard the legal argument based upon what was considered likely to be the eventually agreed basis, but we directed that unless a formally agreed basis were lodged by noon on 3 May 2016, then the matter must be restored for further argument and evidence the following day.

32. The parties did on the morning of 3 May 2016 lodge a Joint Position Paper signed by both counsel which reads as follows:

> "1. The parties are content that the issue can be decided as a point of law.
>
> 2. The Respondent 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.[1]
>
> 3. The parties agree that had the subject hereditament been on the market at the AVD (1 April 2008)[2], 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 paragraph 2 above, the appeal should be dismissed and the decision of the VT confirmed.

[1] But taking the factors in paragraph 2(7) of Schedule 6 as they were at 1 April 2010.
[2] But taking the factors in paragraph 2(7) of Schedule 6 as they were at 1 April 2010.

4. The VO 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 VO 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 RV determined at £370,000.

6. The Respondent accepts the proposition at 5a. but does not accept the proposition at 5.b.

7. If the VO is right, the VO's RV of £370k is confirmed.

8. If the Respondent is right, the Respondent's RV of £1 is confirmed."

33. In the light of this Joint Position Paper and the invitation from both parties that we should not receive any further oral evidence but should instead decide the case as a point of law we have proceeded in accordance with that invitation. 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.

34. During the course of the first day of the hearing, and prior to the parties' decision to ask the Tribunal to resolve the case upon an agreed issue of law, certain points were raised by us as being matters upon which we expected to be addressed. We were subsequently told that, in the light the parties' position as encapsulated in the Joint Position Paper, those matters were no longer of potential relevance. We do however consider that we should note what those points were:

a) We expressed interest in hearing more detailed evidence (i.e. more detailed than as revealed in Mr Baldwin's reports) as to what steps were taken when and by whom to let Mexford House upon what terms. We thought it of potential

interest to investigate the extent to which the property had been exposed to the market.

b) In particular, we expressed an interest in hearing evidence as to whether Mexford House could have been let at a rent which was very much lower than the £59 per square metre contended for by Mr Hewitt but which was more than nil. We asked whether we would be addressed upon the question of whether the DWP or HMRC might have reversed their decision to remove from Mexford House (so as to consolidate their operations at other office buildings in the public sector) and might instead have chosen to consolidate at Mexford House itself if Mexford House had been made available on the hypothetical statutory terms at such a very much lower rent.

35. As regards both these points we were told by Miss McCarthy that the appellant did not seek to argue that in the real world Mexford House could at the AVD have been let at a positive price (see now paragraph 3 of the Joint Position Paper) and that points a) and b) above did not need to be investigated.

36. We also raised the question of whether, supposing that the appellant was correct in his argument that rateable value was to be assessed by reference to the "general demand" as evidenced by the occupation of other office properties with similar characteristics, it was necessary to explore whether the figure of £59 per square metre was correct or whether differences between the comparables on the one hand and Mexford House on the other hand required a lower figure. We were told by Mr Glover that those matters did not need to be investigated and that 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.

37. These matters are indeed now confirmed in the Joint Position Paper.

**Legal authorities**

38. We were referred to various authorities by the parties. The following matters of relevance appear from those authorities.

39. *London County Council v Church Wardens and Overseers of the Poor of the Parish of Erith in the County of Kent* [1893] AC 562 concerned the rating of a pumping station and works owned and occupied by London County Council and used by them as a necessary part of the Metropolitan sewage system to enable them to perform their statutory duties. So long as the land and premises were used as part of the sewage system they were incapable of yielding a profit and the London County Council were practically the only possible tenants. It was held that the true test of beneficial

occupation was not whether a profit could be made but whether the occupation was of value; that even supposing the LCC could not under the relevant statutes legally be tenants they ought to be taken into account as possible hypothetical tenants for the purpose of determining the rateable value of the premises which they owned and occupied; and that the pumping station and works and the outfall sewers were rateable and were assessed on the true principle. The decision of the House of Lords was given in the speech of Lord Herschell LC. As to whether a property was rateable he stated at page 585:

> "It is I think rateable whenever its occupation is of value".

40. He observed that the question as to on what principle the assessment ought to be and what considerations are proper to be taken into account were questions which involved much greater difficulty than the question of rateability. Upon this question he held that a public body, who in the discharge of duties imposed upon them by law have become owners of land and buildings thereon, may be themselves taken into account as possible tenants. At page 588 he stated:

> "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?"

41. He went on to consider the position if the land was "struck with sterility". At page 591 he stated:

> "Now, if land is "struck with sterility in any and every body's hands," whether by law or by its inherent condition, so that its occupation is, and would be, of no value to anyone, I should quite agree that it cannot be rated to relief of the poor."

42. He went on to point out that the fact that profit (in the sense of pecuniary profit) could not be derived from the occupation was not determinative of the value of the property. He referred to the judgement of Fry LJ in an earlier case and stated:

> "I think the learned judge here points to the true test: whether the occupation be such as to be of value. This is the language used by Lord Blackburn, 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."

43. Thus the true test is whether the occupation is of value, and not whether it is one by which pecuniary profit can be made. 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 anyone, then it cannot be rated.

44. The case of *Poplar Metropolitan Borough Assessment Committee v Roberts* [1922] AC 93 concerned the rating of a tied house (including living accommodation) to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 applied such that the maximum recoverable rent was less than the value which had been entered in the valuation list. The ratepayer did not dispute the value in the valuation list save for the argument based upon the fact that the 1920 Act limited the maximum rent recoverable to a lower figure. The House of Lords held that the 1920 Act did not affect the proper assessment of rateable value. At page 104 Lord Buckmaster stated:

> "From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes."

45. At page 107 Lord Atkinson stated:

> "What the ratepayer is, under both the Act of 1836 and that of 1869, rated in respect of is decided by many cases in this House to be the beneficial occupation of a hereditament. And if he is in enjoyment of this species of occupation, he must be rated, even though he should not be a tenant of the hereditament, and though no person could be made the tenant of it, and though no rent is or could be received in respect of it."

46. At page 120 Lord Parmoor stated:

> "It is notoriously difficult, in some instances, to ascertain the figure at which the assumed annual rent should be fixed, but it is the duty of an Assessment Committee, in all cases, to ascertain for this purpose as accurately as may be, the value of the beneficial or profitable occupation of a particular property, and then to make the statutory deductions."

47. He continued at page 121:

> "The fundamental distinction remains that the assumed rental, based on statutory directions for the purpose of ascertaining occupation value, is in itself a different thing from an actual rental which denotes the liability between owner and tenant, and which may depend on a variety of conditions other than those affecting the beneficial or profitable occupation of the property."

48. Accordingly, what needs to be assessed is the value of the beneficial or profitable occupation of the hereditament.

49. In *Ladies Hosiery and Underwear Limited v West Middlesex Assessment Committee* [1932] 2 KB 679 ratepayers objected that they had been incorrectly and unfairly assessed in respect of their premises because seven other hereditaments of the same class in the same valuation list had been assessed at lower figures. The only evidence regarding value was to the effect that the rent which might be expected to be obtained for the premises would be at least the figure given as the rateable value. However, the ratepayers maintained their objection on the grounds that their own assessment was excessive and unfair because other premises were listed substantially lower. The Court of Appeal dismissed the ratepayers appeal. Scrutton LJ referred to the principle of the law of rating that each hereditament should be independently assessed. At page 688 he stated:

> "The appellants here, however, say that besides the principle of independent valuation, there is another vital principle: that as between different classes of hereditaments, and as between different hereditaments in the same class, the valuation should be fair and equal. I agree, 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."

50. Accordingly if, in the present case, the correct rateable value of Mexford House having regard to the statutory formula is only £1 as contended for by the respondents, it would be impermissible to conclude that the value shown for Mexford House in the valuation list should be an incorrect larger figure for the purpose of securing uniformity with other office buildings shown in the list.

51. In *Robinson Bros (Brewers) Limited v Assessment Committee for the No. 7 Houghton and Chester-le-Street Area of the County in Durham* [1937] 2 KB 445 the Court of Appeal was concerned with the assessment to rates of a licensed public house. It was held that regard should be had to the competition between brewers, each desirous of obtaining a tenancy of a house in order to carry on the business there and thereby to secure the use of a house for the sale of beer from its own brewery. At page 474 Scott LJ stated:

> "The task of the assessment committee in the present case was to ascertain "at what figure the hereditament in question" -- that is, the White Lion Hotel, Houghton-le-Spring -- "might reasonably be expected to let from year to year" -- on the assumptions of the definition. Whilst the tenant is hypothetical and the landlord who is to let to the tenant is necessarily also hypothetical, the hereditament is actual -- namely, the hereditament described in the valuation list with all its actualities. Two consequences follow. All the intrinsic advantages and disadvantages must be considered and weighed. It is just that particular hereditament which is supposed to be in the market with all its attractions for would-be tenants, to whatever kind of human emotion or interest or sense of duty they may appeal -- economic, social, aesthetic, political (for example, in order to perform a statutory

> duty) -- and also with all its imperfections and drawbacks which may deter or reduce competition for it……. The second consequence is that the totality of opposing forces of demand and supply must be assessed and weighed in order to hit off the point at which the two opposing negotiators are to be deemed likely to strike their bargain."

52. The decision of the Lands Tribunal in *Fir Mill Limited v Royton UDC and Jones* (1960) 7 RRC 171 was concerned with the valuation of cotton weaving and spinning mills. It was held that the hereditaments were to be valued as if they could be used as a factory but not as any particular kind of factory. At page 185 the Tribunal stated:

> "The second assumption - and here we accept counsel for the respondents' second proposition - is that the mode or category of occupation by the hypothetical tenant must be conceived as the same mode or category as that of the actual occupier. A dwelling-house must be assessed as a dwelling-house; a shop as a shop, but not as any particular kind of shop; a factory as a factory, but not as any particular kind of factory. Some alteration to a hereditament may be, and often is, effected on a change of tenancy. Provided it is not so substantial as to change the mode or category of use, the possibility of making a minor alteration of a non-structural character, which the hypothetical tenant may be assumed to have in mind when making his rental bid, is a factor which may properly be taken into account without doing violence to the statute or to the inference we draw from the authorities."

53. Accordingly, Mexford House must be assessed as offices and not for some other potential form of occupation such as storage. The hypothetical tenant, in framing its bid, would be aware it would be entitled to carry out minor alterations to the property.

54. In *British Transport Commission v Hingley (Valuation Officer)* [1961] 2 QB 16 the Court of Appeal was concerned with the rating of two hereditaments comprising the Grimsby Docks. The court upheld the decision of Lands Tribunal that a nil valuation should be entered in the valuation list for each hereditament. The basis of that decision was that the hereditaments fell to be valued on a profits basis; that upon such a valuation the correct value must be nil; and that there was no evidence to support any other valuation.

55. In *Lambeth London Borough v English Property Corporation Ltd and Shepherd (Valuation Officer)* [1980] RA 279 the Lands Tribunal (Mr J H Emlyn Jones FRICS) was concerned with the annual value for rating of a warehouse (Bridge House) which was purpose built in 1933 with seven storeys which was unoccupied at the relevant date. The ratepayers were of the view that at the relevant date the warehouse had outlived its use and was unsuitable for warehousing purposes; that the premises had various disabilities; and 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 ratepayers' valuer supported the

rateable value of £27,500 found by the valuation court. The valuation officer also supported this figure, but on a different analysis. The valuation authority appealed to the Lands Tribunal contending that the statutory assumption must be made that the building was in a good state of repair and that there was no reason why the hereditament should not be let in the open market as a multi-storey warehouse. They drew attention to the occupation by Boots of a "comparable" hereditament being a multi-storey warehouse with offices at Stamford Street and they also drew attention to another comparable. The relevant date for the valuation was 7 February 1975. Until 1974 the Boots warehouse was occupied but Boots had then vacated their warehouse because it was no longer suitable for their warehousing operation. The Tribunal observed that the hereditament was to be valued at 7 February 1975 in the light of all the circumstances at that date. The Tribunal stated:

> "At that time, the other hereditament which is most closely comparable was the Boots warehouse at Stamford Street. Boots had moved out and the premises were almost entirely vacated and they remain so. The evidence is overwhelming that at that time there was no demand for multi-storey warehouse accommodation in this part of Central London. The valuation officer was of the opinion that there was no evidence to indicate that any tenant could be found who would be prepared to take these premises on any basis which attributed value to all of the 5 ac of storage accommodation. I agree with him …."

56. The Tribunal accepted the argument put forward by the appellant rating authority that the mere fact that premises were unoccupied does not of itself justify a lesser value than that applicable to similar premises which are occupied. The Tribunal stated:

> "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. In the present case it is true that until 1974 the Boots warehouse was occupied, its occupation was of value and it had an agreed assessment of gross value £165,000. But the two properties are not identical and in my opinion the Stamford Street premises are in many ways superior to Bridge House both in quality and in the general facilities which they provide. So long as they remained in occupation the actual owners were clearly to be regarded as possible hypothetical tenants in the rating hypothesis; but if Boots had not been in occupation of Stamford Street, I do not think they could be considered as potential occupiers of Bridge House in February 1975."

57. In the result the Tribunal accepted the rateable value of £27,500 and declined to place a value upon the upper parts of Bridge House. It may be noted that there was evidence before the Tribunal that the premises had outlived their use as a multi-storey warehouse and by the relevant date they were quite unsuitable for warehousing purposes. When the premises had first been designed they were used by relatively small newspaper vans and there was little difficulty in access to and from the premises by road

vehicles. However larger road vehicles meant access had become extremely difficult. Also there were further substantial difficulties in the construction of the property so far as concerns manoeuvrability of vehicles and suitability for forklift trucks and palletisation.

58. The decision of the Lands Tribunal (Mr C R Mallett FRICS) in *Shiel (Valuation Officer) v Borg-Warner Limited* [1985] RA 36 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. The Valuation Officer contended upon the appeal to the Lands Tribunal that the true rateable value was £200,000. There was no cross appeal by the ratepayer seeking to challenge the assessment of £50,000 and to argue that a lesser figure or nil figure was appropriate. The Tribunal stated at page 43:

> "As a valuation for rating purposes is based upon the concept of the value of the occupation it is not surprising that the solution is not always easy to find when the premises are empty. If I may paraphrase what the Member (Mr J H Emlyn Jones FRICS) said in the Lands Tribunal decision of *Lambeth London Borough v English Property Corporation Ltd and Shepherd (VO)*, the mere fact that premises are unoccupied does not of itself justify a lesser value than that applicable to similar premises which are occupied. In a parade of shops where one shop remains unoccupied one would expect to find similar values applicable to all shops possessing similar characteristics on the assumption that the hereditaments were broadly identical. I would add that other considerations arise where empty premises are materially different from those which are occupied and where it can be shown that the premises remain empty because of lack of demand.
>
> In the instance case the evidence of the attempts to market the premises and the records of enquiries received suggests that there was no prospective occupier available in the open market and, if that be so, it is difficult to see that the premises can have any annual value; but first it is necessary to examine closely the evidence of lettings and agreed assessments of comparable premises to see if this evidence is to be preferred."

59. At page 45 the Tribunal stated:

> "None of this evidence appears to contradict or modify the view that the appeal premises in their existing state have reached the end of their economic life in that the previous occupiers have no use for them and no prospective occupiers have been found after a very thorough search of the market. Although built in the mid-1950's, workshop units of this size and type appear to be no longer in demand. The premises cannot readily be used for warehouse or distributive warehouse purposes without major alterations. The future use of the premises appears to depend upon the creation of a hereditament, or hereditaments, different from the existing. It

seems to me, therefore, that in rating terms the premises have ceased to have any value."

60. However as there was no cross appeal the Tribunal was not called upon to consider ordering a nil value to be entered in the valuation list and the Tribunal did not do so. Once again it may be observed that the Tribunal recorded that a valuation for rating purposes is based on the concept of the value of the occupation.

61. The Court of Appeal decision in *Commissioners of Inland Revenue v Gray* [1994] STC 360 was an appeal by way of case stated from the Lands Tribunal concerning the valuation of agricultural land for inheritance tax purposes. A valuation had to be made of each item comprised in the deceased's estate and "the value at any time of any property shall for the purposes of capital transfer tax be the price which the property might reasonably be expected to fetch if sold in the open market at that time". Hoffmann LJ stated:

> "The only express guidance which section 38 offers on the circumstances in which the hypothetical sale must be supposed to have taken place is that it was "in the open market". But this deficiency has been amply remedied by the courts during the century since the provision first made its appearance for the purposes of estate duty in the Finance Act 1894. Certain things are necessarily entailed by the statutory hypothesis. The property must be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question is what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date: *Inland Revenue Commissioners v Crossman* [1937] AC 26. Furthermore, the hypotheses must be applied to the property as it actually existed and not to some other property, even if in real life a vendor would have been likely to make some changes or improvements before putting it on the market: *Duke of Buccleuch v Inland Revenue Commissioners* [1967] 1 AC 506, 525. To this extent, but only to this extent, the express terms of the statute may introduce an element of artificiality into the hypothesis.
>
> In all other respects, the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view

about what in those circumstances would in real life have been the best price reasonably obtainable. The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus upon what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.

It is often said that the hypothetical vendor and purchaser must be assumed to have been "willing", but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or disappointed with the result; for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant."

62. In *Hoare (VO) v National Trust* [1998] RA 391 the Court of Appeal considered an appeal from the Lands Tribunal regarding the annual value for rating of two historic houses owned by the National Trust, namely Petworth House and Castle Drogo. The Lands Tribunal had ascribed positive values to these houses. 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 Tribunal analysed the case by treating the National Trust itself as the hypothetical tenant -- an approach which both parties to the appeal were content to adhere to, although Sir Richard Scott VC expressed the view that this approach was wrong and that the hypothetical tenant should be taken to be a hypothetical person standing in as a hypothetical National Trust. A hypothetical tenant would not have been able to make any profit from being a tenant. The court concluded that the hypothetical tenant would not have been prepared to make any overbid. The court recognised that the statutory formula demands that the hypothetical negotiations for the yearly tenancy should be successful. At page 422 Sir Richard Scott expressly stated this and continued:

> "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."

63. The other judgements are to the similar effect, see per Schiemann LJ at page 408 where he stated that the statutory hypothesis compels one to assume that the subject hereditament is held on a lease on the statutory terms. At page 419 Gibson LJ stated:

> "In particular I would emphasise the necessity to adhere to reality subject only to giving full effect to the statutory hypothesis, so that the hypothetical lessor and lessee act as a prudent lessor and lessee. I would call this the principle of reality, which is, to my mind of fundamental importance in this case. The absence of demand for a property, if reflected in the fact that there is no competition between would-be lessees but only a single would-be lessee in the market, may well have a depreciatory effect on the rent, as the statutory assumption of a letting necessarily entails that the hypothetical lessor cannot refuse to let at the best rent available on the market, and a prudent would-be lessee, who was not in the real world under an obligation or duty to take the letting, cannot be assumed to have been prepared to pay over the odds for the letting. When there is only one bidder, the hypothetical lessor is in a weaker bargaining position, and in the real world would have achieved an advantage for himself by obtaining the letting of a property so much a drain on his resources on terms that the lessee would be bearing the costs of repairs and insurance."

64. Schiemann LJ concluded at page 409 that, if one examines the characteristics of the hypothetical landlord, it would be found that the hypothetical landlord would not have been in a position where he would have been able to drive the Trust (i.e. the hypothetical tenant) to accept rental as well as repairing responsibilities. The hypothetical landlord in that case would be faced with a situation in which there were no other bidders for the tenancy and where every £1 of expenditure (i.e. on repairs and insurance) which the landlord would save would be worth no less to him than every £1 of rent. The court concluded that the hypothetical tenant would not pay any more than a nominal rent and that therefore the appropriate rateable value was nil.

65. In *Scottish & Newcastle Retail Ltd v Williams* [2001] EGLR 157 the Court of Appeal upheld the conclusion of the Lands Tribunal that the rebus sic stantibus principle required it to be assumed that the hereditament (a) was in the same physical state as upon the material day, save for minor alterations, all other prospective alterations to be ignored; and (b) could be occupied only for a purpose within the same mode or category of purpose as that for which it was being occupied on the material day, any prospective change of use outside that mode or category to be ignored. The Court of Appeal decision in *Williams (VO) v Scottish and Newcastle Retail Ltd* [2001] RA 41 is to similar effect.

**The appellant's submissions**

66. On behalf of the appellant Miss McCarthy summarised her argument by saying that, whatever the position might have been in the real world as at the AVD, it is necessary to assume that a hypothetical landlord and a hypothetical tenant do actually agree to a letting on the statutory terms; that it is then necessary to look to the real world to see at what level of rent Mexford House might reasonably be expected to let upon these statutory terms; and that the answer is given by reference to the level of rent paid for comparable property which was serving the function of meeting the general demand at the AVD for office property of a type comparable to Mexford House.

67. Hesketh House was a good example of a comparable office which as at the AVD was in public sector occupation for which a substantial rent was being paid. This showed that occupation of such premises had a substantial (not a nil) value.

68. The provisions of schedule 6 paragraph 2 of the 1988 Act did not require the identification in the real world of a particular individual who would take a tenancy of Mexford House at a substantial rent. The statute, as interpreted by the case law, requires the assumption that a letting on the statutory terms is agreed to between a hypothetical tenant and a hypothetical landlord. It is not permissible to say that such a tenancy would not be granted and taken at all. She referred to *Hoare v National Trust* and especially to the judgement of Sir Richard Scott VC (see paragraph 62 above).

69. Evidence from the real world is relevant in the following manner. It enables one to determine the characteristics of the hypothetical tenant. Having regard to office occupation in the Blackpool area, especially occupation of properties such as Hesketh House, one finds that comparable properties are only occupied by the public sector. Therefore, one must assume that the hypothetical tenant taking the tenancy on the statutory terms is from the public sector. It is not however necessary to examine whether, in the real world at the AVD, there existed some body in the public sector who wished to take a tenancy of Mexford House. It is known (because the statute requires this) that there does exist a hypothetical tenant who does wish to take a tenancy of Mexford House on the statutory terms. The valuation exercise involves determining what rent would be agreed between this hypothetical tenant (which would be a public sector hypothetical tenant) and the hypothetical landlord.

70. It is well-established that the mere fact that a hereditament is unoccupied as at the AVD does not of itself justify a conclusion that a nil value or a lesser value should be attributed to it for rating, see for instance the decision in *Lambeth London Borough v English Property Corporation Ltd and Shepherd (VO)*.

71. Miss McCarthy submitted that this decision in *Lambeth London Borough v English Property Corporation Ltd and Shepherd (VO)* was of particular significance in the present case. She argued that that case showed the reason why a nil value can properly be attributed

to a property (or, as in that case, to a part of property) was if the property was unlettable in the sense of being obsolete and incapable of beneficial occupation. She drew attention to the fact that the appeal hereditament in that case (Bridge House) was a rundown disused warehouse which was unoccupied and which could not be used as a warehouse any more because technology had moved on, such that the building had insufficient access for vehicles and insufficient manoeuvring space inside the building for matters such as forklift trucks etc. She also drew attention to the fact that as at the relevant AVD Boots had moved out of a comparable warehouse. Thus at the AVD the circumstances were such that there were no comparable warehouses in beneficial occupation and there was no evidence of anyone occupying anything similar who was prepared to pay a value for such occupation. She submitted it was significant that the Lands Tribunal found that, if Boots had not moved out of their comparable premises by the AVD, then Boots would have been a potential hypothetical tenant for the subject hereditament. She submitted therefore that, if one can find beneficial occupation of a similar hereditament down the road as at the AVD for which a substantial rent is being paid, one can and must ascribe value to the occupation of the subject hereditament by a hypothetical tenant.

72. Miss McCarthy referred to *Hoare (VO) v National Trust*. She drew attention to an observation by Schiemann LJ at the opening of his judgement:

> "It raises once more a problem which has vexed the law of rating for over a hundred years. It concerns the method of ascribing a rateable value to properties for which no tenant could be found in the real world and which can not generate sufficient income to cover their maintenance costs. The case law indicates that while the existence of such a state of affairs may lead the valuation officer to come to the conclusion that the rateable value of the hereditament is nil it does not force him to do so."

73. She submitted that this statement was inconsistent with the respondent's argument in the present case which appeared to be that if in the real world no tenant can be found then the rateable value must be nil. She pointed out that in the *Hoare* case there was no evidence of comparable properties actually being occupied in the rental market at a positive rent, but in the present case there are comparable properties which are occupied in the rental market at a positive rent.

74. Miss McCarthy submitted that the case of *Shiel (Valuation Officer) v Borg-Warner Limited* was instructive. She drew attention to the principle of equality, recognised in that case, which she submitted was a cornerstone of rating. On this point she referred to the speech of Lord Atkinson in *Poplar Assessment Committee v Roberts* at page 109:

> "It cannot, I think, be disputed that equality of rating is and should be one of the main objects of all rating systems."

75. She drew attention to the example given by the Lands Tribunal in the *Shiel* case to the parade of shops where one shop remains unoccupied and the observation that one

would expect to find similar values applicable to all shops possessing similar characteristics on the assumption that the hereditaments were broadly identical. She drew attention to the Tribunal's further observation that:

> "I would add that other circumstances arise where empty premises are materially different from those which are occupied **and** where it can be shown that the premises remain empty because of a lack of demand."
>
> (Miss McCarthy's emphasis)

76. She submitted that Mexford House was not materially different from the comparable office premises which were in beneficial occupation, and for which substantial rents were being paid, on the AVD.

77. She referred to *Leda Properties Ltd v Howells (VO)* [2009] RA 165. She pointed out that the Lands Tribunal there found that the property was not obsolete, not merely from the demand that had been evidenced for the hereditament itself (by the omission of the tenant to serve a break notice and the agreeing instead of a reviewed rent), but also from the fact that there was evidence of other computer centres of similar age (or older) that were also still in occupation at the relevant date.

78. She submitted that further confirmation of the proposition that at the AVD Mexford House was capable of beneficial occupation could be found in the fact that as at that date Mexford House was in fact still being occupied, anyhow as regards part.

79. She submitted that a rateable value of nil is appropriate only in cases where the hereditament in its existing state can be said to have reached the end of its economic life such that there is no demand either for it or for any other property comparable to it.

80. She suggested that evidence that in relation to other large office block properties elsewhere in the country the valuation officer has agreed a nil value is of no significance to the Upper Tribunal. First the full details regarding those cases are not known and they are geographically removed from the subject property. Separately, it is for the Upper Tribunal to analyse the facts and the law and to reach its conclusion -- the nil values in these other cases may or may not have been correctly attributed.

81. She did however seek some support from the fact that there was a rent review in relation to Mexford House as at 29 September 2007 (some six months before the AVD, but there was no suggestion of any relevant difference in value as between the two dates). She noted that the respondent's surveyor during the rent review negotiations had considered that Mexford House had a "full market value" of £341,000 as at that date. There was no suggestion on behalf of the respondent's surveyor that the value was nil.

**The respondent's submissions**

82. On behalf of the respondents Mr Glover QC advanced the following arguments.

83. He agreed that the respondent did not contend that Mexford House was unoccupiable or in some way incapable of rateable occupation as at the AVD. However, he submitted that a hereditament can be physically capable of occupation and nonetheless be of only nominal rateable value. A nominal value would be appropriate where there is no potential tenant who would be prepared to pay a positive rent. *Hoare v National Trust* is an example of such a case.

84. The appropriate starting point is to base the analysis upon the following two matters. First there is the legal matter, namely the rating hypothesis itself as set forth in schedule 6 paragraph 2 to the 1988 Act. This requires that there be assessed "an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let" on the statutory basis. Secondly there is the factual matter as now recorded in the Joint Position Paper in paragraph 2 namely that had Mexford House been on the market at the AVD nobody in the real world would have been prepared to occupy the property and pay a positive price.

85. Mr Glover referred to the judgement of Gibson LJ at page 419 (see paragraph 63 above). It is necessary to adhere to reality save only to give full effect to the statutory hypothesis. This hypothesis requires the assumption that the hypothetical landlord and hypothetical tenant will agree terms regarding a letting on the statutory basis. However, the hypothesis does not require the assumption of any greater demand for the hereditament than actually existed at the relevant date. It is impermissible to assume a demand that did not exist in the open market. As explained by Gibson LJ the hypothetical tenant will have regard to the state of the actual market and will use that to its advantage in the hypothetical negotiations so far as it can. It is a fundamental flaw to conclude that, as there is a requirement to assume that a tenancy is granted, it is necessary to assume a hypothetical tenant who does not represent what was actually the demand in the market at the relevant date but who represents more demand than existed in that market. Also it must be noted it is demand for the relevant hereditament (here Mexford House) which is relevant not demand for other hereditaments.

86. Mr Glover placed reliance upon the analysis of Hoffmann LJ in *Commissioners of Inland Revenue v Gray* and in particular (i) that the hypothetical buyer (in that case a sale was being contemplated rather than a letting) reflects reality in that he embodies whatever was actually the demand for property at the relevant time and (ii) that it "cannot be too strongly emphasised" that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The actual state of the market for the letting of Mexford House as at the relevant date is therefore of central importance.

87. Mr Glover pointed out that certain matters were required by paragraph 2(7) to be taken not at the AVD but as at the material date (here 1 April 2010) and these matters included the use or occupation of other premises situated in the locality of the hereditament. Accordingly, it is appropriate to observe the state of occupation of the comparable properties referred to by the appellant and to note that they were all occupied as at this date. The fact that a public sector tenant was occupying Hesketh House and other comparable properties may reveal the existence of a demand in the public sector for occupation of the office space in those buildings -- but it also reveals a demand which had already been met such that there was no further demand which could attach to Mexford House.

88. Mr Glover accepted that the mere fact that a property was unoccupied at the relevant date did not justify the conclusion that there was no demand for that property and that the rateable value should be nil. But in the present case it was known (see the Joint Position Paper) that there was no demand in the market for Mexford House on the AVD.

89. He said that it was a vital principle of the law of rating that each hereditament should be independently assessed, see *Ladies Hosiery and Underwear Limited v West Middlesex Assessment Committee*. Mexford House must be independently assessed in accordance with the statutory formula as at the AVD. If a proper application of this formula produces a nil value while other office properties with similar characteristics have a substantial value, then this is indeed the correct result and should not be departed from merely in search of uniformity. It may be that other comparable office blocks in the valuation officer's list will become in the same situation as Mexford House when their current occupiers have no further use for them, but until that moment there remains some evidence of demand for them by reason of the continuing occupation of the current occupiers. That was the position in respect of Mexford House itself at the date of the rent review. Accordingly, no or no significant weight should be given to the expression of opinion by the respondent's value for the purpose of the rent review that the proper rent was £341,000 per annum - and in any event that was merely an expression of opinion by a valuer in circumstances where there was an upward only rent review clause and where the only agreement reached was that there should be no increase on the currently passing rent.

90. He drew attention to the fact that the hypothetical landlord, negotiating in a way as recognised by Gibson LJ in *Hoare*, will recognise the weakness of its bargaining position and the advantage in obtaining a repairing covenant and relieving itself from potential ongoing liabilities in respect of Mexford House. It will in consequence agree a tenancy on the statutory terms with the hypothetical tenant at a nominal rent which can be represented as £1. The Valuation Tribunal was correct so to hold.

91. As regards the case of *Lambeth London Borough v English Property Corporation Ltd and Shepherd (VO)* Mr Glover submitted that this was not a decision of legal

principle taken upon full argument, but was merely an example of a decision upon its own facts which was not inconsistent with his submissions.

92. As regards the case of *Leda Properties Ltd v Howells (VO)* he submitted that the facts there were very different from the present and that it was scarcely surprising that a substantial rateable value had been found appropriate there having regard to the tenant's omission to serve a break notice (which the tenant could have done) and the recent agreeing of a substantial reviewed rent.

93. As regards the case of *Shiel (Valuation Officer) v Borg-Warner Limited* Mr Glover referred to the observation of the Tribunal that the evidence indicated there was no prospective occupier available in the open market and, if that be so, that it was difficult to see that the premises could have any annual value. This observation supported his case. As regards the observation regarding the hypothetical parade of shops, he noted that all that the Tribunal expressed was an expectation. Further this expectation was merely to find similar values applicable to all shops possessing similar characteristics on the assumption they were broadly identical, but that other considerations apply:

> "…….. where empty premises are materially different from those which are occupied and where it can be shown that the premises remain empty because of lack of demand."

94. He submitted that these "other considerations" would apply where either the empty premises were materially different from those which were occupied or where it could be shown that the premises remained empty because of lack of demand -- in other words the expectation was not only displaced in circumstances where both of these characteristics (material difference and a lack of demand) were simultaneously present.

**Discussion**

95. It must be correct to start from the rating hypothesis as laid down in paragraph 2 of Schedule 6 to the 1988 Act. We are concerned to find "an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let" on the statutory terms.

96. 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, see paragraph 62 above.

97. It is well established that the basic question to ask is: is the occupation (i.e. 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, see paragraphs 43, 48 and 60 above.

98. If there is something in the hereditament which makes occupation of it intrinsically valueless then a nil value will be appropriate. This would be the case where the hereditament was "struck with sterility in any and every body's hands", see *London County Council v Church Wardens and Overseers of the Poor of the Parish of Erith in the County of Kent*. An example of such a case is to be found (anyhow so far as concerns the upper parts of the hereditament) in *Lambeth London Borough v English Property Corporation Ltd and Shepherd (VO)* where the physical nature of the vehicular access outside the premises and the layout inside the premises made the warehouse space of no value to anyone.

99. A nil value may also be appropriate where occupation of the hereditament may be beneficial in the physical sense (for instance in relation to Petworth House) 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, see *Hoare (VO) v National Trust*.

100. We accept that the analysis must not depart from the real world any more than is demanded by the rating hypothesis. However, there must be a transaction. It does not necessarily follow, from the fact that in the real world no-one would take a tenancy, that the hypothetical tenant would successfully obtain the hypothetical tenancy if it bid £1 or one peppercorn.

101. The present case is not one where the property in question can be likened to Petworth House or Castle Drogo where the landlord would see great value in passing on the repairing and insuring liabilities to a tenant and would in consequence be happy to do so for a nominal rent.

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 *London County Council v Church Wardens and Overseers of the Poor of the Parish of Erith in the County of Kent* namely whether the occupation (i.e. 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.

107. We do not find of significance the fact that there was a rent review in relation to Mexford House as at 29 September 2007 (some six months before the AVD) and that during the course of that procedure the respondent's surveyor expressed the opinion that Mexford House had a "full market value" of £341,000 per annum as at that date. We were told that the reviewed rent at the 2007 review was determined by an Independent Expert but the details of the Independent Expert's determination and of the respondent's

surveyor's valuation are not before us. Also it may be observed that the rent review was an upwards only review and that the passing rent was already £417,000 per annum. If the respondent's surveyor had taken the view that the full market rent was more than this figure it would have been necessary for the surveyor to decide by how much it exceeded this figure. However if (as was the case) the surveyor took the view that the full market rent was less than this figure it was of no practical significance as to how much less than this figure it was – whatever the correct (lower) figure was the rent would remain at £417,000 per annum. In any event the personal opinion of the respondent's surveyor, who has not given evidence before us and whose view has been merely reported to us (but without any details as to his basis of valuation or his reasons for his conclusion) is not a matter to which we consider we should give any weight.

108. We have not overlooked the fact that in relation to certain other large office buildings in other parts of the country the valuation officer has concluded that the proper rateable value to include in the list was in each case a nil or nominal value. Upon this point we accept Ms McCarthy's argument that it is for us to analyse the facts and the law in the present case and to reach our own conclusion as to the proper value. The nil values in these other cases may or may not have been correctly attributed. Also full details regarding the facts of these other cases are not known to us and they are geographically removed from the subject property.

**Disposal**

109. The appeal is allowed. The parties agreed that in such circumstances the correct rateable value of the appeal property would be £370,000. We therefore direct that the hereditament known as Mexford House, Mexford Avenue, Blackpool, FY2 0XN must be entered into the local non-domestic rating list at a rateable value of £370,000 with effect from 1 April 2010.

110. This decision is final on all matters other than costs. The parties may now make submissions in writing on costs and a letter containing further directions accompanies this decision.

Dated: 16 June 2016

His Honour Judge Huskinson

P D McCrea FRICS

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