UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2023] UKUT 24 (LC)

UTLC Case Number: LC-2022-0177

Rolls Building, 7 Rolls Buildings,
Fetter Lane, London EC4A 1NL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – HEREDITAMENT – alteration of the 2010 rating list – power station – whether mothballing a material change of circumstances – Para 2(7)(b), Sch 6, Local Government and Finance Act 1988 - mode or category of occupation – capability of beneficial occupation – appeal dismissed

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

BETWEEN:

SSE PLC

Appellant

-and-

MS JO MOORE (VALUATION OFFICER)

Respondent

Re: Keadby Power Station,
Trentside,
Keadby
Scunthorpe
DN17 3BE

Mr Justice Edwin Johnson, The President and Mr Mark Higgin FRICS FIRRV
Heard on: 10th January 2023

Decision Date: 3 February 2023

Luke Wilcox for the Appellant
Guy Williams for the Respondent

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The following cases are referred to in this decision:

R v Melladew [1907] KB 192
Poplar Assessment Committee v Roberts [1922] 2 AC 93
Fir Mill v Royton UDC (1960) R.R.C. 171
Almond v Ash Brothers & Heaton Ltd [1969] 2 AC 366
Midland Bank plc v Lanham (Valuation Officer) [1978] RA 1 LT
Scottish & Newcastle v RF Williams (Valuation Officer) (RA/480/1993 & RA/484/1993)
RF Williams (Valuation Officer) v Scottish & Newcastle Retail Ltd [2001] EWCA Civ 185 [2001] LLR 732
United Kingdom Atomic Energy Authority v Highlands and Western Isles Valuation Joint Board Assessor LTS/VA/2003/78
Woolway (VO) v Mazars [2015] UKSC 53 [2015] AC 1862
SJ&J Monk v Newbigin [2017] UKSC 14 [2017] 1 WLR 851
Wigan Football Club Ltd v Wayne Cox (Valuation Officer) [2019] UKUT 0389 (LC)
Hewitt v Telereal Trillium Ltd [2019] UKSC 23 [2019] 1 WLR 3262
Hughes (Valuation Officer) v Exeter City Council [2020] UKUT 0007 (LC)

Introduction

1. This appeal concerns the correct rateable value to be entered into the 2010 rating list for a hereditament known as Keadby Power Station, Trentside, Keadby, Scunthorpe DN17 3BE (**"the Power Station"**). The Appellant is the owner of the Power Station. The Respondent is the Valuation Officer with responsibility for the Power Station.

2. In March 2013 the Appellant announced that the Power Station was being placed into long term mothball; meaning that electricity generation would cease at the Power Station during the mothballing period. Between April and September 2013 works were carried out to mothball the Power Station; that is to say to preserve the Power Station for electricity generation, pending the resumption of this activity. In late 2014 the Appellant decided to commence the process of bringing the Power Station out of mothball. The Power Station became fully operational in November 2015, and returned to commercial activity from December 2015.

3. The material day in the present case is agreed to be 11 June 2013 (**"the Material Day"**). The issue which arises in the appeal is whether, on the Material Day, there had been a change of circumstances requiring an alteration of the rateable value of the Power Station in the 2010 rating list. The Appellant says that there had been such a change of circumstances, either because the mode or category of occupation of the Power Station was that of a mothballed power station in long term preservation on the Material Day, or because, on the Material Day, the Power Station was incapable of beneficial occupation as a power station.

4. The Respondent disputes this. The Respondent's case is that the mode or category of occupation had not changed on the Material Day, and remained occupied as a power station, and that the Power Station was capable of beneficial occupation.

5. The rateable value of the Power Station is currently £5,340,000. The parties' valuers are agreed that if the Appellant is right in either of the arguments set out above, the rateable value of the Power Station should be reduced to £534,000 with effect from 1 April 2013 (the effective date). If the Appellant is wrong, it is agreed that the rateable value remains £5,340,000, with effect from 1 April 2013. The antecedent valuation date is 1 April 2008.

6. The alteration of the list, to reflect the alleged change of circumstances, was originally sought by a proposal dated 7 June 2013, served on the Respondent on 11 June 2013 (the agreed Material Day). The proposal came before the Valuation Tribunal for England (**"the VTE"**). For the reasons set out in a decision dated 16 March 2022 the VTE (Mr Alf Clark, Vice President) dismissed the appeal, thereby maintaining the rateable value of £5,340,000. The Appellant appeals to this Tribunal against that decision. The appeal comes before us as a rehearing.

Representation, evidence and inspection

7. At this hearing the Appellant was represented by Luke Wilcox, and the Respondent by Guy Williams. We are grateful to both counsel for the assistance they have rendered to us by their written and oral submissions.

8. In terms of evidence there was a single witness statement of Paul Goodson. Mr Goodson is the Site Manager of the Power Station. He has held this position since his appointment in October 2012. Mr Goodson first joined the Appellant, as Engineering Manager at the

Power Station, in 2009. Mr Goodson's evidence was not challenged by Mr Williams, but we had some questions of our own for Mr Goodson, and he was therefore called to give oral evidence. We have no reason to doubt the honesty of Mr Goodson, and his evidence was not challenged. In these circumstances we accept the evidence of Mr Goodson in his witness statement, as supplemented by his answers to our questions in oral evidence.

9. Each party also instructed an expert valuer. The expert valuer instructed by the Appellant was Keith Norman FRICS, a partner in the firm of Gerald Eve LLP. The expert valuer instructed by the Respondent was Mark Holliday MRICS, who works for the Valuation Office Agency and is national valuation lead on rating matters for thermal generation sites. Each expert valuer provided a written expert report, and Mr Norman also provided what was described as a rebuttal report, responding to points in Mr Holliday's expert report. On the Respondent's side there was a letter to the Tribunal from the Respondent's solicitor, explaining that it was not considered necessary to serve any rebuttal report to Mr Norman's expert report, while also making it clear that this did not signify acceptance of any particular statement in Mr Norman's report.

10. The parties elected not to call any oral evidence from the witnesses. The reasons for this were (i) that Mr Norman and Mr Holliday had succeeded in agreeing an extensive statement of facts and issues, which was considered by the parties to be sufficiently comprehensive and detailed to avoid the necessity for oral evidence, and (ii) that counsel considered, correctly in our view, that the remaining issues between Mr Norman and Mr Holliday were more a matter for submissions than for expert valuation dispute. We will refer to this agreed statement of facts and issues between Mr Norman and Mr Holliday as **"the Agreed Statement"**. It is also right that we should record our gratitude to Mr Norman and Mr Holliday for producing this helpful document.

11. In terms of evidence for this hearing therefore, we have the witness statement of Mr Goodson, as supplemented by his oral evidence, the written reports of the expert valuers, and the Agreed Statement.

12. We also had the benefit of an inspection of the Power Station on 29 December 2022, when we were shown round by Mr Robbins of the Appellant, accompanied by the valuers and the solicitor for SSE. We are most grateful to Mr Robbins and to all those who organised the inspection, which we found to be helpful in understanding the nature and topography of the Power Station and the factual background to the case.

The relevant background

13. In order to set the scene for the issue we have to decide in this appeal it is necessary to set out a certain amount of the factual background. We take this factual background principally from the Agreed Statement, from the evidence of Mr Goodson, and from our own inspection. The position is the same in relation to our findings of fact generally in this decision. We make our findings as to the facts of this case principally from the Agreed Statement, from the evidence of Mr Goodson, and from our own inspection. Where, in our description of the factual background, we refer to matters as agreed we mean, unless otherwise indicated, that the relevant matters are recorded as agreed in the Agreed Statement. So far as we could see, there were no areas, or at least no material areas of factual disagreement between the parties. If however any such areas of disagreement do exist and impinge upon any of the facts we set out in this decision, it should be assumed that what we say represents our findings of fact in relation to any such area of disagreement.

14. The Power Station comprises a Combined Cycle Gas Turbine (**"CCGT"**) power station which was commissioned on 22 January 1996. The Power Station is located at Keadby in North Lincolnshire, to the west of Scunthorpe and adjacent to the River Trent, from which it draws water. The surrounding area is mainly agricultural, although the Appellant has developed and operates an onshore wind farm immediately adjacent to the Power Station. The Appellant has also recently completed the construction of a second CCGT plant, with approximately 840 MW of capacity, also adjacent to the Power Station. This second power station is known as Keadby 2. There are also plans to develop two further power stations, utilising more modern generating technology.

15. The Power Station is supplied with gas from the National Transmission System operated by the National Grid, and exports electricity into the 400 KV Transmission network operated by the National Grid. The Power Station requires cooling water in order to operate. Cooling water is taken from the River Trent, which is tidal in this location, via a cooling water intake facility and pumphouse located on the western edge of the River Trent, adjacent to the junction of the B1392 and Trent Road. Trent Road is the access road to the Power Station. Cooling water pipes run along the edge of Trent Road to the Power Station, carrying the water from the River Trent.

16. The Power Station was constructed on the site of a former coal fired power station which was decommissioned in 1984. The Power Station was commissioned with a Transmission Entry Capacity (**"TEC"**) of 735 MW electrical capacity. TEC is defined under the National Grid's Connection and Use of System Code. This Code provides the contractual framework for connecting to and using the National Electricity Transmission System. TEC represents the maximum level of transmission access which a power station owner wishes to purchase and use for a given financial year. It therefore governs the maximum volume of electricity which can be exported to the National Grid from the station. Without a TEC agreement in place, it is not possible to export electricity onto the National Grid's 400 KV National Electricity Transmission Network.

17. Mr Goodson's evidence is that the Power Station was one of the earlier generation CCGT power stations constructed in the UK. As such, it is relatively inefficient in comparison with more modern power stations. The consequence of this, according to Mr Goodson's evidence, is that the Power Station would have been one of the first power stations to be switched off, when market conditions worsened, and one of the last power stations to come online following improved market conditions.

18. So far as the mothballing of powers stations is concerned, the Agreed Statement makes reference to a report by Parsons Brinckerhoff, who were asked by the Department of Energy and Climate Change to undertake work in relation to gas and coal power plant technology. This report (**"the PB Report"**) was published in December 2014. The PB Report was commissioned following concerns as to whether the UK would have sufficient coal and gas fired power plant capacity to provide reserve generation which could be delivered at short notice to balance any shortfalls in grid capacity. As part of that consideration, the PB Report specifically addressed the issue of mothballing/preservation of power stations. As characterised in paragraph 8.1 of the Agreed Statement, the PB Report, when considering the purpose, reason, and nature of mothballing, *"represents an impartial detailed review of the topic in the coal and gas electricity generation industry"* (we have added italics to quotations in this decision).

19. A section from the PB Report itself (section 6) is attached to the Agreed Statement as an appendix. It is convenient to quote the opening paragraphs of section 6 of the PB Report, which address the purpose, reason, and nature of mothballing/preservation power stations:

> *"In the context of a power station the words mothballing, or preservation apply to those techniques which could be applied to the plant in order to prevent or reduce deterioration when out of service.'.*
>
> *When market economics are not favourable, the option to mothball the plant can be applied, but at this time it may not be known for how long the plant may be required to remain in the preserved state. Basically, there are two categories or options for preservation, namely short-term preservation, and long-term preservation. The techniques used for each option can vary significantly, together with the timescales required to successfully mothball the plant and reinstate the plant back to operational condition. These returns to service timescales can also vary significantly between technologies (Coal, CCGT or OCGT).*
>
> *Basically, the protection of plant from condensation, corrosion, and seizure due to lack of intended use, is primarily a matter of good engineering practice and good housekeeping."*

20. It will be noted that Parsons Brinkerhoff, in the PB Report, identify two categories of mothballing; namely short term preservation and long term preservation. These two categories are discussed in detail in paragraphs 6.1 and 6.2 of the PB Report. As the description of the two categories featured in the oral arguments, it is convenient to set out each description in full.

21. Short term preservation is described in the following terms, in paragraph 6.1 of the PB Report:

> *"Short term preservation can be classed as a period of 3-12 months and typically the boilers/HRSGs are retained full of de-oxygenated water. The access doors on the steam turbine and condensers are removed to allow dehumidifiers to be installed which circulate dry air through the airspaces to prevent corrosion.*
>
> *Station staff are normally retained and are given alternative dates principally relating to plant preservation. The plant being out of service also provides the opportunity to carry out more routine or planned maintenance that would otherwise require[s] an individual unit or station outage.*
> *Due to the short term nature of the plant preservation, emphasis is required at all times on the ability for a rapid return to service of the plant, in order to capitalise on changes in market economics.*
> *The ability to achieve a successful and rapid return to services relies on the station having a detailed recommissioning plan which includes the cancellation of safety documentation, proof testing of safety systems and running of essential lubrication systems to allow hand turning or machine barring."*

22. Long term preservation is described in the following terms, in paragraph 6.2 of the PB Report:

> *"Long term preservation techniques (>12 months) are far more detailed than short term preservation techniques and require the boilers/HRSGs to be fully drained and*

dried out. Main generators are to be stored under dehumidified air and large electrical motors are to be kept dry using in built heaters where installed. Small high risk components should be removed and stored under clean dry conditions. Live water systems will require protecting against freezing by applying insulation or trace heating. External surfaces normally covered by insulation where rainwater, condensation or leakage could lead to concealed corrosion occurring.

Where advanced information on the long term preservation (>1 year) is available, it is common to reduce the number of site staff down to a minimum level. These staff are then given preservation inspection and maintenance duties. One major disadvantage of this approach is the timescales required to recruit and train new operations staff, when the plant is required to return to service."

23. In terms of rating history, the hereditament was originally entered into the 2010 rating list with the following description

"Power Station & Premises RV £5,647,000 with effect from 1 April 2010."

24. Gerald Eve, acting on behalf of the Appellant, appealed against this assessment on 13 April 2012. Following negotiations, which were focussed on the appropriate level of value, a revised assessment was agreed as follows:

"Power Station & Premises RV £5,340,000 with effect from 1 April 2010."

25. Turning to the hereditament, it comprises land, buildings, and rateable plant within the boundaries of the Power Station. As noted above, the Power Station requires, and uses cooling water drawn from the River Trent through an intake and outfall infrastructure. External to the Power Station boundary there are the cooling water pipelines which run the length of Trent Road, from the main part of the Power Station up to the cooling water pumphouse at the junction with the B1392. The B1392 runs adjacent to the River Trent at this point, and separates the cooling water pumphouse from the riverside infrastructure. Beyond the pumphouse there are six concrete culverts (of which four are operational) installed between the pumphouse and the River Trent. The culverts take the water from the River Trent, on the eastern side of the B1392, to the pumphouse, on the western side of the B1392, at the junction of Trent Road and the B1392. These culverts were originally constructed along with a concrete apron on the riverbed to serve the original coal power station but were adapted for delivering cooling water to the Power Station when it opened in 1996. CCGT power stations comprise a gas turbine and a secondary steam turbine powered by the gas turbine exhaust heat. The cold water from the river is used to condense the steam back into water after it has been through the turbine, in order that it can be reused.

26. The land on which the Appellant has constructed riverside structures/facilities for drawing in water from the River Trent, and for returning the water by an outfall to the river, is not in the ownership of the Appellant. The Appellant's rights to install and maintain the culverts and apron were granted under a deed of grant dated 15 May 1952 by the Commissioners of Crown Lands (now the Crown Estate Commissioners) and the Trent River Authority. The deed of grant granted to the British Electricity Authority (which we assume to be the predecessor in title of the Appellant) the right to install and maintain the riverside infrastructure, and also granted associated rights to *"from time to time to enter upon the said foreshore and bed of the river and inspect, repair, renew and cleanse the*

outfall pipes and intake channels comprised in the said works". The inter-tidal zone of the River Trent is in the ownership of the Crown. In this section of the River Trent the Crown is also the owner of the river bed, to the centre of the river.

27. An abstraction licence from the Environment Agency allows the Power Station to extract water from the River Trent up to an average of 870,000m^3 each day (subject to a maximum daily limit 984,000m^3). This is delivered from the pumphouse to the main part of the Power Station by two large cooling water pumps. During the period of mothballing with which we are concerned, this licence was maintained to preserve these abstraction rights. The cooling water pumps were however switched off, and river gates were fitted, which closed off the culverts from the river. Whilst the river gates were fitted, the cooling water system could not be utilised, with the consequence that electricity could not be generated. The river gates are designed to be removeable and can be removed within a week. The river gates are part of larger section of infrastructure which is referred to by the experts as the sluice gates. The sluice gates include the fixed structure around the river gates, channels, screen and the removeable (sectional) river gates themselves.

28. It was agreed that the river or sluice gates are rateable. An essential requirement of the sluice gates is that they can be closed and opened. They are therefore required to be moveable. The design of the sluice gates on the River Trent which serve the Power Station is as follows. The river gates can be fitted into fixed channels within the cooling water intake structure using a gantry system which we observed on our inspection. The channels are fixed to the concrete cooling water intake structure (CWIS). When not in use, the removeable gates are stored on a concrete storage pad adjacent to the gantry and CWIS. The river gates do not leave the hereditament but are moved between two locations. When fitted they are stacked three deep in channels in the bulkhead. When not in use they are removed, via the overhead gantry, and stored in steel racks on the concrete storage pad. The river gates are only fitted in exceptional circumstances such as an outage on the cooling water system which necessitates switching off the cooling pumps or any extended period when the station will not be generating. Since the Power Station returned to service in 2015 Mr Goodson estimates that the gates have been fitted about four times. Generally, the cooling water pumps remain operational and are used intermittently during periods when the station is not generating, in order to keep the channels and culverts clear of silt. The presence of the river gates enables the cooling water pumps to be switched off whilst protecting the culverts from further silt and mud ingress. It takes around one week to fit river gates to all the culverts and a slightly shorter period to remove them. Divers are required to enter the river to fit and remove the river gates and this is generally accompanied with a dredge of the area around the sluice gate channels. Mr Goodson explained in his evidence that the river gates do not provide a perfect seal but help to reduce the pace of the build up of silt from the river into the culverts and pipes.

29. It is agreed that the cooling water pipelines, pumphouse, and concrete culverts leading into the River Trent form part of the hereditament. This includes the culverts beneath the B1392 and the fenced compound with river frontage which comprises the infrastructure for the intake of cooling water from the river. The compound incorporates a jetty, with the gantry system mentioned above for moving the river gates into and out of fixed sluices. It is also agreed that the area immediately surrounding the culverts, including the riverbed, the concrete apron area and the river channel above the apron also form part of the hereditament. The concrete apron extends from behind the sluice gates down into the River Trent below the mean low water mark.

30. The fact that the River Trent is tidal in this location means that the river carries and deposits large amounts of silt, comprising mud and other fine material. It was explained to us on the inspection that the apron and culverts, through to the pumphouse, silt up rapidly if the silt is not cleared away by regular dredging and regular water flow. As at the Material Day silt had accumulated as sandbanks within the area around the concrete apron, and had also accumulated in the chambers and culverts beneath the pumphouse and the road (the B1392). In the appendices to the Agreed Statement there is a photograph taken in 2014, prior to the recommissioning works which brought the Power Station back into electricity generation, which shows the extent of the silt which had built up in and around the concrete apron.

31. Turning to the mothballing process, the Appellant announced in March 2013 that the Power Station was being placed into a long term mothballed state. The evidence of Mr Goodson is that this was the consequence of a downturn in market conditions, and thus an economic decision. What had happened was that in 2012 *"spark margins"*, which are the difference between the wholesale electricity price and the gas price, reduced substantially. This in turn rendered marginal the economics of older CCGT power stations such as the Power Station. It is agreed that the mothballing of the Power Station was undertaken in response to these adverse market conditions.

32. The work required to mothball the Power Station took place between April and September 2013, and included the following works:

    (1) Draining of the waste heat recovery boilers. This is a rateable item, but the work was non-structural in nature. The duration of the work was approximately one day.
    (2) Chemical coating of the external surfaces of the boiler tubes. This is a rateable item. The boiler tube bank upper sections are carbon steel, so these were spray painted with a corrosion inhibitor. The lower levels are stainless steel which did not require protective painting. The duration of the work was approximately one week. To remove the chemical coating to the boilers the gas turbines were fired up and this eradicated the coating in a single firing.
    (3) Chemical conditioning of the boilers. The works affected items such as drums which are not an integral part of the boiler and so are agreed as not rateable. The duration of the work was approximately two months to fit and two months to remove.
    (4) Drying out the storage vessels and installing dehumidifiers. It is agreed that these works did not affect rateable elements of the hereditament.
    (5) Opening the gas turbines and installing dehumidifiers. The gas turbines are a non-rateable item. The duration of the work was approximately two days.
    (6) Isolating the fuel systems and purging them of all products. The fuel systems comprise non-rateable pipework.
    (7) Decommissioning the water treatment plant, including removing agents and assets from site, and disposing off site. The work was not structural in nature and the duration of the work has been estimated at approximately two months.
    (8) Draining the gas pipeline from the National Grid compound and purging the line with nitrogen as well as shutting off all valves within the compound. The work was non-structural in nature and left the gas pipeline filled with nitrogen to prevent corrosion.
    (9) Removing certain items of plant (e.g. water extraction pumps to the steam turbine building). These assets comprised non-rateable items.
    (10) Draining the cooling water system and isolating the system. The work was non-structural in nature. It is agreed that, by the Material Day, the chemical coating to the

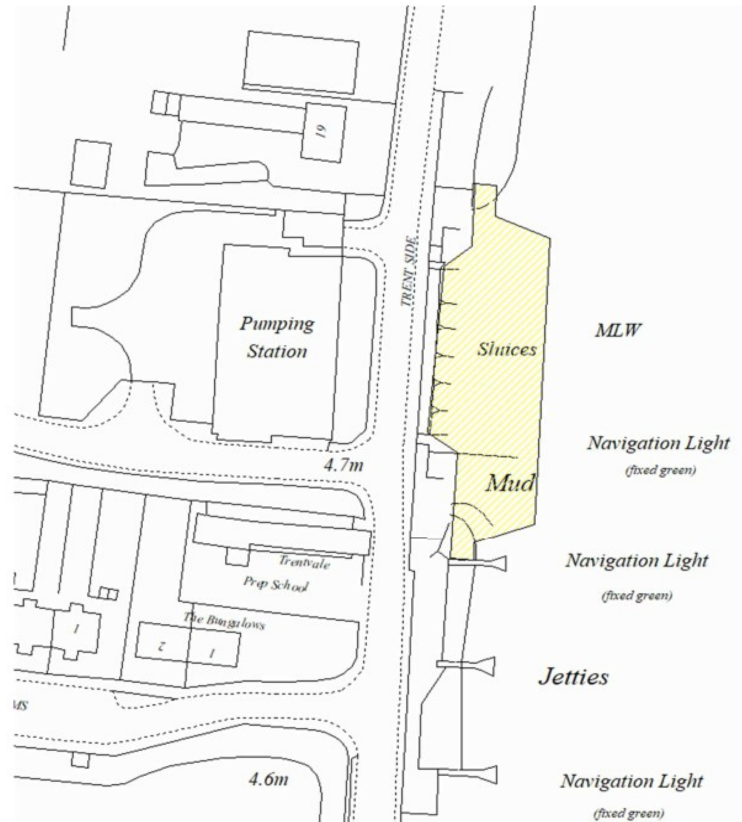
boiler was complete and that the cooling water pipes and culverts were partially full of silt.

33. Over the same period, April to September 2013, the number of staff on site were gradually reduced, leaving a skeleton staff structure in place from September 2013, whose focus was the long-term maintenance and preservation of the plant, so as to ensure that the plant was in a fit state to be recommissioned when required. According to Mr Goodson the reduction in staff was from 53 to approximately 18.

34. The TEC of the Power Station was reduced to zero with effect from 1 April 2013. The TEC remained at zero on the Material Day and thereafter until the Power Station returned to service in November 2015. When the Power Station returned to service, after the recommissioning, the TEC was increased to 755 MW which reflected improvements to non-rateable elements during the 2012/13 upgrade. It has been agreed that because these improvement works were related to the upgrade of non-rateable elements, the valuation should not be increased mid-list to take account of these improvements works.

35. It is agreed that there was a Limited Operational Notification (LON) certificate in place when the Power Station ceased generating and entered a mothballed state. A LON certificate means that the National Grid allows operation of a power station on the understanding that the power station cannot meet the full requirements of the Connection and Use of System Code mentioned above. The relevant power station is required to provide a programme for the resolution of the relevant issues which are the subject of the LON. In the present case the problems which led to the issue of the LON related to the operation of a non-rateable element of the site (the gas turbines). Specifically there were operational issues with the gas turbines. It is agreed that the LON did prevent electricity generation from the station. Some work was done to deal with these problems prior to the mothballing of the Power Station but, according to Mr Goodson, the problems were not finally resolved until September 2016, after recommissioning. Mr Goodson explained in his oral evidence that it was possible to operate the Power Station, between December 2015 and September 2016, while the LON was in place.

36. As mentioned above, by the Material Day, there had been significant silt build up in the pipes and culverts, and the creation of sand banks around the river infrastructure. As part of the mothballing process, it was accepted that once the Power Station and the cooling water system were taken out of service, and regular dredging ceased, silt would start to accumulate around the apron and in the culverts and pipes. Cooling water pump number 1 ceased operation in February 2013, and cooling water pump number 2 ceased operation on 27 May 2013. The plan below shows the arrangement of the apron and pumping station.



37. There are no photographic records or bathymetric reports to demonstrate the level of silt which had built up on the Material Day although Mr Goodson did supply a bathymetric survey from 2014. As explained above, silt had started to accumulate in and around the riverside infrastructure and in the pipes and culverts served by cooling water pump number 1 once the Appellant stopped running this pump in February 2013 and suspended dredging operations. By June 2013 the relevant pipes and culverts were fully silted. There was less silting of the pipes and culverts serving cooling water pump number 2 by June 2013, because this pump was switched off much later, at the end of May 2013. The river gates mentioned above were put in place, to protect all the culverts from further silting, between 27th May 2013 and 12th June 2013. This was after cooling water pump 2 had been switched off. The fitting of the river gates was undertaken by divers in the river, and was coupled with a minor dredge of the area in which the gates were fitted, in order to facilitate their installation.

38. As also mentioned above, there are records which demonstrate the extent of the silt built up around the apron in 2014. The build up in 2014 would have been greater than in 2013. It is agreed that the silt build up in June 2013 would have been sufficient to prevent the Power Station from operating, and would have required dredging and work by divers to remove the silt before recommissioning could have commenced. It is agreed that these desilting works would have been economic to undertake at the antecedent valuation date of 1st April 2008.

39. Turning to the process by which the Power Station was brought back into operation (or de-mothballed), it was in late 2014 that the Appellant decided to start the process of bringing the Power Station out of mothball. Again, it is common ground that this recommissioning was undertaken in response to market conditions.

40. As mentioned above, the Power Station became fully operational again in November 2015, and returned to commercial operation from December 2015. Putting to one side the cooling water infrastructure, the work required to recommission the Power Station principally involved inspecting, resealing and testing of the following items of equipment:

    (1) Gas turbines, auxiliaries, and generators (alternators);
    (2) Waste heat recovery boilers – including burning off the chemical coating and ensuring all potential contaminants removed;
    (3) Steam turbines, auxiliaries, and generators (alternators);
    (4) Fuel gas heaters and pipework;
    (5) Water treatment plant;
    (6) Chemical dosing system;
    (7) Cooling water system;
    (8) Instrumentation;
    (9) Electrical equipment.

41. As part of the recommissioning of the Power Station the silt which had accumulated around the apron and the river gates and in the pipes and culverts had to be cleared. This was achieved by a combination of dredging the river and, in the locality of the gates and in the culverts and pipes, using divers to remove the silt, either by hand or using mechanical pumps or vacuums. The de-silting works took approximately three months. The cooling water system was then recommissioned, between January and April 2015. It was only when this was done that work on recommissioning the generating plant could begin.

42. Turning to the rateable elements of the hereditament, the Power Station receives gas from the National Transmission System, operated by National Grid, into a reception facility located within the power station. It is agreed that the gas pipeline supplying the Power Station, and operated by National Grid, together with the gas reception compound occupied by National Grid, do not form part of the hereditament. It is also agreed that the National Grid 400kV sub station and transmission line exporting electricity from the Power Station do not form part of the hereditament.

43. It is agreed that the rateable elements within the hereditament comprise the following:

    (1) The land;
    (2) The buildings;
    (3) The civil works – concrete and steel structures, and concrete foundations;
    (4) The site infrastructure – roads, pavements, underground drainage, fire protection equipment and security equipment;
    (5) The heat recovery steam generators or boilers;
    (6) The gas turbine enclosures;
    (7) The tanks and vessels in excess of 400 cubic metres;
    (8) The cooling water pipes running from the Power Station boundary to the cooling water pumphouse;
    (9) The concrete culverts, pipelines and sluice gates forming part of infrastructure for the intake of cooling water from the River Trent and the return, by an outfall, of the cooling water back to the River Trent;

(10) The concrete apron within the River Trent.

44. It is agreed that the following plant and machinery on the property is not rateable and does not form part of the hereditament:

(1) The gas turbines, generators, and associated equipment;

(2) The steam turbine, generator, condensers, and associated equipment;
(3) The control equipment, valves, and instrumentation;
(4) The process pipework within the power station boundary;
(5) Other mechanical and electrical equipment.

The issues in the appeal

45. In formal terms, the appeal is concerned with the correct rateable value to be entered into the 2010 rating list for the hereditament constituted by the Power Station. In terms of what we have to decide however, the issue in the appeal relates to the mode or category of occupation of the Power Station, for rating purposes, on the Material Day.

46. In his skeleton argument, Mr Wilcox formulated what he described as the single issue before us in this appeal in the following terms:

> *"This appeal raises a single issue: what is the mode or category of occupation of a property which, while formerly used as a power station, is at the material day not used for and physically incapable of generating electricity, as a result of long-term mothballing works?"*

47. The Appellant's case is that, on the Material Day, there had been a material change of circumstances; namely that the mode or category of occupation (**"the MCO"**) had changed from (i) a power station in use as a power station to (ii) a mothballed power station or (to use the language of the PB Report) a power station subject to long term preservation.

48. In oral submissions Mr Wilcox advanced three broad arguments in support of the Appellant's case, as follows:

(1) The first, and principal argument of Mr Wilcox was that the MCO of the Power Station had changed on the Material Day, to a mothballed power station.

(2) The second argument advanced by Mr Wilcox was that the Power Station was, on the Material Day, incapable of beneficial occupation as a power station and must be valued on that basis. Although this was presented as a separate argument Mr Wilcox accepted, in oral submissions, that this second argument was, in reality, an argument in support of the case that the MCO had changed on the Material Day to a mothballed power station.
(3) The third argument was that the refusal of the Valuation Officer to reduce the rateable value of the Power Station, to reflect its mothballing, was inconsistent with the rateable value treatment of other power stations which were subject to decommissioning work.

49. For the Respondent, Mr Williams disputed the Appellant's case. In summary, his case was that the mothballing of the Power Station did not give rise to any change in the MCO of

the Power Station as a power station. The mothballing of the Power Station did not effect any change in the purpose for which the Power Station was used; namely for the purpose of generating electricity from time to time, depending upon economic conditions. The mothballing works were all intended to allow for the resumption of electricity generation, were fully reversible, and were reversed when market conditions improved. Within the category of properties having the MCO of a power station, so Mr Williams submitted, there is no sub-category of mothballed power stations.

50. As can be seen, the essential issue raised by the appeal is this. What, on the Material Day, was the MCO of the Power Station?

The legal framework – statutory provisions

51. We start by setting out the relevant statutory provisions which provide the legal framework for the valuation of the Power Station for rating purposes. The basic provisions are set out in paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988 (**"Schedule 6"**), in the following terms:

> *"(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 this 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."*

52. The basic rating hypothesis therefore requires the identification of an amount equal to the rent at which it is estimated that the hereditament might reasonably be expected to be let, on an annual letting, on the basis of the three assumptions set out in sub-paragraphs (a), (b) and (c) of paragraph 2(1). For present purposes the key assumption is the repairing assumption in sub-paragraph (b), which requires the assumption that, immediately before the hypothetical tenancy begins, the hereditament is in a reasonable state of repair. Excluded from this assumption are any repair which a reasonable landlord would consider uneconomic.

53. In the case of an alteration in the list, such as that sought by the proposal served upon the Respondent in the present case, which has given rise to this appeal, paragraph 2(6) of Schedule 6 applies, which provides as follows:

> *"(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."*

54. The matters to be taken into account on the material day are set out in paragraph 2(7) of Schedule 6, in the following terms:

> *"(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,*
> *(c) the quantity of minerals or other substances in or extracted from the hereditament,*
> *(cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,*
> *(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and*
> *(e) the use or occupation of other premises situated in the locality of the hereditament."*

55. In the present case it is the matter referred to in sub-paragraph (b) of paragraph 2(7) which is directly in issue; namely the MCO of the hereditament (the Power Station) on the Material Day.

The legal framework – case law

56. In terms of the general purpose of the rating valuation hypothesis, it is useful to keep in mind the classic statement of this purpose in *Poplar Assessment Committee v Roberts* [1922] 2 AC 93. At page 104 Lord Buckmaster described the purpose of rating valuation in the following terms:

> *"Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. 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."*

57. In the same case Lord Parmoor explained the essential principles of rating law in the following terms, at page 119:

> *"It has long been recognized, as a matter of principle in rating law, that to make actual rentals the basis of rateable value would contravene the fundamental principle of equality, both between the rate contributions from individual ratepayers, and between the totals of rate contributions levied in different contributory rating areas. In effect the result would be to make the amount on which the occupier of property is liable to pay rates dependent in many cases on the contractual relationship between a particular landlord and tenant, whereas it is dependent in all cases on a statutory direction applicable on the same principle to*

all hereditaments, and intended to insure equality of treatment as between the occupiers of rateable property and the rating authority."

58. In *Hewitt v Telereal Trillium Ltd* [2019] UKSC 23 [2019] 1 WLR 3262, at [32], Lord Carnwath JSC described the *Poplar* case as providing an authoritative and uncontentious statement of the general approach to rating valuation.

59. Turning specifically to the statutory valuation exercise, there is a considerable body of case law which sets out principles relevant to the valuation exercise. In particular, this case law addresses the question of how, in the valuation exercise, one applies the matters referred to in paragraphs (a) and (b) of paragraph 2(7) of Schedule 6; namely matters affecting the physical state or physical enjoyment of the relevant hereditament and the MCO of the relevant hereditament.

60. It is an established principle of rating law that a hereditament is to be valued as it in fact existed at the material day. In *SJ&J Monk v Newbigin* [2017] UKSC 14 [2017] 1 WLR 851 Lord Hodge JSC explained this principle, which he identified as the reality principle, in the following terms, at [12]:

> *"12 For many years and long before Parliament enacted Schedule 6 to the 1988 Act, it had been an established principle of rating law that a hereditament is to be valued as it in fact existed at the material day. This principle, which in the past was described by the Latin phrase, rebus sic stantibus (i e as things stand), and is often referred to as "the principle of reality" or "the reality principle", was stated by Lord Buckmaster in Assessment Committee of the Metropolitan Borough of Poplar v Roberts[1922] 2 AC 93,103, thus:*
>
> > *"although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made."*
>
> *Similarly, in Townley Mill Co (1919) Ltd v Oldham Assessment Committee [1937] AC 419, 437, Lord Maugham, when explaining the legal context in which the Rating and Valuation Act 1925was enacted, said:*
>
> > *"The hypothetical tenant was assumed to be a tenant from year to year with a reasonable prospect of continuing in occupation; but the hypothetical rent which the tenant could give was estimated with reference to the hereditament in its actual physical condition (rebus sic stantibus), and a continuance of the existing state of things was prima facie to be presumed."*

61. Also important is what Lord Hodge went on to say, at [13], citing an earlier exposition of *"the reality principle"*, by Lord Pearce and Lord Wilberforce:

> *"13 In Almond v Ash Brothers & Heaton Ltd [1969] 2AC 366, in which the House of Lords held that the Lands Tribunal had been correct to take account of an existing demolition order in assessing the hypothetical rent, Lord Pearce stated, at p 382:*
>
> > *"one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some*

estimate of what value should be attributed to a hereditament on the universal standard, namely a letting "from year to year". But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded in so far as they are accidental to the letting of a hereditament. They are acknowledged in so far as they are essential to the hereditament itself."

In the same case, Lord Wilberforce described the reality principle thus, at pp 385—386:

"The principle that the property must be valued as it exists at the relevant date is an old one . . . The principle was mainly devised to meet, and it does deal with, an obvious type of case where the character or condition of the property either has undergone a change or is about to do so: thus, a house in course of construction cannot be rated: nor can a building be rated by reference to changes which might be made in it either as to its structure or its use."

In this passage Lord Wilberforce referred to each of what is generally regarded as the two limbs of the reality principle, namely the physical state of the property and its use."

62. In explaining the continued importance of the reality principle, Lord Hodge also made reference, at [14], to the decision of the Court of Appeal in *RF Williams (Valuation Officer) v Scottish & Newcastle Retail Ltd* [2001] EWCA Civ 185:

"14 The reality principle continues to be a fundamental principle of rating and is manifested in Schedule 6 to the 1988 Act, in particular in paragraph 2(6)(7). In Scottish & Newcastle Retail Ltd v Williams [2001] LLR 732 the Court of Appeal upheld the decision of the Lands Tribunal that the reality principle meant that it was assumed that a hereditament was in the same physical state as upon the material day, save for minor alterations, and could be occupied only for a purpose within the same mode or category of purpose as that for which it was occupied on the material day. Thus in that case two public houses in a shopping centre had to be valued as public houses and not as retail units."

63. This brings us to *Scottish & Newcastle*, which was identified by both counsel as the key authority in the present case. In oral submissions Mr Wilcox identified the case as the leading authority on the correct approach to the determination of the MCO of a hereditament. We did not understand Mr Williams to dissent from this characterisation of the case.

64. *Scottish & Newcastle* was a decision of the Court of Appeal which was concerned with the valuation, for rating purposes, of two units in a shopping centre. One of the units comprised a pub. The other comprised a pub and a licensed café-bar. The rents the units commanded, as licensed premises, were a good deal lower than would have been achievable for shops in the same position. The valuation officer contended that the units should be valued by reference to their potential for more lucrative use as shops. The Court of Appeal upheld the decision of the Lands Tribunal (as it then was) that the units could not be valued, for rating purposes, by reference to their potential use as shops.

65. The only substantive judgment in the Court of Appeal was given by Robert Walker LJ (as he then was), with whom Hale and Aldous LJJ agreed. In order to understand why the dispute in *Scottish & Newcastle* arose, it is useful to have in mind the rival figures for the rateable value of each property, depending upon whether the properties could be valued by reference to their potential for use as shops or only by reference to their existing use. As Robert Walker LJ explained, at [4] and [5]:

> *"4. The essential difference between the parties is whether these two sets of licensed premises ought (as the Buckinghamshire Valuation Tribunal decided, and as the valuation officer contends in this court) to have been valued so as to take account of their more lucrative potential as shops, or ought (as the Lands Tribunal decided, and as Scottish and Newcastle and Allied Domecq contend in this court) to have been valued simply for what they were. That way of putting the issue oversimplifies a complex matter on which this court has had the benefit of a careful and thorough decision of the Lands Tribunal, examining case-law going back to the eighteenth century. But it gives a general indication of the difference between the parties.*
>
> *5. What is at stake has been quantified in money terms by agreement between the parties, and the difference is striking. It was agreed that if the valuation officer's contentions were fully upheld the rateable values ought to be £132,000 for the Rose and Castle and £210,000 for the City Fayre/City Duck. If on the other hand the ratepayers' contentions were fully upheld the values would be £29,500 and £50,000 respectively. The former values were adopted by the Valuation Tribunal. The latter values are adopted in the orders of the Lands Tribunal now under appeal."*

66. In relation to the assumption as to the mode or category of occupation of the relevant hereditament (the MCO), as that expression is used in paragraph 2(7)(b) of Schedule 6, and after reviewing the authorities, Robert Walker LJ concluded as follows, at [68]-[70]:

> *"68. In my view the Lands Tribunal was plainly right in concluding that Parliament has, in paragraph 2(3) to (7) of Schedule 6 to the 1988 Act, recognised that "mode or category of occupation" is a material factor in valuation for rating purposes, so confirming that the rebus sic stantibus principle has a second limb, user, in addition to its first limb, physical condition. Indeed Mr Holgate did not dispute this.*
>
> *69. In my view the Lands Tribunal was also plainly right in rejecting the formulation in Midland Bank v Lanham ("all alternative uses to which the hereditament in its existing state could be put in the real world, and which would be in the minds of competing bidders in the market, are to be taken as being within the same mode or category ... "). That formulation is either self-contradictory, or at best reduces the second limb of the rule (recognised in para 2(7)(b) of Schedule 6) to a pale reflection of the first limb (recognised in para 2(7)(a)).*
>
> *70. Mr Holgate criticised the formulation in Fir Mill as unhelpful in that it was referring only to general categories of use. He urged the court not to treat its language ("a shop as a shop, but not as any particular kind of shop; a factory as a factory, but not any particular kind of factory") as if it were a statutory text. I would certainly not treat that as a statutory text. But Parliament's*

adoption of the expression "mode or category of occupation" must be taken as recognising that the formulation in Fir Mill is on the right lines, even if its precise scope has to be worked out on a case by case basis."

67. Robert Walker LJ thus confirmed, as Lord Hodge has also confirmed in *Monk*, that the reality principle has now been given statutory effect; specifically in paragraph 2(7) of Schedule 6. Robert Walker LJ also confirmed the two limbs of the reality principle; namely physical condition (now recognised in paragraph 2(7)(a) of Schedule 6), and user (now recognised in paragraph 2(7)(b) of Schedule 6).

68. Robert Walker LJ also gave useful guidance, at [71], on how far the second limb of the reality principle (user) goes, in terms of the width of what can be assumed in relation to the MCO of a hereditament:

> *"71. It may be useful to note some situations in which the second limb of the rule, understood in this way, does not assist a ratepayer in obtaining a lower valuation. It does not assist a ratepayer who leaves half of his business premises empty, or otherwise runs his business in an half-hearted or inefficient manner; that does not go to the category of the business occupation, but to the way the particular business is run. Nor does it cast any doubt whatsoever on the decision in Robinson Brothers (Brewers) [1937] 2 KB 445, that a brewer interested in acquiring a tied house should be regarded as in the market for an hypothetical tenancy of a free house; again, that goes not to the category of business for which the premises are occupied, but to the way the business is run."*

69. In relation to the first limb of the reality principle (physical condition), Robert Walker LJ also explained, at [74], what can be assumed, in terms of allowing for the possibility of minor alterations to the relevant hereditament:

> *"74. Turning to the first limb of the rule, I consider that the Lands Tribunal was clearly right, following Fir Mill, to allow for the possibility of minor alterations in the hereditament on the occasion of its hypothetical letting. The absurdity of any other view appears vividly from the circumstances of these appeals, with numerous very well-known retail chains seeking to establish their identities and brand loyalties by distinctive fascias and fittings installed in uniform, featureless units. The first limb cannot be applied so rigidly as to prevent (for instance) Burger King being considered as a possible bidder in competition with McDonald's (which occupies a large unit just opposite the City Fayre/City Duck)."*

70. As can be seen, the Court of Appeal were confronted, in *Scottish & Newcastle*, with rival decisions of the Lands Tribunal, as it then was, on what it was permissible to assume, in terms of the MCO. The rival decisions were *Midland Bank plc v Lanham (Valuation Officer)* [1978] RA 1 LT and *Fir Mill v Royton UDC* (1960) R.R.C. 171. Robert Walker LJ approved the decision in *Fir Mill*, to which we should make direct reference.

71. *Fir Mill* was concerned with the valuation, for rating purposes, of five hereditaments which comprised two cotton spinning mills, a weaving mill and two parts of another very

old weaving mill which was in four different occupations. The case was regarded as a test case for hundreds of similar cotton mills in Lancashire. The essential issue was whether each mill was to be valued as a cotton mill, disregarding the rent which a tenant might reasonably be expected to pay for the premises if put to some other use. The ratepayers contended that the reality principle, or the rebus sic stantibus rule as it used to be known, applied not only to the current physical condition of the relevant premises, but also to their current manner of use, and had the effect that the relevant premises should be valued on the basis that they could only be used as cotton mills. The primary argument of the valuation officer was that no restriction on use should be assumed, so that the premises could be valued on the basis of whatever was their most valuable use. The alternative argument of the valuation officer was that if a restriction on use should be assumed, the assumption should be that the properties were used for the same general purpose as the existing use on the material day. The Lands Tribunal accepted the alternative argument of the valuation officer. The Lands Tribunal decided that the correct assumption was that the relevant properties were to be valued as if they could be used as a factory, but that it did not have to be assumed that they were used as any particular kind of factory.

72. The Lands Tribunal summarised their conclusions on the correct application of what is now referred to as the reality principle in the following extract from their judgment, cited with approval by Robert Walker LJ in *Scottish & Newcastle*, at page 185 of the report:

> *"In our opinion only two assumptions are permitted. The first assumption is that the hereditament is vacant and to let - vacant in the physical sense and in the sense that the existing business has ended and any process machinery has been removed. 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 an 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."*

73. We were also referred directly to the decision of the Lands Tribunal in *Scottish & Newcastle* (RA/480/1993 & RA/484/1993). Without making extensive reference to this decision, it is useful to set out what the Lands Tribunal said at [152], in relation to the operation of the reality principle:

> *"152. The conclusions that we have come to can be stated shortly. The rebus sic stantibus rule identifies for the purpose of valuation the hereditament, the physical changes which may be made to it, and the mode or category of occupation. The rule rests on the concept that what has to be determined in rating is the value to the occupier of his occupation of the hereditament, measured by the rent on an assumed yearly tenancy. In carrying out a valuation under the rating hypothesis the following assumptions are to be made about the hereditament:*
>
> *(a) That the hereditament was in the same physical state as on the material day. Alterations which the hypothetical tenant might make to the hereditament may*

be taken into account if, taken overall, they are minor. All other prospective alterations to the hereditament are to be ignored.

(b) That the hereditament could only be occupied 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 is to be ignored. In determining to what mode or category a particular use belongs it is the principal characteristics of the use and the methods of valuation commonly applied by rating surveyors to which regard must be had; and shops, offices and factories serve as examples. Some uses may not fall within any such broad category, however, and are to be regarded as sui generis.

Any evidence relating to the rents or assessments of other hereditaments may be taken into account provided it is relevant to the valuation. There is no rule that evidence relating to another hereditament is irrelevant if that other hereditament is in a different mode or category of occupation."

74. It should be noted that this paragraph did not receive unqualified approval in the Court of Appeal. As Robert Walker LJ noted, at [73]:

> *"73. I do respectfully differ from the Lands Tribunal as to its view (para 152(b) of the decision) that in determining mode or category of occupation regard should be had to "the methods of valuation commonly applied by rating surveyors". That seems to me to put the cart before the horse. Rating surveyors adopt different methods of valuation because the differences between business premises makes that appropriate. In this case the different methods adopted for public houses and shops reflect the fact that they are in different categories of business use."*

75. This seems to us to support the point, which was stressed to us by Mr Wilcox in his submissions, that the identification of the MCO of a hereditament is a separate and prior process to the determination of what a hypothetical tenant would pay by way of annual rent for the relevant hereditament. For that reason the method of valuation adopted must depend upon the nature of the hereditament to be valued, including the MCO. The process cannot be reversed, by using a method of valuation to identify the MCO.

76. Subject to this qualification, we think that the following points can be taken from the guidance provided by the Lands Tribunal in their decision in *Scottish & Newcastle*, at [152]:

(1) In determining to what MCO a particular use belongs, it is the principal characteristics of the use to which regard can be had.
(2) Shops, offices and factories are examples of categories of MCOs.
(3) Some uses may not fall within any such broad category, and are to be regarded as sui generis.

77. In his submissions, and on the basis of the case law, Mr Wilcox made the following points on the operation of the reality principle:

(1) There are two limbs to the reality principle, which operate independently and must be taken as they are in reality. They should not be collapsed into each other.

(2) The use limb requires the valuation of the relevant hereditament in its MCO on the material day even if, in the real world and as in *Scottish & Newcastle*, the incoming tenant would convert the relevant property to some more lucrative use.

(3) The reality principle is subject to the repairing assumption in paragraph 2(1)(b) of Schedule 6, but the repairing assumption cannot affect the MCO. In other words the repairing assumption cannot be used to change the MCO of the relevant hereditament.

78. So far as the first point is concerned, and while we would be wary of any rigid compartmentalisation of the two limbs of the reality principle, we accept (i) that each limb should be given effect, (ii) that each limb must be taken as it was in reality on the material day, and (iii) that the two limbs should not be collapsed into each other.

79. So far as the second point is concerned, we accept this point, which is clearly articulated in *Scottish & Newcastle*.

80. So far as the third point is concerned, we also accept this point, which reflects what was said by Lord Hodge, in *Monk*. It is clear that the MCO of the relevant hereditament must be determined before the repairing assumption is applied. The repairing assumption cannot be applied in order to create an MCO which did not, in reality, exist on the material day. As Lord Hodge explained, at [22]:

> *"22 In a helpful intervention, the Rating Surveyors' Association and the British Property Federation submitted that, where works were being carried out on an existing building, the correct approach was to proceed in this order: (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament, (ii) if the property is a hereditament, to determine the mode or category of occupation and then (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. The first two stages of that process involve the application of the reality principle. At the third stage the valuation officer applies the statutory assumption in paragraph 2(1)(b) if the reality is otherwise. In my view, this is a helpful approach where a building is undergoing redevelopment. But it is subject to the useful practice, which I discuss in para 31 below, of reducing the rateable value of a building, which is incapable of rateable occupation because of such temporary works, to a nominal figure rather than removing it from the rating list altogether."*

81. We have not, in this section of our decision, set out all of the case law to which we were referred. The above review is not intended to be exhaustive, but rather to be sufficient to identify what we regard as the principal authorities in the appeal. Keeping in mind the guidance provided by all of the legal materials to which we have been referred, we turn to our discussion of the issues in the appeal.

Discussion

82. We start with the principal submission of the Appellant; namely that the MCO of the Power Station had changed, on the Material Day, to a mothballed power station.

83. The starting point, as it seems to us, is to apply the guidance given by Robert Walker LJ in *Scottish & Newcastle* to the task of identifying the MCO of the Power Station on the Material Day. At [70] Robert Walker LJ confirmed that *"the formulation in Fir Mill is on*

the right lines, even if its precise scope has to be worked out on a case by case basis". We have quoted the relevant extract from *Fir Mill* in the previous section of this decision, but we repeat the most material part of the extract, for ease of reference:

> *"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 an 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."*

84. If a dwelling house is to be assessed as a dwelling-house, and a shop as a shop but not any particular kind of shop, and a factory as a factory but not as any particular kind of factory, one might think, at least on a superficial analysis, that the Power Station should simply be assessed as a power station, whether mothballed or active.

85. Also, at least as a matter of superficial analysis, one might think that there were good reasons, on the facts of this case, to support this approach. The mothballing of the Power Station did not take place because it was due for demolition, or for conversion to a different kind of premises such as a factory or a set of retail premises. Both the mothballing and the recommissioning (de-mothballing) works were carried out for economic reasons, as market conditions first declined, and then improved. The mothballing works were, and were intended to be reversible, and were reversed when market conditions improved. During the period of long term preservation the Power Station remained available for the resumption of electricity generation, once market conditions had improved to the required degree, and once the recommissioning works had been carried out.

86. Mr Wilcox submitted that this superficial analysis was wrong. He pointed out that the PB Report identified two types of mothballing; namely (i) short term mothballing such as might occur on a seasonal basis, in the summer months, when electricity demand is lower, and (ii) long term mothballing, which is what occurred in the present case. While it was common ground between counsel that short term mothballing would not effect a change in the MCO for rating valuation purposes, Mr Wilcox submitted that the same was not true of long term mothballing. In the case of long term mothballing, so Mr Wilcox submitted, there was a change in the mode of occupation. The Power Station ceased to be occupied for the purposes of electricity generation and became occupied for the purposes of long term preservation.

87. This argument requires us to accept that, in the case of power stations which are subject to long term mothballing, the long term mothballing constitutes a change of use which is sufficient to justify the creation of a new category or sub-category of MCO applicable to such power stations, while subject to such long term mothballing. Putting the matter more simply, we are asked to accept that there is a specific category of use, which might be called a sui generis use, encompassing power stations subject to long term mothballing, or long term preservation (to use the language of the PB Report).

88. It seems to us that there are a number of difficulties with this line of argument.

89. The starting point is that it is difficult to reconcile this degree of categorisation with the formulation in *Fir Mill* which we have quoted above, as approved in *Scottish & Newcastle*. If a shop is to be assessed as a shop, but not as any particular kind of shop, and factory is to be assessed as a factory, but not as any particular kind of factory, it becomes difficult to see why a power station which happens, by reason of market conditions, to be subject to long term mothballing, should not be assessed as a power station. It is difficult to see why such a power station should be categorised, for rating purposes, as a particular kind of power station; namely a power station subject to long term mothballing.

90. In this context it is instructive to consider what was said by the Upper Tribunal in the case of *Hughes (Valuation Officer) v Exeter City Council* [2020] UKUT 0007 (LC). The case was concerned with the rateable valuation of the Royal Albert Memorial Museum and Art Gallery in Exeter. The valuation proved to be a difficult exercise. The essential dispute in the case was as the correct valuation method to adopt. The decision is a lengthy one, but for present purposes we can go straight to [205] in the decision, where the Upper Tribunal said this in relation to categories of occupation:

> *"205. The mode or category of occupation as defined by the VTE and the respondent council is itself of a specialised nature and it is necessary to be prudent about introducing further subdivisions. There is a risk of ending up with highly specialised, relatively small groupings of property and the grounds upon which the subdivision is advanced may not be sufficiently clear or coherent. The factors put forward by the valuation officer at para 202(i), (iii) and (iv) above may be found in properties belonging to each of the two sub-categories for which he contends. In our judgment it is more realistic and preferable for the purpose of applying the rating hypothesis in this appeal to recognise that there is a broader, single mode or category containing a range of properties rather than culminating that there are narrower categories which are self-contained."*

91. We agree with Mr Williams that the approach of the Upper Tribunal in *Hughes*, at [205], is a reflection of the approach in *Fir Mill*. The object of the exercise, as it emerges from these authorities, is to identify the broad purpose to which the relevant property may be put, consistent with its actual occupation and without requiring more than minor works.

92. Further support for this approach can be found in another decision of the Upper Tribunal in a rating case, which we drew to the attention of the parties, prior to the hearing, so that it could be addressed in the oral submissions. In *Wigan Football Club Ltd v Wayne Cox (Valuation Officer)* [2019] UKUT 0389 (LC) the owner of Wigan Athletic's stadium sought an alteration of the rating list on the basis of a material change of circumstances. The material change of circumstances relied upon was Wigan's relegation from the Premier League, via the Championship, to League One. Wigan's relegation to League One had a substantial adverse effect upon attendance at the stadium and upon the club's revenues, in particular in terms of broadcasting revenue.

93. As part of their decision the Upper Tribunal considered the question of whether the change in league status constituted a change in the MCO of the stadium. The Upper Tribunal answered this question in the negative, at [50-51]:

> *"50. The differences in the conduct of the business of professional football between leagues are matters of degree. The league makes a difference, but it does not change the fact that the stadium is occupied for the purpose of playing football commercially. The idea of a league as a category is of course selective because it is easy to spot, and clearly labelled. Ms Wigley argued that because there is a limited number of relegations and promotions each season there is no danger of floodgates effect; but the argument for regarding a league as a category would itself require groups of clubs within the league, or even single clubs, to be regarded as different categories because the earning power of, for example, Manchester United is likely to be greater than that of, for example, Bournemouth AFC. On that basis the number of modes or categories is not limited to the four leagues but is unpredictably wide, which goes against the principle that the rating system uses broad categories of use rather than the use of the individual occupier. In Williams the Lands Tribunal [2000] RA 119 said at paragraph 111:*
>
>> *"….it is thus the principal characteristics of the actual use that are relevant – those features that reflect the general purpose of the use – rather than the particular occupations of the individual occupier."*
>
> *51. We have to agree with the VTE's pithy summary: football is football. A league is not a mode or category of occupation."*

94. We accept that the facts in *Hughes* and *Wigan* were not, in either case, on all fours with the present case. That said, both cases seem to us to support a broad approach to the identification of the MCO of a particular hereditament, avoiding sub-divisions which are not based upon any real difference in use. As the Upper Tribunal noted from the decision of the Lands Tribunal in *Scottish & Newcastle*, it is the principal characteristics of the actual use that are relevant rather than the particular occupation of the individual occupier.

95. We can see that the position would be different if, instead of mothballing works, the works which had been carried out in the present case had been carried out for the purposes of decommissioning the Power Station, preparatory to its demolition or conversion to another use, such as a factory or a set of retail premises. On that hypothesis the position would have been equivalent to that considered by the House of Lords in *Dawkins (VO) v Ash Brothers & Heaton Ltd* [1969] 2 AC 366, where it was held that the Lands Tribunal had been correct to take account of an existing demolition order, relating to the relevant property, in assessing the hypothetical rent for rating purposes; see the reference to this case by Lord Hodge in *Monk*, at [13]. Effectively, in *Dawkins*, the relevant property was doomed to demolition.

96. In the present case however the mothballing works were entirely reversible, were intended to be reversed, and were reversed. All that occurred was an economic decision to shut down the Power Station until the market improved. We agree with Mr Williams that it is significant in the present case that it is common ground that there continued to be a hereditament during the period of mothballing, and common ground that there was rateable occupation during the period of mothballing. While the number of staff on site was reduced, the Appellant maintained a staff presence at the Power Station throughout the period of mothballing. All this seems to us to support the argument that there was no change in the MCO of the Power Station as a consequence of the mothballing.

97. Mr Wilcox stressed in his submissions that there is a difference in kind between short term preservation and long term preservation, as these concepts are identified in the PB Report. He pointed out, by reference to the evidence of Mr Goodson, that when the decision was taken by the Appellant to mothball the Power Station it had been anticipated that the Power Station would remain in a mothballed state for a period of 2-4 years. In the event the Power Station was out of operation for a considerable period of time, and the works required to bring the Power Station back into operation were extensive and expensive, costing some £9 million and lasting some 14 months. During the period of mothballing the occupation of the Power Station was not, so Mr Wilcox submitted, for the purposes of electricity generation, but rather for the purposes of long term preservation of the Power Station, which was a different kind of occupation.

98. We are unable to accept that the distinction drawn by Mr Wilcox does amount to a change in the purpose of occupation for rateable value purposes. The authorities to which we have been referred do not seem to us to support a distinction of this kind. In the present case it is common ground that if the Power Station had been put into short term preservation, of the kind which can occur on a seasonal basis, there would have been no change in the MCO of the Power Station. It is also clear, from all the evidence which we have received, that at least in the case of an older power station such as the Power Station mothballing is part of the way in which the Power Station operates. As Mr Goodson explains, in paragraph 2.6 of his witness statement:

> *"Keadby was one of the earlier generation CCGT's built in the UK and is therefore relatively inefficient in comparison with more modern plants. Keadby was one of the lower stations in the "merit order" of gas fired power stations. In other words, it would have been one of the last stations to come online following improved market conditions and the first to be switched off when market conditions worsen."*

99. Bearing in mind the facts referred to in our previous paragraph it is difficult to see how a meaningful distinction can be drawn between a period when the Power Station is being mothballed, pending an improvement in market conditions, and a period when the Power Station is generating electricity. During both of these periods the Power Station is still being occupied as a power station, but the nature of the business conducted from the Power Station means that the actual generation of electricity is not continuous. We agree with Mr Williams that the purpose of the occupation of the Power Station is better described as the generation of electricity from time to time, adding the point that market conditions control the times at which actual generation of electricity takes place. Equally, if short term mothballing does not amount to a change of occupation for rating purposes, it is difficult to see a logical reason why long term mothballing does amount to such a change of occupation. Equally, it is difficult to see, if such a distinction does exist, where the line is to be drawn between the concepts, which are themselves necessarily fluid, of short term preservation and long term preservation.

100. Returning briefly to *Scottish & Newcastle* we repeat, for ease of reference, what was said by Robert Walker LJ at [71]:

> *"71. It may be useful to note some situations in which the second limb of the rule, understood in this way, does not assist a ratepayer in obtaining a lower valuation. It does not assist a ratepayer who leaves half of his business premises empty, or otherwise runs his business in an half-hearted or inefficient manner; that does not go to the category of the business occupation, but to the way the particular business*

is run. Nor does it cast any doubt whatsoever on the decision in Robinson Brothers (Brewers) [1937] 2 KB 445, that a brewer interested in acquiring a tied house should be regarded as in the market for an hypothetical tenancy of a free house; again, that goes not to the category of business for which the premises are occupied, but to the way the business is run."

101. This paragraph seems to us to be apt in the present case. In the present case the mothballing of the Power Station from time to time, whether short term or long term, reflects the way this particular business (electricity generation) is run. The way the business is run means that actual electricity generation is not continuous. Sometimes the pauses in actual electricity generation may be short. Sometimes the pauses in actual electricity generation may be long. As Robert Walker LJ explained, the way a particular business is run does not assist a ratepayer in obtaining a lower valuation.

102. In support of his argument Mr Wilcox sought to rely on a decision of the Lands Tribunal for Scotland; *United Kingdom Atomic Energy Authority v Highlands and Western Isles Valuation Joint Board Assessor* LTS/VA/2003/78. The case was concerned with the rateable valuation of the civil nuclear installation at Dounreay. The nuclear facilities were no longer in operation, and the buildings which housed the nuclear activity were in varying stages of a lengthy decommissioning process. The decision is a lengthy one, and dealt with a variety of issues, but Mr Wilcox directed our attention to [83], where the Tribunal were considering the question of the correct approach to the valuation of contaminated and redundant parts of the nuclear facilities. In terms of redundant buildings, the Tribunal said this at [83]:

"It seems to us, however, that in the case of a contaminated building which no longer contains identifiable radioactive materials which require to be managed as such, the situation is in principle no different from that of buildings awaiting or in the course of demolition, or for that matter alteration, as in Arbuckle Smith, or construction. It could be said of the appellants in Arbuckle Smith that their possession of the subjects for the purposes of preparing them for the intended business use was of value to them, but their Lordships did not accept that that was such a use as to amount to rateable occupation. The idea that entering the premises for the purpose of inspection, cleaning or ordinary maintenance might, as a matter of degree, amount to occupation was rejected by Lord Reid. No doubt the maintenance regime here is something out of the ordinary, but we do not see any difference in principle. Again, in the present case, there was apparently actually some positive benefit in delaying the work required to make a building safe and then demolish it. However, delaying, even for some commercial reason, the demolition of buildings would not, as it seems to us, change the character of the occupation of the buildings. It seems to us that the buildings which are simply in that situation are not in rateable occupation. The case seems to us in that respect to be similar to the construction site case, Dunbarton Assessor v McKenzie: the contractors were making beneficial use of certain buildings on the site but not of the buildings awaiting or in the course of demolition. One might imagine a chemical works closed down for economic reasons, with some buildings perhaps in the course of demolition and others awaiting demolition but meantime requiring care and maintenance of contaminated structures. A decision perhaps to "mothball" some or all of the buildings for future use would not alter the position."

103. Mr Wilcox fastened on the last sentence of this paragraph, as indicating that the Tribunal were of the view that mothballing buildings for future use fell into the same category as the decommissioning of buildings which the Tribunal were considering, and amounted to a change of use for rating purposes. It seems to us however that there are obvious difficulties with applying this sentence to the present case. The Tribunal were clearly considering a very different case, with very different facts. We very much doubt that they had in mind a mothballing process of the kind which has occurred in the present case. Beyond that however, the Tribunal were considering circumstances in which buildings were being decommissioned, with the consequence that they were not in rateable occupation. In the present case, as we have already noted, it is common ground that the Power Station continued in rateable occupation during the period of mothballing. As such, it seems to us that the last sentence of [83] is not apt to apply in the present case.

104. In this context we should also make the point, for the sake of good order, that there is a distinction which needs to be drawn between the works which were carried out in the present case for the purposes of mothballing the Power Station, and decommissioning works properly so called. As we understand the evidence and the authorities, decommissioning of a building is the expression generally used to refer to a process whereby the relevant building is prepared for demolition or conversion to a different use. This is not what occurred in the present case, unless one accepts the argument that the long term mothballing of the Power Station did constitute conversion to a different use. We mention this point not only to identify what seems to us to be the difference in meaning between mothballing works and decommissioning works, but also because there is reference in the evidence in this case to the recommissioning of the Power Station. This expression is used to refer to the works which took the Power Station out of its mothballed state and back to active operation. For convenience, we have used the same expression in this decision. There is however a need for some caution in the use of this expression, as it should not be allowed to imply that the works which put the Power Station into a mothballed state were decommissioning works. As we understand the word *"decommissioning"*, it is not apt to refer to the works which put the Power Station into a mothballed state.

105. The point made in our previous paragraph is not one which, in itself, undermines the argument of either party. Returning however to the decision in *UK Atomic Energy Authority* we do not consider that the extract from the decision relied upon by Mr Wilcox does actually support his argument in the present case. We were also provided with the decision of the appeal court in this case (the Lands Valuation Appeal Court), but we did not understand Mr Wilcox to rely upon this decision as demonstrating more than the upholding of the decision of the Tribunal.

106. In terms of other authorities we were also referred to an older case; *R v Melladew* [1907] KB 192. In this case a warehouse was used by the defendant ratepayer for the letting out of storage space, either as a whole or in parts. The defendant (who had died by the time the case reached the Court of Appeal and was thus replaced by the executrix of his estate) gave notice to the rating authority that he had gone out of occupation of the warehouse. At the relevant time there were no goods in the warehouse and it was closed. The water supply to the warehouse had also been cut off, and the weights, scales and trucks for weighing and trucking goods on the premises had been removed. The water supply could however be restored whenever this was required, the weights, scales and trucks could be restored, and the warehouse was still available for storage, at such point as there was sufficient demand for storage to justify re-opening the warehouse. Put simply, the factual position was that the decision to close the warehouse was an economic decision, which

could be reversed at the point when there was sufficient demand to render it economically justifiable to re-open.

107. The Court of Appeal allowed the appeal of the rating authority, deciding that the defendant had been in rateable occupation of the warehouse when it was closed. The essential reasoning behind this decision can be found in the judgment of Collins MR, at page 202:

> *"To come to the case before us, the business of a warehouseman need not involve the actual presence on the premises either of the warehouseman himself, or of any representative, or of any movable chattels. If he has the necessary appliances ready for use when the demand for storage comes, he is in a position to do business to which the physical occupation of the premises is indispensable. If he holds himself out to let storage space not involving a demise of the whole warehouse, and, by securing exclusive control over the premises, has put himself in a position forthwith to give the accommodation required, is he to be deemed as not the occupier until some customer has been found to deposit goods for storage? And when he has secured customers, and his warehouse has afterwards again become empty, is he to be deemed as having ceased to occupy? I cannot think that this can be so."*

108. Collins MR also made the following, more general point about rateable occupation, at pages 200-201:

> *"It is important to remember, in dealing with questions of liability to pay rates, that occupation, which is the basis of liability, necessarily varies with the nature of the rateable subject-matter. The acts necessary to establish occupancy of a dwelling-house may be very different from those which might be required to establish occupation of a non-habitable hereditament. It is, I think, clear from a comparison of many authorities that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established."*

109. We would accept that the facts of *Melladew* were not on all fours with the present case. In *Melladew* the warehouse remained open for business, as soon as sufficient demand arose, without the necessity for extensive works to render the warehouse ready for storage. We do however consider that the decision in *Melladew* is consistent with the later authorities in terms of its identification of what amounts to a cessation or change of occupation. In *Melladew* the defendant did not go out of rateable occupation while the business of the warehouse effectively remained in existence, awaiting an improvement in demand. In the present case the Power Station was mothballed, pending an improvement in market conditions. In each case the essential position is the same. The relevant hereditament remained in occupation for the purposes of the relevant business, notwithstanding an interruption in actual business activity, respectively actual storage and actual electricity generation, caused by market conditions.

110. Turning to the *Poplar* case, and the statements of Lord Buckmaster and Lord Parmoor as to the purpose of rating valuation, these statements are clearly valuable in identifying the basic purpose of rating valuation. They do not however answer the question in the present case, which is whether there was a change of occupation, for rating purposes, when the Power Station was mothballed or, in the language of the PB Report, went into long term preservation. While we accept that the general underlying purpose of rating valuation is to

identify the value to the occupier of its occupation of the relevant hereditament, it is clear that this does not mean that the valuation is based upon the business needs or practices of a particular occupier or the use which, for his own purposes, the occupier chooses to make of the relevant hereditament. This is clear from the decision of the Court of Appeal in *Scottish & Newcastle*, but the same point has been made by Lord Sumption JSC in *Woolway (VO) v Mazars* [2015] UKSC 53 [2015] AC 1862. In the context of whether distinct spaces under common occupation could form a single hereditament, Lord Sumption said this, at [12]:

> *"Thirdly, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it."*

111. We note Lord Sumption's reference, albeit in a different context, to the physical characteristics of the relevant hereditament. This seems to us to be consistent with what was said by the Lands Tribunal in *Scottish & Newcastle* at [152(b)]; namely that in determining to what mode or category a particular use belongs it is the principal characteristics of the use to which regard must be had. In the present case, as we find in the evidence, there was no change in the principal characteristic of the Power Station, as between (i) periods of actual electricity generation, (ii) the period of mothballing with which we are concerned, and (iii) any shorter seasonal periods of mothballing which may have occurred over the years. In each case the principal characteristic of the Power Station remained that it was a set of premises used for the generation of electricity from time to time, as market conditions dictated.

112. In a memorable phrase in his oral submissions Mr Wilcox described electricity generation as the golden thread which, while unbroken, determined the MCO of the Power Station. The purpose of this expression was of course to pave the way for Mr Wilcox's argument that, once the Power Station went into long term mothballing, or long term preservation, the thread was broken and the MCO changed, placing the Power Station into a different category of use for rating purposes. As Mr Wilcox pointed out, it is possible for the MCO of a hereditament to change, without any physical change in the relevant property.

113. We accept the point that the MCO of a hereditament can change, without any physical change in the relevant property, but for this to happen it seems to us that there needs to be some demonstrably different use of the relevant property. Putting the matter another way, there needs to be a move across categories. To use the examples given in *Fir Mill* and *Scottish & Newcastle*, one would need something similar to a factory becoming a shop, or a shop becoming a pub, or a pub becoming a shop.

114. Drawing together all of the above discussion the conclusion which we reach on the Appellant's principal argument is that the MCO of the Power Station did not change, during the period of mothballing. Ultimately, the Appellant's case depends upon establishing there was a difference in kind, in terms of the MCO, between the Power Station when it was in active operation and the Power Station when it was in the period of long-term mothballing. On the basis of all the evidence which we have received, and all the arguments which we have heard, we are not persuaded that this difference in kind exists. We do not think that the case law supports the existence of such a difference in kind, for rating purposes, in the MCO of the Power Station.

115. In *Wigan*, at [51], the Upper Tribunal made use of the following part of the decision of the VTE in that case:

> *"51. We have to agree with the VTE's pithy summary: football is football. A league is not a mode or category of occupation."*

116. We conclude that the same pithy summary is appropriate in the present case. A power station is a power station. A period of long term mothballing of a power station, resulting from market conditions, is not a separate or distinct mode or category of occupation.

117. Before we leave the Appellant's principal argument we should make reference to the repairing assumption in paragraph 2(1)(b) of Schedule 6. Although the repairing assumption featured in the submissions, it ultimately turned out to be peripheral to the arguments. The reason for this was that the Agreed Statement, at paragraph 10.1 addresses the question of repair in the following terms:

> *"10.1It is agreed that.*
>
> *If the mode or category of occupation has not changed and the hereditament remains a gas fired power station that the buildup of silt within the cooling water culverts and the riverbank adjacent to the cooling water intake pipes is a matter of repair and therefore should be ignored for the purposes of the valuation. The mothballing works undertaken on site would also be disregarded on the basis it comprised minor non-structural works to rateable assets or work to non-rateable assets.*
>
> *and*
>
> *If the mode or category of occupation has changed to that of a power station in long term preservation that the presence of silt preventing an alternative use as an operational power station is an essential feature of the hereditament and the valuation should reflect this as well as the mothballed status of the hereditament."*

118. As can be seen, the agreement in relation to the status of the mothballing works effectively avoids any risk of the repairing assumption being used to affect the determination of the MCO. As we have previously accepted in this decision, the repairing assumption cannot be used in the determination of the MCO, but only falls to be applied to the hereditament, in whatever category of MCO the hereditament belongs. In the present case therefore, the position is as follows:

(1) If the MCO did not change as a result of the mothballing, the works required to deal with the build up of silt which occurred during the period of mothballing can be treated as works of repair, and can be disregarded for the purposes of the valuation. The mothballing works can also be disregarded on the basis that they comprised minor non-structural works to rateable assets or work to non-rateable assets.

(2) If the MCO did change to a power station in long term preservation, the presence of silt was an essential feature of the hereditament in that MCO, which falls to be reflected in the valuation, together with the remaining features of the Power Station while in its mothballed state.

119. On either of the above hypotheses the application of the repairing assumption depends upon what decision is made as to the MCO of the Power Station on the Material Day, and comes after that decision.

120. The consequence of this was that although we received a good deal of evidence in relation to the mothballing works and, in particular, in relation to the operation of the cooling water system and the silting which occurred during the period of mothballing, there was no dispute as to how the mothballing works should be treated in the valuation. It seems to us that the real relevance of the mothballing works and, in particular, the silting and desilting of the cooling water system is that these are all matters which fall to be taken into account when considering the argument that there was a difference in kind between the Power Station in active operation and the Power Station in its mothballed state. We have taken these matters into account in reaching our conclusion as to whether the mothballing of the Power Station did change the MCO. In this context, and for the reasons which we have explained, we have not been persuaded that the mothballing works, or the state of the cooling water system during the period of mothballing did have this effect, either directly or as a contributing factor.

121. The point we have just made brings us to the Appellant's second argument; namely that the Power Station was, on the Material Day, incapable of beneficial occupation as a power station and must be valued on that basis. We can take this second argument much more shortly.

122. As we have already noted, Mr Wilcox accepted, in oral submissions, that this second argument was, in reality, an argument in support of the case that the MCO had changed on the Material Day to a mothballed power station. As such, it seems to us that the argument begs the question which we have to answer, and which we have already answered in the conclusion which we have just stated on the Appellant's principal argument.

123. The question is begged because saying that the Power Station was, on the Material Day, incapable of beneficial occupation as a power station begs the question of what the occupation of the Power Station was on the Material Day. It is perfectly true that the Power Station could not, during the period of mothballing, be used for the generation of electricity. It is however also true that the Power Station was in rateable occupation during the period of mothballing. This is common ground between the parties. The question is what was the mode or category of that rateable occupation. This brings one back to the question of the category of MCO to which the Power Station belonged during the period of mothballing. The fact that the Power Station could not be used for the generation of electricity during the period of mothballing is a matter to be taken into account in deciding whether the MCO changed during the period of mothballing, but it does not, in itself, answer that question.

124. We are not persuaded that the fact that the Power Station could not be used for the generation of electricity during the period of mothballing had the effect of changing the MCO of the Power Station to a mothballed power station. Our reasons for this conclusion are the same reasons upon which we have relied in reaching our conclusion on the Appellant's principal argument.

125. We therefore conclude that the second argument fails. We do not think that it is correct to characterise the period of mothballing as a period when the Power Station was incapable of beneficial occupation. We accept that, during this period, the Power Station was incapable of generating electricity. We do not accept that this justifies a change in the MCO of the Power Station to a mothballed power station.

126. Finally, there is the Appellant's argument based on consistency. As we understood this argument, which was explained by Mr Wilcox in his oral submissions, there has been an inconsistency of treatment, for rating purposes, as between the Power Station and other power stations. Examples of the rating treatment of other power stations are given in paragraphs 6.7-6.10 of the Agreed Statement.

127. Again, we can take this argument shortly. It seems to us to suffer from two fatal difficulties.

128. The first difficulty is that the examples given in the Agreed Statement do not seem to us to be anywhere near close enough to the circumstances of the Power Station to give rise to a claim of inconsistent treatment. We were referred, in particular, to Cottam and Fiddlers Ferry Power Stations. In that case however it is clear that the revised rateable value which was agreed in that case reflected the fact that the relevant coal fired power stations were being decommissioned, prior to demolition. As we have noted earlier in this decision, hereditaments which are scheduled for demolition are treated differently for rating purposes. In the present case however the Power Station was not scheduled for demolition or indeed redevelopment or conversion. The Power Station was mothballed for economic reasons, pending an improvement in market conditions. We cannot see any material similarity between the Power Station, on the one side, and Cottam and Fiddlers Ferry Power Stations, on the other side, which would justify a claim of inconsistent treatment. The same seems to us to apply to the other examples given in the evidence.

129. The second difficulty is that even if, contrary to our view, inconsistency of treatment was demonstrated, we struggle to see where such inconsistency goes, in terms of its legal effect. We have to determine the question of the MCO on the Material Day by the application of the relevant law, both statute and case law, to the facts of this case. The fact that there may have been different treatment of another power station in the same circumstances would not, as it seems to us, create any legal rule or precedent binding upon us. In theory, and depending upon the parties involved, there might be some argument for equality of treatment based on human rights grounds, or something of that kind. Mr Wilcox confirmed however that he was not seeking to advance any argument of that kind.

130. We therefore conclude that the third argument fails. We do not think that there is evidence of inconsistent treatment. Nor do we think, if there had been such evidence, that it could have been relied upon to compel different conclusions to the conclusions which we have reached on the Appellant's principal and second arguments.

Conclusion

131. For the reasons which we have set out in this decision, we reach the following conclusions:
   (1) There was no material change of circumstances, for rating valuation purposes, on the Material Day.
   (2) The mothballing of the Power Station did not change the MCO of the Power Station, for rating valuation purposes, on the Material Day.
   (3) On the Material Day the Power Station remained in use as a power station.
   (4) Accordingly, no alteration of the 2010 rating list is justified on the basis of material change of circumstances.

132. Accordingly, the appeal falls to be dismissed. The decision of the VTE stands, and the rateable value of the hereditament comprising the Power Station remained £5,340,000 as from 1st April 2013.

The President, Mr Justice Edwin Johnson — Mr Mark Higgin FRICS FIRRV

3 February 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.