



BREXIT

Implications for Rating



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INTRODUCTION

Brexit is the withdrawal of the United Kingdom (UK) from the European Union (EU).

In a referendum on 23 June 2016 a majority of British voters supported leaving the EU. On 29 March 2017, the UK government invoked Article 50 of the Treaty on the European Union, starting a process that is to conclude with the UK withdrawing no later than 31 January 2020.

Many effects of Brexit depend on whether the UK leaves with a withdrawal agreement, or before an agreement is ratified. There is a broad consensus in existing economic research that Brexit is likely

to reduce the UK’s real per capita income in the medium and long term.

This paper examines whether certain matters subsequent to the referendum vote can be properly construed as a ‘material change in circumstances’ (a MCC) that could give rise to a reduction in the rateable value (RV) of a property in respect of the 2017 non-domestic rating list (the 2017 List).

In tandem with that consideration, how those same matters might affect the 2021 non-domestic rating list (the 2021 List) where the antecedent valuation date (the AVD) is 1 April 2019.





ENGLAND & WALES

Statutory Background

The relevant legislation is found in paragraph 2 of Schedule 6 to the Local Government Finance Act 1988 which, in so far it is relevant, is as follows. The rateable value of a non-domestic hereditament (property) 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.*

Regulation 4 of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) regulations 2009 (SI 2009 No.2268) define the circumstances in which a proposal can be made to alter the rating list. A proposal is limited to the grounds set out in Regulation 4 (1) which includes that the rateable

value shown in the list for a hereditament is inaccurate by the reason of a "material change of circumstances".

Under regulation 3(1) of the Regulations, material change of circumstances (MCC) is defined as a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the Local Government Finance Act 1988. Those matters include:

- a. matters affecting the physical state or physical enjoyment of the hereditament;*
- b. 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.*

The questions to be addressed

- a. Is Brexit a change affecting the physical state or physical enjoyment that affects the property; and/or*
- b. Is Brexit a wider change that is physically manifest in the locality which needs to be considered when assessing the property's rateable value?*

Any ratepayer only needs to succeed on either of these propositions for the question to move to one of valuation.

In seeking the rateable value we are to assess the rent at which the hereditament 'might reasonably be expected to let' on the statutory terms and assumptions. In carrying out that exercise, it is important that consideration is given to every intrinsic quality and circumstance which tends to push the rental up or down. The rent to be ascertained is the figure at which the hypothetical landlord and tenant would,

“ in the opinion of the valuer or the Tribunal, come to terms as a result of bargaining for the hereditament; in the light of competition or its absence in both demand and supply, as a result of the higgling of the market.”¹

Of course, valuers may make mistakes; ratepayers may omit to pursue appeals that they should have made; so the statutory provisions do not, of themselves, guarantee that uniformity and fairness are always achieved; but they aim for uniformity and fairness, and provide a structure within which those ends can be achieved.

Preliminary Points – The 2017 Rating List

It is clearly established that it is fundamental to the law of rating that the rateable value of a hereditament should represent the value of beneficial occupation to the occupier. (See **Scottish & Newcastle Ltd v Williams (VO) [2000] RA 119** ('LT decision') at paras 98 to 106, approved in the Court of Appeal at **[2001] EWCA Civ 185** ('CA decision') at para 79).

The principle approved in **Scottish & Newcastle** is that the assessment of rateable value of a hereditament must reflect the value of the hereditament for the purpose for which it is occupied. As a general point, it is well established that there is no room for fairness, reasonableness or discretion when the Valuation Tribunal England comes to determine the proper application

of the legislation to any given case where the interpretation is clear; see **Roberts (VO) v West Coast Marine (Pwllheli) Ltd [2013] UKUT 0413 (LC)** at [28], **Wragg v Harwood [2010] UKUT 350** at [17] and **Pawson v Rowland [1998] RVR 314** at [315]. Moreover, it is also well established that a fall in the rental value of a hereditament – however significant – is not **on its own** sufficient to result in a reduction in rateable value absent a MCC.

This is best illustrated by the Court of Appeal's decision in **Addis Ltd v Clement (VO) [1987] RA 1 (CA)** ('Addis v Clement'). The issue was whether for the purposes of a valuation under s.20 of the General Rate Act 1967 the effect on value of a nearby enterprise zone should be taken into account or disregarded. In that case, it was common ground (not to mention common sense) that the designation of an enterprise zone in the locality would have a severe negative impact on the rental values of those hereditaments just outside the zone, which had none of the financial benefits offered by the zone. This factor did not, however, prevent the Court of Appeal from concluding that there was no MCC in that case because none of the para 2(7) matters above had been established.

Although the Court of Appeal's judgment was reversed by the House of Lords, it is generally regarded that the 1988 Act, by introducing the word 'physical' into the correlative provisions of that Act, effected a statutory reversal of the House of Lords' decision and a preference for the Court of Appeal's reasoning and conclusion prevails. Accordingly, the Court of Appeal's judgment is part of the important background to such provisions which now include those of the 1988 Act.

Therefore, before considering any valuation matter the issue to be addressed is **not** one of valuation but is simply one of whether (on the words of the statute) there is a MCC. **If, and only if**, a MCC can be established do questions of valuation arise.

¹ Scott LJ in *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee* [1937] 2 KB 445

Preliminary Points – The 2021 Rating List

The AVD for the 2021 rating list is 1 April 2019. Brexit is an important factor comprising part of the economic context of the 2021 rating list and needs to be fully accounted for through evidence. There is no need to establish that a MCC has occurred to take account of Brexit when assessing a rateable value for the 2021 rating list.

Proposals made in respect of the 2017 Rating List

The correct question to ask is whether at the material day (the date of the proposal) there was a relevant matter affecting physical enjoyment (para 2(7) (a)) or a matter physically manifest in the locality (para 2(7)(d)) which allows the consequences of Brexit to be reflected in the valuation at the material day. Therefore the date that a Check is lodged in respect of 2017 rating list assessments will be crucial to the success of any proposal.

It is trite law that the relevant test for establishing whether a matter can be a MCC requires the matter to be ‘observable on the ground’ (i.e. more than something that is demonstrable by statistics alone). This proposition can be derived from the council tax case **Chilton-Merryweather v Hunt [2008] RA 357** where Rix LJ stated at [42]:

“...Schedule 6, paragraph 2(7) of the 1988 Act distinguishes between both the ‘physical state’ and ‘physical enjoyment’ of the hereditament itself on the one hand, and on the other hand between ‘the physical state of the locality’ and other matters which are ‘physically manifest’ there without themselves affecting the physical state of the locality. Those matters would appear to include such matters as were discussed by the Court of Appeal in *Addis v Clement*, such as ‘alterations in the economic conditions’ which ‘result in changes in the locality which are capable of being observed ‘on the ground’ in the locality’ (per Woolf LJ at 10).”



Accordingly, the ratepayer would need to overcome the evidential burden of Brexit resulting in a real observable difference on the ground. In many cases Brexit may affect the physical state or physical enjoyment of a port or airport (under para 2(7)(a)), for example, being the cause of increased accommodation for immigration and police accommodation. In that case therefore a MCC has occurred. The rating valuation considerations are therefore invoked for example:

- a. Increased costs of operation; or
- b. Increased risk to the hypothetical tenant of operations; and
- c. The uncertainty in the market.

The appeal of **Kendrick (VO) [2009] RA 145** ('Kendrick') provides support for the proposition that the enduring consequence of events (such as, in Kendrick, the attitude of passengers to air travel as a result of 11 September 2001) could qualify as a para 2(7)(d) matter provided that it was physically manifest in the locality of the hereditament. As a result, it may well be possible to show that the effects of Brexit are physically manifest in the locality allowing appeal under para 2(7)(d). Accordingly, it may be that the relevant 'matter' in the case of Brexit is the marked change in the levels of activity in and around the port or airport. This would include observable queuing, lorry parking etc. which, again, all point to increased costs of operation, the increased risk to the hypothetical tenant of operations and the uncertainty in the market.

In order for a MCC on para 2(7)(d) grounds to be established, there must also be a clear and causative link between the relevant matter and the reduction in rental value such that the matter can be said to have caused the reduction (hence the existence of an inaccuracy in the list).

Unless the property being considered is of a specialist nature that causative link is likely to be very difficult to demonstrate.

Conclusion 2017 Rating List proposals and the 2021 Rating List

It is likely that appeals can be successfully lodged against the 2017 rating list but for proposals to result in reductions in assessment the appellant will need to show that Brexit has affected property value and the outlook of the industry in each case.

Merlin Entertainment Group Limited v Cox (VO) [2018] UKUT 0406 (LC) provides practical advice. It concludes with practical guidance for surveyors and tribunals to consider when dealing with MCCs.

- (i) Does the matter concern an intrinsic characteristic of the hereditament or of the locality, or is it an extraneous matter, for example, something to do with the personal attributes of the actual occupier or the way in which a party conducts its business? If the latter, then generally **it will not fall within para 2 (7)** - see also *Wigan Football Company Limited v Cox (VO) [2019] UKUT 0389 (LC)*.
- (ii) Does the matter concern a characteristic of the hereditament itself or the locality in which it sits? If yes does it fall within para 2 (7)?;

Note that *"For a given property, the rateable value is the same whether the actual occupier runs a flourishing business or trades at a loss... Rates are not a tax on actual profits."*²



² See para 45 *Merlin Entertainment Group Limited v Cox (VO) [2018] UKUT 0406 (LC)*



SCOTLAND

Section 37 of the Local Government (Scotland) Act 1975 ('the Act') defines a MCC as meaning 'in relation to any lands and heritages a change of circumstances affecting their value'. It is not enough for there simply to have been a change of circumstances – to be material, the change of circumstances must be shown to have affected the value of the subjects.

A distinction requires to be made between changes resulting from the normal fluctuations or variations which may occur from time to time in any business venture, or general fluctuations in the economy, which do not constitute a MCC; and those which result from some abnormal economic crisis, which do. The key distinction is between the normal processes of change and those resulting from some abnormal or unusual situation.

See **Assessor for Glasgow v Schuh 2012 SLT 903** ('Schuh 1'), Lord Justice Clerk (Gill), paras 30-34.

In **Assessor for Dunbartonshire and Argyll & Bute v Akram and Ali [2012] SC 235**, the Lord Justice Clerk (Gill), in his preliminary discussion of general principles, explained (para 6): An essential feature of the system is that a value entered in the roll remains fixed for the duration of the roll unless during its currency there should be a material change of circumstances affecting that value.

As explained by the Lord President at para 22 of *Schuh Limited v Assessor for Glasgow* 2014 SLT 184 ('Schuh 2'):

“ if every downward fluctuation, whatever the cause, constituted a material change of circumstances, the whole basis of quinquennial revaluation would be undermined. The quinquennium would consist of an endless series of material change appeals relating to all kinds of lands and heritages.”



In **Grampian v Anderson March [2018] CSIH 15b** at [32] the Lord Justice Clerk Lady Dorrian said at para [34]:

“ In a case where the MCC is based on a change to the physical nature of the premises, or of the locality, the figure may be inaccurate because the premises or locality were fundamentally different from those upon which the NAV/RV had been assessed. However, where the claimed effect on value is predicated entirely on the assertion of a general fall in rental levels, this will only render the entry in the roll open to challenge if the fall has generally taken rental values below the values set at tone. Even then, an appeal will only succeed if what has caused the fall is something beyond the normal ebb and flow of business. Where general levels of rents have risen significantly above tone, then fallen back to levels which are not below tone, it is hard to see why the change is a material change of circumstances affecting value; or that the entry in the roll, reflecting the tone valuation, is incorrect.”

Therefore, to succeed, there must be a change in the physical nature, or locality of the property.

Alternatively, there must be a drop in the value of all relevant properties, but whatever route is chosen the assertion needs to be supported by a clear drop in value which in the absence of rental evidence would require an analysis of trade.

In Scotland the revaluation is set for 1 April 2022 and the AVD is 1 April 2020. The economic context at this date, including Brexit, will set the basis for that new valuation roll.





NORTHERN IRELAND

Article 39(A) of the Rates (Northern Ireland) Order 1977 requires that the net annual value (NAV) must be ‘ascertained by reference to’ the AVD. In estimating the net annual value for the purposes of any revision of a valuation list, regard shall be had to the net annual values in that list of comparable hereditaments which are in the same state and circumstances as the hereditament whose net annual value is being revised.

The term ‘state and circumstances’ should be given a narrow meaning. The meaning of the word ‘circumstances’ is heavily dependent on context.

In **Debenhams plc v Commissioner of Valuation (VR/32/2001)** at para [27] the Member said that the phrase ‘state and circumstances’ should be given *“a narrow rather than a broad interpretation so the inquiry need not be extensive and also the number of potential subsequent appeals should be limited.”*

In **Belfast International Airport v Commissioner of Valuation (VR/9/2016)** at para [28] Mr Justice

Horner confirmed *“that ‘state’ goes to the hereditament itself and that circumstances’ to its environs, which in our opinion accords with the purpose and sense of the legislation.”* Furthermore, at para 30(v) that *“Economic circumstances had to be given a restricted meaning as the value had to be ascertained by reference to the AVD”*. In considering any revision to an assessment the district valuer, the Commissioner and indeed the Lands Tribunal must use as the primary guideline, not rental evidence or other evidence but the NAVs of comparable properties in the same state and circumstances. Economic changes are not relevant because the valuation date is fixed at the AVD but nor are other changes relevant which might affect value if they apply equally to a whole class because each will remain assessed comparably to the others. Only at a general revaluation can such changes be taken into account. A revaluation is currently underway and the valuation date is 1 April 2018. Therefore Brexit is a relevant factor for the revaluation.





REPUBLIC OF IRELAND

In the ROI ‘material change in circumstances’ is set out in the Valuation Amendment Act 2015 at 2(d): ‘material change of circumstances’ means a change of circumstances that consists of:

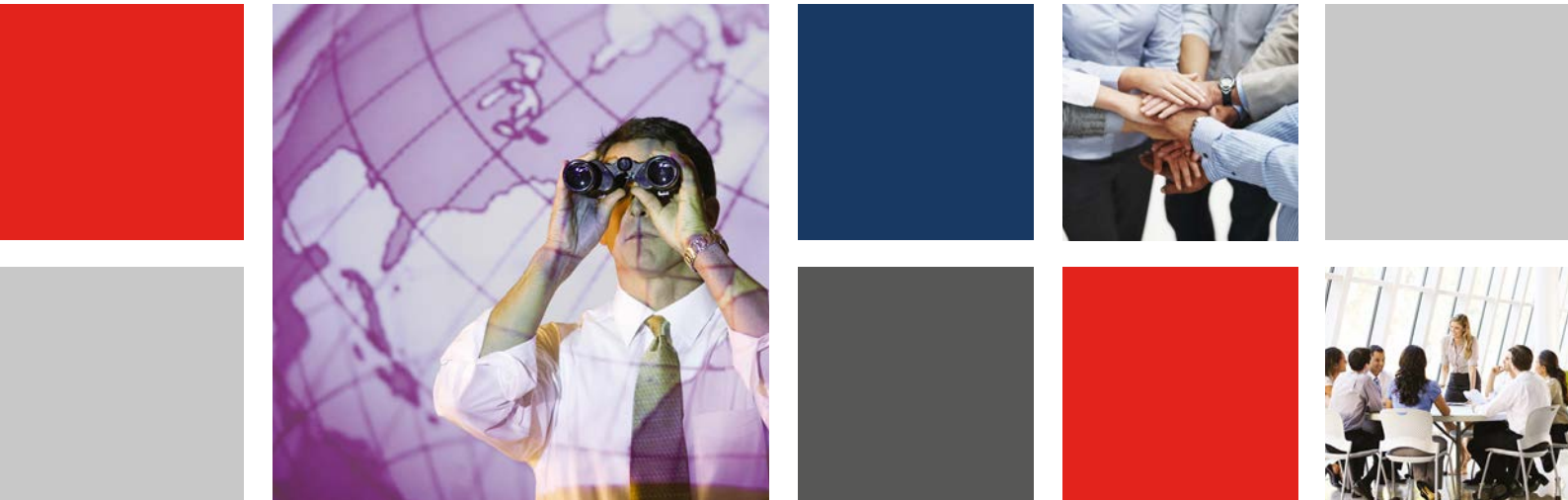
- a. the coming into being of a newly erected or newly constructed relevant property or of a relevant property, or*
- b. a change in the value of a relevant property caused by:

 - i. the making of structural alterations to that relevant property, or*
 - ii. the total or partial destruction of any building or other erection which forms part of that relevant property, by fire or any other physical cause, or**
- c. the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property, or*
- d. the happening of any event whereby any relevant property begins, or ceases, to be treated as property falling within Schedule 4, or*
- e. property previously valued as a single relevant property becoming liable to be valued as 2 or more relevant properties, or*
- f. property previously valued as 2 or more relevant properties becoming liable to be*

valued as a single relevant property, or

- g. the fact that relevant property has been moved or transferred from the jurisdiction of one rating authority to another rating authority, or*
- h. relevant property or part of any relevant property becoming licensed or ceasing to be licensed under the Licensing Acts 1833 to 2011; the restriction of a material change in circumstances to physical changes means that Brexit is unlikely to affect values in the ROI other than at Revaluation.*





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