Case Name: *Cemex UK Operations Ltd v O'Dwyer (VO)* [2019] UKUT 106 (LC) (3 April 2019)

Topic: Minerals – the application of para 2(7)(c) of Schedule 6 to LGFA 1988 to mineral output and the issue of obsolescence (material change of circumstances since the AVD)

Full case: click here

Summary: Where the output from a quarry declined significantly between the AVD and the material day (in this case the date of compilation of the list on 1 April 2010), due to reduced demand as a result of the global financial crisis commencing in 2008, the output must be valued at AVD levels but having regard to the physical state of the quarry on the material day (and the valuer may take the current capacity of the quarry into account when reaching a value). This may include evidence of historic output as an element of the valuation. Obsolescence of storage buildings as a result of changes in the cement industry by the AVD was dealt with by allowances proposed by the VO.

Commentary: The quarry was entered into the 2010 list at an RV of £1,800,000, which was reduced to £1,660,000 by the VTE on appeal. Cemex appealed that decision and sought an RV of £1,260,000. The hereditament has three components – the cement production plant (the "Works"), the "Quarry" and a conveyor belt (the "Conveyor") around a mile in length linking the Works with the Quarry. All material for the Works is taken from the Quarry and is transported solely by the Conveyor.

At the AVD the level of demand for cement was such that two kilns at the Works were fully utilised, but by the material day demand had fallen and one kiln had been taken out of use (although kept on standby).

The Quarry was valued on a royalty basis (plus values for the land and buildings, plant and machinery) and the Works (including the kilns) were valued on the contractor's basis. The mineral element of the assessment was effectively revalued annually by application of the VOA's standard guidance for mineral assessments to calculate the RV each year by reference to the previous calendar year's output tonnage.

The three issues addressed by the Tribunal were (1) the relevant date for valuing the output (the AVD or the material date), (2) should full value be attributed to the storage buildings which had become wholly or partly obsolete by the AVD and (3) whether the Conveyor should be included in the valuation on the contractor's basis. The parties had agreed values for the Quarry assets, with or without the Conveyor.

Dealing with these in turn:

(1) the appellant was arguing for the output at the material date to be used to assess the RV, rather than at the AVD. As one kiln was no longer operating at the material date, it should not be included at full value in the contractor's basis valuation. The VO pointed out that economic demand was not one of the reality factors to be taken into account under paragraph 2(7), as it did not affect the physical state or enjoyment of the property nor was it intrinsic to the hereditament itself. The appellant's counsel referred to the recent *Merlin* case and the distinction between intrinsic (or essential) qualities of the hereditament, which must be taken into account as they were at the material day (but valued at the AVD), and factors

which are non-essential and must be disregarded (para 44 of *Merlin*). He then sought to persuade the Tribunal that because of "the direct causative relationship" between the quantity of raw material won from the Quarry and the number of kilns needed to process that material, paragraph 120 of *Merlin* was authority for the proposition that if one of the paragraph 2(7) factors changes the reason for that change does not matter, even if it is economic in nature. In short, the argument was that the ability of the hereditament to satisfy the AVD level of demand was limited by the level of production it achieved at the material day. He further argued that the words "or extracted from" in paragraph 2(7)(c) can be construed as referring to the rate of extraction at the material day where the hereditament combined a quarry and a processing facility served exclusively by that quarry. The Tribunal did not accept these arguments but agreed that the levels of past extraction would feature in the valuation judgement. However, it held that the state of the market for cement was not a characteristic of the hereditament falling under paragraph 2(7) and it was the operator's commercial decision to extract less material when the market had fallen. The expert valuer's contention that the second kiln had little or no value at the material date was not accepted by the Tribunal, but instead the underutilisation of the second kiln due to reduced demand should be allocated an end allowance at stage 5 of the assessment on the contractor's basis;

(2) the clinker store was reduced in capacity due to solidified clinker but was assumed (under the statutory formula) by the Tribunal to be in repair. An obsolescence allowance was proposed by the VO and accepted by the Tribunal. The petroleum coke store was no longer fully required due to the use of alternative fuels and an allowance was made by the VO for that, which was accepted by the Tribunal; and

(3) the Conveyor was viewed by Cemex's expert as having no value, as its role was to overcome the disadvantage of the distance between the Quarry and the Works and the lack of any practical means of transporting chalk and clay by road. The appellant's counsel argued that the greater the distance between the Quarry and the Works, the less valuable the hereditament is on the open market because of increased maintenance costs and risk of malfunction. Unusually, the normal cost-value relationship is inverted. The Tribunal suggested that an alternative approach may have been to value the Quarry and the Conveyor together, which would have reflected this inversion, but was unable to come to a conclusion on the point as no valuation evidence arguing that the value of the Quarry already reflected the essential need for the Conveyor had been produced to the Tribunal.

In conclusion, the Tribunal was unable to disagree with the approach taken by the VTE when confirming the RV at £1,660,000 and the appeal was dismissed.