Case name: *Newbigin v Monk* [2017] UKSC 12 (1 March 2017)

Topic: Repair/*rebus sic stantibus* (the "reality principle")

Full case: click here

Summary: Where premises are undergoing redevelopment as a consequence of which they are incapable of beneficial occupation they do not constitute a hereditament and, therefore, the repair assumption in the statutory formula cannot apply. If it is determined that the premises do constitute a hereditament one must then consider the mode or category of occupation and then whether the premises are in a reasonable state of repair consistent with that mode or category.

Commentary: This Supreme Court landmark case clarified the treatment for rating purposes of office premises undergoing redevelopment with a view to attracting replacement tenants. The works involved the removal of all internal elements, except for the enclosure for the lift and staircase by which people gained access to other floors. New common parts were to be constructed as well as new communal sanitary facilities.

On the material day for establishing the rateable value the premises were vacant. Contractors had removed the majority of the suspended ceiling, raised floor, cooling system and sanitary fittings, demolished the block walls of the lavatories and stripped out the electrical wiring.

The ratepayer's agents had proposed to the Valuation Officer (VO) that the rateable value should be reduced to £1 and that the description of the premises in the rating list should be amended to "building undergoing reconstruction". In short, the premises were incapable of beneficial occupation as they were undergoing building works.

The Valuation Tribunal had dismissed the ratepayer's appeal, treating the premises as an office suite in disrepair. This was based on the statutory formula for assessing rateable value, one element of which assumes that the property is in a state of reasonable repair but excluding from the assumption any repairs which a reasonable landlord would consider uneconomic.

The Upper Tribunal allowed Monk's appeal, on the basis that the premises had been stripped out to such an extent that to replace its major building elements would go beyond the meaning of repair. The assumption as to reasonable repair did not extend to the replacement of systems that had been completely removed.

The VO appealed to the Court of Appeal, which allowed his appeal. The court's reasoning was that the principle of reality (rebus sic stantibus) could be displaced by contrary statutory provisions. They applied the law of landlord and tenant to conclude that the replacement of the stripped-out elements could fairly be described as the making good of disrepair.

The Supreme Court was of the view that the statutory provisions did not displace the reality principle to that degree. It referred to previous cases distinguishing between mere lack of repair and development works making a building uninhabitable.

Following the case of *Benjamin v Anston Properties* [1998] 2 EGLR 147 the Local Government Finance Act 1988 was amended in 1999 so the assumption that the tenant keeps the property in repair (prior to that Act the landlord was assumed to bear the cost of repair) would not reduce the rateable value. The Supreme Court considered that the Court of Appeal went too far in interpreting the amending legislation as displacing the reality principle in relation to both the physical state and the mode of occupation of the building undergoing redevelopment.

The Rating Surveyors' Association and the British Property Federation intervened in the Supreme Court case to suggest the correct approach where works are being carried out to an existing building. Theirs was a three-stage process: (1) determine whether a property is capable of rateable occupation at all, and thus whether it is a hereditament, (2) if it is a hereditament, to determine the mode or category of occupation and (3) then consider whether the property is in a reasonable state of repair for use consistent with that mode or category.

The Court decided that the question as to whether premises are undergoing reconstruction rather than simply being in disrepair is an objective one, but the VO can have regard to the programme of works being undertaken on the property. A building under redevelopment is incapable of beneficial occupation and in any event the hypothetical landlord of a building undergoing redevelopment would normally not consider it economic to restore it to its prior use.

The Supreme Court concluded that the Monk premises were undergoing refurbishment on the material day and that the Upper Tribunal was entitled to alter the rating list so as to reduce the RV to £1 ("building undergoing reconstruction").