RA/44/2007

LANDS TRIBUNAL ACT 1949

RATING – proposal – proposal seeking deletion of hereditament and reduction in value – hereditament deleted from list pursuant to proposal – material date for valuation later than effective date of deletion – whether proposal for reduction in value still valid – held invalid – Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 regs 4A, 5A; Non-Domestic Rating (Material Day for List Alterations) Regulations 1992, reg 3

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LONDON SOUTH EAST VALUATION TRIBUNAL

BETWEEN	**BARRY O'BRIEN** **(trading as POSTER SITES SOUTHERN)**	**Appellant**
	and	
	J R HARDING **(Valuation Officer)**	**Respondent**

Re: Land used for advertising
1-3 Penge Road
London SE25 4EJ

Before: His Honour Judge Mole QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL on 12 October 2007

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The following cases are referred to in this decision:

Galgate Cricket Club v Doyle (VO)[2001] RA 21
Courtney PLC v Murphy (VO) [1998] RA 77
Shaw v Hughes (VO) [1991] RVR 91
O'Brien v Leahy (VO)
Black v Oliver [1978] QB 870
Esau Brothers v Rodd (VO) [1992] RA 257

DECISION

1. This matter concerns two interesting points. The first is whether a proposal may lawfully contain two separate grounds. The second is whether, if it may, and the grounds are such that the regulations specify different material or effective dates for each ground, the Tribunal may treat each ground as if it were a separate proposal. If, then, the Tribunal finds that one of the grounds is valid but the other is invalid, is the whole proposal invalid or may the invalid bit be severed from the wholesome remainder?

2. The grounds on which an alteration is made make a difference to its "material date" (roughly the date at which its circumstances are judged) and its "effective date" (the date from which the change operates). The Regulations set out the way both these dates must be defined in respect of each proposal. But the dates vary according to the grounds they are based on. A proposal to change the list because of a change in circumstances cannot reach as far back into the past as a proposal to delete; in effect, the former is subject to a tighter time limit. This causes no difficulty if each proposal specifies one ground of alteration supported by grounds that relate to that alteration alone. The problem arises if one proposal may validly specify more than one form of alteration on grounds that give rise to different material dates or effective dates. Can one proposal have two different effective dates?

3. This matter has been heard under the simplified procedure. Its progress to this Tribunal has been circuitous.

4. The hereditament in question was the rear portion of a plot of land beside Penge Road. Two poster hoardings were erected on it. At the material times this hereditament was occupied by Mr Barry O'Brien, who traded as Poster Sites (Southern). The hereditament was entered on the 2000 Rating List as "land used for advertising, 1-3 Penge Rd, London SE25 4EJ" at a rateable value of £ 7,250, with effect from the compilation date of the 1st of April 2000. By 2002 it appeared that the hoardings were hardly being used. An inspection by the VO on the 17th of September showed that the advertising boards had been removed. In fact, it is agreed, the hoardings were removed on about the 20th of July 2002. The VO altered the list on the 8th of October and deleted the entry.

5. On the 20th of January 2003 Mr O'Brien made a proposal in respect of the hereditament. It was on the usual Valuation Office form (VO 7012/2000). As the President has remarked (decision 21st April 2006, paragraph 10) this form is not provided for by the Regulations and there is no statutory requirement that it should be used. Part B required details of the proposed list alteration. It said:

> "Please complete **one** of 11 A-G, or 12 below as appropriate.
>
> 11. I propose that the rating list entry shown for the above property .... should be altered as follows: *(note: please tick the relevant box and supply additional information as necessary)*."

Mr O'Brien ticked "**C.** the existing entry deleted - **with effect from** 01/01/01".
Over the page part C required "GROUNDS FOR YOUR PROPOSED ALTERATION". It continued:

> "Tick only **one** box. If more than one of the following statements apply, select the one you consider most appropriate.
> Detailed reasons for believing that grounds A or D-K are applicable should be given at 14 below."

Mr O'Brien ticked- "**D** circumstances affecting the rateable value of the property changed on" and then inserted "01/01/01 & various dates prior."
At 14 he gave, as his detailed reasons for believing that the rating list was inaccurate, "This site was described as land used for advertising but fell into disrepair and effectively ceased to be so used as per end 2000".

6. In his decision of the 21st of April 2006 the President said of this form –

> "12. There are thus 12 boxes specifying grounds on which the proposal may be made, in contrast to the15 grounds specified in regulation 4A(1). Some correspond more or less precisely, but others do not. The guidance contained in the guidance notes about the completion of part B includes some examples. After the examples, this is said:
>
> > "If you are seeking to make more than one alteration to a rating list, such as where each proposed alteration relates to different events in time, please use a separate proposal form for each event. For example, if you are (a) disputing a rating list alteration made by the Valuation Officer on 1 May 2000 (to increase the rateable value) and (b) seeking a reduction on the grounds of a 'material change of circumstances' that occurred on 10 June 2000, use separate Proposal forms for each proposed alteration to a List."
>
> In relation to part C the guidance notes emphasise that only one statement must be selected."

7. The VO received this proposal on the 23rd January 2003. He did not regard it as well founded and, not being prepared to agree to it, referred the disagreement to the London South East Valuation Tribunal. There was a hearing on the 8th of June 2005 at which Mr O'Brien argued that the effective date for removal from the list should be the 1st of January 2001. Secondly, in the alternative, he said that the assessment should be reduced. The Tribunal gave its decision on the 16th of June 2005. It rejected the first argument. As for the second, it determined that it had no jurisdiction because the point had not been "specifically mentioned on the form and is ancillary to the actual grounds stated by the appellant".

Mr O'Brien appealed to this Tribunal and, by agreement, it was ordered that the following question should be determined as a preliminary issue:

> "Whether Mr O'Brien's appeal is limited by the scope of his proposal as was determined by the Valuation Tribunal, so as to preclude him from arguing in the

alternative for a reduction in Rateable Value should he fail to secure the total deletion of the Appeal Hereditament from the 2000 Rating List; or whether it is open to him in these appeal proceedings to argue that (a) the entry in the list ought to be deleted, but that if not then (b) the Rateable Value should nonetheless be reduced."

8. This preliminary issue was heard by the President, who gave his decision on it on the 21st of April 2006. He noted that Mr Burrows, appearing on behalf of the VO, did not actively oppose the appellant's case, seeing some force in it. The President set out the relevant provisions relating to the making of proposals. I shall repeat that exercise now.

9. The provisions relating to the making of proposals to alter the 2000 rating list are to be found in the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993, as amended, made under section 55 of the Local Government Finance Act 1988. Regulation 4A provides:

> "**Circumstances in which proposals may be made**
>
> (1) The grounds for making a proposal to alter a list are as follows --
>
> ....
>
> (b) the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled;
>
> ....
>
> (g) a hereditament shown in the list ought not to be shown in the list;
>
> (2) .... an interested person may make a proposal where he has reason to believe that any of the grounds set out in paragraph (1) exists."

I pause to comment that 4A (2) seems to me to be, at its lowest, consistent with the proposition that one proposal may include several grounds and that 'any of the grounds' (plural) means not simply "any ground" (singular) but as many of the grounds as the proposer believes exists.

10. The making of proposals is dealt with by regulation 5A thus:

> "(1) a proposal to alter a list shall be made by notice in writing served on the valuation officer which shall --
>
> (a) state the name and address of the proposer and the capacity in which he makes the proposal;
> (b) identify the property to which the proposal relates;
> (c) identify the respects in which it is proposed that the list be altered; and
> (d) include --
> (i) a statement of the grounds for making the proposal and, in the case of a proposal made on any of the grounds set out in paragraphs(1)(a) or (f) to (k) of regulation 4A, a statement of the reasons for believing that those grounds exist;

(ii) in the case of a proposal made on the grounds set out in regulation 4A(1)(b), a statement of the nature of the change in question and of the date on which the proposer believes the change occurred;"

5A (3) sets out the conditions under which a proposal may deal with more than one hereditament. 5A (4) deals with specific circumstances where a proposal may ask for two different actions to be carried out.

11. In his decision of the 21st of April the President dealt with the matter thus:

> "13. I approach the point at issue in this way. The function of the VT was to decide the appeal. Under paragraph 12 the subject-matter of the appeal consisted of the disagreement between the proposer and the VO as to whether the proposal was well-founded. The question, therefore, is whether the contention that the rateable value should be reduced formed part of the proposal. If it did, the VT had jurisdiction to consider it.
>
> 14. The proposal was required to identify the respects in which it was proposed that the list be altered (regulation 5A(1)(c). If it was made on any of grounds (a) or (f) to (k) of regulation 4A, it had to include a statement of the grounds for making the proposal and a statement of reasons for believing that those grounds existed (regulation 5A(1)(d)(i)). Alternatively, if the proposal was made on ground (b) it had to include a statement of the nature of the change in question and of the date when the proposer believed the change occurred (regulation 5A(1)(d)(ii)).
>
> 15. Mr O'Brien's proposal identified as the alteration proposed the deletion of the existing entry. It gave as the grounds for making the proposal that circumstances affecting the rateable value had changed. It set out reasons for believing that the rating list was inaccurate.
>
> 16. It is immediately apparent that the alteration that the proposal sought – deletion - was not supported by the grounds on which the alteration was stated to be based - change of circumstances affecting the rateable value. This was not, however, a matter that the VO having received the proposal saw fit to do anything about. Under regulation 7, where a VO is of the opinion that a proposal has not been validly made, he may serve an invalidity notice on the proposer; and the proposer may then within four weeks make another (proposal). The VO did not serve an invalidity notice on Mr O'Brien. He accepted the notice as valid. Nor did he ask for clarification of the alteration that Mr O'Brien was seeking all the grounds on which he was doing so.
>
> 17. What then was the proposal for the purposes of the appeal? It is, in my judgment, tolerably clear that Mr O'Brien, in completing the form as he did, was seeking to advance two matters - firstly that the hereditament should be deleted from the list with effect from 1 January 2001 because it had by that date cease to be used for advertising; and secondly, that the rateable value of the hereditament should be reduced because of a change in circumstances consisting of disrepair and disuse. The proposal sufficiently identified both matters, in my judgment, and accordingly they both became the subject-matter of the appeal.

> 18. The difficulty in this case appears to have arisen, as it did at least in part in the case of *Galgate Cricket Club v Doyle (VO)*[2001] RA 21, because the ratepayer was confronted by a proposal form requiring him to opt for one particular alteration and one particular ground for making it. The guidance notes say that separate proposal forms should be used where the proposer is seeking to make more than one alteration to the list. They do not say that separate proposal forms should be used where the proposer is seeking to advance arguments (and alterations) in the alternative. While I have no doubt that the proposal form was intended to make things as easy as possible for a person making a proposal and to assist in the processing of proposals, it seems clear that in a case like the present it may not achieve those objectives. It is also somewhat surprising that the form does not mirror the relevant contents of paragraphs 4A and 5 A of the Regulations and does not refer to the Regulations at all. It is hard not to feel sympathy for a ratepayer who does his best to complete the form and is then met by a contention before the VT that a particular argument cannot (be) advanced because of the provisions of regulations of which he may have no knowledge.
>
> 19. I would add that in *Galgate Cricket Club* (see Paras 3 to 6) I said that there were strong reasons against adopting a restrictive approach to the construction of proposals, and it is perhaps a pity that the VT was not referred to that decision."

12. At this point it is convenient to recall the President's decision in *Galgate Cricket Club.* He set out the law that the jurisdiction of a local valuation tribunal and the Lands Tribunal on appeal is limited to the issues raised by the proposal giving rise to the appeal. (See *Courtney PLC v. Murphy (VO)* [1998] RA 77, at page 85; *Shaw v Hughes (VO)* [1991] RVR 91 at page 98.) He therefore examined the words of the proposal in question and, at paragraph 6, the President said this -

> "The words quoted are indeed wide enough to encompass the question of rateability, and I can see no reason to limit their scope so as to prevent the ratepayer from advancing a legitimate argument and this tribunal from ordering the list to be corrected if it finds it to be inaccurate in this respect. Indeed, since it is desirable that inaccuracies in the list should be corrected and since the valuation officer has had sufficient notice of the point, there are strong reasons against adopting such a restrictive approach. The valuation officer certainly understood that rateability was raised by the proposal. He conducted his case in the valuation Tribunal on this basis, and invited it to amend the entry to take account of the non- rateability of the cricket ground and the pavilion. I have no doubt at all that this tribunal has jurisdiction to consider whether the clubhouse also is exempt…"

13. In *Courtney PLC v Murphy (VO)*[1998] RA 77 the first question identified for the determination of the Tribunal was whether it had the power to order that the appeal hereditament be shown in the list at a lower value with effect from a date earlier than the date of the material change of circumstances described in the originating proposals. The tribunal (P.H. Clarke Esquire, FRICS) held that on the true construction of the proposals an effective date earlier than the date given as the date of the material change in circumstances had not been

raised as an issue and for that reason he had no power to alter an effective date earlier than the date of the material change of circumstances.

14. The point that combining two sets of grounds within one proposal may give rise to different and conflicting 'material days' or 'effective dates'- and the consequences of that - was not something that appears to have been argued before the President in either the *Galgate Cricket Club* case or the present case.

15. The President determined the preliminary issue in favour of Mr O'Brien and declared that it was open to him, if his argument on deletion failed, to content that the rateable value of the hereditament should be reduced. To that end, the President ordered that if the issue of deletion were to be decided in the VO's favour, the case should be remitted to the VT. In the meantime the appeal was to proceed by the simplified procedure.

16. Thus the case progressed. It was heard on the 3rd of August 2006 by the Tribunal (Mr A. J. Trott FRICS.) Mr O'Brien appeared in person and Mr Harding appeared for the Valuation Officer. The Tribunal recorded that the jurisdiction of that hearing was limited to the determination of the correct date for the deletion of the entry from the list. The following facts were found:

> "7. The hereditament was located within a triangular shaped plot of land on the north western side of Penge Road adjoining No. 5 and the London to Croydon railway line to the west. This land comprised two hereditaments in the 2000 list. At the front of the site, along Penge Road, was a hereditament described as "land used for car sales". The hereditament that is the subject of this appeal was at the rear of the site and comprised a collection of three freestanding timber framed hoardings attached directly to the land. The total display area was for four advertisements each of a size known as 48 sheet.
>
> 8. Mr O'Brien acquired the freehold interest in 1 - 3 Penge Road in January 1991 having previously held a licence to use the advertising hoardings. The appeal hereditament has at all material times during the life of the 2000 list being owned or occupied by the appellant trading as Poster Sites Southern.
>
> 9. The parties agreed that the date the hoardings were removed from the site was at or around 20 July 2002 and not the 17 September 2002 as was previously stated at both the VT hearing and the hearing of the preliminary issue before this Tribunal.
>
> 10. Deemed consent for the displaying of the advertisements was granted under regulation 6 and Class 13 of Part 1 of Schedule 3 of the Town and Country Planning (Control of Advertisements) Regulations 1992 (the 1992 Regulations). This regulation applied because the advertisements were displayed on the site without express consent on 1 April 1974 and, for the purposes of that regulation, the site was used continually for that purpose from that date until 20 July 2002."

I should interpose that I accept and endorse those findings of fact.

17. Mr O'Brien submitted that his inability to let the site meant that he was in neither actual nor beneficial occupation of the site from the first of January 2001 and was therefore not in rateable occupation of the hereditament from that date. He could not have removed the advertising hoardings because that would have meant losing the deemed consent he enjoyed under the planning regulations. Nonetheless they were in such a poor condition that nobody would have paid any rent for them and that the hereditament had a nil value.

18. Mr Harding submitted that the appeal property was a hereditament within the meaning of section 64 (1) of the 1988 Act on the material day. He ran a further argument (very much as a second line of defence, it seems to me) based upon section 65 (8A). He said that there was no evidence to justify deleting the entry earlier than 20 July 2002.

19. The Tribunal's conclusions were:

> "20. The issue to be decided in this case is whether, and, if so, when, the hereditament should be deleted from the 2000 list. It seems to me that there are two grounds upon which such deletion may be justified. Firstly, if the hereditament has ceased to exist and, secondly, if the hereditament has become incapable of beneficial occupation and is therefore unusable. The question of whether the appellant was in actual occupation does not seem to me to be relevant to the issue in hand. Rather it goes to the point of whether the appellant was in rateable occupation after the 1 January 2001 which is not an issue under consideration in this hearing. The absence of actual occupation is not a ground for deleting a hereditament from the rating list for the reasons set out by Mr Harding in his submissions and with which I agree.
>
> 21. The hereditament in this case is defined under section 64 (1) of the 1988 act. The display of advertisements on the appeal property was not a right forming a hereditament for the purposes of section 64 (2) of the 1988 act because the appeal property was not let out or reserved to any person other than the occupier or owner of the land. The parties have now agreed that the advertising hoardings and their supporting structures were removed on 20th of July 2002. That is therefore the date from which the hereditament ceased to exist."

20. The Tribunal dealt with Mr O'Brien's argument that the hereditament was incapable of beneficial occupation in the following way:

> "24. Mr O'Brien submitted that the advertising structures and hoardings fell into disrepair following their disuse and that they would have been uneconomic to repair and are thus incapable of beneficial occupation. I do not agree with this for two reasons. Firstly, there are photographs taken on 2 July 2002 that show the structures and hoarding still in situ and apparently still capable of being used. Secondly, the respondent's analysis of the cost effectiveness of repair is reasonable and is based upon agreed figures. I do not consider that these repairs would be uneconomic even if the structures had to be replaced (which is unlikely) and that the hypothetical landlord would consider it reasonable to undertake them. Mr O'Brien submitted that he was not able to afford to undertake such repair at the time but, as stated above, the reality

> of his personal circumstances is accidental to the hypothetical letting and are not essential to it and are therefore not taken into account.
>
> 25. It follows that I do not accept Mr O'Brien's argument that the appeal property is struck with sterility. I do not consider this to be an appropriate phrase to use in circumstances other than those where the occupation of a hereditament he is, and would be, of no value to anyone. That is not the case here.
>
> 26. I conclude that the appeal property should be deleted as a hereditament from the 2000 list with effect from 20 July 2002."

21. The Tribunal decided in favour of the VO and the appeal, so far as it related to the deletion of the entry from the 2000 list, was dismissed. The case was remitted to the VT to determine the rateable value, leaving the parties able to argue the appropriate and effective date and material day for the purposes of the appeal.

22. Mr O'Brien sought permission to appeal to the Court of Appeal against Mr Trott's decision. His application for permission was heard by Carnwarth LJ on 8 November 2006. Carnwarth LJ remarked that of the Tribunal's decision seemed to be essentially a question of fact, not giving rise to an issue of law, but expressed some reservations about the interaction of section 64 and section 65 (8A). He noted that the matter would have to be remitted to the VT to determine the rateable value of the property. He therefore adjourned the application on notice to the respondent VO but indicating that the matter should not come back to court until the VT had dealt with the valuation issue.

23. On the 27th of February 2007 this matter returned to the VT. The Valuation Tribunal first considered the material day for the purposes of the appeal. They concluded that, in accordance with the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992, regulation 3 (1) and (7), the material day was the day on which the proposal was served on the valuation officer, namely 22 January 2003. However the hereditament had been deleted from the list with effect from 20 July 2002 so at the material day there was no entry in the list for this hereditament. The tribunal referred to the case of *O'Brien v Leahy (VO)* in which the tribunal held that "…no effect therefore could be given to the proposal because the hereditament to which it related did not exist and was not then entered in the list. I agree with the valuation officer that no effect could be given to the proposal and that it was therefore invalid." The VT accordingly decided that the appeal must be dismissed since the proposal was invalid. Nonetheless it went on to consider the proper rateable value of a hereditament and accepted the evidence of Mr Spooner called on behalf of the of the VO, expressing the view that it was the Valuation Tribunal's opinion that the correct rateable value as at 1 January 2001 would have been £6,600.

24. Mr O'Brien appeals that decision to this Tribunal. Two issues arise. The first is whether the Valuation Tribunal were right to decide that the appeal must be dismissed because the proposal was invalid. The second was whether the Valuation Tribunal were right to conclude that the correct rateable value as at 1 January 2001 would have been £6,600.

25. Mr O'Brien's grounds of appeal, maintained and amplified before me, were that the hoardings in question were not used other than once to advertise and were maintained to preserve deemed consent under the planning regulations. The hoardings were there and there was an intention to let the site in the sense that Mr O'Brien would have invested the money necessary to refurbish the hoardings if anybody had been interested in paying a rent that justified it. But obviously he would not spend money he did not have if the result would be that he would be exposed to a tax. Mr O'Brien submitted that a hypothetical tenant would have been anxious to get onto the site. The hypothetical tenant would have paid a nominal amount for the advertising rights in the circumstances, no more than its value for fly posting. He referred me to *Black v Oliver* [1978] QB 870. He submitted that it was contrary to law that one could not appeal a rateable value in respect of a hereditament because it was no longer in the list. In order to give effect to the concept of the hypothetical tenant the hereditament should be entered into the list again from the point of deletion.

26. Mr Harding, for the Valuation Officer, submitted that the Valuation Tribunal was right on both points. On the issue of the validity of the proposal, the first step was to identify the ground of the proposal so that the appropriate material day could be determined in accordance with the Material Day Regulations. His primary submission would have been that it would only be possible to have a proposal lawfully made on two or more grounds if the material day was the same on all grounds. He acknowledged that the 1992 Material Day Regulations were ambiguous and pointed out that this ambiguity had been resolved for the 2005 list by the Material Day Regulations 2005. However, acknowledging that this point had been determined against him by the President's decision, he submitted that the correct approach must be to treat Mr O'Brien's proposal as two proposals and to test them against the regulations in turn. On that basis Mr O'Brien's alternative proposal was made on the ground that "the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on the or after the day on which the list was compiled." That ground fell under paragraph 3 (7) of the Material Day Regulations and the material day is "the day on which the proposal was served on the valuation officer" which was the 22nd of January 2003. But the first part of Mr O'Brien's multiple proposal had been found to be valid and had led to the deletion of the hereditament from the list with effect from 20 July 2002. Given that the first part of the proposal was valid, the alternative proposal could have no affect and was therefore invalid. The hereditament to which it related did not exist and was not then entered in the list, as Mr Clarke said in *O'Brien v Leahy*.

27. On the issue of valuation Mr Harding called Mr J. Spooner, MRICS, a Principal Valuer in the Bromley Valuation Office. In his evidence Mr Spooner pointed out that on the 27th of October 1998 the Valuation Tribunal had established a rateable value for the same hereditament for the purposes of the 1995 list at £6,400. Given the rises in value set out in his appendix 7, 'Schedule of Value Movement and Relativities between the Lists', the value for which he was arguing, a rateable value of £6,600, was by no means excessive for the 2000 list. He gave evidence that he derived little assistance from either the actual rent paid in respect of the hereditament or from the rental evidence of similar properties. In his view, settled assessments of comparable properties were of more assistance. By reference to his appendix 6 he pointed out an advertising right on the rating assessment on 1 - 3 Penge Rd that was brought into the list on the 28th of December 2002 with an effective date of the 22nd of October 2002 . This was assessed at £1,700 per 48 sheet. A proposal was made for deletion but this was

withdrawn. This was some evidence of a letting on the site in the economic circumstances that existed shortly after the relevant date for Mr O'Brien's last occupation. Mr Spooner felt this transaction carried some weight for the purpose of comparison. Mr Spooner's second comparable was also on Penge Rd in a position he thought to be inferior. The valuation for an advertising right for a 48 sheet structure was agreed by professional valuers at £1,400 rateable value. In the light of his inspection of the site and these and his other comparables Mr Spooner set out his valuation at appendix 8. For the two advertising hoardings at the opposite ends of the site, which he considered to be the most valuable, he adopted a value of £1700 per 48 sheet; for the two between those two positions, which he thought were more poorly placed, he adopted a value of £1450. He took into account and decapitalised the cost of the structure. This exercise gave him a rateable value of £6,600.

28. In considering this matter I will not repeat those provisions of law, such as the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 (as amended), regulation 4A, that I have already set out above. The President reached a conclusion on those regulations. His conclusion was that the regulations do not preclude the Valuation Tribunal or the Lands Tribunal from reading one proposal form as relying upon two grounds in the alternative, if that is the proper interpretation of that document. The President therefore concluded that the Valuation Tribunal was wrong to determine that, because the point had not been specifically mentioned in the form, it had no jurisdiction in respect of Mr O'Brien's second argument relating to value. The Valuation Tribunal had jurisdiction. The President held that Mr O'Brien was not precluded from arguing in the alternative for a reduction in rateable value, should he fail to secure the total deletion of the hereditament from the 2000 rating list.

29. That preliminary point having been decided by the President, it is certainly not for me to review his decision. However, since it is my task to work out the consequences of that decision, it seems appropriate to set out, as a starting point for that exercise, my complete agreement with the President, for the reasons he gives. In my view, the first question must always be the proper interpretation of the proposal because that limits the jurisdiction of the Tribunal. If, as a matter of interpretation, a proposal is to be read as amounting to a proposal on two grounds, or two grounds in the alternative, there does not seem to me to be anything in the 1992 and 1993 regulations that prevents the Tribunal from having the jurisdiction to consider each of the constituent or alternative grounds in turn.

30. It is interesting that the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2005 (SI 2005/659), regulation 4, "Circumstances in which proposals may be made", (3) reads "No proposal may be made - (a) by reference to more than one ground unless, for each of the grounds relied upon, the material day and the effective date are the same". This provision explicitly recognises that a proposal may be made by reference to more than one ground, subject to the condition that is laid down. It may be that this provision could be read as a tacit acknowledgement of the point I have just made. That provision does, however, directly address the difficulty that may arise where multiple or alternative grounds have different material days or effective dates. Just such a difficulty arises in the current case.

31. The Non-Domestic Rating (Material Day for List Alterations) Regulations 1992, provide as follows-

> "3 (1) for the purposes of sub-paragraph (6) of paragraph 2 of Schedule 6 to the 1988 Act, the material day shall be determined in accordance with paragraphs (2) to (7) below.
> (4) where the determination is with a view to making an alteration so as to show in, or delete from the list any hereditament which --
> (a) has come into existence or ceased to exist;
> ….
> the material day is … the day on which the circumstances giving rise to the alteration occurred.
> (7) in any other case, the material day is the day on which the proposal for the alteration in respect of which a determination falls to be made is served on the valuation officer or, where there is no such proposal, the day on which the valuation officer alters the list."

32. As regulation 3 (1) recites, the material day is determined for the purposes of subparagraph (6) of schedule 6 to the Local Government Finance Act1988. The relevant part of those provisions reads 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.
>
> (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,
> (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."

33. The effective date is to be determined in accordance with the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993, regulation 13A. This provision takes some untangling.

34. Regulation 13A(5) reads, so far as relevant, "(a) where the alteration is made in pursuance of a proposal on the grounds of material change of circumstances… the alteration shall have effect from the day on which the circumstances giving rise to the alteration first arose, or the first day of the financial year in which the proposal is served, whichever is the later".

35. In the present case Mr O'Brien claims that the relevant circumstances arose on the 1st of January 2001 but the first day of the financial year in which Mr O'Brien's proposal was served was 1 April 2002, which was later.

36. Regulation 13A(8) reads, so far as relevant, "notwithstanding paragraph (5), where an alteration is made-

(a) to show in or delete from a list any hereditament which, since the list was compiled-

(i) has ceased to exist …
the alteration shall have effect from the day on which the circumstances giving rise to the alterations occurred."

37. In the present case the day on which the circumstances occurred that gave rise to the deletion of the hereditament because it had ceased to exist was the 20th July 2002.

38. It is thus evident that the different grounds Mr O'Brien seeks to rely upon have different material days and different effective dates.

39. In my judgment, given that the Tribunal has jurisdiction, the exercise that it must follow is to test each ground against the law and the relevant regulations to establish its material day and effective date. In some cases, for example, where the material days are the same, both constituent grounds may be valid and may be capable of being given effect. Difficulties arise where the material days or the effective dates are not the same. The difficulty is likely to be resolved by the logical application of the regulations.

40. In the present case the first part of the proposal expressly asks for the existing entry to be deleted on the grounds that the hereditament effectively ceased to be used from the date specified. Regulation 3(4) (a) of the 1992 Regulations applies, so the material day is the day on which circumstances giving rise to the alteration occurred. This has been found to be the 20th July 2002. The effective date for that ground was the same day, 20th July 2002, by virtue of Regulation 13A (8). The hereditament fell to be deleted from the list on that date and Mr Trott so concluded. (See paragraph 26 of his decision.)

41. The matter was then remitted to the Valuation Tribunal by Mr Trott, as the President had said it should be, "to argue what is the correct rateable value of the hereditament in the 2000 list and what is the appropriate effective date and material day."

42. I do not read either of the President or Mr Trott as concluding anything more than that the Valuation Tribunal should determine the rateable value in accordance with the alternative ground of the proposal (so far as it could be understood), applying the regulations in relation to material day and effective date. Neither the President nor Mr Trott had considered, and had not been invited to consider, whether, when the exercise was done, it would actually be open to

the Tribunal, as a matter of law, to determine a rateable value. Neither decided that Mr O'Brien's alternative ground was - or was not – valid, when tested against the law.

43. What Mr O'Brien was arguing, before both the Valuation Tribunal and this Tribunal was that there had been a change in circumstances on the first of January 2001 and the rateable value of the hereditament had been only nominal thereafter. Putting to one side for a moment any consideration of the evidence for such a change in circumstances, either at the first of January 2001 or at any dates up until the 20th of July 2002, the material day for any such change in circumstances is the day on which the proposal for the alteration is served on the valuation officer. (1992 Regulations, regulation 3(7)) The material day was thus the 22nd of January 2003. It will readily be seen that if the statutory exercise were to be followed it would require the matters relevant to the assessment of the rateable value of the hereditament "to be taken as they are assumed to be" on a day some six months after the hereditament had ceased to exist. It is difficult to imagine a matter more fundamental to the "physical state or physical enjoyment of the hereditament" than the fact that it had ceased to exist. The provisions clearly do not contemplate such circumstances.

44. The case of *O'Brien v Leahy* was a decision of the Lands Tribunal, Mr P. H. Clarke FRICS, dated the 4 November 2005. On that occasion, once more, Mr Barry O'Brien appeared in person and Mr Harding appeared for the VO. The circumstances of that case, concerning the right to display advertisements on the wall of the Wishing Well public house, were different to the circumstances of the present case. There is, however, a point of principle, which is of relevance. Mr Clarke concluded:

> "20, Mr O'Brien's proposal was served on the valuation officer on 8 September 2004. This was more than six months from the date of the previous alteration and after 30th of June 2002. Sub-paragraph (a) (iii) above therefore applied and the proposal would have had effect (if well founded) from the date on which the previous alteration fell to have effect or the first day of the financial year in which the proposal was served (1 April 2004), whichever is the later. The later date is 1 April 2004. At that date, however, the appeal hereditament was not entered in the rating list having been deleted by the valuation officer's notice dated 22 October 2002 with effect from the 1 April 2002. No affect therefore could be given to the proposal because the hereditament to which it related did not exist and was not then entered in the list. I agree with the valuation officer that no effect could be given to the proposal and that it is therefore invalid."

45. Mr O'Brien argued that the result was unfair and contrary to natural justice but the Tribunal held that this was not a matter in which it had any discretion, referring to and agreeing with the decision of the former President, Judge Marder QC, in *Esau Brothers v Rodd (VO)* [1992] RA 257.

46. In my judgment the application of the regulations shows that Mr O'Brien's second or alternative ground falls squarely within the principle set out by Mr Clarke in *O'Brien v Leahy.* At the material day the hereditament did not exist and was not entered into the list. That

ground of the proposal could have no effect and was therefore invalid. The Valuation Tribunal was right so to conclude.

47. I will add, for the sake of completeness, that if I had concluded that it was open to the Tribunal to determine a rateable value, I, like the Valuation Tribunal, would have accepted the evidence of Mr Spooner and determined the rateable value at £6,600. That rateable value represents a comparatively small increase on the value that was agreed in the previous list and Mr Spooner's analysis of comparable assessments on or near the hereditament seems to me to provide persuasive support for his valuation of the hereditament itself. Mr O'Brien's arguments for a nominal value seemed to me, by contrast, to have no basis in any evidence of substance and were not supported by the case law he relied on.

48. For those reasons the appeal is dismissed.

49. This case was unexceptional and heard under the simplified procedure. None of its circumstances seem to me justify an award of costs and neither side has so argued. I therefore make no order as to costs.

Dated 23 January 2008

His Honour Judge Mole QC