

Repair, replace or improve?

The application of empty rates charging has raised the significance of works being made to commercial property. Andrew Warde examines some of the differences and their implications.

Alter: to make different.

The principle has been long established that a property should be valued as it stands, or ‘rebus sic stantibus’, an assumption established at first by case law and now established in statute. *Wexler v Playle (VO)* [1960] 53 R&IT 38 considered the assessment of a property in disrepair and held that the landlord must be deemed to have put the hereditament in a reasonable state of repair. It was further ascertained from *Saunders v Malby (VO)* [1976] RA109 that a reasonable landlord would be prepared to make repairs where it was economic to do so. However, this position was established under the assumption the landlord had a responsibility to carry out the necessary repairs, under an internal repairing lease. These are repairs, not alterations, and the hereditament will be no different after they are finished.

The Local Government Finance Act 1988 altered the assumed lease terms from April 1990 to those where the tenant had a full repairing and insuring liability, but this change from an assumption of IR terms to FRI terms did not cause any difficulties until the case of *Benjamin (VO) v Anston Properties* [1988] RA53. Here, the Lands Tribunal decided that valuation for rating could take account of disrepair that could be remedied at a cost less than twice the rateable value of the hereditament. In the light of this

decision, the government decided to introduce the Rating (Valuation) Act 1999 as a means of re-establishing the practical effects of previously decided cases.

The change to the definition of rateable value caused some rating valuers to be concerned that the actual effect of the rewording would be greater than was promised, but these fears were relieved by a speech made by Baroness Farrington in the House of Lords. The speech was retained as an appendix to the act, for future guidance, and it included the following:

“I turn to buildings undergoing alterations and refurbishment. In a programme of extensive alterations, the works required to make the property capable of beneficial occupation are clearly not repairs. In many cases, properties are stripped back to the shell so that substantial reconstruction or improvement work can be carried out. In such cases, the property will be considered in its actual state on the material day and if it is incapable of beneficial use, removed from the rating list.”

The statement refers elsewhere to previously decided rating cases. In *Brighton Marine Palace and Pier Company v DG Rees (VO)* RA 39 [1961] the Lands Tribunal member sought to distinguish between replacement and repair: “To sew a new button on an old shirt was clearly a repair; to sew a new shirt on an old button was clearly a replacement”. The issues addressed in the case concern an income & receipts valuation, so it does not provide much practical guidance over the effect of repair, but it does show there is a difference between a repair and a replacement. The issue over the point at which a property should be taken out of rating during building works is one that did not require attention at all before the introduction of empty rates charging. Empty rates were introduced in 1966 and even then only charged at the discretion of the local authority before April 1990. There was therefore limited need for consideration of where the dividing line should lie.

Full charging of empty rates since 1 April 2008 has changed the situation and now landlords who are carrying out substantial reconstruction or improvement works find they can be faced with substantial rates bills while carrying out this work. This is at a time when the market for re-letting the completed building is decidedly uncertain and these owners want to have such buildings removed from the rating list for the time when, on the face of it, they are incapable of beneficial use during alterations. The appendix to the 1999 Act did state that work involving the 'replacement and renewal of damaged parts' might constitute repairs to be disregarded. Where then is this line to be drawn between repairs that must be disregarded in rating valuation and works involving more than repair?

Repair: to restore something damaged or broken to good, working condition.

In dealing with current rating appeals practitioners hold a variety of opinions about where to draw the line between repairs and work that amounts to more than that, because the answer is not clear. Some rating practitioners hold that works which do not result in an improved property must therefore be repairs, even in circumstances where the costs are quite considerable. This no doubt has the effect of limiting the number of properties that qualify to be taken out of the rating list, but is this the right measure to apply?

The statutory requirement is not that a program of works must be to improve the property, only that the valuer should not take into account the state of repair, unless the cost of dealing with it is uneconomic. Should significant replacement of ceiling panels or raised floors, for example, constitute works that are beyond repair? Where does this boundary between repair and refurbishment lie?

Landlord & Tenant case law provides interesting parallels, where tenants are contractually liable for repairs but will resist any attempt to make them pay for works to replace items in the landlord's building from which they will receive no benefit. *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] 4EGCS 142 where it was held that works to the mechanical and electrical systems were only recoverable in the service charge where the system was actually defective rather than having reached the end of its theoretical life. In *Scottish Mutual Assurance plc v Jardine*

Public Relations Ltd [1999] EGCS 43 the tenant with a three year lease of a building was faced with substantial repair costs to maintain the roof in good order over a longer period. Here, the High Court held that the tenant's liability was limited by the short length of the lease; in rating we are looking at a valuation for a year to year term, although with a reasonable prospect of continuance. This puts the decision from *Ravenseft Properties Ltd v Davstone Holdings* [1980] QB 12 in context, where it has been held that repairs might encompass improvement.

For a property to require repair, there must be deterioration from a building's previous condition. Repair will only bring a property back into the condition it would have been in before the damage or decay began. Such remedial works were considered in the case of *Holding Management Ltd v Property Holding and Investment Trust plc and Others* [1990] 50 EG 75, where Lord Justice Nicholls identified some or all of the following as aspects to consider in the service charge recovery:

- The nature of the building
- The terms of the lease
- The state of the building at the date of the lease
- The nature and extent of the defects sought to be remedied
- The nature, extent and cost of the proposed remedial works
- At whose expense the proposed remedial works are to be done
- The value of the building and its expected life span
- The effect of the works on such value and life span
- Current building practice
- The likelihood of a recurrence if one remedy rather than another is adopted
- The comparative cost of alternative remedial work
- The impact of the works on the use and enjoyment of the building by the occupants
- The likelihood of similar disrepair arising in other parts of the building if remedial work is not undertaken, and how soon such further disrepair is likely to arise.
- These considerations will most likely apply to a building during the course of its occupation, since costs are to be incurred during the lifetime of the lease.

Refurbish: to restore to former and better condition.

In most cases refurbishment takes place after the letting of a hereditament has come to an end. This is the occasion available to the landlord for the undertaking of more substantial works, which will make the property more attractive to an incoming tenant. Are these works of repair that are simply to be disregarded in the rating hypothesis, or are they something more? If extensive works of refurbishment do not increase the value of a property, but only improve its condition and therefore its lettable in the current market, can they be considered as repairs or are they something more? The definition given above does not allow for any change in value, only in condition. As an example, a property severely damaged by fire would require works amounting to something more than repair, since the existing structure and fittings will have been so destroyed that repair is not sufficient.

The law concerning repair in rating valuations has provided some guidance, but each circumstance needs to be considered on its own merits. However, the point at which repair is to be disregarded seems in danger of becoming too widely applied. Valuation for rating needs to be carried out with some certainty, which is essential for the fair administration of taxation. If this does not take place, the credibility of the taxation is undermined. Gordon Brown's announcement (as Chancellor) about modernising empty property relief was made with the intention that this would enhance the supply of commercial property. If landlords are being subject to additional financial costs in the process, continuing empty rates charging during refurbishments will block the intentions of Government to achieve this.

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