

UPPER TRIBUNAL (LANDS CHAMBER)



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RATING – Valuation – quarry, processing plant and connecting conveyor – whether rate of extraction of minerals to be fixed by reference to material day for purpose of contractor’s basis valuation – whether value of conveyor in inverse proportion to its length and therefore to be given no value – appeal dismissed

IN THE MATTER OF AN APPEAL FROM THE
VALUATION TRIBUNAL FOR ENGLAND

BETWEEN: CEMEX UK OPERATIONS LIMITED Appellant

and

**THOMAS O’DWYER
(VALUATION OFFICER) Respondent**

**Re: Cemex UK, South Ferriby Works,
 Winteringham,
 Scunthorpe,
 Lincolnshire DN18 6HY**

Martin Rodger QC, Deputy Chamber President and Mr P D McCrea FRICS

**Royal Courts of Justice
on
23-24 January 2019**

*Luke Wilcox, instructed by Colliers International, for the appellant
Hugh Flanagan, instructed by HMRC solicitor, for the respondent*

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The following cases are referred to in this decision:

Gilbard (VO) v Amey Roadstone Corporation Ltd [1975] 1 EGLR 86

Merlin Entertainments Group Ltd v Cox (VO) [2018] UKUT 406 (LC)

Williams v Scottish and Newcastle Retail Limited [2001] RA 41

SJ & J Monk v Newbiggin (Rating Surveyors Association and another intervening) [2017] 1 WLR 851

Hardman (VO) v British Gas Trading [2015] UKUT 53 (LC)

Introduction

1. This is an appeal by the ratepayer, Cemex UK Operations Limited (“Cemex”) against a decision of the Valuation Tribunal for England (“the VTE”) dated 2 November 2017. The VTE dismissed Cemex’s appeal, and confirmed the rateable value of its South Ferriby Works at Winteringham in Lincolnshire at £1,660,000 with effect from 1 April 2010. The appeal arose out of a notice by the Valuation Officer which entered the rateable value of the hereditament into the 2010 rating list at that figure, it having originally appeared in the compiled list at £1,800,000.

2. Cemex contends for a greater reduction to give a rateable value of £1,260,000. The valuation officer’s original valuation was £1,700,000. By the end of the hearing, following agreement of various elements between the parties, he considered the value determined by the VTE at £1,660,000 to be correct, and sought the dismissal of the appeal.

3. The appellant was represented by Luke Wilcox of counsel, who called Cemex’s Director of Cement Operations, Mr Philip Baynes-Clarke, to give evidence of fact, and Mr Damien Clarke MRICS, a Director of Colliers International, to give expert valuation evidence. The respondent was represented by Hugh Flanagan of counsel, who called Mr Glen Martin MRICS to give evidence as to the value of the quarry and conveyor and Mr Thomas O’Dwyer MRICS DipRating to give expert evidence as to the value of the works.

4. The appeal raises an issue of law concerning the effect of paragraph 2(7)(c) of Schedule 6 to the Local Government Finance Act 1988 (“LGFA 1988”). It also raises valuation issues specific to the appeal property, which largely follow from the resolution of the legal point. It was not suggested that we would benefit from a site view of the appeal property and we have not undertaken one.

The relevant statutory provisions

5. The rating list is required to include all relevant hereditaments. These include lands, coal mines and mines of any other description (section 64(4), LGFA 1988). The expression “lands” is given a wide meaning and includes not only the surface of the ground but everything over or under it including workings in the land (Encyclopaedia of Rating and Local Taxation, para. 2-107).

6. In accordance with paragraph 2(1) of Schedule 6, LGFA 1988 the rateable value of a non-domestic hereditament is an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year, subject to certain assumptions about the terms of the notional letting and the date on which and circumstances in which it is taken to occur. The assumed valuation date is prescribed by the Secretary of State and, for convenience, is usually two years before the date on which the rating list comes into force; for that reason, it is referred to as the antecedent valuation date (“AVD”). This appeal relates to the 2010 list, for which the AVD was 1 April 2008.

7. Where a rateable value is to be determined for the purposes of altering a list which has already been compiled, the effect of paragraph 2(4) of Schedule 6 is that the valuation date is also

taken to be the AVD. In its recent decision, *Merlin Entertainments Group Ltd v Cox (VO)* [2018] UKUT 406 (LC), the Tribunal considered the purpose of these provisions and, at [37], concluded:

“Thus, the general legal principle is that all rateable values for properties entered in a rating list, including any alterations to that list, are determined by reference to the same valuation date, the AVD, prescribed for that particular list. This is but one aspect of the “principle of uniformity” which provides equal treatment for all ratepayers.”

8. The assumption of a common valuation date which is earlier than the date on which the rating list comes into force creates a dilemma. The condition, mode of occupation and circumstances of property are liable to change over time, and it is necessary to focus on a particular condition and circumstances when undertaking a valuation. A fundamental principle of rating, the reality principle, requires that regard should be had to certain matters affecting the value of the hereditament as they exist at the time the assessment is made and not at some other date. Sub-paragraphs 2(6) and 2(7) of Schedule 6 give effect to the reality principle by identifying those matters and the date by reference to which they are to be taken into account in the valuation:

“(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.

(6A) ...

(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
- (cc)
- (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.”

9. These assumptions were considered in detail by the Tribunal in *Merlin* and it is not necessary for us to repeat that analysis in this appeal. We remind ourselves of what the Tribunal said at [47]-[48]:

“47. As the Court of Appeal acknowledged in *Williams*, Parliament decided to enact in para. 2(7) of schedule 6 to the LGFA 1988 the physical state and user limbs of the reality principle, in relation to both the hereditament and its locality (see also *SJ & J Monk v Newbiggin* [14]). The context for understanding the scope of that provision includes the rules which govern its operation. Paragraph 2(5) provides that when the list is compiled the “reality factors” in para. 2(7) are to be taken as they were on the date on which the list was compiled. Paragraph 2(6) provides that where a rateable value is being determined for

the alteration of a list, the factors in para. 2(7) are to be taken as they were on “the material day”. The “material day” is defined by the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 (SI 1992 No. 556). So, by way of example, the material day for an alteration to correct an inaccuracy in the list when it was compiled, is the date on which the list was compiled. The material day for an alteration to give effect to a “material change of circumstance” in a factor listed in para. 2(7) is generally the date on which the valuation officer altered the list or the proposal was served on the valuation officer.

48. Thus, whether the factors in para. 2(7) are applied when compiling the list or altering the list, they are applied to the circumstances which existed on the relevant date (two years or more after the AVD) and those circumstances are then treated as if they existed as at the AVD. It is important to appreciate two points when construing para. 2(7) of schedule 6. First, whatever is the true ambit of these factors, para. 2(7) applies both to the compilation of the list and to the issue whether it is permissible to alter the list subsequently. Second, any matter or circumstance which falls *outside* the ambit of para. 2(7) which is relevant to the valuation of a hereditament for rating purposes, is taken as at the valuation date, the AVD, and not the date on which the list is compiled or any later date.”

10. In short, in assessing the rateable value of a hereditament in circumstances where a proposal has been made against the compiled rating list assessment in the 2010 list, a letting is assumed to have taken place on the AVD, 1 April 2008, having regard to values and levels of demand at that date, but assuming the matters specific to the hereditament itself and its locality identified in subparagraph (7) were as they existed on 1 April 2010.

11. Regulation 4(1)(b) of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 allows an interested person to make a proposal to alter the rating list on the grounds that the rateable value shown in the list for a hereditament is inaccurate by the reason of a material change of circumstances which occurred on or after the day on which the list was compiled. By regulation 3(1) a “material change of circumstances” in relation to a hereditament “means a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the LGFA 1988”.

The relevant facts

12. The appeal property is located on the southern banks of the Humber in north Lincolnshire. It appears in the rating list as a single hereditament comprising three components. First the cement production plant known as South Ferriby Works (“the Works”). Secondly, a quarry known as the Middlegate Quarry from which chalk and clay are extracted (“the Quarry”). The Works and the Quarry are approximately one mile apart and are linked by the third component of the hereditament – a substantial mineral conveyor, which transports raw materials from the Quarry to the Works (“the Conveyor”). The Conveyor is elevated, crossing the B1204 at the village of South Ferriby.

13. Mr Baynes-Clarke provided a comprehensive explanation of the processes by which raw materials are converted to a finished cement product. The materials involved comprise around 90-95% chalk and clay, and 5-10% sand and iron oxide. They are subjected to a series of processes

including being fired in a kiln, to produce cement clinker which can be stored before being ground with gypsum to produce the finished cement product.

14. Material dug out of the Quarry is processed, bagged, and is normally ready to be dispatched within two days. This allows Cemex to react quickly to changes in the market, but the works do not have the capacity to stockpile cement for more than a few days owing to a lack of space.

15. Cemex obtains all its chalk and clay from the Quarry and transport it to the Works via the Conveyor. In 2010 559,533 tonnes of minerals in total were extracted and transported by this method. The necessary sand and iron oxide are brought in by lorry. It would not be practical to transfer chalk and clay from the Quarry by road because the road from the quarry onto the A1077 is too steep to allow safe egress, and because the Works could not accommodate the number of vehicles and the tipping operations that would be required. Even if the site could accommodate the haulage of clay and chalk by road, it would be uneconomic to operate in this way; the annual cost at April 2008 levels would be in the order of £3.3 million.

16. The Works has two functioning cement production lines. Central to each of these lines is a kiln. The two kilns are identified as Kiln 2 and Kiln 3 (there is no kiln 1).

17. At the AVD of 1 April 2008 the level of demand for cement was such that Kilns 2 and 3, and the buildings, plant and machinery associated with them were in full operation. Extraction of raw materials from the Quarry was at a level which serviced the requirements of both Kilns.

18. The effect of the global financial crisis of 2008 on the UK cement industry was to cause several cement plants to close, including Cemex's operation in Barrington in Cambridgeshire. Quarry production at the appeal property began to decline but not until after the AVD, with the first noticeable drop occurring in June 2008.

19. By 2009 demand for cement had dropped and output had fallen to such a level that Kiln 2 was shut down and its associated buildings, plant and machinery were taken out of use. Kiln 3 and its cement production line remained in operation. That was the state of affairs at the material day, 1 April 2010.

20. Although it was out of normal operation, Kiln 2 was not wholly redundant and was kept on stand-by. Together with another plant at Tilbury it was brought back into use at short notice when the company's operation at Rugby was shut down temporarily in 2012. Its state of readiness was evidenced by an article in an in-house magazine:

“with just a few days' notice, South Ferriby's newly refurbished kiln 2 came into service alongside kiln 3. As Rugby ran down its own stocks of clinker, South Ferriby worked flat out to fill the gap...”

Kiln 2 was not a full substitute for Rugby as it only had quarter of the output of the Rugby plant.

21. The source of fuel to power the Kilns has diversified since 2002. Historically, the plant used coal or petroleum coke (“petcoke”) at a rate of 140 tonnes per day per kiln, which was held in a petcoke store with capacity for 300 tonnes. By 2008 greater use was being made of alternative fuels with fuels derived from waste comprising 37% of total usage. Mr Baynes-Clarke estimated that a store of about half the original capacity would have been sufficient to meet the appellant’s requirements while only one kiln was being used.

Issues

22. The parties agreed that the appeal property should be valued by aggregating the value of the Quarry, the value of the Works and (subject to the third issue) the value of the Conveyor. The total sum arrived at would represent the annual letting value of the hereditament on the statutory assumptions.

23. An unusual (but not unprecedented) feature of this case is the use of different valuation techniques to value different parts of the hereditament. It was agreed that the value of the Quarry should be ascertained by applying a royalty to an assumed annual mineral output in tonnes, to which there should be added a sum representing the value of the quarry land, buildings, plant and machinery (referred to in the statement of agreed facts as the “Quarry assets”). It was also agreed that the value of the Works should be arrived at using the contractor’s basis of valuation. The adoption of different methods of valuation has contributed to some of the complexities of this case.

24. Three main issues have arisen, together with a number of subsidiary issues concerning specific elements of the Works which we will deal with later.

25. The first and main issue concerns the output which the appeal property should be assumed to have been producing at the AVD: should it be a level of output sufficient to meet the demands of the market as it was on the AVD itself, 1 April 2008, or only enough to satisfy demand as it existed on the material day, 1 April 2010? That has been referred to as “the material day issue”. The resolution of that issue is said to be critical to the question whether Kiln 2 and its associated buildings and plant should be included in the contractor’s basis valuation at full value, or at a reduced value or, as the appellant contends, should be ascribed little or no value at all.

26. The second issue is whether full value should be attributed to parts of the property which Cemex says had become wholly or partly obsolete by the AVD as a result of changes in the cement industry (“the overcapacity issue”).

27. The third issue is whether the value of the Conveyor should be included as a component in the contractor’s basis valuation (“the conveyor issue”).

Agreed valuations

28. Helpfully, the parties used a common framework, in the form of an Excel spreadsheet, as the basis of the competing valuations. While the data behind the valuations was voluminous, comprising in excess of 600 individual components, there was a significant degree of common

ground, with the basic methodology, floor areas or cubic capacity of the buildings and general approach all agreed.

29. It was also agreed that the rateable value of the Quarry assets including the minerals themselves and the Conveyor is £135,778. If the Conveyor is not included this figure is reduced to £93,780.

30. We were informed by Mr Martin that the mineral element of the assessment (which is part of the value of the Quarry assets) was ascertained by reference to evidence of royalty rates at the AVD. Moreover, in accordance with the practice of the Valuation Office Agency explained in its Rating Manual at Part 2, para. 9.3.1, the component of the overall assessment which is attributable to the minerals themselves will be revalued annually by reference to the tonnage extracted in the preceding year. This practice is based on paragraph 2(7)(c) of Schedule 6, LGFA 1988 and treats the change from time to time in the quantity of minerals in or extracted from the hereditament as a material change in circumstances triggering a revaluation. Where a hereditament comprises both a quarry and a processing plant, as in this case, the practice is to revalue only the minerals, and not the remainder of the hereditament. Since the value to be attributed to the Quarry assets was agreed it is not necessary for us to consider that practice. In this appeal we are concerned with the value of the hereditament as a whole in the 2010 compiled list, and not with a revaluation arising from a material change of circumstances.

31. The remaining valuation aspects of the dispute are dependent on the resolution of the material day issue, which we will deal with first, before explaining how our conclusions impact on the rateable value of the appeal property having regard to the relevant expert valuation evidence.

The material day issue

32. The Appellant's case on this issue is that, in valuing the hereditament, the level of cement which the Works is assumed to be capable of producing should be fixed by reference to the output being achieved at the material day rather than at the AVD. This proposition is said to have the consequence that Kiln 2 and its associated line should not be included at full value in the contractor's basis valuation of the Works, as they were not in use on 1 April 2010 and would not have been needed to sustain the assumed level of production.

33. On behalf of the Appellant Mr Wilcox contended that the following sequence of reasoning led to this conclusion:

(a) for the purpose of determining the rateable value of the hereditament paragraph 2(7)(c) of Schedule 6 dictates that the quantity of minerals in or extracted from the Quarry must be taken to be fixed by reference to the material day; this was also said to be a requirement of paragraph 2(7)(a) as regards both the physical state and physical enjoyment of the property;

(b) at the material day the quantity of chalk extracted from the Quarry was dictated by market demand for cement;

(c) the quantity of chalk being extracted at the material day was such that Kiln 2 was not required; and

(d) as there was no other viable means of bringing chalk on to the hereditament than via the Quarry, Kiln 2 and its associated assets should be predominantly excluded from the valuation.

34. For the valuation officer Mr Flanagan argued that economic demand was not one of the “reality factors” (as the Tribunal called them in *Merlin*) which paragraph 2(7) requires to be taken as they were on the material day. It was not a matter affecting the physical state or enjoyment of the hereditament, or otherwise intrinsic to the hereditament itself and it was not encompassed within the reference in sub-paragraph 2(7)(a) to “the quantity of minerals or other substances in or extracted from the hereditament”. It therefore fell to be taken as it was on the AVD, when demand was strong and both lines were in use to meet it. Accordingly, there was no justification for not taking account of Kiln 2 at its full value.

35. Mr Wilcox reminded the Tribunal of the propositions of law for which *Merlin* is the most recent authority. He drew attention to the distinction between the “essential” or “intrinsic” qualities or characteristics of the hereditament, which must be taken into account as they were at the material day, and factors which are non-essential or “accidental” to the property which must be disregarded (*Merlin*, para.44). He acknowledged that the volume of trade or profitability of the occupier are not essential characteristics of the hereditament or of the value of the right to occupy it (*Merlin*, para.45).

36. Where the intrinsic characteristics of the hereditament are liable to change the principle underlying the statutory approach is that material changes after the compilation of the list are taken into account, but always by reference to values subsisting at the same point in time, namely the AVD (*Merlin*, para.51). It was immaterial that a change in one of the paragraph 2(7) factors was itself the cause of changed economic or financial circumstances (*Merlin*, para.120, as regards matters affecting the physical state of the locality or physically manifest there).

37. As the Tribunal had acknowledged in *Merlin*, at paragraph 53, mineral valuation has special features which receive special consideration in paragraph 2(7)(c):

“Sub-paragraph (a) is to do with the physical state of the hereditament itself or its use. Sub-paragraph (c) creates a special rule for the physical state of mines and quarries. An important feature of such hereditaments is, of course, the mineral reserve. But that asset can only be exploited once and for all. During the lifetime of a rating list the reserve in a working mine or quarry will decrease as minerals are extracted and processed each year. Sub-paragraph (c) reflects those unusual features of that class of hereditament. It cannot be taken to support any general proposition that rates are levied on the volume, or trade, or profits of a business, which would be contrary to established principle ...”

38. Mr Wilcox also referred the Tribunal to a statement at paragraph 9.3.1 of the Valuation Office Agency’s Rating Manual which explained its practice:

“Mineral hereditaments are treated differently from other classes of hereditament. Changes to the quantity of minerals extracted from a mine or quarry ... are MCCs by virtue of [paragraph 2(7)(c)]. This allows the annual revision of mineral assessments depending on previous year’s extraction or deposit.”

39. Finally, we were referred by Mr Wilcox to *Gilbard (VO) v Amey Roadstone Corporation Ltd* [1975] 1 EGLR 86 for judicial consideration of mineral valuation for the purpose of rating. The Court of Appeal there decided that in ascertaining the rateable value of a gravel pit worked on a royalty basis, rating should not be at half the annual value in the final year merely because there was only enough gravel for six months' working, but should be charged at its full annual value during the period of extracting gravel.

40. Some of the complexities of mineral valuation were referred to by Lord Denning MR (at page 86 E-H). He considered that the requirement under section 19 of the General Rate Act 1967 to ascertain the net annual value of a hereditament by reference to the amount at which it might reasonably be expected to let from year to year was “impossible to apply to some hereditaments”. Amongst these were hereditaments, such as brickfields and gravel pits, which are continually being exhausted by the extraction of clay or gravel:

“Such hereditaments are not let at a rent from year to year. They are worked on a royalty basis. In order to rate them, the rating experts and the courts assess the net annual value on the current rate of extraction of gravel. The practice is to estimate the amount of gravel which will be extracted during the current year. To do this, the valuer will take the actual output during the previous calendar year (1st January - 31st December) (of which the figure is known), and then assume that extraction will continue at the same rate during the current year. ... So long as the pit is being worked at a steady rate of extraction that method works well. But difficulties arise when the extraction rate is much higher in one year than the next, or when all is extracted in less than a year, say in 10 months. In that case the assessment must be made as nearly as may be on the actual output for the particular year...”

41. One essential characteristic of the hereditament in this case, Mr Wilcox suggested, was what he called “the direct causative relationship” between the quantity of raw mineral being won from the Quarry and the number of kilns required to process it into cement. That relationship arose because of the hereditament’s physical characteristics, most particularly from the practical and commercial impossibility of supplying the kilns from any source other than the Quarry. As the quantity of chalk extracted from the Quarry was fixed by paragraph 2(7)(c) as it was at the material day, when undertaking the contractor’s basis valuation the extent of the facilities at the Works required to process that chalk must also be taken as established at the same date, 1 April 2010. It was not permissible to assume a need for Kiln 2 on the basis of market circumstances as they were at the AVD on 1 April 2008, because paragraph 2(7)(c) fixed the level of extraction, and thus the level of production, at a later date when there was no such need. It was irrelevant, Mr Wilcox submitted, that the cause of the reduced level of extraction at the material day was a fall in the demand for cement since the AVD because, as the Tribunal had explained in *Merlin* at paragraph 120, if one of the paragraph 2(7) factors changes the reason for that change does not matter even if it is economic in nature.

42. Mr Wilcox explained that his argument did not depend on valuing on the basis of demand or other economic circumstances as they were at the material day; those should be assessed as at the AVD. His contention 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.

43. The lynchpin of Mr Wilcox's submissions was paragraph 2(7)(c), which he said operated as a "statutory fixing of extraction quantities". It will be recalled that it requires "the quantity of minerals or other substances in or extracted from the hereditament" to be taken into account for the purpose of the valuation as they are assumed to be on the material day.

44. Mr Wilcox submitted that the first limb of paragraph 2(7)(c) (the quantity of minerals "in the ... hereditament") would be of little consequence when determining a rent based on a royalty for material extracted until a quarry approached the point of exhaustion. What mattered more, especially while a quarry was capable of production over an extended period, was the second limb ("or extracted from"). He suggested that this could be referring to one of two things. It could mean the quantity of minerals which had been taken from the mine or quarry in the period before the material day, but where the purpose of the exercise was to arrive at a rental value which would be paid in the future this was not information of significance. It did not make any sense to have regard to quantities which had been extracted in the past and which were no longer available. The alternative meaning, and the one which Mr Wilcox submitted was the intended meaning of the words "extracted from", was that they referred to the *rate* of extraction prevailing at the material day. Mr Wilcox submitted that this rate, when combined with the knowledge of the mineral reserve, is critical to the valuation of a minerals hereditament. As a matter of valuation practice, as *Gilbard* illustrated, the rateable value of a quarry was determined by applying a royalty rate to the quantity of material produced in the previous year. Paragraph 2(7)(c) facilitated that approach by fixing the rate of extraction in the previous year as the rate at which the hereditament was to be taken to be operating at the material day. Where the hereditament combined a quarry and processing facility served exclusively by that quarry, the rate of extraction determined the output of the hereditament as a whole.

45. We do not accept that paragraph 2(7)(c) has the effect contended for by Mr Wilcox. Nor do we accept that, if it had the suggested effect, it would have the valuation consequences which are said to follow from it.

46. The language of paragraph 2(7)(c) is straightforward and, as Mr Wilcox submitted, it directs attention to two matters which must be taken into account in determining the rateable value of the hereditament as they were at the material day. The first is the quantity of minerals or other substances in the hereditament. That is obviously a reference to the mineral reserve. The quantity of minerals available to be exploited is clearly a matter capable of having an effect on the rent at which the hereditament might reasonably be expected to let from year to year. Whether in any particular case it will have an effect on value, and what that effect will be, will depend on the circumstances of the case, but it would not be surprising if a quarry or mine with a very limited reserve commanded a lower royalty and thus a lower rent than one with a much greater reserve. The most obvious case would be where the reserve was expected to be exhausted within the year.

47. The other focus of paragraph 2(7)(c) is on the quantity of minerals extracted from the hereditament. Once again, we see no difficulty in understanding and applying this consideration.

It refers simply to the quantity of material which has previously been extracted, and we can see no reason to give it any other meaning. Since the purpose of paragraph 2(7) is to give effect to the reality principle in relation to the hereditament, there should be no reason to limit the relevant information to a single figure representing the total amount extracted at any time from the site. It would be relevant to consider the period over which that quantity had been extracted and, in particular, the quantity extracted in the period immediately before the material day. The information ought therefore properly to include the historic rate of extraction of minerals from the quarry.

48. What paragraph 2(7)(c) does not do, in our judgment, is to fix a rate of extraction which it must be assumed will be achieved in the future. The statutory rating hypothesis is directed towards the determination of an annual rental value which is payable prospectively, without retrospective adjustment; that rent will necessarily reflect the value of the opportunity to take the unwon minerals from the Quarry and process them at the Works; it is not a rental value payable in respect of occupation which has already taken place or minerals which have already been won.

49. That is not to say that the rate at which minerals have been extracted in the past is irrelevant to the valuation exercise. It is a matter of valuation judgment what rent would be agreed to be payable prospectively on the letting of a mineral producing hereditament. The fact that in the preceding year a particular quantity of material had been extracted is information relevant to the formation of that judgment. Where it is expected that production will continue at a steady rate the previous year's performance is likely to be regarded as a solid piece of evidence on which to base the expectation of production in the first year of the new letting. As Lord Denning MR explained in *Gilbard*, as a matter of valuation technique the known output during the previous calendar year may be assumed to continue at the same rate during the forthcoming year. "So long as the pit is being worked at a steady rate of extraction this method works well" but it may become unsatisfactory where production fluctuates significantly. The risks of unfairness inherent in this method of valuation are limited by the opportunity which exists to undertake a revaluation whenever a material change occurs in the quantity of minerals extracted from the hereditament, as is the Valuation Office Agency's practice.

50. It is important to appreciate that paragraph 2(7)(c) does not dictate a particular valuation technique. As the Tribunal said in *Merlin* it "creates a special rule for the physical state of mines and quarries". It is concerned only with the subject of the valuation, not with the method which is then adopted to value that subject.

51. Contrary to Mr Wilcox's submissions, all that is taken to be fixed by reference to the material day is the quantity of minerals extracted before the hypothetical letting. What a valuer does with that information is not the subject of any statutory direction. Provided the requirement to determine the rent at which the hereditament as a whole might reasonably be expected to be let from year to year is respected, the valuer may reflect that historic performance in the valuation in whatever way is considered most appropriate.

52. We do not consider that paragraph 2(7)(a) permits or requires any different approach. It requires only that the rateable value of the hereditament be determined having regard to its physical state and physical enjoyment at the material day. We agree that the capacity of the Quarry is an aspect of its physical state, and that the manner in which the hereditament as a whole is worked is

an aspect of its physical enjoyment. But neither of those considerations dictates a fixed rate of exploitation of the reserves of clay or chalk at the Quarry during the hypothetical letting. The reduced rate of extraction was a commercial decision by the appellant, dictated by the state of the market for cement, but the hereditament continued to be physically enjoyed in the same way as before. The state of the market for cement was not a characteristic of the hereditament.

53. As Mr Wilcox acknowledged, the economic circumstances in which the hypothetical letting is deemed to take place are those which existed at the AVD. We reject his submission that the ability of the hereditament to service such demand as there was at the AVD is to be taken to be limited to the output of materials from the Quarry achieved at the material day. The relevant features of the valuation are therefore that at the valuation date the commercial opportunities available in the market were sufficient to justify the operation of both Kilns, albeit that in the immediately preceding year the output of the Quarry must be taken to have been at 2010 levels which required the use of only one Kiln.

Impact of the Material Day on Rateable Value

54. Even if we had been in agreement with Mr Wilcox that the capacity of the hereditament to produce cement must be taken to be limited by reference to the output which could be achieved assuming 2010 levels of sand and chalk extraction from the Quarry, we would not have accepted Mr Clarke's contention that little or no value should therefore be attributed to one of the Kilns and its production line. The notional rent which is to be determined under paragraph 2 of Schedule 6, LGFA 1988 is a rent for the whole of the hereditament, including both production lines and Kilns. Unless it was suggested that the second Kiln was entirely redundant it would be wrong in principle to value the hereditament without regard to its presence. The second Kiln was clearly not redundant, as the appellant's decision to refurbish it and its subsequent use when the appellant's operation at Rugby was interrupted for ten weeks demonstrate. As the changes in the demand for cement between the AVD and the material day also illustrate, fluctuation is a feature of the market for the supply of materials for the construction industry which the hereditament is designed to service.

55. It is a matter of valuation judgment how that potential for fluctuation would be reflected in the rent at which the hereditament might reasonably be expected to be let on the AVD. Where the contractor's basis of assessment is adopted as the preferred valuation method, we consider that, even when full production is being achieved at the AVD, the risk of underutilisation of assets at times of reduced demand might more appropriately be reflected in an appropriate end allowance at stage 5 of the assessment.

56. It is not necessary for us to refer to each individual element of the valuation concerned solely with the kiln 2 issue. In broad terms, Mr O'Dwyer's rateable value aggregated to £297,089 RV, largely attributing 100% to each item, whilst Mr Clarke's £40,932 RV was arrived at by applying discounts of between 90%, where he considered the hypothetical tenant would attribute 10% of full value to the element to have it "on standby", and 100% where the element was in his view redundant. For some elements, for instance the main kiln house and the kiln house extension, other discounts were agreed. It follows from our determination as above that we prefer Mr O'Dwyer's figure at £297,089 RV.

The over-capacity issue

Clinker Store (line 422)

57. We can deal with this point briefly. There were several elements to the dispute. Mr Clarke's evidence was not entirely clear, but we understood him to contend for two separate allowances to reduce the value of the clinker store building as follows. The first allowance concerned the cubic capacity of the building itself: owing to a build-up of solidified clinker over time, at the material day its usable cubic capacity was said to have reduced by half, although there was little by way of evidence in support of that conveniently round number. Mr Clarke therefore based his valuation on a cubic capacity of 40,417 m³ compared with Mr O'Dwyer's 80,835 m³. The second allowance was a consequence of the assumption that Kiln 2 was not required to process the volume of material being extracted on the material day (i.e. the issue we have already determined against the appellant) – for which Mr Clarke made a deduction of 20%.

58. Mr Flanagan submitted that the presence of solidified clinker in the building was disrepair, and we must assume under sub paragraph 2(1)(b) of Schedule 6, LGFA 1988 that the building would be put in repair by the landlord, since there was no evidence that to remove the clinker would be uneconomic. Mr Wilcox quite properly accepted that the presence of solidified clinker constituted disrepair, and that if we were not persuaded by his Kiln 2 argument, there was insufficient evidence to show that, in a 2-kiln scenario, the removal of the solidified clinker would not be economic.

59. Having rejected the appellant's argument on the material day issue it follows that the solidified clinker must be assumed to have been removed to put the building in a state of repair ready for letting. There is no reason to assume its capacity to be less than its agreed dimensions allow (although Mr O'Dwyer proposed an obsolescence allowance of 30% which we accept). We therefore find Mr Clarke's valuation unsustainable, and prefer Mr O'Dwyer's valuation for this element at £115,998 RV.

Pet coke store (lines 303 to 313)

60. Mr Clarke applied two discounts to the adjusted replacement cost of the pet coke store – first a 50% allowance to reflect the increase in alternative fuels used at the Works and thus less reliance on pet coke, and secondly a further net 50% allowance (so 75% in total) owing to the Kiln 2 point. Mr O'Dwyer accepted that there was some overcapacity on the site but contended for a 25% allowance given the actual use of the assets and levels of use of alternative fuels at the AVD. The competing valuations were Mr Clarke's £13,373 against Mr O'Dwyer's £40,119 RV.

61. Mr O'Dwyer did not dispute that with the increase in usage of alternative fuels, the storage requirement for traditional fossil fuels would decline. He also accepted that, in principle, if the Works were rebuilt with a modern equivalent the size of the pet coke store would reduce, but the appellants had not put forward any evidence to show the extent of this reduction or how the building would be designed. In fact, on his inspection he and Mr Martin noted that the building was being used in full, not only for pet coke but also for the storage of fuel for the rotators, and a further loading conveyor. Accordingly, any reduction in the amount of fossil fuels would not necessarily result in a similar reduction in the size of building required to store that fuel. Mr O'Dwyer took as his starting point the ratio of fossil fuels (63%) to alternative fuels (37%) in 2008,

but since the building was being used for other storage, he considered an allowance of 25% to be reasonable.

62. We accept Mr O'Dwyer's evidence, and given our conclusion on the Kiln 2 issue, we adopt his figure of £40,119 RV.

Site area, over ground and underground site works (lines 624 to 626)

63. By the end of the hearing the rates to be applied for over ground and underground site works were agreed, leaving in issue only the acreage to which those rates should be applied. Mr Clarke's figure was £51,733 RV based on 21.4 acres, Mr O'Dwyer's was £68,901 based on 28.5 acres.

64. It was common ground that in previous rating lists, the site area adopted for the purposes of valuation was 20.9 acres. Having inspected the appeal property on 11 September 2018 and subsequently checking on a digital plan, Mr O'Dwyer adjusted the site area to 28.5 acres.

65. Mr Clarke's expert report was based on the historic measurement of 20.9 acres. While he did not dispute that the area on Mr O'Dwyer's plan amounted to 28.5 acres, his subsequent valuation applied a 25% reduction to this area, because he considered 7.6 acres to be surplus to requirements. He therefore adopted 21.4 acres. He did not identify, until his oral evidence in chief, which areas of the property he considered surplus to requirements, and even then, only did so in fairly sketchy terms. He accepted in cross examination that he had not produced a plan or any evidence that identified which areas would not be required. Mr Clarke said that the site area had not previously been identified and measured by way of a digital plan upon which the operational boundary of the property (Cemex's land extended far beyond this) could be shown. Part of the land, in the north-west corner, was vacant land at the material day but had been used to erect a temporary welfare facility following flooding in 2013.

66. Having considered the plans and aerial photographs, we are satisfied that Mr O'Dwyer has correctly identified the site area of the property. The area which Mr Clarke considered surplus to requirements appears to include, for instance, one of the vehicular entrances to the site and car/lorry parking spaces. We note that the 28.5 acres excludes other land belonging to Cemex. In the absence of any material evidence from Mr Clarke, we prefer Mr O'Dwyer's approach, and adopt a site area of 28.5 acres, leading to a figure of £68,901 RV.

67. Accordingly, we accept Mr O'Dwyer's valuation of the Works at £1,513,915 RV. The value of the Quarry is agreed at £93,780 RV. The remaining issue is the valuation of the Conveyor.

The Conveyor issue (lines 650-664)

68. We remind ourselves that the Works and the Quarry are linked by the elevated Conveyor, approximately 1.6 km in length. It passes beneath Middlegate Lane, over the B1204 Horkstow

Road, beneath a farm track, and over the River Ancholme and two drains. On any view, it is a considerable structure. The adjusted replacement cost on the contractor's basis, including towers, tunnels etc, was around £1 million. The agreed value of the rateable buildings, plant and machinery in the Quarry was £64,789 RV including the Conveyor, and £22,791 RV without it, thus the implied value of the Conveyor was in the order of £42,000 or thereabouts.

69. Mr Clarke considered that, when viewed holistically, the value of the sum of the parts would exceed the value of the whole hereditament. Whilst the adjusted replacement cost of the Conveyor was agreed, the "stand back and look" exercise in stage 5 of the contractor's basis of valuation led him to conclude that the Conveyor had no value, essential though it was to the functioning of the hereditament. Its role was to overcome the disadvantage of the distance between the Works and the Quarry, and the lack of any practical means of transporting chalk and clay by road. It could not be correct to suppose that its value was commensurate with the degree of separation - a conveyor of twice the length could not have twice the value to the hypothetical tenant who would incur higher running and maintenance costs.

70. Mr Martin and Mr O'Dwyer didn't agree, noting that Mr Clarke had attributed value to various smaller conveyors both within the Quarry and the Works, and agreed the Conveyor was rateable (although he ascribed no value to it). Mr Martin said that the Conveyor replaced a previous runway system along a similar route, and since the Conveyor was in full use, not least because road haulage was impractical, there were no grounds to exclude it from the valuation. Mr O'Dwyer noted Mr Clarke's acceptance that the Works, the Quarry and the Conveyor were all essential to the operation of the hereditament, and that Mr Clarke had accepted that the conveyor had a value in agreeing the rateable value of the appeal property in the 2005 rating list.

71. Mr Martin said that there were many quarries across England and Wales that have a considerable separation between quarry and plant, and operators must contend with the added costs of longer mineral transportation. In principle the disadvantages of the separation and associated costs should be reflected in the royalty payments for the mineral negotiated at AVD – the more remote the mineral source from its processing plant, the lower the royalty. The agreed royalty for the appeal property was 25.2p/tonne (28p less a 10% allowance to reflect the site-specific difficulties in working below the water table and removing the 5m thick red chalk). Other sites in East Yorkshire and South Lincolnshire with shorter haulage distances had been valued at 30p/tonne, and Mr Martin's view was that the haulage distance between the Works and the Quarry had already been accounted for.

72. Mr Clarke emphasised that in reality Cemex had no choice but to transport material on the Conveyor. He accepted that it was rateable but stressed that it was of no value to the hypothetical tenant. It could be differentiated from the smaller conveyors within the hereditament, which would be required whatever the configuration of the hypothetical tenant's modern substitute and they would add value to the hereditament. In contrast, the Conveyor was only necessary because of the physical distance between the Works and the Quarry, and the lack of haulage facilities. He accepted in cross examination that there was no evidence to show that a modern substitute could be constructed any closer to the Quarry.

73. For the appellant, Mr Wilcox submitted that the Conveyor operates to overcome what would otherwise be an unsurmountable disadvantage for the hereditament when taken as a whole.

Absent the Conveyor, the value of the Works would be almost entirely removed because the hypothetical tenant would not pay any meaningful sum for a cement works at which cement could not viably be produced. For valuation purposes the presence of the Conveyor serves to release the value of the Works – so the value of the Conveyor should be taken to be subsumed in the value attached to the Works, and the inclusion of an additional element in the valuation to reflect the direct cost of the Conveyor would be a form of double counting. The cost-value relationship on which the contractor’s basis depends breaks down if the cost of the Conveyor is included in addition to that of the Works. As a matter of common sense, all else being equal, 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 risks of malfunction. Thus, the normal cost-value relationship is inverted.

74. We accept that the appellant has identified a striking paradox, but that only serves to emphasise that the blunt instrument of the contractor’s basis is not an ideal method of valuation.

75. We do not accept that the Conveyor should be valued at zero. It is common ground that the only practical way to transport material from the Quarry to the Works is via the Conveyor. We find it inconceivable that, if considering the matter at April 2008, the hypothetical tenant would not increase his or her bid by a positive figure to have the use of the Conveyor, even allowing for maintenance and repair costs, when the alternative of transporting materials by road, even if it were available, would cost something in the order of £3.3 million a year. If the Conveyor did not exist, the owner of the Quarry and the Works would need to provide it and would regard the cost of doing so as a worthwhile investment to release the value of both.

76. If a particular method of valuation produces a result which appears, on the face of it, surprising or even perverse, as Mr Clarke suggests is the case with the Conveyor, it is necessary for the valuer to consider whether that method is appropriate. As the Tribunal observed in *Hardman (VO) v British Gas Trading* [2015] UKUT 53 (LC), at [163]:

“where a valuer finds that the application of a particular method of valuation produces [a surprising] result, it would be wise to step back and consider whether or not the result should be tested appropriately by using another method of valuation...”

If Mr Clarke concluded that the value of the Conveyor is not related to its cost, he ought to have considered whether an alternative method of valuation might be more suitable rather than pushing the contractor’s basis to the point of destruction.

77. A possible alternative approach to valuation might have been to value the Conveyor and the Quarry together, rather than treating them as separate and valuing them by different methods. The value of the minerals in the Quarry, and thus the Quarry itself, is related to their proximity to the Works at which they can be processed into a saleable form. An inaccessible source of minerals is likely to be less valuable than an accessible one. In the same way, it might be expected that the greater the cost associated with the Conveyor required to transport the minerals, the lower the value of the minerals themselves.

78. Mr Martin’s evidence suggested that the size of the Conveyor has already been taken into account by him in his assessment of the value of the Quarry. When assessing an appropriate

royalty for minerals extracted, he said he made an allowance to reflect the size of the Conveyor. In principle that seems to us a permissible approach, but it has the disadvantage in this case that the mineral royalty and Quarry values were agreed figures and Mr Martin did not suggest that they had been agreed on the basis that they incorporated such an allowance. We had no evidence of royalty rates or how they are related to the degree of difficulty of exploiting the minerals concerned and it is not possible for us to determine whether the agreed figure in this case has any bearing on the disputed value of the Conveyor.

79. Given the consensus that the contractor's method is the appropriate method of valuation for the Works and the Conveyor, and the absence of evidence that the value of the Quarry already takes the relative inaccessibility of the Quarry into account, an end allowance might have been a better approach, but there was no evidence before us advocating that as a basis. We have referred in paragraph 55 above to the possibility of using an end allowance to reflect the risk of underutilisation, but none of the experts advanced their case on that basis, and we therefore make no deduction.

Conclusions

80. For these reasons Mr Clarke has not persuaded us that the approach taken by the VTE is incorrect. Even after taking into account the various adjustments which have been agreed, Mr O'Dwyer's valuation remained at the level determined by the VTE. We are satisfied that it provides a reliable determination of the rateable value of the hereditament. The appeal is therefore dismissed.

81. This decision is final on all matters other than costs. If an appropriate order cannot be agreed the parties may make submissions in writing on costs and a letter containing further directions accompanies this decision.

Martin Rodger QC
Deputy Chamber President

Peter McCrea FRICS
Member

3 April 2019