NORTHERN IRELAND VALUATION TRIBUNAL

THE RATES (NORTHERN IRELAND) ORDER 1977 (AS AMENDED) AND THE

VALUATION TRIBUNAL RULES (NORTHERN IRELAND) 2007 (AS AMENDED)

CASE REFERENCE NUMBER: NIVT 9/20

COLM MARK McATEER – APPELLANT

AND

THE COMMISSIONER OF VALUATION – RESPONDENT

Northern Ireland Valuation Tribunal

Chairman: Mr James Leonard, President

Members: Mr C Kenton FRICS & Mrs N Wright

Hearing: 27 September 2022, Belfast

DECISION

The unanimous decision of the tribunal is that the appellant's appeal succeeds for the reasons stated and the tribunal Orders that the property identified in this decision shall be removed from the Valuation List.

REASONS

Introduction

1. This appeal consists of a reference under Article 54 of the Rates (Northern Ireland) Order 1977, as amended ("the 1977 Order"). The appellant, by Notice of Appeal (Form 3) appealed against the decision of the Commissioner of Valuation in a Valuation Certificate in respect of the Capital Valuation of a stated hereditament.

The Background to the Matter and the Hearing

2. This appeal has had a regrettably lengthy history due, in no small part, to the appellant exercising his entitlement - quite properly and which he is perfectly entitled to do - to present detailed arguments and submissions, including some well-rehearsed and presented submissions concerning the law. The tribunal regrets the delay in bringing the matter to a conclusion, including between the conclusion of the oral hearing and the promulgation of this decision which latter was caused, firstly, on account of the request for the respondent to be afforded further time to take legal advice at the conclusion of the oral hearing and also on account of the subject matter and the detailed nature of the submissions, including a range of legal authorities, and the comprehensive range of issues requiring to be considered and determined. Arising from all of this, however, the tribunal has been afforded a welcome opportunity to consider in detail and to make some observations upon the current state of the law as it bears upon cases of this nature. Whilst the facts of this case are quite specific, nonetheless the tribunal hopes that some broader principles may be extracted from the tribunal's decision-making in this case which might be of application and relevance to other cases touching upon areas of the law in this jurisdiction.

3. It might be useful at this point to set out the history of the case, most of which history is undisputed. However, there are certain core or central matters which are fundamentally in dispute between the parties to this appeal and the tribunal's task, amongst other matters, is to resolve these specific disputed issues in making a determination.

4. The background to the matter is that the appellant, Mr McAteer, who in his appeal states his residence as being "C/O 1 Windmill Road, Newry BT34 2QW", lodged a Form of Appeal (Form 3) with the Valuation Tribunal. That appeal was received on 9 November 2020. In the appeal, Mr McAteer indicates that he is appealing against a Notice of Decision dated 5 November 2020 in respect of a property with the address: "3 Windmill Road (Ballynacraig), Newry, Co Down BT34 2QW". This latter shall be referred to in this determination as being "the property". Mr McAteer in his appeal contends that the Capital Value of the property, instead of the ascribed figure of £105,000, ought to be "nil". The appeal form as received sets forth grounds of appeal which grounds comprise some additional 2 ½ pages of typescript. As the case has proceeded, Mr McAteer has added to the foregoing by virtue of some detailed written submissions presented to the tribunal which contain a number of references to case law, submitted to be relevant. Mr McAteer has helpfully submitted copies of some case law authorities to which he wishes to refer, together with certain other written materials, including some statutory provisions contended by him to be relevant to the issues. The case has been

case managed and, ultimately, as requested by Mr McAteer in the appeal form, was the subject of an oral hearing held in the Tribunals' Hearing Centre, Belfast, which hearing took place on 27 September 2022. The appellant appeared and represented himself (in person) at hearing and the respondent was represented by Mr Gerard Fitzpatrick MRICS together with Mr Steven Jeffrey MRICS, both attending remotely (by Webex). Towards the conclusion of the oral hearing, Mr McAteer sought to introduce and to have considered by the tribunal an additional legal authority (***Bunyan (LO) v Patel [2022] EWHC 1143 (Admin)***). The respondent's representative, Mr Jeffrey, sought from the tribunal additional time in order to consider and to take legal advice concerning this and other issues emerging in consequence of the hearing. The tribunal readily afforded an additional period of time for that purpose to the respondent. Thereafter, the respondent reverted with further written submissions and Mr McAteer was granted by the tribunal a further opportunity to respond to these latter. This then brought the hearing, both in terms of written and oral evidence and also written and oral submissions, to a conclusion. In view of the foregoing matters and the nature of the case, it was explained to the parties at the conclusion of the oral hearing that the tribunal's decision would be reserved. The tribunal is now a position to promulgate its decision, having fully considered all relevant matters. It is important to state that the tribunal fully considered all evidence and submissions from both parties to this appeal in arriving at a determination. Because any argument or matter of evidence might not be expressly referenced in this decision, it is not to be assumed that it was not fully and properly considered by the tribunal.

The Documents Considered

5. The papers and documents which tribunal had before it and considered in making this determination included the following:

- The appellant's Form of Appeal (Form 3) received 9 November 2020, with an annexed document setting out grounds of appeal (the pages of this being signed by the appellant and dated "7/11/20").
- A copy Valuation Certificate issued 27 June 2017 (effective date 1 April 2017) indicating a previous valuation in respect of the property of £150,000 and an updated valuation of £130,000.
- A copy Valuation Certificate issued 9 October 2017 (effective date 1 April 2017) indicating a previous valuation in respect of the property of £130,000 and an updated valuation of £0.
- A copy Valuation Certificate issued 25 September 2019 (effective date not stated) indicating a previous valuation in respect of the property of £0 and an updated valuation of £145,000.

- A copy Valuation Certificate issued 1 October 2020 (effective date not stated) indicating a previous valuation in respect of the property of £145,000 and an updated valuation of £105,000.
- A copy Valuation Certificate issued 5 October 2020 (effective date not stated) indicating a previous valuation in respect of the property of £105,000 and an updated valuation of £105,000.
- A copy Valuation Certificate dated 5 November 2020 indicating a previous valuation in respect of the property of £105,000 and an updated valuation of £105,000.
- Copy of a planning permission document (Ref: LA07/2018/0644/F) in respect of the property, Authority Decision Date 30 May 2018, consequent upon an application received on 16 April 2018, indicating permission granted concerning, "*single storey disabled adaptation and alterations to dwelling*".
- Copy of a planning permission document (Ref: LA07/2019/0286/F) in respect of the property, Authority Decision Date 22 May 2019, consequent upon an application received on 7 February 2019, indicating permission granted concerning, "*replacement dwelling and garage*".
- Copy of a planning permission document (Ref: LA07/2020/0565/F) in respect of the property, Authority Decision Date 5 August 2020, consequent upon an application received on 23 March 2020, indicating permission granted concerning, "*replacement dwelling and retention of derelict house for conversion to garage/garden store in substitution for approval granted under LA07/2019/0286/F*"
- Copy of a document entitled "Presentation of Evidence" prepared by Mr Gerard Fitzpatrick MRICS on behalf of the respondent and dated 14 September 2021. This document sets forth the respondent's position in respect of the appellant's appeal and contains schedules of stated comparators, a location map and internal photographs of the property.
- Copy of the appellant's response to the Presentation of Evidence, which runs to some 11 pages and includes detailed submissions on matters of fact and the law.
- Copy of the respondent's response to the appellant's response to the Presentation of Evidence.
- Some colour photographs of the interior of the property.
- Copy of a document entitled "proposed extensions and alterations" concerning the property prepared by contractor, AMC Building Contracts Ltd.
- Copy correspondence dated 6 November 2020 addressed to Francis McShane, Architect, concerning a tender for the construction of a dwelling house at 3 Windmill Road, Newry.

- Copy correspondence dated 17 December 2020 from Newry, Mourne and Down District Council confirming the following postal address: "*Colm McAteer, 3 Windmill Road, Ballynacraig, Newry BT34 2QW*".
- Some additional colour photographs showing interior and exterior views.
- Copy of a Memorandum of Sale concerning lands situated at 3 Windmill Road, Newry.
- Email communications and correspondence with Land & Property Services (concerning registration issues relating to technical title matters).
- Copy communications between the office of the tribunal and the appellant and respondent.
- A document entitled "Appellant's Submission 27 September 2022" provided to the tribunal by the appellant at the oral hearing held on that date.
- Further communications between the appellant, the respondent's representatives and the tribunal after completion of the oral hearing in respect of additional matters where further written submissions and arguments were permitted by the tribunal, with annexed documents.

The Statutory Provisions

6. The fundamental statutory provisions bearing upon this appeal are to be found in the 1977 Order, as amended by the Rates (Amendment) (Northern Ireland) Order 2006 ("the 2006 Order"). Article 8 of the 2006 Order amended Article 39 of the 1977 Order as regards the basis of valuation, more of which below. These provisions have been fully set out in many previous decisions of the Valuation Tribunal, readily available. All relevant statutory provisions and principles were fully considered by the tribunal in arriving at its decision in the matter. Antecedent Valuation Date ("AVD") is the date to which reference is made for the assessment of Capital Values in the Valuation List. Until a further domestic property revaluation occurs, Capital Values are, under the statutory regime, notionally assessed as at 1 January 2005, that being the AVD for the purposes of the domestic rating scheme. The 2006 Order amending legislation to the 1977 Order, at Article 8 (2), provides that in Part 1 of Schedule 12 (concerning the basis of valuation), after paragraph 6 was to be inserted paragraph 7. Paragraph 7 (3) provides that the assumptions mentioned in paragraphs 9 to 15 shall apply for the purposes of determining whether one hereditament is a comparable hereditament in the same circumstances as another, this being the statutory test underpinning valuation. These assumptions thus must be applied appropriately. However, the tribunal wishes in this decision to make some further observations regarding this latter issue. The material ("assumption") provisions, for the purposes of this determination and which the tribunal explored with the parties, read as follows:-

11. The hereditament is sold free from any rentcharge or other incumbrance;

12. – (1) The hereditament is in an average state of internal repair and fit out, having regard to the age and character of the hereditament and its locality.

(2) The hereditament is otherwise in the state and circumstances in which it might reasonably be expected to be on the relevant date.

The following further statutory provisions were referenced in submissions:

The 2006 Order, Schedule 12, Paragraph 15 (1), which provides a statutory assumption, as follows:

15.—(1) There has been no relevant contravention of—

(a) any statutory provision; or

(b) any requirement or obligation, whether arising under a statutory provision, an agreement or otherwise.

(2) In sub-paragraph (1) "relevant contravention" means a contravention which would affect the capital value of the hereditament.

In regard to the 1977 Order, Schedule 5, Article 7, which provides as follows:

7.—(1) In this Order "private storage premises" means a hereditament which is used wholly in connection with a dwelling-house or dwelling-houses and so used wholly or mainly for the storage of domestic articles belonging to the residents.

(2) In sub-paragraph (1)—

"domestic articles" means—

(a) household stores and other articles for domestic use;

(b) light vehicles, whether mechanically-propelled or not;

"residents" means persons residing in the dwelling-house or dwelling-houses referred to in sub-paragraph (1)

In regard to the 1977 Order, Schedule 6 (1)(f), which provides as follows:

1. In this Order—

"material change of circumstances" means a change of circumstances which consists of—

…….(f) a hereditament becoming or ceasing to be a dwelling-house; …

In regard to the 1977 Order, Article 25B, which provides as follows:

New buildings

25B.—…

(5) Where—

(a) a day is determined under Schedule 8B as the completion day in relation to a new building, and

(b) the building is one produced by the structural alteration of an existing building,

the hereditament which comprised the existing building shall be deemed for the purposes of Article 25A to have ceased to exist, and to have been omitted from the list, on that day.

(6) In this Article—

(a)"building" includes part of a building; and

(c) *references to a new building include references to a building produced by the structural alteration of an existing building where the existing building is comprised in a hereditament which, by virtue of the alteration, becomes, or becomes part of, a different hereditament or different hereditaments.*

Article 8 of the 2006 Order (amending Article 39 of the 1977 Order), which provides as follows:

Basis of valuation

8.—(1) In Article 39 of the principal Order (basis of valuation), for paragraph (1) there shall be substituted the following paragraphs—

" Basis of valuation

39.—For the purposes of this Order every hereditament shall, except as provided by paragraphs (1A) to (1C), be valued upon an estimate of its net annual value.

(1A) For the purposes of this Order the following hereditaments shall be valued upon an estimate of their capital value—

(a) any dwelling-house;

(b) any private garage;

(c) any private storage premises.

……

(1C) For the purposes of paragraphs (1A) and (1B), any hereditament—

(a) which is not in use; and

(b) which the Commissioner or the district valuer considers will, when next in use, fall within any sub-paragraph of paragraph (1A) or within paragraph (1B),

shall be deemed to be in use and to fall within that sub-paragraph of paragraph (1A) or, as the case may be, within paragraph (1B).".

The Interpretation Act (Northern Ireland) 1954, at Section 45, which provides as follows:

References relating to land.

(1) In any enactment passed after the commencement of this Act the expression—
(a) "land" shall include—

(i)…. hereditaments of any tenure;

(ii)-;

(iii) any estate in land….; and

(iv) houses or other buildings or structures whatsoever;

(2) In any enactment… "estate", when used with reference to land, includes any legal or equitable estate or interest, easement, right, title, claim, demand, charge, lien or encumbrance in, over, to or in respect of the land.

In addition to the foregoing statutory provisions, a number of case law authorities were introduced into submissions and certain of these are referenced by the tribunal further below, with the tribunal's observations regarding any principles of law emerging from any of these which are applicable to this appeal.

Findings of Fact Relevant to the Issues

7. The tribunal made findings of fact derived from the evidence, relevant to the issues, including the following:-

7.1 The property (which for the purposes of this determination refers to the lands with a structure erected thereon located at 3 Windmill Road, Ballynacraig, Newry, Co Down BT34 2Q) has been in the appellant's immediate family for a considerable number of years. Any reference to the property is hereafter primarily directed to the structure situated upon the lands at that location. It appears that some refurbishment work had been carried out to the property by the appellant's family a few decades ago and thereafter, as far as the tribunal understands it, the property remained in the same state and circumstances until the appellant commenced carrying out certain works to the property in 2017.

7.2 The tribunal has noted correspondence from Land and Property Services (LPS) to the appellant dated 4 December 2017 and 2 February 2018 which sets forth certain information communicated by LPS to the appellant. This concerns matters of background information and indeed alludes to and concedes some errors made by LPS. Errors mentioned included confusion regarding the appellant's legal status regarding the property after his late father's demise. It is unnecessary to recite the detail in this determination and this is only mentioned for the reason that it led to an abatement being applied in rating liability for a prior rating period up to April 2017, at which point the property was temporarily removed from the Valuation List. The correspondence confirms that this removal was on account of ongoing work that was accepted by LPS as being undertaken at the property. The consequent Valuation Certificate issued on 9 October 2017 bears out this reduction in the Capital Value from £130,000 to £0, with the stated explanation in the Valuation Certificate: "*Subject removed temporarily from Valuation List due to works*".

7.3 The appellant has a disability. Planning permission dated 30 May 2018 (Ref: LA07/2018/0644/F) was granted to the appellant for, "*single storey disabled adaptation and alterations to dwelling*". This work involved, primarily, stripping out the interior to the property, removing interior walls and disconnection of services. As was explained to the tribunal by the appellant, an electrical power supply needed to be maintained for storage purposes. However, a septic tank was disconnected as was the mains water supply. The appellant resided in an adjacent property at 1 Windmill Road at this time.

7.4 The appellant's oral evidence, coupled with photographic evidence concerning the interior, shows that the property was used for storage of such items as garden tools and equipment and bicycles, amongst other things. The further evidence, which has not been directly controverted by any evidence from the respondent, is that from the time these works were carried out and the property commenced being used for storage, that is to say from 2017, there has been no significant material alteration or construction works carried out to the property nor any alteration to the use of the property for storage purposes and not as a habitation.

7.5 Notwithstanding that work had been carried out to the interior of the property, the structural envelope of the property remained intact. It remained watertight and weathertight, with windows and doors intact and functioning. The photographic evidence bears this out, including evidence of such matters as rainwater goods in situ and a seemingly undamaged tiled roof and wooden framed windows, with no obvious evidence of damage, deterioration or decay to the exterior.

7.6 The appellant, it is understood for reasons of cost and feasibility, then decided not to proceed with the disabled adaptation and alterations to the property. He applied for further planning permission. This was granted on 22 May 2019 (Ref: LA07/2019/0286/F) for, "*replacement dwelling and garage*". However, no further work was carried out on foot of this planning permission at the time this was granted.

7.7 The appellant then had a further change of plan. He applied again for planning permission. This third planning permission was granted on 5 August 2020 (Ref: LA07/2020/0565/F) for, "*replacement dwelling and retention of derelict house for conversion to garage/garden store in substitution for approval granted under LA07/2019/0286/F*". Accordingly, for the first time this third planning permission contemplated the retention of what is described as being the "derelict house", for conversion to storage premises. This also reiterates the 2019 permission, which contemplated a replacement dwelling. The material change in the third planning permission is therefore the retention element included.

7.8 The rating history, that is to say beyond 2017, indicates that a Valuation Certificate was issued on 25 September 2019 which indicates a previous valuation in respect of the property of £0. This latter references the Valuation Certificate issued on 9 October 2017 (effective date 1 April 2017) indicating a

previous valuation in respect of the property of £130,000, with the updated valuation then being £0. The reinstatement of the property into the Valuation List and the updated valuation indicated in the 25 September 2019 Valuation Certificate was £145,000. Thereafter followed a number of Valuation Certificates dated, respectively, 1 October 2020 (previous valuation £145,000, updated valuation £105,000); 5 October 2020 (previous valuation £105,000, updated valuation £105,000); and 5 November 2020 (previous valuation £105,000, updated valuation £105,000).

7.9 The appellant did not appeal any Valuation Certificate prior to that dated 5 November 2020, notwithstanding that the property had been reinstated in the Valuation List as evidenced in the Valuation Certificates of 25 September 2019 and thereafter. It is not fully clear to the tribunal why that was the case save, perhaps, that this might be in some manner connected to the appellant's change of plan concerning the retention of the structure for conversion to storage premises, this being as contemplated in the 5 August 2020 planning permission.

7.10 The appellant's proposal to proceed with works in accordance with the planning permissions obtained ran into a legal difficulty concerning site access. Clearly, the appellant wished to endeavour to resolve matters. Firstly, in August 2018 the appellant entered into a contract to purchase land in order to facilitate site access. Registration of the land interest acquired under that purchase contract, however, encountered difficulties. The Land Registry, at title registration stage, raised queries of a technical nature regarding root of title (which issues do not need a full explanation to be set out in this decision). Apart from such matters of a technical land registration nature, it appears that the appellant had encountered, since 2017 and onwards, some very practical site access issues and indeed obstruction, whereby he was unable, legally, to arrange for construction access, pending further legal proceedings being taken by him.

7.11 The appellant, accordingly, issued injunctive proceedings on 4 December 2020 in the High Court in Northern Ireland in a case entitled ***Colm McAteer v John Keeley and Geraldine Keeley***. This action concerned a right-of-way in relation to a laneway leading from Windmill Road, Newry, to the appellant's lands at number 3 Windmill Road and sought to restrain the named defendants (who resided at 5 Windmill Road) from obstructing the right-of-way which the appellant claimed. He obtained a High Court interim injunction on 11 December 2020 against the named defendants and thereafter was successful in obtaining a final judgment which was delivered on 6 August 2021 by Colton J.

7.12 The salient facts, as determined Colton J, are fully set out in the High Court judgment but, essentially, after having obtained planning permission the appellant appointed a builder who was due to commence work. However, access was required for vehicles involved with the construction process. As Colton J mentions in the judgment, the appellant issued proceedings on 4

December 2020 and he obtained an interim injunction on 11 December 2020, which restrained the defendants to the case from obstructing the laneway. Ultimately, the concluding determination of the High Court was to grant the appellant a right-of-way, together with an injunction restraining the named defendants and others from obstructing this.

7.13 As the appellant asserts in his written and oral submissions - and with which assertions, as a matter of fact and law the tribunal agrees - until the (interim) injunction was granted in December 2020, the appellant could not commence building works. The appellant was thus legally constrained in doing so up to that point.

7.14 Once this legal constraint was, first of all temporarily and then permanently, removed, the appellant proceeded with the necessary construction work in accordance with the 2020 planning permission and a new dwelling was constructed upon the site. The water supply and the septic tank were connected to this new dwelling. Documentation from Northern Ireland Electricity Networks dated 25 March 2021 together with associated mapping provides evidence of electrical line alteration with associated field work indicating electricity connection to the newly-constructed dwelling at 3 Windmill Road. Further, the local Council, Newry, Mourne and Down District Council by letter dated 17 December 2020 under the title "*POSTAL NAMING AND NUMBERING SCHEME ALLOCATION OF ADDRESS*" states as follows: "*Colm McAteer, 3 Windmill Road, Ballynacraig, Newry BT34 2QW*", thereby confirming that with effect from mid-December 2020 the postal address had been allocated to the newly-constructed dwelling.

7.15 Although the precise facts in this regard were not fully recounted to the tribunal in the respondent's evidence, from the appellant's evidence, which seemingly was not contradicted (at least not expressly so in the oral hearing), the tribunal understands that, with effect from 20 December 2021, the respondent classified the older structure, for rating purposes, as being storage ancillary to the newly-constructed dwelling. In his oral evidence the appellant alluded to a Valuation Certificate giving effect to that. At that point, if not before, the respondent appears to have accepted that the property had ceased to be a domestic dwelling to be included as a distinct hereditament in the Valuation List.

The Appellant's Submissions

8. From the appellant's written submissions and the submissions orally made by him at hearing, the tribunal can summarise the appellant's arguments, upon matters of fact and law, as follows:

8.1 The property had been removed from the Valuation List on 9 October 2017 (the Valuation Officer being a Mr Miller) and it was not at that date regarded by the

respondent as capable of beneficial occupation due to works having commenced to structurally alter the property (as distinct from repairing the property). It is contended that it has never been maintained on behalf of the respondent that that decision was wrong.

8.2 In terms of further works to the property beyond that date which might have affected its status or Capital Value, there have been none of any significant and material nature.

8.3 The revised Valuation Certificate was issued on 25 September 2019 (Valuation Officer Ms McIntyre) without consultation nor any further inspection of the property. This had the effect of reinstating the property in the Valuation List, at an updated Capital Valuation of £145,000.

8.4 The foregoing reinstatement of the property in the Valuation List was at a figure higher than prior to removal and it included a "derelict shed" which had previously been removed on 27 June 2017.

8.5 Whilst the respondent submits that the property has been inspected in accordance with statutory requirements no evidence of that has been provided nor any explanation as to why a stated derelict shed had been included. It is asserted that the respondent failed to follow proper procedure.

8.6 Examining the latter part of the history of applications for planning permission, the approved application of 5 August 2020 granted planning permission to the appellant to retain the former dwelling, in terms as the permission states: "for *conversion to garage/garden store in substitution for approval granted under LA07/2019/0286/F*".

8.7 The property was inspected (Valuation Officer Ms Allen) on 24 July 2020. The Valuation Officer carried out an external inspection only (refusing to inspect the interior) but agreed to again remove the derelict shed from the valuation and also agreed that the property was smaller than had been recorded for the respondent. In this latter regard, the appellant's submission is that the Valuation Officer, in error, applied statutory assumptions concerning internal repair (failing to conduct an internal inspection) prior to first giving consideration to the issue of whether it could be established that a hereditament existed.

8.8 By Valuation Certificate dated 1 October 2020 the Capital Value was reduced (from £145,000 to £105,000) to reflect the removal of the outbuilding and the incorrect size.

8.9 On 17 December 2020 the Council reallocated to the appellant the address ("3 Windmill Road, Ballynacraig, Newry, Co Down BT34 2QW") concerning the replacement dwelling as per statutory planning permission granted on 5 August 2020. In respect of the respondent's submissions regarding the import

of 2006 Order, Schedule 12, paragraph 15 (1), the assertion is made that the respondent believes it can disregard lawful planning permission but has failed to direct the tribunal to where this power lies. The tribunal is invited to focus upon the statutory words “relevant contravention”.

8.10 The respondent should have had proper regard to the granting of statutory planning permission and ought to have followed relevant statutory procedures with reference to the 2006 Order, Article 8 (1C), and the statement in that provision that any property should be placed in the Valuation List and valued as when next in use. It is asserted that the respondent altered the statutory wording to suggest that a hereditament removed from the Valuation List, when returned, continued to be as it was before removal.

8.11 It is submitted that Schedule 6 (1) (f) permits a material change and for a dwelling house to cease to be a dwelling house. Whilst Valuation Officer, Mr Fitzpatrick, would not accept this proposition in November 2020, Valuation Officer, Ms Stewart, accepted the change on 10 May 2022.

8.12 Regarding the case law authority of ***Wilson v Coll [2011] EWHC 2824 (Admin)*** it is of note in that case that there had been no changes to the subject appeal property and the law since last occupied, but that the respondent has disregarded changes to the property and had disregarded the import of the decision of the UK Supreme Court in ***Newbigin (Valuation Officer) v S J & J Monk [2017] UKSC 14.***

8.13 Despite previous Valuation Officers failing to inspect the property internally, Valuation Officer, Mr Fitzpatrick, did inspect the interior and took photographs. The appellant had submitted photographs taken from the time of the decision of Mr Miller in October 2017 and it is asserted that nothing had changed between then and October 2020 when Mr Fitzpatrick inspected the property. Whilst the respondent’s submissions from February 2022 were to the effect that on 5 October 2020 the property was in the process of being adapted with a view to being occupied as a domestic dwelling, this is untrue and is indeed asserted as being an attempt to mislead the tribunal for, at that time, planning permission was in place and the premises when next in use would be used as storage premises - and were indeed already being used for storage premises, as confirmed by Mr Fitzpatrick. By that date the appellant was living at 1 Windmill Road and was using the property as storage for use with that dwelling.

8.14 Whilst the respondent’s assertion is that storage premises can only be used in association with a replacement dwelling, the appellant submits that Schedule 5, Article 7, can be used in association with a dwelling or dwellings and, in that regard, the appellant asserts that he has provided evidence of storage

premises at a location, Courteney Hill, which are valued independently of a dwelling in accordance with the statutory provisions.

8.15 The facts are that the utilities to the former dwelling (the property) were disconnected and, whilst the respondent asserts that in hypothetical terms external utilities can be reconnected, there is no hypothetical proposition in the 1977 Order and any statutory assumption as to repair under Schedule 12 is in relation to internal repairs only and, further, only if the hereditament test has been satisfied – not to satisfy the hereditament test. It is asserted, accordingly, that the respondent is mistaken in the proper sequence.

8.16 The Valuation Officer, Mr Miller, removed the property from the Valuation List on 9 October 2017 due to ongoing works which were regarded as making the property incapable of beneficial occupation. Valuation Officer, Mr Fitzpatrick, on 5 November 2020 refused to do so, but he does not explain why, when nothing fundamentally had changed, that the property is then regarded as being capable of beneficial occupation.

8.17 Regarding the case law authorities cited, the respondent has asserted that the UK Supreme Court decision of ***Newbigin v Monk*** is inapplicable as being not relevant to the Northern Ireland jurisdiction and legislation. The respondent however relies on the case of ***Wilson v Coll*** which also relates to the same legislation and jurisdiction as that considered in ***Newbigin v Monk*** but however by a lower court. There have been other recent decisions concerning UK domestic rating and it is asserted that ***Wilson v Coll*** has been superseded by ***Newbigin v Monk*** and also such cases as ***Bunyan (LO) v Patel [2022] EWHC 1143 (Admin)*** and it is submitted that the tribunal must consider the Supreme Court case and more recent cases in also considering ***Wilson v Coll***.

8.18 It is asserted that the position of the respondent is, to this extent, illogical for the hereditament test relied upon stemming from ***Wilson v Coll*** also takes account of the Council Tax Manual, Practice Note 4 (a copy of which has been helpfully provided to the tribunal by the appellant). It is asserted that, whilst Mr Fitzpatrick took photographs upon his inspection but he did not submit them to the tribunal, the appellant however has done so and has submitted such photographs to the tribunal. Mr Fitzpatrick did not take into account the fact that the property was “a shell internally with no utilities and that nothing needed to be done to alter it to storage premises”. The respondent has, however, subsequently accepted that it was storage premises, despite no further alterations being made.

8.19 As a matter of statutory interpretation the respondent submits that the word used in the statutory provision “incumbrance” means any encumbrance - in the broad dictionary definition. The appellant has referred the tribunal to

certain definitions in legislation: to the 1925 Law of Property Act (which does not apply to Northern Ireland) and to the Conveyancing Act 1881 (which does continue to apply in Northern Ireland) and also to the Interpretation Act (Northern Ireland) 1954, chapter 33, paragraph 45. In a commentary, the appellant states that whilst definitions were given in British legislation in interpretation, it is unreasonable to expect Northern Ireland to "use a dictionary", as he puts it. A further point, connected with statutory interpretation, is made by the appellant in reference to 2006 Order, Schedule 12, Paragraph 15 (1), which provides for a statutory assumption that there has been no relevant contravention of: (a) any statutory provision; or (b) any requirement or obligation, whether arising under a statutory provision, an agreement or otherwise, in this case "relevant contravention" meaning a contravention which would affect the Capital Value of the hereditament. In this regard, the appellant's contention is that, far from contravening any statutory provision (in this case the statutory planning permission granted), the appellant has been in full compliance: he has not "contravened" anything. Accordingly, in the absence of any contravention on his part, the respondent is not entitled to exclude the significance of planning permission from consideration on the basis of the statutory assumption provided by Schedule 12, Paragraph 15 (1).

8.20 Post-hearing, the appellant made submissions, including the following. Schedule 12 paragraph 15, allowed the respondent to disregard any "contraventions" and thus allowed the respondent to value a property as if it had not contravened planning legislation. However, in this case there was no question that the property was a dwelling, being used as a dwelling, and should therefore be valued as a dwelling, as if it did have statutory planning permission. The respondent had argued that the legislation allowed it to disregard all planning, whether lawful or upon contravention. However, the respondent was restricted to only disregarding planning contraventions and, only once a hereditament has been established, what type of hereditament it was, and to comparing it for valuation purposes to similar hereditaments. The appellant was using the former dwelling as storage, not as a dwelling. The property had lawful planning permission, which pre-dated 5 October 2020, to be converted for use as storage premises. It had already, in 2017, been converted and continued to be used as storage premises in connection with the dwelling at 1 Windmill Road from April 2019 and then subsequently with the newly-constructed property at 3 Windmill Road. Whether or not the appellant could legally use the property as a dwelling was asserted to be a new argument and a distraction. Schedule 12, paragraph 15, made it clear that if a dwelling did not have legal planning permission it could still be valued for domestic rating as if it had such. The argument now made by the respondent that the property only ceased to be a dwelling for rating purposes on 20 December 2021, had been addressed in the hearing. The respondent

had already argued that the property had the outward appearance of a dwelling and therefore had to be treated as a dwelling for rating purposes but, as submitted by the appellant at hearing, without any change, it "transformed" from a dwelling to storage premises on 20 December 2021. Whilst the respondent now argued that there were no ongoing works apparent on inspection in October 2020, there were no ongoing works apparent on 10 May 2022, yet the respondent still changed the status to storage from 20 December 2021, when it was not inspected and when there was no apparent work being undertaken. The respondent was choosing to disregard the fact that the property was removed from the Valuation List on 9 October 2017 due to ongoing works and it was not capable of beneficial occupation. This was the same circumstances as in ***Newbigin v Monk*** which was a decision that pre-dated the decision to remove the property. The bulk of the works undertaken at the date that the property was removed from the Valuation List on 9 October 2017 were sufficient to allow the property to be treated by the planning authorities (and post - 20 December 2021 by the Respondent) as storage premises, without any further change. The respondent was mistaken in the belief that it has statutory power to make assumptions about connecting external utilities and that this would constitute more than "repair".

The Respondent's Submissions

9. The position of the respondent in respect of this appeal can be gleaned from, firstly, the Presentation of Evidence content, secondly, the position articulated on behalf of the respondent in a number of communications responding to written submissions made by the appellant, thirdly, from the respondent's position in accordance with the evidence and submissions presented in the oral hearing and, finally, upon invitation by the tribunal to present further submissions (after the respondent had been afforded the facility to seek further legal advice, upon the conclusion of the oral hearing) and anything further received by the tribunal from the respondent in that regard. Further details of this position and the various submissions are now mentioned below.

9.1 The Presentation of Evidence prepared by Mr Fitzpatrick and dated 14 September 2021 commences by reciting the applicable statutory provisions contained in Schedule 12, Paragraph 7 of the 1977 Order with particular reference to the "capital value assumptions" which are set forth. Of particular interest to the tribunal in this appeal is the statutory assumption mentioned in Paragraph 12 (1) that: "*the hereditament is in an average state of internal repair and fit out, having regard to the age and character of the hereditament and its locality*". This may be referred to, in short, as being the "average internal repair assumption". Further to that, Paragraph 15 (1) is an assumption that: "*there has been no relevant contravention of (a) any statutory provision;*

or (b) any requirement or obligation, whether arising under a statutory provision, an agreement or otherwise." In regard to the term "relevant contravention" the meaning of this is clarified by the following sub-paragraph as meaning a contravention which would affect the Capital Value of the hereditament.

9.2 The Presentation of Evidence then proceeds to recite the history and background of the matter with specific reference to the dates 24 July 2017, 25 September 2019, 12 June 2020, 14 October 2020 and then 9 November 2020 when the appellant submitted his appeal to this tribunal. Thereafter the Presentation of Evidence copies the text of the appellant's grounds of appeal as annexed to his appeal form. There is a brief property description then provided, with two external photographs of the property.

9.3 The Presentation of Evidence then provides, in terms, a rebuttal of the stated grounds of appeal and deals with the inclusion of the ***Newbigin v Monk*** case in the appellant's submissions. An effort is made to distinguish the subject matter of that case, with the submission being advanced that the UK Supreme Court's ruling relates to a non-domestic property which was being redeveloped to create three separate non-domestic hereditaments. However, the respondent's position is that it is not considered that the works which have been undertaken to date by the appellant on the property can be described as redevelopment. Further, the Supreme Court's judgment references statutory provisions which do not apply in Northern Ireland. It is asserted that there is therefore no basis to support the adoption of this rationale in assessing a domestic property for rating purposes in this jurisdiction. Instead, there must be reference made to the relevant provisions contained within the 1977 Order and the "hereditament test" must be applied. Reference is then made to a further case cited by the appellant in his submissions. The legal authority cited is ***Appeal by Assessor, Tayside Joint Valuation Board against a Decision of the Valuation Appeal Committee for Perth and Kinross [2017] CSIH 64 XA22/17***. The observation made on behalf of the respondent concerning this case mentions that this case involved a domestic property stated to have been undergoing repair and improvement works in 2016. The Scottish Assessors believed the property should remain in the Valuation List but the Valuation Appeal Committee overturned that decision, concluding that the subject had ceased to be a dwelling. The comment is made that the Scottish Court of Sessions ultimately decided that a dwelling existed throughout the works and that the subject should remain in the Valuation List, thus reversing the decision of the Valuation Appeal Committee. There is an extract cited from paragraphs 24, 26 and 27 of the judgment of the Court of Session which, amongst other matters, it makes reference to the case of ***Newbigin v Monk***. The ***Tayside*** judgment mentions matters of fact specific to the case and that the alterations in the case did not involve redevelopment and subdivision of the house to create more than one house, in contrast to the subject matter of ***Newbigin v Monk***, where a single office building was refurbished and redeveloped to create three separate office premises.

Accordingly, the observation is made on behalf of the respondent that, contrary to the view of the appellant, this Court of Session decision supports the argument that, in the instant case, the property should remain in the Valuation List for the reason that the property had similarly undergone adaptations to accord with the preferences of the appellant and, further, the subject had, as submitted, retained and continued to retain the character of a domestic dwelling. Further, the legislation referenced in the Scottish judgment did not apply in Northern Ireland.

9.4 The submission on behalf of the respondent then proceeds with a commentary referring to the often-cited case of ***Wilson v Coll*** and the so-called "hereditament test". The Northern Ireland Valuation Tribunal decision in the case of ***Eric McComb v The Commissioner of Valuation*** (which in that case also references an earlier case of ***Whitehead v The Commissioner of Valuation***) is stated to have affirmed the tribunal's proper approach to these matters in Northern Ireland. On that premise, so it is argued for the respondent, if one applies the "hereditament test" to the property, with a reasonable amount of repair works the property could be occupied once again as a dwelling. Upon inspection, it was noted that some internal walls had been removed. However these works were undertaken with a view to adapting the living space in accordance with the appellant's requirements. These works had now ceased, with the appellant confirming that the renovation of the property would not proceed. It is asserted that the property continued to be weathertight and the fabric of the building remained completely intact. As, so it is submitted for the respondent, a hereditament continued to exist, this hereditament should remain in the Valuation List.

9.5 The submission continues, in respect of matters internal repair, that Schedule 12, Paragraph 12 (1) of the 1977 Order states that it must be assumed that the property is in an average state of internal repair and fit out, having regard to the age and character of the hereditament and its locality. With this in mind, internal repair issues such as the removal of the internal walls, as detailed by the appellant, must be disregarded for the purposes of assessing the property for rating.

9.6 Next, the planning permission history is mentioned in the respondent's submission, with the comment that, whilst it is the case that the revised planning application (LA/07/2020/0565/F) (the 2020 permission) has indicated that the property is now to be utilised as a garage/garden store, at the date of the relevant District Valuer's Certificate the subject retained the characteristics of a domestic dwelling and there was no evidence of any works having commenced to alter the property for this proposed future use. Specifically, reference is made to Schedule 12, Paragraph 15 of the 1977 Order where it must be considered that: (1) there is been no relevant contravention of (a) any statutory provision; or (b) any requirement or obligation whether arising under a statutory provision, an agreement or otherwise. ("Relevant contravention" is as mentioned above). The proposition, accordingly, is that planning permission, whether granted or refused, cannot be taken into consideration

when assessing the Capital Value for rating purposes. Instead one must envisage a hypothetical sale of the property in accordance with the statutory provisions whereby is assumed that the hypothetical seller and purchaser are both reasonable people. The state and circumstances as they exist at the date of the District Valuer's Certificate must be considered.

9.7 The conclusion on behalf of the respondent is that the property was in the nature of a domestic dwelling house and not a garage or garden store. Returning to the proper application (or otherwise) of ***Newbigin v Monk***, in the course of the oral hearing, the tribunal sought to enquire directly from the respondent's representative, Mr Jeffrey, about whether it was accepted for the respondent that the Supreme Court case and the legal principles enunciated therein, notwithstanding that ***Newbigin v Monk*** was a case, factually, concerning non-domestic rating, were nonetheless applicable to domestic rating matters in Northern Ireland. The tribunal is grateful for the confirmation afforded in answer that this point, in that it was accepted by the respondent that legal principles emanating from the Supreme Court in ***Newbigin v Monk*** are indeed applicable to domestic rating matters in Northern Ireland.

9.8 The respondent's concluding submissions, post-hearing, were that the 2020 planning permission confirmed that the property retained its legal status as a dwelling and remained available for human habitation until the new dwelling became occupied in December 2021. Further, Schedule 12 paragraph 15 was of very limited significance in the case because the necessary planning permission existed at the relevant date. The purpose of the statutory assumption was to allow the respondent to assume that the necessary permissions and approvals were in place. These were not a mechanism that should only apply in circumstances where a property was occupied (which it was submitted was what the appellant had suggested); it applied equally in all circumstances where a domestic property was to be assessed for rating purposes. The respondent also wished to highlight the fact that there was no active programme of works at the relevant (appeal) date: the appellant had confirmed during the hearing that any works were limited and had ceased several years earlier, in 2017.

The Tribunal's Assessment of the Legal Principles from the Statutory and Case Law

10. The tribunal has had regard to a number of legal authorities cited in argument in this case. The first of these cases, upon which the appellant places considerable emphasis in his submissions, is the case of ***Newbigin v Monk***, a determination of the UK Supreme Court, with judgment being given on 1 March 2017. (As mentioned, the principles emanating are accepted as applicable in Northern Ireland by the respondent). This was a case relating to commercial property. As would be so in regard to any judgement of the

Supreme Court, the case is to be read, as far as pertains to this appeal, in respect of any salient principles of applicable law. Whilst, in the submissions made on behalf of the respondent, it is sought to distinguish ***Newbigin v Monk*** from the instant case, for example, as ***Newbigin v Monk*** related to commercial premises, not domestic, and also that the case was addressing different statutory provisions and a different rating regime to that which prevails in Northern Ireland, nonetheless central to the judgment as articulated by Lord Hodge, with whom the other four Law Lords agreed, is a consideration of certain fundamental valuation principles of broader remit than to the facts specific to that case. The judgment alludes to the *rebus sic stantibus* principle in rating law ("as things stand"): that is otherwise referred to as, "the reality principle". There is a discussion in the ***Newbigin v Monk*** judgment regarding the extent to which statutory provisions might supplant the reality principle and, if so, to what degree. Case law has distinguished between mere lack of repair, which did not affect rateable value, and redevelopment works which made a building uninhabitable. The correct approach, cited with approval in ***Newbigin v Monk***, is, firstly, to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament, secondly, if the property is a hereditament, to determine the mode or category of occupation and then, thirdly, to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. The first two of the three stages of that process involve the application of the reality principle. At the third stage, the Valuation Officer applies the statutory assumption. This is stated to be a helpful approach to a building that is undergoing redevelopment. The subjective intentions of the owner are not relevant to the reality principle: the matter must be assessed objectively. However, any programme of works being undertaken may be considered by the Valuation Officer. This tribunal believes that there is no reason whatsoever not to apply the pertinent principles emerging from ***Newbigin v Monk.*** Dealing with one specific argument advanced on behalf of the respondent, the fact that ***Newbigin v Monk*** deals with non-domestic property, the appellant has cited the Scottish Court of Session case of ***Assessor, Tayside Joint Valuation Board against A Decision of the Valuation Appealed Committee for Perth and Kinross [2017} CSIH 64,*** not, as the respondent's side is quick to point out, because the outcome in the case favoured the property owner, but rather because the case featured a domestic property in Scotland and observations were made by the Court of Session in that case both concerning the ***Newbigin v Monk*** case and also ***Wilson v Coll***. This Court of Session judgment confirms the correctness of the principle that the valuation assumptions (under Scottish law) only applied for the purposes of the valuation of dwellings and that these assumptions had no role to play in determining the prior question of whether a subject was indeed a dwelling. Only if the prior question was determined in the affirmative did one reach the second stage, which was to determine the appropriate valuation (in this case using the statutory regime applicable in Scotland of

Council Tax Bands) by applying the statutory assumptions contained in the applicable regulations.

11. The ***Tayside*** judgment states [Para.13 &14]:

> "*Accordingly, when determining whether subjects are, or remain, a dwelling it is not correct to treat them as if they are in a state of reasonable repair if in fact they are not. The assumption* [in the relevant statutory regulations] *does not apply at that stage. Rather, regard has to be had to the subjects' actual state and existing use. [14] We are clear as a matter of ordinary construction that the two stage approach we describe is the correct one. In our view it is clear that in deciding whether the subjects were a dwelling it looked at their actual state. In determining the issue it did not apply the…. valuation assumption that the subjects were in a state of repair*".

12. The appellant included in his submission on the day of the oral hearing a reference to the recent case of ***Dawn Bunyan (Listing Officer) v Lexmi Patel [2022] EWHC 1143 (Admin)***. This judgment of the High Court in England, per Mrs Justice Lang, alludes to the case of ***Newbigin v Monk*** and contains extracts from the speech of Lord Hodge in that latter case, specifically in reference to the necessary approach, that being in this order: (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament (ii) if it is a hereditament to determine the mode or category of occupation and then (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. ***Bunyan v Patel*** is a domestic rating case. It is clear from the judgment of the English High Court in ***Bunyan v Patel*** that the principles in ***Newbigin v Monk*** may be readily applied in domestic rating cases. Further, the principles in ***Wilson v Coll*** remain relevant, but subject perhaps to a more nuanced interpretation. Whilst part of the thinking in ***Bunyan v Patel*** related to technical issues concerning Council Tax bands, the following extracts from a passage set out at the conclusion of ***Bunyan v Patel*** [Para.37] might be helpfully cited:

> "*The test enunciated by Singh J* [that is to say in **Wilson v Coll**] *is, of course, not limited to "derelict", implying severely neglected, properties. ….. A property may be incapable of beneficial occupation because it is currently undergoing major reconstruction works or because major reconstruction works will be required before it can be occupied….. I consider that the Listing Officer in this case was correct to concede that, once the respondent decided to undertake major reconstruction works at the Property in September 2020, the entry on the list should be deleted because the Property was no longer capable of beneficial occupation".*

13. It is clear to the tribunal that the genesis of a very considerable body of rating law over many years and throughout the United Kingdom derives from (in rather archaic terminology) seeking the avoidance of, or guarding against, "a

mischief". As has been expressed in a considerable number of cases, this "mischief" is any endeavour by a ratepayer, perhaps by removal of certain fixtures and fittings or by engendering a degree of disrepair, intentionally and for such a malign purpose to avoid the payment of rates - rates of course being a tax on property. Addressing this potential "mischief", accordingly, is the reason underpinning the existence of certain statutory provisions making this endeavour to avoid property rates, in the prescribed circumstances, either impossible or extremely difficult to attain. The tribunal fully recognises, without any difficulty, that the tribunal must be astute in applying a comparatively strict view of matters, otherwise avoidance would be facilitated; the tribunal must of necessity adopt a cautious approach and a relatively narrow interpretation. Appeal cases are replete with entirely justified criticism by the higher courts of various courts and tribunals which have taken an unduly liberal view in this area.

14. Examination of the specific facts of any case affords to the tribunal a measure of discretion in applying the law to the facts. This discretion, dependent upon the determined facts, materially relates to whether the so-called "hereditament test" has been satisfied, or not. Examining the legal authorities, the tribunal concludes that it can only move on to the next stage or stages (identified in the authorities mentioned above) once the fundamental hereditament test has been positively determined. This must be determined at the first stage. The tribunal harbours no doubt that this is the correct legal principle to be applied in this jurisdiction and that any other approach cannot be in accordance with established principles of law. For example - and for the avoidance of any doubt - the tribunal is not permitted to consider and to apply the statutory assumptions prior to first arriving at a determination of whether any domestic property ought properly to be included in the Valuation List. The tribunal is fortified in its view of the correctness of this approach by the following extract from ***Newbigin v Monk*** [para. 22 per Lord Hodge] (where the Supreme Court approves of what it describes as a "helpful intervention" from the Rating Surveyors' Association and the British Property Federation) in the following terms:

> "… *Where works were being carried out on an existing building, the correct approach was to proceed in this order: (i) to determine whether a property is capable of rateable occupation at all and thus whether it is a hereditament, (ii) if the property is a hereditament, to determine the mode or category of occupation and then (iii) to consider whether the property is in a state of reasonable repair for use consistent with that mode or category. The first two stages of that process involve the application of the reality principle. At the third stage the valuation officer applies the statutory assumption* [referring to the applicable statutory provision] *if the reality is otherwise*".

15. It is notable that the Supreme Court, in making the foregoing observations, accepted that the statutory assumptions expressly recognised a legally-sanctioned departure from the so-called reality principle, that is to say that the

statutory assumptions permit, under specific circumstances, the application of what is in effect a legally-constructed view which permissibly disregards the reality. The reasons for this include, as above-mentioned, countering potential property tax avoidance under particular circumstances. Accordingly the reality principle, whilst being fully recognised in legal authority, has certain prescribed limits under statute; that is so for good reason.

The Tribunal's Application of the Law to the Facts and Determination of the Case

16. The tribunal considered the three grants of planning permission obtained by the appellant, as mentioned above being, firstly, that referenced LA07/2018/0644/F and dated 30 May 2018, (for a single story disabled adaptation and alterations to dwelling) with the tribunal shall refer to as "the 2018 permission", secondly, that referenced LA07/2019/0286/F and dated 22 May 2019 (for a replacement dwelling and garage) which the tribunal shall refer to as "the 2019 permission" and, thirdly and finally, that referenced LA07/2020/0565/F and dated 5 August 2020 (for a "replacement dwelling and retention of derelict house for conversion to garage/garden store in substitution for approval granted under LA07/2019/0286/F") which the tribunal shall refer to as "the 2020 permission". It is quite clear from the evidence in the case that the appellant had commenced, and indeed had effectively completed, interior "stripping out" work concerning the property which involved in 2017 removing fixtures and fittings and some internal walls and some services. The work done at this stage was carried out in contemplation of what was envisaged in the 2018 permission - a single story disabled adaptation and alteration work. The appellant asserts, and the respondent has offered no evidence to contradict this, that this work effectively and materially ceased in 2017 and that no further substantial works were carried out thereafter to this structure. The 2019 permission then evidences a "change of plan" so to speak, and the appellant now proposes a replacement dwelling and garage in substitution for the previous proposal. Thirdly and finally (and it is only at this stage that we have a clear idea of the fate then anticipated for the structure) the 2020 permission not only envisages a replacement dwelling but, further and importantly, the retention of the original structure and conversion of that to a "garage/garden store".

17. Any planning permission, in the tribunal's view, provides legal status, once granted, to a proposal which might, in theory, either be actioned or which might not. This latter might depend upon a wide range of factors, including perhaps a change of heart, potential availability of finance and many other things. Accordingly, as is very evident from the facts in this case, the appellant had initially arranged for certain positive actions and steps to be taken in stripping out the interior of the structure in connection with the 2018 permission. Then, in accordance with the uncontroverted evidence, the appellant took no further action in connection with the 2018 permission and

indeed the 2019 permission. Furthermore, we must now look at the 2020 permission. Here, the tribunal must distinguish between the taking of positive action or actions in fulfilment or furtherance of planning permission, on the one hand, and the taking of no action as a consequence, in other words adopting a so-called "do nothing" approach. For example, in respect of the 2020 permission there are two distinct elements or components to that permission, which are expressly stated by the planning authority. The first of these relates to the construction of a replacement dwelling; the second of these is: (i) the retention of a structure and (ii) the conversion of that structure to a garage/garden store, insofar as work actually is required to do that latter conversion. In the tribunal's determination what might be termed the "non-action" or "do nothing" in relation to "retention" of a structure, without more, cannot stand in isolation to the other elements present in the 2020 planning permission. These other elements relate to the positive action of the construction of a replacement dwelling. The elements of that 2020 permission must be read together. The mere act of "retention", of itself, does not represent any manner of material, significant, work contemplated as being conducted in furtherance of any of the elements stated in the 2020 permission.

18. The tribunal is however tasked with considering, in the specific context of the facts of this case, whether (dealing with these two) either the 2019 permission or the 2020 permission might have had a material impact upon rating status. Here, the appellant argues that these matters are fully relevant; conversely the respondent submits the contrary proposition. The appellant argues that the tribunal ought to regard the property as occupying a particular legal status. This would be a status whereby it cannot be properly and legally included in the Valuation List (and thus does not satisfy the first test mentioned above). However, in considering the foregoing submission, the tribunal also considers whether it is of relevance whether the appellant did (or did not) take any positive action as regards the property in consequence of either the 2019 permission or the 2020 permission.

19. In the normal course of things - leaving to one side for the moment the tribunal's important observations made below - the tribunal's considered view would have been that merely obtaining planning permission and then, as it were, "doing nothing", would have not advanced the appellant's case in respect of this submission. It is logical that planning permission might be obtained, but then, for whatever reason, it might remain unactioned. In these circumstances, hypothetically and from a rating perspective, matters shall remain unchanged. There would be no reason merely on account of the granting of planning permission for the status of the property in the Valuation List to be altered. Here, however, the point connects with the appellant's argument concerning the statutory assumptions.

20. Having said this, a further point of fundamental significance emerges when one examines particular facts in this case. Here, the tribunal need look to no more authoritative a source than to have regard to the factual findings of Mr Justice

Colton in the Northern Ireland High Court case of ***Colm McAteer v John Keeley and Geraldine Keeley***, a judgment delivered on 6 August 2021. As mentioned, this case related to an action taken by the appellant concerning a right-of-way in relation to a laneway leading from Windmill Road, Newry, to the appellant's lands at number 3 Windmill Road. As mentioned above, in this legal action, the appellant sought an injunction restraining the defendants from obstructing the right-of-way which the appellant claimed. The facts, as determined by the High Court Judge, were that after having obtained planning permission in 2020 (in other words "the 2020 permission") the appellant appointed a builder who was due to commence work in November 2020. The appellant required access for vehicles involved with the construction process. As Colton J mentions, the appellant issued proceedings on 4 December 2020 and he obtained an interim injunction on 11 December 2020, which restrained the defendants from obstructing the laneway. Ultimately, the concluding determination of the High Court was to grant the appellant a right-of-way together with an injunction restraining the named defendants and others from obstructing this. The appellant asserts in his written submissions that until the (interim) injunction was granted in December 2020, he could not commence any building works (that is to say he could not take any positive action in furtherance of the planning permissions). In effect, he was legally constrained until that point. The appellant cannot be faulted, because of this, concerning any omission or default in his taking positive action on foot of either the 2019 permission or the 2020 permission. Accordingly, in the tribunal's determination, it would be entirely wrong to accept the argument that the tribunal is compelled to disregard that legal and factual reality and any constraints thereby placed upon the appellant until the matter had a satisfactory legal resolution, as far as the appellant was concerned.

21. A specific issue has been raised by both parties as a matter requiring interpretation and determination by the tribunal. The tribunal shall now deal with this issue. Taking, first of all, the respondent's position concerning the matter, the respondent relies upon Articles 7 and 8, mentioned above, Article 8 being the provision setting out the statutory assumptions. These statutory assumptions have been the subject of much previous comment in many decisions of the Valuation Tribunal. They are required to be taken into account by virtue of Article 7 (3). In this case, the assumption mentioned in Article 8 upon which focus is required to be directed lies in the definition of "incumbrance". This word is defined in the statutory provision, perhaps somewhat unhelpfully, in the following terms: "*any incumbrance, whether capable of being removed by the seller or not, except service charges*". Article 8 (11) provides the statutory assumption that: "*the hereditament is sold free from any rentcharge or other incumbrance".* The absence of a legally-unchallengable right-of-way providing access to the property is argued by the appellant to constitute an "incumbrance" of fundamentally material significance to the status of the property. He states that this fact must be fully considered in this appeal. Opposing that proposition, the respondent's submission is, in terms, that the tribunal is prevented from taking any account

of that issue due to the legal effect of the statutory assumption which must be applied, that flowing from the import of Article 8 (11), when taken together with Article 7 (3).

22. In his argument, the appellant refers the tribunal to certain matters which he submits assist in aid of the statutory interpretation of the relevant provision. Firstly, he refers the tribunal to the Conveyancing and Law of Property Act 1881. This latter is legislation which, despite its relative antiquity, continues to apply to Northern Ireland. In the 1881 Act, the interpretation section which is located at Section 2 (vii) of the 1881 Act defines the statutory word "incumbrance" as including: "… *a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof*".

23. The appellant then turns to legislation which does not apply in this jurisdiction. This is nonetheless invoked by the appellant to assist as an aid to interpretation. This legislation is the Law of Property Act 1925. In the general definitions section, at Section 205 (vii) this defines the word "incumbrance" as: "*includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, and unity, or other capital or annual sum; and "incumbrancer" has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof*". As will be noted, this uses terms rather similar to the 1881 Act.

24. Then the appellant refers the tribunal to the English Valuation Tribunal Service Council Tax Guidance Manual (December 2018 revision) which, at paragraph 2.3.1 e, in setting forth a commentary upon the English High Court case of ***Coll (LO) v Walters & Walters [2016] EWHC (Admin) 831*** states as follows: "*The High Court found that the definition of incumbrance did not encompass restrictive covenants and there was no distinction to be made between a state and a private restriction if the person subject to it could do nothing to remove it. Such a covenant, which might be enforced for the benefit of the estate, would affect the value of the house and annex. The panel had therefore been correct in taking the covenant into account and was entitled to come to the decision it did regarding the band*".

25. Accordingly, the appellant's submission refers to the 1881 Act, which does apply in this jurisdiction; the 1925 Act, which does not, but which is nonetheless cited by the appellant in aid of interpretation, and; further the Council Tax Manual, which is of course not directly applicable in this jurisdiction as it deals with the topic of Council Tax but which, nonetheless, in the appellant's submission, may be of assistance in interpretation, so he argues. He also refers to the Interpretation Act (Northern Ireland) 1954, Section 45. All of these, upon the appellant's submission, propose that the proper definition of the word "incumbrance" present in Article 8 (11) (which, as

mentioned, provides for the statutory assumption that: "*the hereditament is sold free from any rentcharge or other incumbrance"*) should be subject to a restrictive interpretation, as opposed to what the appellant describes as the "dictionary definition". The appellant suggests that this is precisely the definition employed by the respondent and he is very critical of that position and interpretation, which he suggests is an entirely erroneous view, confined only to this jurisdiction and absent in England and Wales.

26. Having carefully considered this point, as a matter of statutory interpretation the tribunal's determination is that it is inappropriate to apply the broadest possible (as it were, "dictionary") definition or interpretation to the word "incumbrance" in Article 8 (11). A much more nuanced approach is required. If one were to apply the broadest approach, it must be the case that anything within that broad compass is required to be "caught" by the statutory assumption ("…*or other incumbrance"*). That latter approach does not appear to chime with what emerges from a reading of the statutory provisions referenced in submissions nor in the jurisdiction of England and Wales. Turning from the general to the particular, specifically upon the facts of this case, if the appellant were to be restricted, as he was in fact and law, in proper legal access to the property in order to proceed with construction works in accordance with the planning permission granted, the tribunal's view is that this constitutes a most significant legal impediment to the appellant in progressing with the works that had been statutorily approved. Clearly, on the facts, including those determined by the High Court, the appellant wished and endeavoured to proceed with work in furtherance of the planning permission. In the tribunal's view, this is a fundamental legal impediment to the use of and enjoyment of the property, including the right to proceed expeditiously with legally-approved works. This is a matter which must fall properly outside the statutory exclusion envisaged by the word "incumbrance". The assumption is not engaged and the factual and legal reality outweighs the potential import of the assumption. In consequence of all this, if the tribunal is correct, it means that the tribunal is entitled to take account of this significant impediment as constituting a good and proper reason why the appellant could not and did not proceed with the works approved by planning consent until this impediment was removed by order of the High Court. It was not reasonable to expect the appellant to take action in furtherance of the planning permission until the way (both literally and figuratively) was legally opened to him to do so, without obstruction. The appellant is certainly not to be faulted or exposed to any detriment on this account. Indeed, as is clear from the facts established by the High Court, as soon as the impediment was removed the appellant proceeded forthwith with the construction of the replacement dwelling: he took action on the permission.

27 The tribunal's conclusion and resultant determination emerging from the foregoing is as follows:

27.1 The appellant is not assisted by either the 2018 or the 2019 planning permission and the tribunal does not uphold the appellant's arguments

that the granting of either of these planning consents was sufficient to cause the property to be taken off the Valuation List for the purposes of this appeal.

27.2 The works carried out by the appellant in 2017, in and of themselves, were not sufficient to cause the property to be taken off the Valuation List for the purposes of this appeal. These were the only works of material significance carried out prior to much later work commencing - after the date of this appeal. The Tribunal does not accept the argument that the property ceased to be a hereditament on account of these (2017) works.

27.3 The 2020 planning permission which provided for "retention" of the older structure and for its re-use as storage is certainly material to the issues to be determined in this appeal. The progression of works in furtherance of material action in connection with the 2020 planning permission was, without doubt (as was clearly recognised by the High Court) subject to a legal impediment, which latter has been referenced above. That significant impediment was only removed by the interim injunction granted by Order of the High Court on 11 December 2020, that of course being after the date of this appeal. Accordingly, at the time of this appeal, which is the material time upon which the tribunal is required to focus, the litigated impediment was subsisting and was effectively preventing (prior to it being legally removed by injunctive action) the physical access required to commence work to implement relevant aspects of the 2020 planning permission.

27.4 The tribunal determines, upon the evidence, that the appellant at the date of this appeal desired to proceed with the construction work in furtherance of the 2020 planning permission. What prevented that was the impediment. There is no evidence of any other cause preventing that action.

27.5 The tribunal's determination is that, notwithstanding that construction had not commenced at the appeal date, which construction work would have otherwise constituted the requisite action necessary to, as it were, "action" the 2020 planning permission, the appellant is nonetheless entitled to have the benefit of the 2020 planning permission to the relevant extent at the material date. That benefit of which the appellant is entitled to avail has the consequence that the 2020 planning permission may be properly regarded as engaged, legally. The effect is that the classification of the older structure as ancillary storage is effective and the property, at the appeal date, is not to be regarded as a hereditament to be included in the Valuation List.

28. Accordingly, the legal effect of the 2020 planning permission, under these specific circumstances, at the material date had effectively removed the former dwelling structure from being a domestic dwelling house: at the

material date it had ceased to be a domestic dwelling. The older structure was legally entitled, under the 2020 planning permission, to be used as ancillary storage only. Thereafter, the newly-constructed dwelling house was properly included in the Valuation List. Applying, therefore, scrutiny of the first stage in what is the three-stage process described above, the property was not, in the determination of the tribunal, a hereditament at the material time of this appeal. Accordingly, the appeal succeeds to that extent. On account of this determination, it is unnecessary for the tribunal to consider the further stages mentioned in the case authorities, nor is it necessary for the tribunal to consider the comparables identified in the Presentation of Evidence nor to address a number of other matters that have been raised in this appeal as these do not bear upon this essential determination. The appeal is successful for these reasons and the tribunal Orders that the property identified in this decision shall be removed from the Valuation List.

29. In conclusion, the tribunal hopes that the tribunal's deliberations upon the considerable volume of material presented in this case and the detailed and well-presented arguments advanced have been of value to the parties and that certain observations made in this determination concerning a number of matters of law might be of broader application and may be of assistance in regard to future cases in which such matters arise.

Dated: 20 December 2022

President: James Leonard

Northern Ireland Valuation Tribunal