UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0007 (LC)
UTLC Case Number: RA/73/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – valuation – alteration of rating list – museum located in an historic building – valuation method – receipts and expenditure – socio-economic benefits – whether contractor's basis to be used where occupation is not for profit – modern substitute building – function of stage 4 of contractor's basis – affordability of rent – contractor's basis inappropriate – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN: **STEPHEN G HUGHES (VALUATION OFFICER)** **Appellant**

and

EXETER CITY COUNCIL **Respondent**

Re: Royal Albert Memorial Museum and Art Gallery,
Queen Street,
Exeter,
EX4 3RX

The President, the Hon. Sir David Holgate and A J Trott FRICS

Royal Courts of Justice

25-27 June 2019

Sarabjit Singh QC, instructed by HMRC Solicitor's Office, for the Appellant
David Forsdick QC, instructed by the City Solicitor Exeter City Council, for the Respondent

The following cases are referred to in this decision:

Allen v English Sports Council [2009] RA 289
Allied Domecq Retailing Limited v Williams [2000] RA 119
Amalgamated Relays Ltd v Burnley Rating Authority [1950] 2 KB 183
British Telecommunications plc v Central Valuation Officer [1998] RVR 86
British Transport Commission v Hingley [1961] 2 QB 16
Bromley London Borough Council v Greater London Council [1983] 1 AC 768
Cardiff City Council v Williams [1973] RA 46
Cartwright v Sculcoates Assessment Union [1900] AC 150
Dawkins v Ash [1969] 2 AC 366
Dawkins v Leamington Spa Corporation (1961) 8 RRC 241*;*
Eastbourne Borough Council v Allen [2001] RA 273
Fir Mill Ltd v Royton UDC (1960) 7 RRC 171
Garton v Hunter [1969] 2 QB 37
Great Western Metropolitan Railway Co. v Hammersmith Assessment Committee [1916] AC 23
Harrods Limited v Baker [2007] RA 247
Hewitt v Telereal Williams Ltd [2019] 1 WLR 1362
Hoare v National Trust [1998] RA 391
Hoare v National Trust (1998) 77 P & CR 366
Hughes (VO) v York Museums and Gallery Trust [2017] UKUT 200 (LC)
Hughes v York Museums and Gallery Trust [2017] RA 302
Hughes (VO) v York Museums and Gallery Trust [2017] UKUT 200 (LC)
Humber Ltd v Jones (1960) 6 RRC 161
Imperial College of Science and Technology v Ebdon [1986] RA 233
Inland Revenue Commissioners v Gray [1994] STC 360
Kingston Union Assessment Committee v Metropolitan Water Board [1926] AC 331
London County Council v Erith and West Ham Churchwardens and Overseers [1893] AC 562
Marylebone Cricket Club v Morley (1959) 5 RRC 122
Merlin Entertainments Group Limited v Cox (VO) [2019] RA 101
Mersey Docks and Harbour Board v Birkenhead Union Assessment Committee [1901] AC 175
Monsanto plc v Farris (1998) RA 107
Montrose Town Council v Assessor for Angus (1964) S.C. 363
Morecambe and Heysham Corporation v Robinson [1961] 1 WLR 373
Oakbank Oil Company v Assessor for Midlothian (1902) 9 SLT 471
Pollway Nominees Ltd v Croydon LBC [1987] AC 79
Poplar Metropolitan Borough Assessment Committee v Roberts [1922] 2 AC 93
Port of London Authority v Orsett Union Assessment Committee [1920] AC 273
R v London School Board (1886) 17 QBD 738
R v School Board for London (1886) 17 QBD 738
Roberts v Hopgood [1975] AC 578
Robinson Brothers (Brewers) Limited v Houghton and Chester le Street Assessment Committee [1937] 2 KB 445; [1938] AC 321
Scottish Exhibition Centre Ltd v Strathclyde Regional Assessor [1992] RA 209
Scottish Greyhound Racing Company v Glasgow Assessor and others [1947] S.C. 380
Semilogistics Milford Haven Limited v Stephen Webb (VO) [2018] UKUT 019 (LC)
SJ & J Monk v Newbigin (Rating Surveyors Association and another intervening) [2017] 1 WLR 851
Surrey County Valuation Committee v Chessington Zoo Ltd [1950] 1 KB 640

Tomlinson v Plymouth Argyle Football Club Limited (1960) 6 RRC 173
Townley Mill Company (1919) Limited v Oldham Assessment Committee [1937] AC 419
Williams v Scottish and Newcastle Retail Limited [2001] RA 41

DECISION

Introduction

1. This is an appeal by the valuation officer, Mr Stephen Hughes, against a decision of the Valuation Tribunal for England ("the VTE") dated 23 August 2018 in which it determined the rateable value of the museum and premises known as Royal Albert Memorial Museum and Art Gallery, Queen Street, Exeter, EX4 3RX ("RAMM") at £1 with effect from 1 April 2015. The respondent ratepayer is Exeter City Council ("the Respondent" or "the Council").

2. RAMM was entered in the 2010 non-domestic rating list at a rateable value of £510,000 with effect from 15 December 2011. This followed the completion of a refurbishment project that started in 2008. This assessment was appealed and a revised rateable value of £445,000 was agreed.

3. The Council made a proposal to alter the list on 18 September 2017 following the Tribunal's decision in *Hughes (VO) v York Museums and Gallery Trust* [2017] UKUT 200 (LC) issued on 23 May 2017 in which it determined the rateable value of the Yorkshire Museum in the 2010 list at £1. In reaching this decision the Tribunal held that the contractor's basis was not an appropriate valuation method. The valuation officer did not appeal.

4. The VTE allowed RAMM's appeal (the valuation officer having said the proposal was not well-founded), concluding at paragraph 31:

> "Having carefully considered the evidence before it the panel concluded that, in applying the reality principle to the rating hypothesis for this property, it could not reasonably be expected to have achieved, on an open market letting, a positive rent. The benefit to be derived from its occupation was clearly not financial and while there may be some socio-economic benefit to the area, this has not been shown to be significant enough to off-set the financial burden which would rest on the hypothetical tenant of the property occupying it for the purposes of use as a museum."

5. RAMM was built as a memorial to Prince Albert following his death in 1861 and its uses reflected his range of interests and progressive ideas. It was originally designed to house a museum, a library/reading room and the newly-founded Exeter Colleges of Art and Science. It was a prestigious public building in the Gothic style, with the foundation stone being laid in October 1865. Completion was in 1868 but extensions were added in 1884, 1891, 1895 and in 1899 the York Wing was constructed (named after the Duke and Duchess of York) at the opening of which the Royal title was bestowed. It is now a grade II listed building.

6. Major works of repair and improvement were undertaken between 2008 and 2011. These comprised a programme of essential repairs, and extensions to the museum. Two earlier nineteenth century extensions were demolished and a new disabled access was created at the rear of the building. The works were completed and the museum re-opened on 15 December 2011.

7. We give further details below of the history, ownership and funding of RAMM.

8. Mr Sarabjit Singh QC appeared for the Appellant and called Mr Stephen Hughes MRICS, Dip Rating, Head of the Commercial, Leisure & Civic Team of the Valuation Office Agency ("VOA"), as an expert valuation witness; and Mr Laurie Hulse BSc, IRRV (Hons), a valuer working in the National Valuation Unit of the VOA, as an expert valuation (contractor's basis) witness. Mr Stephen Jones MRICS, Principal Surveyor in the Built Environment and Minerals Team of the VOA produced an expert report and a rebuttal report about the effects of the physical obsolescence of RAMM on the contractor's basis of valuation but, by agreement, he was not called to give oral evidence.

9. Mr David Forsdick QC appeared for the respondent and called Mr Jon-Paul Hedge, a Director of the Council responsible for Communications, Tourism and Culture, as a witness of fact; Mr Colin Hunter MRICS, IRRV (Hons), Divisional Director at Lambert Smith Hampton, as an expert valuation witness; and Mr Jon Anderson MRICS, a director of Lambert Smith Hampton, as an expert building surveying witness. Mr Alan Caig, formerly Head of Leisure and Museums at the Council from 2000 to 2011, produced a witness statement but, by agreement, was not called to give oral evidence.

The issues and matters agreed

10. The issues in this appeal are:

(i) What is the appropriate valuation method (or methods) to determine the rateable value of RAMM?

(ii) What should that rateable value be?

11. The parties have helpfully agreed the following matters:

(i) The mode or category of occupation of RAMM is that of a museum and premises (although the experts do not agree about the scope and extent of this description);

(ii) The limited rental evidence available cannot be analysed and applied to RAMM by direct comparison;

(iii) If the receipts and expenditure method of valuation is used the resultant rateable value is £1;

(iv) In the context of the contractor's basis of valuation:

(a) the valuation should adopt a modern substitute building approach;

(b) the unit cost of building a modern equivalent building is £3,450 per m^2, inclusive of preliminaries, fees and external works;

(c) the area of the subject hereditament is 5,281.44 m^2;

(d) the physical obsolescence allowance made at Stage 2 is 16.29%;

(e) the site value at Stage 3 is £1,125,000; and

(f) the statutory decapitalisation rate to be used at Stage 4 is 5%.

Background to the appeal

12. The rateable value of the hereditament is to be determined in accordance with s.56 and sched. 6 of the Local Government Finance Act 1988 ("LGFA 1988"). Because this appeal relates to the 2010 list, the "antecedent valuation date" ("AVD") is 1 April 2008. The museum was closed between 2008 and 2011 for major works of repair and redevelopment. Upon completion of the works the hereditament was entered in the 2010 non-domestic rating list at a rateable value of £510,000 with effect from 15 December 2011, the date the museum was re-opened to the public. This assessment was appealed and a revised entry of £445,000 was agreed with effect from 15 December 2011. On 18 September 2017 the Respondent made a proposal to alter the list, ostensibly by changing the effective date to 15 December 2011 even though this was already the effective date. The grounds for the proposed alteration were that the entry was wrong by reason of a (unspecified) decision dated 23 May 2017 concerning "Castle Museum, Yorkshire Museum, & others". This referred to the decision of the Tribunal, Martin Rodger QC, Deputy Chamber President, and P D McCrea FRICS, in *Hughes (VO) v York Museums and Gallery Trust* [2017] UKUT 200 (LC).

13. The valuation officer ("VO") did not consider the Respondent's proposal to be well founded and referred it to the Valuation Tribunal for England ("VTE") as an appeal against the VO's refusal to alter the list. The VTE allowed the appeal on 23 August 2018 and ordered (i) that the museum and art gallery should be entered in the list at a rateable value of £1 with effect from 1 April 2015 and (ii) (by agreement) that the café should be the subject of a separate entry in the list at a rateable value of £14,750. The VO appealed against part (i) of this decision to the Tribunal on 20 September 2018, but accepted that the effective date was 1 April 2015[1].

14. The "material day" for the purposes of para. 2(6) and (7) of sched. 6 to the LGFA 1988 is 18 September 2017, the date on which the proposal was served on the VO (regulation 3(7)(b)(i) of the Non-Domestic Rating (Material Day for List Alternations) Regulations 1992 (SI 1992 No. 556)).

[1] See Mr Hughes' expert report at paragraph 5 and Mr Hulse's expert report at paragraph 116.

The rating hypothesis

15. The LGFA 1988 employs a single standard by which every hereditament in the country can be measured in relation to every other hereditament, namely annual letting value (*Dawkins v Ash* [1969] 2 AC 366, 381H). Paragraph 2(1) of sched. 6 provides that the rateable value:

> "Shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions –
>
> (a) The first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
>
> (b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;
>
> (c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above."

16. The statutory hypothesis of a notional yearly tenancy is only a mechanism to enable the valuer to arrive at the value of a particular hereditament, vacant and to let, for rating purposes. It does not entitle the valuer to depart further from the real world than the hypothesis compels (*Hoare v National Trust* [1998] RA 391).

17. The principle that the property should be valued as it was on the material day (18 September 2017) previously referred to as the *rebus sic stantibus* principle (i.e. "as things stand"), became well-established in a series of cases beginning in the nineteenth century and reviewed by the Court of Appeal in *Williams v Scottish and Newcastle Retail Limited* [2001] RA 41. The principle was used to identify the property to which the measure of annual letting value should be applied by the valuer (see e.g. *Townley Mill Company (1919) Limited v Oldham Assessment Committee* [1937] AC 419, 437).

18. The principle comprises two limbs, one describing the physical state of the hereditament and the other its use (*Williams* p.17). As to the physical limb, it is to be assumed that the hereditament would have been in the same physical state as it was on the material day, save that the valuer may take into account alterations which the hypothetical tenant might make to the property provided that, taken overall, they are "minor". As to the user limb, it is to be assumed that the hereditament may only be occupied for a purpose within the same mode or category of occupation as that for which it was actually being used on the material day. The valuer should ignore any prospective change of use outside that mode or category (see *Williams* at pp. 52, 68-72 and 74-75).

19. In *SJ & J Monk v Newbigin (Rating Surveyors Association and another intervening)* [2017] 1 WLR 851 the Supreme Court reviewed the leading authorities on the basis of the *rebus* principle, which it renamed the "reality principle". This term is preferable because the principle identifies

the subject-matter of, and the context for, the hypothetical letting, and hence it directs attention to what should be the very focus of a rating valuation.

20. The reality principle rests on the fundamental objective of the rating hypothesis, namely to arrive at the real annual value of the occupation of the hereditament to a hypothetical tenant, otherwise referred to as "a just and true result". The valuer must have regard to the "essential" or "intrinsic" qualities or characteristics *of the hereditament* and disregard factors which are non-essential or "accidental" to that property. Thus, the intention of the actual occupier to demolish his property would be irrelevant to the application of the rating hypothesis, but a demolition order which would render a property "doomed to demolition" whoever might be the occupier, would be an essential characteristic of the property. That circumstance would not be due to any "accident of ownership". (see *Dawkins v Ash* [1969] 2 AC at pp. 382-3, 385-6, 389-390 and 393-394).

21. *Dawkins v Ash* also explained that the rating hypothesis has regard to matters external to the hereditament which are "essential" to that property, for example, an advantageous location close to the sea ([1969] 2 AC 382C). The presence of a motorway, airport, prison or open space may add to, or detract from, the value of a property ([1969] 2 AC 386C). A property is valued not in isolation, but in the context of its location, or "locality".

22. 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 Newbigin* [14]):-

> "(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) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,
>
> (d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and
>
> (e) the use or occupation of other premises situated in the locality of the hereditament".

23. One aspect is excluded from these provisions in para. 2(7), but this is solely to do with the physical state of the hereditament. Under para. 2(1)(b) it must be assumed that immediately before the hypothetical letting began on the AVD, the hereditament was in a reasonable state of repair

(save for any repair which a reasonable landlord would consider uneconomic) whether or not that was in fact the case (see also para. 2(8A) of sched. 6 and *SJ & J Monk v Newbigin*).

24. The factors listed in para. 2(7) fall into two parts. Sub-paragraphs (a) to (cc) deal with the hereditament. Sub-paragraphs (d) to (e) deal with the locality. All of these provisions are focused on identifying the subject-matter of a valuation assessment, to which the measure represented by the hypothetical letting is applied. It is the object of the legislation to levy rates on the annual occupation value of a rateable property, assessed in the context of its locality (see also *Merlin Entertainments Group Limited v Cox (VO)* [2019] RA 101).

General legal principles on rating valuation

Robinson Brothers

25. The classic explanation of the overarching legal principles applicable to a rating valuation is contained in the judgment of Scott LJ in *Robinson Brothers (Brewers) Limited v Houghton and Chester le Street Assessment Committee* [1937] 2 KB 445. The House of Lords expressly endorsed the analysis by Scott LJ of the case law ([1938] AC 321, 339).

26. For the purposes of this appeal we summarise the principles stated by Scott LJ at [1937] 2 KB at pp. 469-484 as follows: -

(i) The rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the tribunal, come to terms as a result of bargaining for that hereditament in the light of competition or its absence in both demand and supply as a result of "the higgling of the market". This is the true rent because it corresponds to real value;

(ii) The totality of the opposing forces of demand and supply must be assessed and weighed in order to arrive at the point at which the hypothetical parties would reach agreement;

(iii) The valuation must take into account every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down "to see the resultant figure on the dial at which the pointer finally rests";

(iv) Every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant and is, therefore, admissible evidence.

(v) While the letting on a yearly tenancy is hypothetical, the hereditament to be valued is actual, with all its actualities. All its intrinsic advantages and disadvantages must be taken into account. It is just that particular hereditament which is assumed to be in the market, with all its attractions for potential tenants (to whatever kind of human emotion or interest or sense of duty they may appeal – e.g. economic, social, aesthetic, political or statutory duty) and all its imperfections and drawbacks which deter or reduce competition for it;

(vi) The exercise is more difficult where hereditaments are not in practice let and so indirect methods of valuation have to be used. But the factors which would be taken into account in the higgling in the market over a real tenancy must still be taken into account in arriving at the rent under the hypothetical letting;

(vii) Even where the occupation of a property could not achieve any pecuniary profit, as for example where a public authority is in occupation for the purpose of performing a statutory or public duty, that still represents a real demand for which a real value would be payable, but not any arbitrary sum higher or lower than that real value. In such cases, the whole of the circumstances and conditions under which the actual owner has become the occupier of the premises must be taken into consideration, and no higher rental value must be assessed than "the owner would really be willing to pay for the occupation of the premises" – the real value criterion (see *R v School Board for London (1886)* 17 QBD 738; *London County Council v Erith and West Ham Churchwardens and Overseers* [1893] AC 562, 591, 593).

(viii) The determination of the rateable value of a property is a question of fact, not law. There is no rule of law which determines the valuation method by which that value is to be ascertained.

27. In *Hewitt v Telereal Williams Ltd* [2019] 1 WLR 1362 at [7] the Supreme Court approved point (i) above. The phrase "the higgling of the market" appears to have come from Adam Smith in his *Wealth of Nations* (see Lord Davey in *Cartwright v Sculcoates Assessment Union* [1900] AC 150, 158).

28. As to point (iv), the word "extrinsic", when read in context, must refer to factors external to or outside the hereditament being valued, i.e. its locality (see the explanation in *Merlin* at [46]);

29. As to point (viii), in *Mersey Docks and Harbour Board v Birkenhead Union Assessment Committee* [1901] AC 175 the Earl of Halsbury LC pointed out that save for where the courts have to decide a question of law (e.g. the relevance of a factor taken into account by a tribunal), judicial comments on valuation methods in case law should be treated as being of an "advisory character" to assist tribunals by indicating "ordinary and reasonable" methods for applying the statutory hypothesis (pp.179 – 181).

Hewitt v Telereal

30. Both parties referred to *Telereal*. The ratepayer in that case was the owner of an office block which had been occupied as government offices continuously between 1972 and 2008 but had been vacant for several months by the material day, 1 April 2010, the date on which the 2010 list was compiled. In this Tribunal the parties agreed a statement in which it was common ground that if the property had been on the market at the AVD, nobody in the real world would have been prepared to occupy the property and pay a positive price and so, if that were the correct basis for a rating valuation, the rateable value would be a nominal figure, £1 [13]. Although at the AVD there had been a number of broadly comparable office buildings in beneficial occupation and for which substantial rents were being paid, the Valuation Officer accepted that all the demand in the market

had been absorbed by those other properties. But he contended that a substantial rateable value should nonetheless be assessed for the appeal hereditament by reference to "general demand" evidenced by the occupation of similar office buildings, and that that property had simply been "unlucky" not to be occupied at the relevant date.

31. The Tribunal decided that it had to be assumed that the hypothetical tenant would take the tenancy, and the issue was simply the amount of rent which would have been payable. The Tribunal considered that it would only be reasonable to treat the hypothetical tenant as not wanting the hypothetical tenancy at all if the hereditament was "intrinsically valueless" or if the responsibilities of occupying the premises were such that no beneficial occupation was possible in a commercial sense ([2016] RA 349 [104]). The Tribunal determined the rateable value to be the agreed figure based on "general demand", namely £370,000. Although the subject premises had always been occupied for government purposes and the rental evidence came from comparables occupied by public sector bodies, it should be noted that the Tribunal was dealing with a mode or category of occupation of a commercial nature, namely offices. It did not have to value a land use of a specialist nature, where the hereditament had been constructed for a purely philanthropic, socio-economic or cultural purpose, rather than a commercial purpose. Nor did it have to rely upon indirect methods of valuation used in the assessment of such properties.

32. The Court of Appeal allowed *Telereal's* appeal and restored the VTE's assessment of £1. Henderson LJ, giving the leading judgment of the court, said that the reality principle appeared to indicate that, in circumstances where there was *no* potential bidder for the hypothetical lease, no hypothetical lease at a positive rent could have been concluded ([2018] EWCA Civ 26, [36]). In the absence of any actual demand, there was no principle of law which required such demand to be assumed ([41]).

33. The Supreme Court (by a majority) reversed the Court of Appeal's judgment and reinstated the decision of the Lands Chamber. The Court reaffirmed the well-established principle that the object of the rating hypothesis is to ascertain the value of the *beneficial or profitable* occupation of the subject property, which requires the valuer to take into account "all that can reasonably influence the judgment of an intending occupier" [33].

34. The Court pointed out that there was a problem with the parties' joint position statement in that it had said nothing about their reasons for taking the view that nobody in the real world would have been prepared to pay a positive price for the hereditament at the AVD [28]. The Supreme Court agreed with the Tribunal that it is necessary to distinguish between situations in which no person would take a tenancy of a property because of its inherent characteristics – for example, a building's obsolescence or physical unsuitability for its mode or category of occupation, or a building which is too burdensome for occupation within that mode or category, or a building which has reached the end of its economic life – as contrasted with a building which is vacant, albeit suitable for use within its mode or category of occupation, merely because of a surplus in the market of comparable properties for which there is a general demand ([51-58]). The latter case is often referable to a "void" period between one occupation and the next. The Supreme Court considered that there was no reason why, subject to any other material evidence, the level of rental value should not be assessed by reference to "general demand" derived from the "occupation of other office premises with similar characteristics" [58].

35. The Supreme Court treated two cases to which we return below (*Hoare v National Trust* (1998) 77 P & CR 366; *Tomlinson v Plymouth Argyle Football Club Limited* (1960) 6 RRC 173) as examples where, although occupation of a hereditament was beneficial in the physical sense, the responsibilities of being a tenant (e.g. repairing liabilities) were so great that occupation is burdensome rather than beneficial in the commercial sense ([46] and [48]), resulting in a nil valuation in the former case and a reduced valuation in the latter.

36. It was in this context that the Supreme Court warned ([49]-[50]) that it would be "potentially misleading" to treat the open market postulated by the rating hypothesis as identical to that envisaged by Hoffmann LJ (as he then was) in the well-known passage in *Inland Revenue Commissioners v Gray* [1994] STC 360 when dealing with the capital transfer tax regime. No doubt it remains correct to regard the hypothetical landlord as an abstraction, an anonymous but reasonable person who goes about the letting as a prudent man of business, without giving the impression of being either over-anxious or unduly reluctant. Likewise, it should be assumed that the hypothetical tenant behaves reasonably, making proper enquiries about the property, and not appearing too anxious to take the letting. But the Supreme Court held that under the rating hypothesis, the identification of the hypothetical tenant (and his interest in taking the tenancy) is not *limited* by "whatever was the actual demand for that property at the relevant time". The purpose of rating is much wider, "it is to achieve a fair standard for comparable properties across the country as a whole". To treat demand as restricted "by whatever was the actual demand for the property at the relevant time" is inconsistent with the statutory test and the approach set out in *Poplar Metropolitan Borough Assessment Committee v Roberts* [1922] 2 AC 93 and *Dawkins v Ash* [1969] 2 AC 366, 381-3 (see *Telereal* at [33-4 and 50]).

Valuation issues in this appeal

37. We note that the Appellant does not suggest that the valuation in the present case should be based upon "general demand" in the market as in *Telereal*. That is hardly surprising, given that at all relevant times the hereditament was occupied by the Respondent and it became common ground during the hearing that the Respondent was the only party who would bid for the hypothetical tenancy. The parties are agreed that there are no comparable properties to the hereditament which would enable its rental value to be derived using the comparative method. Within its locality, the RAMM is a specialist property, if not a unique property. As Scott LJ pointed out in *Robinson* at p. 478, the ascertainment of a rateable value for such a property is not dependent upon there being an "actual market" or a "market value" for such a property. Where the occupation of a hereditament has no commercial or pecuniary purpose, its "real value" may be influenced by the performance of a public duty, or the pursuit of a purpose in the public interest ([1937] 2 KB at pp. 478-481). How such purposes may affect a rating valuation of a historic building such as RAMM, and by what means they may be taken into account, are questions which lie at the heart of the dispute in this appeal.

38. The main issue between the parties is whether the hereditament should be valued using the receipts and expenditure ("R and E") method or the contractor's basis ("CB") method. In *Hughes v York Museums and Gallery Trust* [2017] RA 302 the Tribunal helpfully summarised each of these methods and some of the considerations they involve [118] to [128] and [129] to [140] so that we need not repeat that material here.

39. In his closing submissions Mr Forsdick QC pointed out that the Appellant had chosen to put all his eggs in one basket, the CB method, but he could have opted to use the R and E method, or considered using other techniques, namely a percentage of gross receipts or an "overbid" (as in the cases listed in Ryde on Rating and the Council Tax at paras. E627 to 641), whether as alternative or additional methods. Mr Forsdick QC submitted that on the evidence before the Tribunal, the application of such alternative methods would have resulted in a rateable value very much lower than the figure for which the Appellant contends, perhaps a figure in the region of £30,000. However, as Mr Forsdick reminded us, the Appellant has made no attempt to rely on any alternative to the CB method and there is no material from the Appellant deploying other methods to which the Respondent could reasonably have been expected to reply. Alternative valuation methods could not have been relied upon without substantial additional evidence and analysis and would have been subject to testing both before and during the hearing. As Appellant the VO bears the burden of proving that the rateable value should be assessed at the figure for which he contends. Mr Singh QC did not demur from any of these submissions.

40. We also note that Mr Hunter, for the Respondent, also decided to put all his eggs in one basket, the R and E method. On the material before the Tribunal, we accept that if we should decide to reject the use of the CB method, no alternative other than the R and E method has been advanced upon which we could rely compatibly with the requirements of procedural fairness. It was not suggested by either party, and in particular it was not suggested by the Appellant, that the Tribunal should adjourn or reconvene the hearing so that the parties could address other valuation methods. In these circumstances, and having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, we do not consider that it would be appropriate for our decision to be deferred so that the hearing could be reopened in order to explore other valuation methods.

41. The upshot is that the parties have agreed to set valuation parameters for the Tribunal's decision, namely an R and E valuation which is agreed to lead to a nil or nominal £1 assessment, and a CB valuation producing a figure of £430,000 in the case of the Respondent and £690,000 in the case of the Appellant. However, the Appellant accepts that the effect of the legislation governing alterations to the 2010 list is that £445,000 is the highest value that could now be entered in that list.

42. Of course, it also remains open to the Tribunal to attach such weight as it considers appropriate to both the R and E and the CB valuations advanced by the parties, and not simply one method. In that situation it would be for the Tribunal to determine the relative weight to attach to each method and the value it gives before arriving at a final judgment on rateable value.

Characteristics of the hypothetical letting

43. Mr Forsdick QC submitted, and Mr Singh QC accepted, that in order to assist the Tribunal decide which valuation method to prefer, or how to weigh rival methods and valuations, there should be identified key factors which would influence the negotiations for the hypothetical letting of the hereditament, so that the Tribunal could take into account how well each method fits, or sits

with, those factors, ultimately viewing the matter as a whole. It was common ground that in this case those factors are:-

(i) The mode or category of occupation of the hereditament;
(ii) The identification of the hypothetical tenant;
(iii) The supply of museum premises;
(iv) The circumstances in which the Respondent acquired the hereditament;
(v) Whether the hereditament could be occupied in order to make a profit or is occupied only for socio-economic and cultural reasons;
(vi) The responsibilities of owning or occupying the hereditament;
(vii) The need for revenue to subsidise the costs of occupying and operating RAMM;
(viii) Affordability of rent under the hypothetical letting.

44. We understood Mr Singh QC to have accepted that all of these matters are relevant to the application of the rating hypothesis in this appeal.

Mode or category of occupation

45. The parties are agreed that the mode or category of occupation of the hereditament is that of "museum and premises". They agree that it follows, in accordance with the decision of the Lands Tribunal in *Allied Domecq Retailing Limited v Williams* [2000] RA 119, that the hypothetical landlord may only let the hereditament for museum purposes and any prospective change of use from those purposes is to be disregarded [p.152]. However, the Tribunal made it clear that that rule does not prevent regard being had to rental evidence or assessments on other properties in a different mode or category of occupation in so far as that is relevant to the hereditament.

46. In the present case, the Appellant contended that a museum or art gallery is in a different mode or category of occupation from historic visitor or tourist attractions, such as stately homes, Stonehenge or the Cutty Sark. He says that in the former case it is the contents which the public comes to see, even if the museum is housed in a grand listed building. But in the latter case the hereditament itself is the draw and typically could not be replicated or replaced by a modern equivalent under the CB method. In his oral evidence, Mr Hughes went further by suggesting that the museums category should be sub-divided into eight separate modes or categories of occupation. To this end he sought to rely upon classifications adopted by the VOA in section 6: Part 3 – section 715 of its Rating Manual entitled "Museums and Art Galleries". We note that paragraph 1.1 begins by stating that "for rating purposes there is no distinction to be made between "museums" and "art galleries", they may be regarded generically as "museums"." We will consider below whether the categorisation put forward by the Appellant is appropriate.

47. At this stage we note two further points made by the Court of Appeal in *Williams* [2001] RA 41. First, the Court took the view that the formulation in *Fir Mill Ltd v Royton UDC* (1960) 7 RRC 171 of general categories for the purposes of the reality principle, i.e. shops, offices and factories, was on the right lines, even if its precise scope remained to be worked out on a case by case basis ([70]).

48. Second, the Court held that the Tribunal had been wrong in thinking that when determining mode or category of occupation regard should be had to the methods of valuation commonly used by surveyors. That was "to put the cart before the horse". Instead, differences in valuation methods could be the consequence of having identified different categories of business use ([73]). Thus, no significance should be attached in the present case to the Appellant's reasoning that a historic visitor attraction could not be replaced by a "modern substitute". That is simply a reference to one of the techniques used in the application of the CB method. Furthermore, it should be recalled that the CB method is based upon the fiction of the tenant constructing a "notional alternative" to the actual hereditament. That alternative will not be built and the fiction should not be carried too far (*Monsanto plc v Farris* (1998) RA 107).

The identification of the hypothetical tenant

49. Mr Hughes took the view at one point that there would be competition for the hypothetical tenancy of RAMM, vacant and to let, from a local authority, or a charitable trust funded by that authority or possibly by a philanthropist. However, in cross examination he accepted that there was no evidence to support the notion of a bid by a philanthropist for this museum in Exeter. As regards the suggestion of interest from a charitable trust, Mr Hughes rightly accepted that a trust would require a large endowment from the local authority to cover the substantial operating costs of the museum and there was no evidence to suggest that funding on the scale needed would be available.[2] In any event, such a trust would be the alter ego of the local authority and could not truly be said to be in competition with it. Given the fact that the museum is inherently loss-making, Mr Hughes accepted that no commercially motivated person would take the letting. Ultimately, therefore he agreed that the Respondent would be the only bidder for the hypothetical tenancy. It is long established that the premises must be valued vacant and to let, but the actual owner may be a bidder for the hypothetical letting (*R v London School Board* (1886) 17 QBD 738), even where that owner operates under statutory powers which prohibit it from taking a lease (see the *Erith* case) or its business model would preclude or inhibit that possibility (*Robinson* at [1937] 2 KB at p. 476; *Humber Ltd v Jones* (1960) 6 RRC 161).

The supply of museum premises

50. It is not suggested that there was any alternative location for RAMM. The only available premises for the museum was the appeal hereditament. Supply was limited to that one property, but demand was also limited to one bidder, the Respondent.

[2] The Respondent produced a calculation to show that an endowment of nearly £41m would be required to fund an annual deficit or subsidy of just over £2.1m over a 30 year period, assuming a discount rate of 3.5%

The circumstances in which the Respondent acquired RAMM

51. Mr Alan Caig provided a witness statement the content of which the Appellant stated was not in dispute. Mr Jon-Paul Hedge also provided a witness statement. We refer to uncontentious parts of that document in relation to this subject.

52. In August 1866 William Kendall, then Mayor of Exeter, together with others created a charitable trust for the establishment of what became known as RAMM. It was originally founded as a School of Art, a Museum and a Library. A School of Science was added by 1868. This philanthropic exercise soon ran into financial difficulties. In 1869 the trust sought financial assistance from the City Council. On 8 March 1870 the Charity Commissioners made an order directing that the museum be transferred to the City of Exeter so as to be "perpetually maintained" by the Council for the benefit of the City under the Public Libraries Act 1855. By an indenture dated 21 April 1870 the charitable trustees conveyed the museum to the City of Exeter to hold on trust and with the intent that the Council would "perpetually maintain" the museum, library and other facilities under the 1855 Act.

53. According to Mr Hedge, the records show that the museum was handed on to the Respondent because of the financial losses involved in operating the museum, which was not maintainable as a philanthropic or charitable institution. The City Council did not receive from the trustees anything in the nature of an endowment fund to pay for the ongoing costs of operating the museum. We accept Mr Forsdick QC's submission that the museum was not "gifted" to the Respondent. Instead, the original museum was transferred to the authority to relieve the trustees of a burden which had become unsustainable for them, namely the occupation and use of the premises as a museum, library and school of art and science. That burden was taken on by the Respondent. Subsequently, the library and educational facilities were located elsewhere and the museum occupied the whole site.

54. Since 1870 the continued operation of the museum has depended upon the Council paying for, indeed subsidising, the operating costs of the museum and the building in which it is housed. Extensions to the museum erected in the latter part of the nineteenth century were predominantly funded by two bequests, supplemented by private subscriptions. Small loans were obtained by the Council. In summary, therefore, the City Council made only a relatively small contribution to the capital costs of erecting the historic buildings. It is those buildings which represent by far the largest part of the hereditament.

55. By 1990 there was a major backlog in the carrying out of repairs on the hereditament and in January of that year a limited structural condition survey of RAMM was undertaken by consulting engineers. This identified many defects and, in particular, the substantial settlement of the building in the locality of the medieval city ditch running across the site. By the early 2000s the lack of repair of RAMM was threatening its fitness for purpose since water ingress and deteriorating structural elements meant it was impossible to control the temperature and humidity at a level commensurate with the proper conservation of exhibits.

56. In June 2003 the Council approved a conservation plan for RAMM which, inter alia, provided a clear framework for future development and maintenance of the site. Although the conservation plan was driven by the urgent need to repair RAMM, it identified three priorities:

(i) to overhaul the building, replace worn out services, fully control the internal environment, remove ill-considered 20th century adaptations and create a rational layout for storage, administrative and public use while utilising the space to best advantage;

(ii) to redisplay the collection, putting more objects on public view and emphasising the unique character of Exeter and Devon; and

(iii) to create a landmark building at the rear of the museum to show case the Roman Wall, open up a new public space and provide modern facilities where these could not be accommodated in the original building.

The total estimated cost was £21m of which it was proposed to seek funding of £15m from the Heritage Lottery Fund ("the HLF") with the Council contributing £5m and the balance of £1m coming from several sources, including the Museum Development Trust.

57. In June 2003 the Council applied to the HLF for funding but was refused. Encouraged by the HLF to re-apply, the Council revised its proposals and submitted a reduced scheme in 2004. The key amendment was the abandonment of the proposal to create a landmark building at the rear of the museum. Instead a high-quality landscape scheme was proposed which showcased the Roman Wall. The revised cost of the amended proposal was £15.4m of which £8.9m was to be funded by HLF grant. This application was successful.

58. Once work had begun it became apparent that the design team had underestimated the problems with the building. In particular, the subsidence was worse than expected, several roofs had to be replaced, walls needed to be stabilised and foundations strengthened. The result was the project overran by two years and the Council's net spend on repairs increased from £5m to £15m. HLF also increased its grant by £1m.

59. The Respondent's expenditure on repairs gave rise to an opportunity to obtain HLF funding for capital improvements, but the Respondent did not contribute to the capital cost of funding the extensions and improvements and there is no evidence that it had the resources to do so. Without the expenditure on the repairs there would have been no leverage to support HLF funding for the extensions and improvements and, without that funding, no reason to think that those works would have been undertaken. Although the Respondent was no doubt compelled to carry out the works of repair, it was under no legal compulsion to undertake the extensions and improvements.

60. In summary, therefore, this is not a case where the occupier has paid for all the capital costs of constructing the hereditament. Here the Respondent contributed only a small proportion of the overall costs. The improvements carried out in the 21st century represent only a small proportion of the overall hereditament (see, for example, the cost figures used in the CB valuations). Nor is this a case where the Respondent was under a statutory duty to construct any of the buildings, as

may arise where a local education authority builds a school or a statutory undertaker constructs sewerage works.

61. During the hearing the Tribunal raised the question with the parties whether the Respondent remained under a continuing obligation as at the AVD to maintain RAMM in perpetuity and if so the relevance or otherwise of that factor to the rating hypothesis. It turned out that this raised some complex questions of fact and law. During the hearing it was not possible for parties to produce material which would enable the Tribunal to reach any proper conclusions on the issue of whether the Respondent has continued to hold the museum subject to a trust "in perpetuity". Accordingly, shortly after the hearing concluded the parties agreed that this matter should be treated as an entirely neutral factor in the application of the rating hypothesis in this appeal and so the Tribunal should disregard it. We accept the stance taken by the parties on this point.

Whether the hereditament could be occupied to make a profit

62. The Appellant accepts that RAMM is not and never has been occupied with a view to making a profit (paras. 11 and 20 of skeleton). Instead, the property is occupied solely for socio-economic and cultural purposes. The Respondent does not contend otherwise. The Appellant relies upon this factor as a justification for his opinion that the R and E method is wholly inappropriate, and that only the CB method may be relied upon to arrive at the rateable value in this case. He maintains that this view is supported by earlier decisions which we review below.

The responsibilities of owning or occupying the building

63. As the freehold owner of RAMM the City Council has been responsible for its maintenance and refurbishment since it acquired the premises in the nineteenth century. In addition, the premises became, and remain, a grade II listed building. Chapter IV in Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990 contains a code for the prevention of deterioration or damage to listed buildings.

64. Under section 48 either the local planning authority or the Secretary of State may serve a "repairs notice" on the owner of the building requiring works to be carried out for the preservation of the building. The "owner" effectively means the owner of that interest which carries with it the right, actual or potential, to receive the rent for the land (s. 192 read together with s. 336 (1) of the Town and Country Planning Act 1990; *Pollway Nominees Ltd v Croydon LBC* [1987] AC 79, 92). In the event of non-compliance with the notice, compulsory purchase of the building (by the local authority or by the Secretary of State) may be authorised under s.47. Under s. 54 the local authority may, or the Secretary of State may authorise English Heritage to, carry out any works which appear to them to be urgently necessary for the preservation of a listed building in their area and then recover the expenses of those works under s. 55 from the owner.

65. The upshot is that the owner of a listed building bears legal and economic obligations for the preservation of his property which he must satisfy on a continuing basis, even if he does not in fact put the premises to any beneficial use. A failure to satisfy these obligations may well result in the

owner having to reimburse the local authority or English Heritage for the costs of their intervention and, ultimately, expropriation.

66. It has been recognised in rating law that for some listed buildings these responsibilities may be very onerous, such that the hypothetical landlord would be glad to be relieved of them by granting the hypothetical tenancy to a tenant who thereby becomes liable to comply with a repairing obligation owed to that landlord (*Hoare v National Trust*). In *Hoare* this resulted in the two National Trust properties, Petworth House and Castle Drogo, being assessed to a nominal value. Where the listed building obligation is not so onerous, it may nevertheless justify a specific reduction in rateable value to reflect the annualised additional cost of maintaining a hereditament which is a listed building as compared with a similar property which is not (*Harrods Limited v Baker* [2007] RA 247*)*. Such a deduction may also be justified where the property is valued by an indirect method of valuation (e.g. a CB valuation based upon a "modern substitute").

67. In the present case, the Respondent did not seek to quantify any such reduction as a separate item, given that its case is that the rateable value of the property is nil or a nominal amount in any event. Instead the Respondent contended, relying on *Hoare*, that the repairing obligations for the museum as a listed building, in the context of the overall operating costs, were so great that this is a case where the hypothetical landlord would be keen, if not glad, to transfer all those burdens to a hypothetical tenant in return for a nominal or nil rent.

The need for revenue to subsidise the costs of occupying and operating RAMM

68. In the circumstances we have described above, there was no dispute between the parties that RAMM could only be occupied under the hypothetical letting for the purposes of its mode or category of occupation if the hypothetical tenant, the Respondent, provided revenue from its own resources to subsidise the costs of occupying and operating the museum. There was no evidence to suggest that any other source of revenue funding would have been available.

Affordability of rent under the hypothetical letting

69. In *Tomlinson* the Court of Appeal referred to the principle that the valuer must not create or imagine additional demand for the hereditament from hypothetical tenants if, on the evidence, there is no reasonable possibility of that demand existing ((1960) 6 RRC 173, 177 and also *Great Western Metropolitan Railway Co. v Hammersmith Assessment Committee* [1916] AC 23, 35). In that case the Court held that it was plain that there could be no hypothetical tenant other than the actual occupier, Plymouth Argyle, for a league football ground with large grandstands and other equipment needing thousands of pounds to be spent annually on maintenance. On the evidence in that case it would have been wrong to assume that the actual occupier would face competition for the hypothetical letting.

70. Given that the actual occupier would have been the sole bidder for the hypothetical letting, the Court went on to hold (pp. 177 – 180) that whether the occupier was financially able to pay the hypothetical rent contended for by the Valuation Officer in that case was a relevant consideration.

The financial difficulties faced by the football club, the local benefactions upon which it had depended from time to time and the club's history were matters to be taken into account, alongside the importance attached by the inhabitants of Plymouth to the continued existence of the club, when assessing the reasonable rent which the hypothetical parties would agree.

71. As we have already pointed out, in this case it is common ground between the parties that the Respondent would be the only bidder for the hypothetical letting. Accordingly, its financial ability (or otherwise) to pay the rent contended for is a relevant consideration in deciding how much weight to give to the valuation opinions advanced before us. Furthermore, we should have regard to the circumstances of the Respondent. It is a local authority which is subject to democratic accountability. It also has legal responsibilities with regard to the setting of its budget and financial management. By way of example, Mr Forsdick QC relied upon the well-established principle that a local authority owes a duty to conduct the administration of its funds in a fairly business-like manner with reasonable care, skill and caution, and a due and alert regard to the interests of council tax payers, who contribute part of those funds (*Roberts v Hopgood* [1975] AC 578; *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768). In effect, the authority has a duty to exercise financial prudence in determining its expenditure and the use of its resources. The Appellant did not make any contrary submission.

72. While there can be no doubt that the Respondent regards RAMM as making important socio-economic and cultural contributions to the area, it would be unrealistic and improper for the Tribunal to ignore the competing demands for expenditure which the authority faces from other public services and premises, whether of a mandatory or discretionary nature. Such matters were treated as relevant considerations in, for example, *Eastbourne Borough Council v Allen* [2001] RA 273. Mr Singh QC did not argue to the contrary. Between the financial years 2008/9 to 2010/11 the Respondent's budgeted revenue expenditure on RAMM amounted to between £1.366m and £1.531m, which represented 8.42 to 9.1% of its net annual budget[3] (£16.215m to £16.821m). Thus, the Appellant's annual rental value of £690,000 which would represent an increase of approximately 45-50% in the Respondent's budget for RAMM, or an additional 4% of the Respondent's total annual net budget, a substantial increase in the outgoings it already subsidises each year and continuing for the future duration of the hypothetical letting.

73. Mr Singh QC faintly suggested that the Respondent could have provided additional funds to pay for the rent estimated by Mr Hughes by disposing of other property to raise capital receipts. However, Mr Forsdick QC pointed to the legislation which constrains the ability of a local authority to apply capital receipts to revenue expenditure. The Appellant did not produce any analysis to the contrary. Mr Singh QC also made generalised suggestions (for example, in his speaking note for closing submissions) that the Respondent could have made revenue savings by disposing of properties or could simply have increased charges for its car parks in the City by say 10p an hour. The Appellant did not produce any analysis to support what were really no more than

[3] Net annual budget refers to the authority's General Fund expenditure. The General Fund comprises all revenue items falling outside ring-fenced accounts (such as housing revenue account and certain grants) and covers both mandatory and discretionary expenditure. We note that during these years RAMM was closed for the works of alteration. Below we also consider the agreed R & E valuation in which the parties assumed footfall and revenue expenditure for RAMM when reopened. It also allowed for admission charges.

vague assertions. For example, particular properties were not identified[4]. A similar approach was taken to the submission on parking charges. No analysis was made, let alone evidence adduced, for example, of the number of spaces operated by the Respondent, any competition with private sector car parks, supply and demand considerations, or the policy or economic implications of seeking to increase parking charges. Both of the suggestions made by Mr Singh QC give rise to sensitive issues which would need to be considered carefully and in appropriate detail.

74. We will assess the evidence before us on affordability and the Respondent's financial position below.

Review of case law and decisions

Introduction

75. At the heart of the Appellant's case lies the submission that the R & E method is only appropriate where a hereditament is occupied with a view to making profits, and so the valuer can assess what rent the hypothetical tenant might reasonably pay in order to occupy the property and have the opportunity of achieving those profits. By the same token, the R and E method should not be used where the hereditament is occupied not to make profits, but to obtain or promote social, economic or cultural benefits for the public. Where the accounts show that such occupation is loss-making, the R and E method does not indicate the value or extent of those benefits of occupying the hereditament and therefore how much an occupier would be prepared to pay by way of rent. Applying the R & E method in such circumstances to arrive at a nil or nominal rent effectively confines the notion of "value" to "profit" and conflicts with case law in which it has been held that occupation for non-profitable purposes may itself be valuable and therefore justify a positive rateable value.

76. The Appellant goes on to say that because there is no comparable evidence which can be used to derive a rental value, and because the R & E method has to be rejected, there remains only the CB method. We note that the CB has sometimes been described as a "method of last resort" to reflect its potential weaknesses. But the R & E and CB methods are both indirect methods of valuation. There is no legal hierarchy as between the two. But here the label "method of last resort" is used by the Appellant as part of his construct that, because no other methods are suitable, *only* the CB may be used. That begs the important question whether the R & E method is indeed inappropriate for dealing with a hereditament of the present kind and, in any event, whether the CB faces similar challenges of how to evaluate and then reflect in a valuation non-commercial motivation, ability to afford rent and other factors affecting this hypothetical letting.

77. Mr Hughes' reliance upon the CB method was rejected by the Tribunal in *the York Museums case.* Mr Singh submits that that case was wrongly decided. Accordingly, we will review the

[4] Other than the Clifton Hill Sports Centre, but see the evidence on leisure centres at [137] below.

relevant case law to see whether it supports the Appellant's contention before going on to consider the *York Museums* case.

78. Mr Singh QC began with the Guidance Note on the R & E method issued by the Joint Professional Institutions' Rating Valuation Forum ("JPIRVF"), paragraph 3.4 of which advises that the R & E method "may be the most appropriate method" in the absence of reliable rental evidence, where the occupation of a property is primarily concerned with achieving anticipated profit and the tenant's rental bid is therefore likely to be based upon a consideration of receipts and expenditure. However, it will be noted that the document does not state that the R & E method should *only* be used in those circumstances or that it would be inappropriate to apply that technique in the present type of case.

79. We will begin our review by considering earlier cases on the use of the CB and R & E methods, before going on to address decisions from the 1960s leading up to the seminal decision of the Court of Appeal in *Garton v Hunter* [1969] 2 QB 37. We will then address some Scottish decisions to which we have been referred, before considering more recent English decisions. Finally, we will turn to deal with the *York Museums* case and summarise our overall conclusions. Before embarking on this exercise, we should make it clear that the purposes of this review are limited to (a) examining the correctness of the Appellant's propositions and (b) providing guidance for valuation in the unusual circumstances of historic properties such as RAMM. Given that the focus of the evidence in this case was on hereditaments of that nature, our conclusions and observations should not be taken as necessarily applying more generally.

Earlier case law

80. Mr Singh QC placed great reliance upon *R v School Board for London* (1886) 17 QBD 738 and *London County Council v Erith and West Ham Overseas* [1893] AC 562. Those decisions firmly established the legal principle that occupation of a hereditament for non-pecuniary or non-profit making purposes did not lead to the conclusion that such occupation could not be of value. Occupation for social or public interest reasons may both amount to beneficial occupation attracting liability for rates and support a positive rateable value (see also *Telereal* [41]).

81. In the *London School Board* case the actual occupier had a statutory duty to perform, namely to provide a school. That obligation was satisfied through the Board's occupation of the hereditament. It was held that the relevant question was what rent would be paid by a hypothetical tenant to occupy the property "from any motive", and not merely for the purposes of making a profit or commercial reasons.

82. The House of Lords endorsed that approach in the *Erith* case. The true test of beneficial occupation, and for the assessment of rateable value, is not whether a profit can be made from the occupation but whether it is of value (pp. 591-2). The hereditament in *Erith* was occupied by the Council as part of its sewerage system which it was under a statutory duty to provide. But it is also important to note that, in the context of discussing a valuation method based on the capital costs of constructing a hereditament, Lord Herschell LC stated (p. 593) that there are *many*

circumstances affecting the question what would the owner of premises have been willing to give if instead of becoming the owner he had become the tenant of them, and then added: -

> **"**In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises".

This is the "real value" criterion referred in [26(vii)] above.

83. In *Kingston Union Assessment Committee v Metropolitan Water Board* [1926] AC 331 the House of Lords explained the derivation and application of the R & E method in relation to utility undertakings which generate revenue (pp. 338-340). In that case the justices had applied the CB method to part of the Respondent's undertaking, rather than following the normal approach of applying the R & E method to ascertain a rental value for the whole undertaking before apportioning that figure between individual rating authorities ("the diffusion principle"). The justices did so on the grounds that the Respondent occupied the hereditament for the purpose of carrying out their statutory duties and not for the purpose of earning profits (p. 341). The House of Lords rejected the notion that the R & E method could not be applied to the occupation of an undertaking which generates revenue, merely because it is subject to such duties, or to restrictions on the profit earning capacity of the property or on the distribution of those profits (see also *Port of London Authority v Orsett Union Assessment Committee* [1920] AC 273). Lord Atkinson also made it plain that both the R & E and CB methods are mere aids for arriving at the annual letting value required by the rating hypothesis; they are not substitutes for the test laid down by the legislation (pp. 349-350).

84. In *Robinson*, Scott LJ referred to cases of profit-earning hereditaments occupied by utilities, where the R & E method is used, and to cases where the motive for occupying a hereditament is the performance of a statutory duty and there is no motive to make profits, where the CB method is applied ([1937] 2KB at pp. 475 and 481)). However, he did not suggest that those categories defined exhaustively the circumstances in which either method may be applied.

85. None of these cases addressed the situation where a non-profit making property is occupied, in the absence of any legal compulsion, for the purposes of promoting socio-economic benefits. Certainly, there are examples of the CB method being applied to premises occupied on a voluntary basis because of a social, cultural or moral motivation, for example, educational facilities (*Cardiff City Council v Williams* [1973] RA 46; *Imperial College of Science and Technology v Ebdon* [1986] RA 233). But there was no dispute in those cases that the occupation was of positive value and that the CB method should be used to ascertain that value. In our judgment, it is important to bear in mind that the relative strength or weakness of motivations of this kind may affect the extent to which the occupier could reasonably be expected to pay a rent to occupy a loss-making historic property, along with all other relevant considerations. The nature and significance of such benefits and their effects may be relevant factors. Ultimately, these are matters of fact and degree and of valuation judgment. It is necessary to consider whether in the case of properties such as RAMM, the R & E method (or a variant thereof) may have a useful role to play in assessing rateable value.

Decisions in the 1960s

Morecambe and Heysham Corporation v Robinson

86. *Morecambe and Heysham Corporation v Robinson* [1961] 1 WLR 373 was concerned with the valuation of "beach and premises" at Morecambe. The hereditament comprised the foreshore, the sea wall, the esplanade, paddling pools, putting greens, ornamental gardens and shelters. Charges were levied for the use of a few facilities, e.g. putting greens, deck chairs and a jetty. The parties agreed that the R & E method should be used. The Corporation's evidence was that revenue only just exceeded expenditure, and that became a modest deficit after allowing for the tenant's share on tenant's assets, i.e. deck chairs and small items of equipment (see the Lands Tribunal (1959) 5 RCC 164, 167-8). The Valuation Officer arrived at a positive rateable value mainly by contending that income from the hire of deck chairs could reasonably have been increased (p. 169). There was evidence that in other parts of the country, beaches had been let in only a small number of cases and had generally been valued on the R & E basis; where that method had indicated a nil value, a "substantial" rateable value had been agreed of around £1000 (pp.171-172).

87. Not surprisingly, the benefits provided by the hereditament were of "prime importance" to the town and its prosperity. The preamble to the Morecambe Corporation Act 1928, which empowered the authority to construct a sea wall and promenade, explicitly made that point (p. 172). There is therefore a clear analogy with the present case. The Tribunal accepted that although "nil or exiguous" profits were not uncommon for this type of property, the assessment of a rateable value "would be conditioned by *the degree of loss or profit (however small)*" (p. 172 with emphasis added).

88. The Tribunal rejected the Corporation's analysis of the accounts resulting in a deficit and a nil value. But the Tribunal also concluded that, even with the corrections it had made, the Valuation Officer's valuation produced a positive rent which was still too low to represent the "true value" of the hereditament to the authority. Accordingly, the Tribunal decided that the authority "would be prepared to suffer a *moderate loss*, rather than permit this hereditament to remain unlet and unmanaged" (p. 175). It then arrived at a rateable value of £1,000.

89. It is noteworthy that, although capital costs would have been incurred in the construction of the hereditament under the 1928 Act, no one suggested that the CB method should be used. Presumably this was because to value the property by reference to capital costs would have produced an absurdly high result, notwithstanding the undoubted socio-economic importance of the hereditament to a coastal town dependent on its seaside amenities. It would have been necessary to apply very large end allowances at stage 5 which would only have served to undermine considerably the reliability of the CB method in that case.

90. The discussion in *Morecambe* also shows that for properties of that nature, the R & E method is not to be ruled out as an aid or tool to assess the rateable value simply because it arrives at a modest profit or even a loss. Instead, that outcome should form part of the overall circumstances

which must be taken into account in making a valuation judgment as to what the rateable value should be.

91. In the Court of Appeal the complaint made by the Corporation essentially was that the Tribunal had erred in law by departing from the strict application of the R & E basis. The Court held that there had been evidence to show that, in the circumstances of that case, a nil assessment would have been unrealistically low, and that the Tribunal had been entitled to rely upon other beach assessments to support a rateable value of £1000 (p. 379).

92. The Court went on to summarise the position which had been reached by 1961 in the application of the R & E method. First, in the class of hereditaments described as public utility undertakings, the consistent approach was that the R & E method had to be applied, unless "special circumstances" existed to justify a departure therefrom (pp. 379-380). Although the Corporation's 1924 statute referred to the hereditament as being occupied by an "entertainments undertaking", and this was an activity of the Borough, the Court of Appeal decided that it was not a public utility undertaking to which the R & E method had to be applied as a matter of principle. The undertaking was not directed to supplying public needs; it was an amenity undertaking, intended to create attractions in Morecambe to draw visitors to it and to spend their money in the Borough for its general prosperity (Holroyd Pearce LJ at p. 380).

93. The Court of Appeal also confirmed that there is a second class of case comprising undertakings which are not public utility undertakings, but which may share some of their characteristics (and need not be located in more than one rating area so as to engage the "diffusion principle" in *Kingston Union*). The Morecambe hereditament was such a case. In this second class, the use of R & E method is "permissible" rather than mandatory, and the method may be applied in its "strict form" or in a "modified form" (see also the citation at pp. 380-381 of *Amalgamated Relays Ltd v Burnley Rating Authority* [1950] 2 KB 183 and *Surrey County Valuation Committee v Chessington Zoo Ltd* [1950] 1 KB 640). The selection of either form is a matter for the Tribunal on the particular facts of the case, so long as it leads to a valuation satisfying the rating hypothesis in what is now sched. 6 of LGFA 1988 (pp. 380-382).

94. Harman LJ explained that the R & E method may be used where the occupier's motive is to *collect revenue* and not solely to make a profit (p. 384). In the *Morecambe* case the revenue sources and amounts were limited in relation to the hereditament as a whole. He pointed out that elsewhere such an enterprise might be let out to an entrepreneur in order to make a profit:-

> "But the Borough itself has other objects in view than a direct profit, such as the prestige of the town, the employment thus given to its citizens and the money likely to flow into the pockets of shop and lodging-house keepers, and it seems to me that unless there is a rule binding us to adhere to the profits basis, the statutory formula might well require a figure above that based on direct profits alone."

95. Accordingly, the Court of Appeal decided that the Tribunal had been entitled to arrive at an assessment of £1,000, albeit a higher figure than that resulting from the strict application of the R & E method, in order to make a judgmental allowance for important socio-economic benefits to

the actual occupier, the local authority. That was the approach taken in *Morecambe*, rather than to reject the use of the R & E method altogether. However, as we have pointed out, the Appellant in the present case has decided not to present any evidence on that alternative basis, even as a fallback. His is an "all or nothing" case, relying solely on the CB method.

96. This approach for the second class of case has been applied in many English decisions on local authority properties such as municipal markets, beaches and esplanades, and piers. In such cases, the Tribunal has sometimes added a percentage, varying between 25 and 50%, to the outcome of an R & E valuation to represent the local authority's "overbid" for the socio-economic benefits arising from the occupation of the hereditament (see e.g. Ryde on Rating and the Council Tax at paras. E627-641). Although the use of this technique has been criticised in Scotland, there is no dispute that it is used in this jurisdiction.

97. As the decision of the Lands Tribunal in the *Morecambe* case shows, and as we discuss further below, the assessment of an amount to represent or reflect the size or significance of socio-economic benefits, or the affordability of any given level of rent by a local authority occupier, is dependent on the use of valuation judgment. We have not been referred to, nor are we aware of, any valuation technique which enables the socio-economic motivation for a local authority's occupation of a hereditament to be directly estimated as an annual letting value, or component thereof. Nevertheless, it is established practice for a valuer to use judgment in making significant adjustments to allow for this factor.

98. An authority's "overbid" may be expressed as a percentage, a proportion, or an absolute (i.e. monetary) adjustment. It may be expressed as a separate adjustment, or, as in the *Morecambe* case, rolled up as part of a broader assessment of value, taking into account other factors as well. However this assessment is carried out, it is important that the valuer should set out his or her reasoning to explain the judgment which has been made.

99. Where the R & E method produces a low rental figure, and an uplift for the local authority's "overbid" is justified, it is sometimes said that a percentage addition, for example 50%, is arbitrary. But it has to be acknowledged that although a socio-economic motivation may be a very real factor which should be taken into account in the estimation of rateable value, generally, there may be no direct, or even indirect, evidence to enable such a percentage (or indeed any other numerical expression) to be computed. Instead a valuer uses his or her expertise and judgment about the significance of the socio-economic benefits to assess what that uplift is worth, *alongside all other relevant valuation factors*.

100. Given that this is so, there can be no objection in principle to the use of valuation judgment for the same purpose where the outcome of the R & E method is approximately nil or a modest deficit or even plainly a negative value. In our judgment the same applies when the R & E method produces a very substantial loss year on year, as in the present case. The difference between these situations is one of degree, not principle. It is open to the valuer to assess whether the valuation significance of any relevant socio-economic benefits approximately equates to, or is less or greater than, the size of the R & E deficit, provided that all other factors affecting the rateable value are also taken into account. As we explain below, very similar issues arise in any event where the CB

method is used, for example where the ability of a local authority to afford a rent for the hereditament is a relevant consideration.

101. Before leaving *Morecambe*, we note that by Regulation 3 of the Non-Domestic Rating (Miscellaneous Provisions) (No.2) Regulations 1989 (S.I 1989 No. 2303) Parliament repealed any rule requiring the R & E method to be used for the valuation of a public utility undertaking. This is consistent with the modern approach in *Garton v Hunter* which allows a more flexible or nuanced approach to the use of valuation methods (see below).

British Transport Commission v Hingley

102. *British Transport Commission v Hingley* [1961] 2 QB 16 was a case argued before and determined by the Court of Appeal almost contemporaneously with *Morecambe*. Two of the judges sat in both cases (Holroyde Pearce and Harman LJJ). The main issue was whether the Grimsby Docks should be assessed on the R & E method. The hereditament was intrinsically a loss-making property. It had operated at a loss for many years. Applying the R & E method, the Lands Tribunal assessed the rateable value as nil. It had cost the undertaking millions of pounds to construct the docks and the ratepayer accepted that it was unthinkable that they should be closed down.

103. It was common ground that on a normal application of the R & E method the rateable value would be nil. However, the Valuation Officer (represented by the Solicitor General, Sir Jocelyn Simon Q.C.) submitted that there were special circumstances which justified a departure from, or modification of, the R & E method resulting in a rateable value of just over £6,000. The Valuation Officer relied not only upon the size of the capital investment made by the undertaking, but also the direct employment of 1000 people and the dependency of many others upon the enterprise (p. 32). The ratepayer accepted that the prosperity of the town was bound up with the port (p. 33). Any losses resulting from the running of the docks was made good from other resources of the Commission and ultimately by the Treasury (pp. 23-24 and 33). The R & E method resulted in a substantial deficit, even before making any allowance for the tenant's share (p. 35). Notwithstanding the very considerable socio-economic benefits and public interest in keeping the docks in operation, it was not suggested that the CB method should have been applied.

104. The Tribunal decided that although a tenant might be found to take on the liability to run the docks at a loss, whether for statutory, moral or social reasons, they would not be prepared to pay any rent at all in order to do so (p. 34). This is another example of valuation judgment being used "to weigh every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down" "to see the resultant figure on the dial at which the pointer finally rests" (Scott LJ in *Robinson* at p. 469).

105. The Court of Appeal dismissed the Valuation Officer's appeal, after reviewing the line of authority which includes *Erith* and *Kingston Union* (pp. 36-9). It held that the R & E method had

consistently been applied to public utility undertakings, including docks, the object of which was to collect a *revenue*. Thus, the application of that method did not depend upon the hereditament having the capacity to generate *profits*, as opposed to revenue, or even a motive to achieve profits (p. 36). It held that the mere fact that the R & E method produces a nil assessment for a large industrial concern is not a special circumstance which makes that method inapplicable (p. 39).[5]

106. The Court reiterated the important point that a valuation method, such as the R & E, is only an aid or guide to ascertaining rental value on the statutory hypothesis. Such methods are not to be treated as the statutory test (pp. 35-8 and 43). The Court held that there was no legal basis for interfering with the Tribunal's factual findings that the hypothetical tenant would consider the loss in operating the docks to be so significant that, notwithstanding the socio-economic importance of keeping the docks in operation, he would be justified in offering no rent for the tenancy, and the landlord would accept that offer knowing that the docks would be functioning and kept in good order (pp. 32, 34 and 43).

107. The Court acknowledged that the CB method had been applied consistently to cases where, for example, a local authority is obliged to provide sewerage works or a school and where the object is not to collect a *revenue*. In such cases, the assumption is that the authority which has to provide the works or the building would, as a hypothetical tenant, be prepared to pay as a rent a reasonable percentage on the cost of the works or building which it would otherwise have to construct. Plainly, that part of the Court of Appeal's judgment cannot be treated as an exhaustive statement on the circumstances in which the CB method may (or may not) be applicable. Although the dock undertaking had incurred the capital costs of construction, it was common ground that the CB method would have produced too high a figure for ascertaining the rateable value, owing to the very large costs of construction, and so that method was inapplicable (p. 36). Accordingly, *Hingley* indicates that evidence of a public authority having been prepared to incur capital expenditure on the construction of the hereditament is one of the factors to be weighed in the valuation assessment, but it may not be conclusive. Rather it is a matter of judgment and weight having regard to all the relevant circumstances.

Garton v Hunter

108. *Garton v Hunter* [1969] 2 QB 37 was concerned with the methods of valuation for arriving at the rateable value of a caravan site. There was evidence of the rent payable under a lease of the site. The ratepayer relied upon the CB to support a valuation of £5,100. The Valuation Officer relied upon the R & E method to support a valuation of £8,700. The Tribunal rejected the use of those two methods and arrived at a rateable value of £5,750 by making adjustments to the rental evidence. The Tribunal relied upon a principle that evidence of a rack rent on the subject property (or truly comparable properties), provided "the best evidence" for a rating valuation and for that reason alone decided that the evidence applying two other methods, CB and R & E, was inadmissible.

[5] The Court also confirmed that a decision to use the R & E method does not depend upon the "diffusion principle" referred to in *Kingston Union*, The R & E method is applicable to a hereditament located within the area of a single rating authority (p. 40).

109. The Court of Appeal allowed the Valuation Officer's appeal. Lord Denning MR said (p. 44):-

> "Nowadays, we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility".

Where the subject property is let at a rent which is plainly a rack rent, or where similar hereditaments are so let, so that they are truly comparable, that is admissible evidence of what the hypothetical tenant would pay, but it is not necessarily decisive. All other relevant considerations are admissible.

110. In *Garton* there were no comparables and caravan sites were not often let out to tenants. The usefulness of the rent on the hereditament might have been affected by the special circumstances in which the lease had been granted, involving the surrender of an earlier lease. Accordingly, it was prudent to take into account valuations based on the R & E and CB methods. The Court decided that the Tribunal ought to have taken all that material into account and from that overall information arrived at its assessment of the rateable value (pp. 44-45).

111. Accordingly, the matter was remitted to the Tribunal so that it could evaluate the evidence on each of the three methods and decide the relative weight to attach to each of them. That exercise was carried out by the Tribunal in the further decision reported at (1969) 15 RRC 145. The Tribunal rightly held (p. 163): -

> "We do not look upon any of these tests as being either a "right" method or a "wrong" method of valuation; all three are means to the same end; all three are legitimate ways of seeking to arrive at a rental figure that would correspond with an actual market rent on the statutory hypothesis, and if they are properly applied all three should in fact point to the same answer; but the greater the margin for error in any particular test, the less the weight that can be attached to it".

112. There is no dispute between the parties that this guidance from the Court of Appeal and the Lands Tribunal in *Garton v Hunter* remains sound today. For the sake of clarity, we would add that this guidance should be taken as also referring to how well the application of any valuation method in a particular case reflects the circumstances of the hereditament (and its locality) and the relative significance of all the relevant factors affecting the negotiations between the hypothetical parties.

113. We mention in passing that in its redetermination of the appeal the Tribunal decided, on the evidence in that case, to attach considerable weight to the R & E valuation, not much weight to the rental evidence, and very little weight to the CB method.

Decisions in Scotland

Introduction

114. Mr Singh QC helpfully explained that where an appeal is made from the Lands Tribunal for Scotland to the Lands Valuation Appeal Court, the jurisdiction of that court is not confined to correcting errors of law, but includes valuation matters.

115. It is necessary to sound a note of caution in relation to some of the dicta in the Scottish decisions cited to us on choice of valuation methods. In some respects their approach is rather different to that taken in English decisions; it is sometimes more restrictive or strict. By contrast, in this jurisdiction it is well-established that valuation judgment may be used in the selection and application of valuation methods to reflect the circumstances of the hypothetical letting of a particular hereditament (see e.g. *Robinson, Morecambe* and *Garton v Hunter*).

116. By way of example, in *Scottish Exhibition Centre Ltd v Strathclyde Regional Assessor* [1992] RA 209 Lord Cameron relied upon the line of authority which includes *Oakbank Oil Company v Assessor for Midlothian* (1902) 9 SLT 471 and *Scottish Greyhound Racing Company v Glasgow Assessor and others* [1947] S.C. 380 for the proposition that there is a very limited class of case (notably utilities) in which the R & E method may be used, but these all involved a monopoly or quasi-monopoly associated with the particular hereditament. This "monopoly of place" refers to the profit earning capacity of an undertaking which cannot be carried on elsewhere (p. 219 and see also Lord Clyde at p. 211). In England a monopoly of place is one possible justification for relying upon the R & E method, but we have seen that our case law does not restrict the use of that method to that circumstance.

Montrose Town Council v Assessor for Angus

117. In *Montrose Town Council v Assessor for Angus* (1964) S.C. 363, the Lands Valuation Appeal Court decided that a loss-making, public indoor swimming pool constructed by a local authority should be assessed using the CB and not the R & E method. In England and Wales it is likely that the same conclusion would be reached (see e.g. the *Eastbourne* case on leisure centres discussed below), but it would not involve reasoning of the kind we see, for example, in *Montrose.*

118. Lord Sorn stated that the R & E method was confined to a very limited class of property in which the premises, and the monopoly of place attaching to their occupation, are of such a nature that the profit generated is treated "as being earned virtually by the premises themselves." In such cases, the profit, or the revenue is treated as "the direct basis of valuation" (p. 370).

119. But it is noteworthy that Lord Sorn referred at p. 370 to a second type of property, where an "element of monopoly" attaches to the occupation of premises because, for example, of the special adaptation of the premises for a particular activity. Thus, Lord Sorn was prepared to treat an indoor swimming pool as potentially falling within this second category (provided that the pool was

operated as a separate undertaking), in which case regard might be had to profits or revenue as "indirectly throwing light upon the value of the occupation". In our judgment, this observation could be applied to a building, such as RAMM, constructed and adapted for the specialist purpose of a public museum. RAMM generates only a limited amount of revenue, and is occupied as a loss-making operation. But why should this approach not be applied to the revenue and expenditure (i.e. the ongoing deficit) which attaches to the occupation of RAMM, when assessing the reasonableness of expecting the hypothetical tenant to pay a significant rent rather than a nominal or nil rent, and if a positive rent, then how much?

120. The other members of the Court did not address this second type of property. Lord Patrick stated that the "normal case" for applying the R & E method is where the occupier has attempted to make a profit, or at least to avoid incurring a loss. But because the local authority had expended a large amount of capital in providing a social service, without any intention of producing a surplus revenue (although charges were made for admission - p. 372), the R & E method could not be applied, otherwise all such properties would have to be assessed at a nil value. On this basis he decided that the CB method had to be used (p. 369). Lord Sorn and Lord Hunter reached the same conclusion (pp. 370-2).

121. That analysis, with great respect, merely posed a binary choice between the two valuation methods, dependent simply upon whether the hereditament had been created at a substantial capital cost and without any intention to produce a surplus revenue. But there are further issues which may need to be considered in unusual cases such as the present one. For example, are social or socio-economic benefits attaching to the occupation of the premises only capable of being taken into account by using the CB, or could they also be reflected by using the R & E method? Can the CB method sometimes overstate the annualised sum derived from capital costs unless substantial reductions can be made at stage 5 to reflect other factors of the hypothetical letting, such as lack of commercial motive, affordability of rent and high operating costs? It could be said that for loss-making properties, just as the R and E method always results in nil valuations, the CB method always results in positive valuations, unless *in either* case, valuation judgment is applied by making adjustments, if appropriate, to reflect all relevant factors not otherwise taken into account (see e.g. stage 5 in the CB method). There was no discussion in *Montrose* on whether the R & E method may sometimes be used as a tool to help on these issues, and if so how valuation judgment may be applied (other than the brief comment of Lord Sorn at p. 370). The reasoning of the Scottish court stands in marked contrast to English decisions such as *Morecambe*, *Hingley* and *Garton*. Accordingly, we find the decision in *Montrose* to be of little assistance on the issues with which we have to grapple in the present case.

Scottish Exhibition Centre Ltd v Strathclyde Regional Assessor

122. The Appellant regards this decision as being particularly supportive of his case. The Lands Valuation Appeal Court considered the assessment of the Scottish Exhibition Centre, which was used for exhibitions and conferences in a dockland development in Glasgow occupying about 54 acres of land. The Assessor had valued the property for rating at £1.275m applying the CB method. In arriving at that figure the Assessor had made a final end allowance of one third. That deduction included a 20% allowance for "the non-commercial aspect" of the occupation, equivalent in absolute terms to about £320,000. Without that particular deduction the assessment would have

been in the order of £1.6m. The ratepayer had contended before the Tribunal that if the CB method were to be used, the end allowance should be 71%, including 30% for the non-commercial nature of the occupation. However, the ratepayer's main contention at first instance and on appeal was that the R & E method should have been used instead of the CB, which would have resulted in a nil valuation. The Court dismissed the appeal and so the Assessor's valuation was confirmed.

123. The centre had only been open for about 3 years before the valuation date (p. 212). It comprised two main buildings, one containing three halls and the other two. It had been built to a high standard to allow flexibility of layout and use. It was the largest such centre in Scotland and competed for much of its business with other venues in Great Britain and Europe, as regards both facilities and charges. When the centre was first planned the market for conferences and exhibitions had been growing and it had been hoped that the centre would be profitable. It was introduced to attract visitors to Glasgow and Scotland and to promote Scottish trade and industry. About 78% of the total investment at the construction stage came from the public sector. A substantial proportion was provided by the European Development Fund and the balance by Strathclyde Regional Council, Glasgow District Council and the Scottish Development Agency. In 1989 the ratepayer company was restructured so that the public investment was increased to 91%, so that both local authorities had the major financial interest in the business. The centre had turned out to be loss-making and it was judged that for the foreseeable future it would be unlikely to make profits. Nevertheless, the two local authorities were prepared to make grants and subventions to encourage the use of the centre for socio-economic purposes (pp. 212, 218 and 220). So in this case it is notable that the development was a recent, purpose-built construction, for which the capital cost was funded largely by the public sector, and the ongoing operating costs were subsided by the two major public authority investors.

124. The Court upheld the main reasons given by the Lands Tribunal for rejecting the use of the R & E method in this particular case. First, the activity carried on at the centre was in competition with other venues and so was not something which could not be carried on elsewhere. There was no "monopoly of place". Although the hereditament was the largest exhibition centre in Scotland and there was no single facility directly comparable with it for major events designed for the Scottish public, that did not put the premises into a different category from other places large enough to accommodate major exhibitions or conferences (pp. 211-212, 216, 218-220). By contrast, English case law does not insist upon a "monopoly of place" in relation to the generation of revenue as a pre-requisite for using the R & E method (see above).

125. The second reason for rejecting the R & E method, was that the Centre was being operated for the sake of the benefits brought to the community and to Scotland; it was for that reason that considerable public capital investment had recently been made to fund most of the construction costs. The centre was viewed as a major attraction for economic benefits, rather than a commercial enterprise which had failed (pp. 212-213, 216 and 220-221). By contrast English case law does not preclude reliance upon the R & E method where loss-making premises are occupied purely for social or economic purposes (see e.g. *Hingley*). Furthermore, in the present case most of the capital investment in the costs of constructing the appeal hereditament was historic and was not provided by a public authority.

126. However, it is worth noting that one member of the court, Lord Prosser, did not consider that the "monopoly of place" rationale necessarily ruled out the use of the R & E method where the hereditament itself was intrinsically incapable of producing a profit, so as to point to a nil valuation. In such a case, he thought that the precise level of the loss would be of no concern and, furthermore, that it might be inappropriate to use the CB method (pp 214-216). But it appears to have been the socio-economic motivation for the construction and subsequent operation of the centre on a loss-making basis, requiring public sector funding, which led him to reject the use of the R & E method and accept the application of the CB as the sole method of valuation in that case (p. 216).

127. But in our judgment if it is sought to apply that line of reasoning to the present type of case there is a gap. Where the actual occupier of a museum with a historic origin is the only potential bidder for the hypothetical letting, we do not see why the substantial size of an ongoing deficit could not inform the valuer's judgement on the value-significance of the socio-economic motivation for continuing to carry on the activity, the extent to which the occupier has resources to afford a rent, and all other relevant considerations. The R & E method can provide a tool or framework within which those factors may be taken into account.

128. We are reinforced in this view by the way in which the CB method was applied in the Scottish Exhibition Centre case itself. It appears that the ratepayer submitted faintly that an addition could have been made to the outcome of the R & E method, otherwise a nil valuation, to reflect the readiness of a local authority to pay some rent for occupying the premises in order to promote socio-economic benefits. Lord Clyde referred to this "in the English terminology as an overbid" (see the discussion on local authority markets, piers and beaches above), which he criticised for lacking guidance "to restrain the arbitrary nature of that course". He preferred the alternative of making a percentage deduction (i.e. 20%) as an end allowance for "non-commercial aspects" at stage 5 of the CB valuation (p. 213). Even so, when it came to dealing with the ground of appeal as to whether that deduction should have been 30% rather than 20%, Lord Clyde said that while the end allowance for "limitation on use" of 13.33% had been "open to some kind of calculation and explanation, the allowance for the non-commercial aspect appears to have been assessed very much more on the basis of an expert appraisal where detailed reasoning was not available" (p. 214).

129. We note the dictum of Schiemann LJ in *Hoare v National Trust* [1998] RA 391, 411 agreeing with Lord Clyde's remarks. But we also note that he did not address the following passage from the judgment of Lord Prosser (pp. 217-218): -

> "the adoption of any figure, whether seen as a negative deduction under the construction principle, or a positive estimate of value to the occupier, appears to me to be virtually arbitrary."

130. We agree with Lord Prosser that in this respect there is no difference of substance between the two valuation approaches, the R & E method and the CB method. We find it difficult to see why a stage 5 deduction of this nature for a "non-commercial aspect" would be any less "arbitrary" (if that is the correct term) than the assessment of an overbid or uplift for a socio-economic motivation in conjunction with an R & E valuation. But rather than criticise the allowance as "arbitrary", we consider it preferable to say that in a case where the evidence indicates that such

an adjustment should be made, it is a judgment which the valuer, or the tribunal, is called upon to make using valuation expertise. A judgment of this kind may not be susceptible to calculation or detailed reasoning, but that is not unusual in valuation. At the end of the day the Lands Tribunal of Scotland made, and the Court endorsed, a very substantial 20% end allowance for the "non-commercial aspect", exemplifying this very point. By contrast in the present case the Appellant was not prepared to make any adjustment of that nature at stage 5.

Roxburghe Estates v Scottish Borders Council Assessor

131. The Appellant also relied upon the decision of the Lands Tribunal for Scotland [2004] RA 15. The appeal concerned the assessment of exhibition rooms in Floors Castle, an adjacent gift shop and restaurant, and part of the castle grounds. The Assessor had entered a rateable value of £16,400 in the roll derived from a percentage of gross turnover (which, incidentally, had been the method used by the Lands Tribunal to value Petworth House and Castle Drogo before that decision was reversed in *Hoare v National Trust* [1998] RA 391). The ratepayer contended that the R & E method should have been used, giving rise to a nil valuation because trading losses were attributable to the high costs of repairs, insurance and other expenses. Floors Castle was a historic house of national importance, the home of the Duke of Roxburghe. This case did not raise any issue as to whether the CB method should have been applied ([33]).

132. The Tribunal stated that normally the application of the R & E method *must depend* on the tenant being motivated to occupy the premises solely to make a profit ([33]). The Tribunal also disagreed with the approach taken in English valuation law and practice to use an "overbid" to reflect a non-commercial motive for the occupation of property. As we have seen, these statements in *Roxburghe* do not accord with well-established authorities in England and Wales. We have explained why we do not accept the criticism made of the overbid approach.

133. The Tribunal found that the Duke would be likely to be the tenant of the subject premises under the hypothetical letting ([36] and [47]). He was the occupier of the remainder of the Castle which was never open to the public and he had a "special interest" in obtaining the tenancy of those parts to which the public were admitted between April and October each year to help defray the costs of repairing and maintaining the Castle *overall*. The Tribunal regarded that as an obvious distinction from the *Hoare* case, where the National Trust occupied the whole of each of the historic properties ([35]), a point with which we agree.

134. Given the "special interest" which the Duke would have had in bidding for the subject premises, it is important to identify his motives for so doing ([47]). The evidence and findings were dealt with in a number of passages ([22], [26], [30-31], [34], [37] and [40-42]) and are well summarised in the headnote of the law report. The purpose of the operation was to alleviate some of the expense of maintaining the castle and grounds, and thereby to preserve the Castle as an ancestral home for the benefit of the Duke (including the use and enjoyment of the subject premises at times when they were closed to the public, the provision of an appropriate setting for the display of the art collection, and the enjoyment of the grounds as part of the setting for the Castle). The use of the public areas enabled the Duke to be a public benefactor by preserving Scotland's heritage for the future. Finally, public access to this part of the Castle for viewing the art collection enabled

the Duke to satisfy his obligations to the Inland Revenue in order to reduce his liabilities to capital taxation. The Tribunal described this as a "mixed motive combining the interests of the public in having access to the items in question and the occupier in saving of taxation" ([41]). There was also evidence that the costs involved in opening the subject premises to the public were always comfortably exceeded by the income generated and thus helped to defray the overall costs of maintaining the Castle, including its purely "domestic" parts ([38]). In these unusual circumstances, it is hardly surprising that the Tribunal rejected the contention that the subject premises should be assessed at a nil value and distinguished *Hoare v National Trust*. *Roxburghe* is not analogous to the present case and we gain no real help from it.

More recent decisions in England

Hoare v National Trust

135. The Lands Tribunal accepted the Valuation Officer's case that properties owned and occupied by the National Trust should be assessed to a modest rateable value by applying a percentage (3%) to the gross receipts earned at each property. The Trust contended that the assessment should have been nil in each case, because of the great burden in running and maintaining the properties, each of which was a listed building. The hypothetical landlord would have been content to be relieved of this burden by letting the property to the hypothetical tenant in return for a nil rent. The Tribunal accepted the Trust's evidence that the hereditaments were intrinsically loss-making (because of the large costs of running them) but decided that the Trust, which would be the hypothetical tenant, would be willing and able to make an overbid above a nil rent to reflect the great historic and cultural value of preserving the properties and enabling the public to visit them. This overbid was expressed through the percentage of gross receipts method. Neither party suggested that the CB method be used. The Court of Appeal reversed the Tribunal's decision, accepting the Trust's argument ([1998] RA 391).

136. The appeal proceeded on the agreed basis that the National Trust would be the only bidder for the hypothetical lettings (pp. 407 and 416). The Court acknowledged that the "overbid" approach had been developed in the context of properties occupied for local government purposes (p. 398). But it held that the Tribunal's conclusion that the Trust would make an "overbid" for social and cultural reasons (i.e. to preserve and secure public access to buildings of national importance) was legally flawed because the Tribunal had failed to take into account the fact that all the evidence pointed to the Trust being unwilling to use its existing assets and resources to fund net outgoings in respect of any property in respect of which it was considering obtaining an interest (p. 408). The Trust operated a policy under which it would generally not use its surplus funds to pay for the cost of occupying and running properties, but instead would require an endowment to be provided to the Trust for that purpose (p. 408). Accordingly, it had been inappropriate for the Tribunal to make judgments on the availability of such funds to pay a positive rent. Furthermore, it was unclear on what basis such surplus funds would be available to spend as rent for the appeal hereditaments as compared with all or any of the other properties owned by the Trust, or to meet other calls on those funds (p. 408).

137. There was no dispute in *Hoare* that affordability of rent was a relevant consideration and that the ratepayer had surplus funds. Although an essential part of the reasoning for allowing the Trust's appeal was that its acquisition policy had not been taken into account, the Court also relied upon the Valuation Officer's failure to demonstrate that surplus funds would be applied to the appeal properties rather than on other *potentially* competing demands. There was evidence of the Trust applying its acquisition policy, by refusing to acquire a property of exceptional quality, Pitchford Hall, on terms which were not self-financing (p. 417). Similarly, in the present case the Respondent provided evidence, to which we refer below of having had to make cuts in other services. For example, the Council had divested itself of its leisure facilities[6].

138. The Court of Appeal also held that on the evidence the hypothetical landlord would have been delighted to be relieved of the burden of meeting the net annual deficit for each of the properties whilst retaining the freehold reversion and obtaining from the hypothetical tenant a covenant to keep them in repair (p. 408). Every £1 of such expenditure saved by the landlord was worth to him no less than every £1 of rent which he would otherwise have received (p. 409). Schiemann LJ pointed out that in those cases where a positive hypothetical rent had assumed an "overbid" by a local authority, there had been material before the Tribunal entitling it to conclude that the authority would have been prepared to pay the assessed rent in order to secure premises so that it could perform its statutory function (p. 409).

139. In the present case it is common ground that because the Respondent would be the only bidder for the hypothetical letting, it is relevant and therefore necessary for the Tribunal to consider what hypothetical rent it would be willing and able to pay having regard to its resources. In our judgment that exercise should take into account the annual receipts that could be obtained from occupying the property and the costs of maintaining and running the property. Regard may be had to whether the hypothetical tenant could reasonably increase revenue[7] by taking a different approach to charges for the use of the hereditament (see e.g. *Marylebone Cricket Club v Morley* (1959) 5 RRC 122). Having taken these steps, the valuer can assess the extent of the ongoing deficit and how large a burden that would be on the tenant's resources. Although the occupation of a hereditament may be beneficial for cultural and social reasons, the tenant's responsibilities may be so great that that occupation is in reality burdensome when viewed overall and therefore not command any positive rent (*Telereal* at [45-46] approving *Hoare*).

Eastbourne Borough Council v Allen

140. The Lands Tribunal determined that two local authority leisure centres (not in historic buildings) should be assessed to substantial rateable values ([2001] RA 273). Although each received around ½ million visits a year, they operated at a loss (indeed, they had always been loss-making). The pricing policies for their use involved balancing the need to obtain revenue and the authorities' object of providing socio-economic benefits. Each authority subsidised the annual loss incurred. The properties could not be expected to make a profit and the relevant local authority

[6] See para. 72 of the closing submissions of Mr Forsdick QC. In cross-examination Mr Hedge said that they had been outsourced.

[7] The Respondent pointed out (p. 24 of closing submissions) that in practice this is done for historic visitor attractions and submitted that there is no reason why the same should not apply to historic buildings used as museums.

was the only potential bidder for each hypothetical letting. The ratepayers accepted that a positive rental value was appropriate, which they arrived at by taking a percentage of gross receipts, the percentage being derived from properties of a wide range of different types. The Valuation Officer relied solely upon the use of the CB method. The Tribunal rejected the evidence using a percentage of gross receipts because it had been drawn from properties which were too dissimilar. It was therefore left with the parties' agreed position that the CB method be used as the sole method of valuation ([43]). Accordingly, the Tribunal did not have to deal with the sort of issues with which we are faced.

141. The Tribunal referred to the traditional rationale justifying the use of the CB method, namely that the hypothetical tenant has an alternative to renting the hereditament in that he could build similar premises; so that in the negotiations he would not pay more, and might well pay somewhat less, than the financial cost of funding the capital sum to provide the tenant's alternative [71] (see also *Dawkins v Leamington Spa Corporation* (1961) 8 RRC 241*; Monsanto plc v Farris* (1998) RA 107, 140). The Tribunal also stated that regard should be had to the fact that each local authority had spent funds on building the facility, their motivation for doing so and for continuing to operate it, and the state of their respective finances at the AVD. The fact that each authority had constructed the facility for itself, and in one case had built the whole premises, and in the other an extension, relatively recently, made the CB a particularly suitable method of valuation [71-72]. Nothing we say in this decision should be treated as casting any doubt on the soundness of that reasoning in relation to properties of the kind dealt with in *Eastbourne*, namely purpose-built, relatively recent, public facilities.

142. The Tribunal also rejected the percentage of gross receipts method because of its arbitrary nature in the absence of adequate evidential underpinning (relying upon Schiemann LJ in *Hoare*). In effect it was said that where a hereditament is incapable of yielding a profit, or no revenue is collected at all, this method amounts arithmetically to a percentage increase in the deficit or on the outgoings. Nonetheless, we think that this may be an approach or tool to which further consideration should be given in a suitable case in the future. The relationship between the amount of a hypothetical rent (or a nil rent) and the outgoings or deficit being incurred in any event, may afford some guide to the reasonableness of expecting the occupier to pay that rent as an additional cost, taking into account any other relevant factors, including the socio-economic benefits of the occupation.

143. Most of the remainder of the Tribunal's decision was taken up with the resolution of detailed issues on the application of the CB in those appeals. One matter which is pertinent to the application of the CB in the present case concerns stages 4 and 5. Under powers conferred by the LGFA 1988, from the 1990 list onwards regulations have been made prescribing the decapitalisation rate to be used at stage 4 of each CB valuation across the country. The Tribunal stated that this step had been taken in order to remove from contention the economic considerations which had taken up so much time in litigation such as the *Imperial College* case, and to promote uniformity as between different assessments in this respect. Those "economic considerations" referred solely to matters affecting the rate at which money could be borrowed to finance the construction of the tenant's notional alternative building or works. Other matters, including those taken into account under stages 1 to 3 or 5, were unaffected by the prescription of a decapitalisation rate [129].

144. We agree with that view. It is plain from all the consultation papers that have been issued by the responsible Government department on each proposal to prescribe a decapitalisation rate, that the key factors taken into account were those to do with the cost of financing relevant projects (see for example "The decapitalisation rates for the 2021 business rates revaluation"; Ministry of Housing, Communities and Local Government – March 2019). The only significant change over the years to this assessment of the cost of capital has been to introduce cost of equity in combination with cost of debt as a further option. There has never been any attempt to reflect in the prescribed rate all matters taken into account under stage 5, such as those dealt with in the *Scottish Exhibition Centre* case. Likewise issues as to affordability of rent may be relevant to stage 5 but have never been reflected in the prescription of decapitalisation rates. Factors of this nature are far too variable as between different hereditaments across the country, and genuinely so, to be capable of incorporation within uniform prescribed rates.

145. As the Tribunal pointed out in *Eastbourne* [130], the figure arrived at by the end of stage 4 of the CB is generally a "ceiling value". In negotiations with the landlord the tenant would generally not pay more than this amount. At stage 5 such deductions may be made as appear to the valuer to be justified in order to arrive at the appropriate rateable value. It is at stage 5 that the valuer must use his or her valuation judgment to reflect all the matters relevant to the hypothetical letting which have not so far been taken into account in the CB method. For example, a valuer or the Tribunal might be satisfied that a substantial reduction should be made at stage 5 because the hypothetical tenant genuinely could not afford, or justifiably would not be prepared to pay, the figure resulting from stage 4 [130].

146. We entirely agree with the analysis in *Eastbourne* of the relationship between stages 4 and 5 following the introduction of prescribed decapitalisation rates. We are unable to agree with the contrary view taken by the Tribunal in *Allen v English Sports Council* [2009] RA 289 ("*Allen*") at [68-69]. First, it is plain that the Tribunal's observations were unnecessary to its decision, given that it had already decided the main issue concerned with the treatment of grants against the ratepayer [59-60]. Second, the Tribunal made no reference to the decision in *Eastbourne* the reasoning of which we prefer (although it was cited to the Tribunal). Third, the decision in *Allen* is inconsistent with *Scottish Exhibition Centre* which we consider dealt correctly with stage 5 allowances. Fourth, *Allen* is inconsistent with the basis upon which decapitalisation rates have been prescribed, in particular the matters which either have or have not been taken into account in that process. Fifth, there was no justification for the Tribunal in *Allen* at [68-69] to assume that the factor identified by Lord Denning MR in *Cardiff Corporation* (the preparedness of the tenant to pay the "stage 4 rent") was taken into account in the prescription of decapitalisation rates. The consultation papers show that "the Denning discount" (which reflects differences between being the owner rather than a tenant of property) was taken into account in the prescribed rates, but that is an entirely different matter.

147. We consider that from now on the Tribunal's decision in *Eastbourne Borough Council v Allen*, and not its decision in *Allen v English Sports Council*, should be treated as stating the law on this issue accurately, unless and until a superior court should decide otherwise.

Hughes v York Museums and Gallery Trust

148. The facts and circumstances relating to this decision ([2017] RA 302) involved a number of premises and were somewhat complex. It is unnecessary in this decision to summarise those matters. They are well set out in the headnote of the law report.

149. Mr Singh QC submits that the *York Museums* case was wrongly decided in that firstly it rejected the CB method in favour of the R & E method and secondly, arrived at nil valuations for certain hereditaments albeit that they were occupied for socio-economic purposes.

150. The Tribunal correctly directed itself that the ascertainment of the rent at which a hereditament might reasonably be expected to let on the statutory hypothesis is fundamentally a question of fact, not law. Likewise, the selection of the appropriate valuation technique (or we would add the weighting of alternative techniques) is a matter of valuation judgment, not law [112]. It is plain from our survey of the case law that the Appellant's contention that the R & E method *must* be rejected in a case such as *York* Museums or in the present case, and *only* the CB method may be employed, is not supported by any legal or valuation principle to that effect. Indeed, the proposition conflicts with clear and longstanding authority in this jurisdiction.

151. In *York Museums* the Tribunal referred to the arguments presented by both parties that their preferred methods should be adopted as a matter of principle. It acknowledged that there were difficulties of principle with each of these methods and decided to approach the choice (or weighting) of method after reviewing the available evidence, rather than as a matter of principle [141-143]. We cannot see how the Tribunal's judgment on that aspect could possibly be faulted.

152. The Tribunal then proceeded to review the evidence and arguments and to express its own reasoning and conclusions in a long, detailed and careful analysis [144-264]. Two points should be noted at this stage. First, the Tribunal found that there were a number of weaknesses in various aspects of the valuation evidence of both parties (see for example [163-183] on the CB method and [208-218] on the R & E method). Plainly, this presented the Tribunal with a difficult task. Second, the Tribunal rejected the use of the CB method and the Valuation Officer's application of the R & E method on a number of different grounds. However, the Appellant has chosen to criticise only parts of that reasoning on a very selective basis.

153. Some of the Appellant's criticisms concern points of law. On the face of it they could therefore have been raised in an appeal to the Court of Appeal. But it would appear that the Appellant did not have a reasonable prospect of success in an appeal, given the cogency and effect of those other parts of the Tribunal's reasoning which he has not attempted to impugn.

154. The Appellant also criticises parts of the Tribunal's findings on matters of valuation judgment, for example the treatment of rental evidence. We will consider those points below when we come to deal with the valuation evidence in this appeal. However, it is necessary to reiterate that those criticisms relate to only part of the Tribunal's overall reasoning. We have not been asked to review all the factual findings and judgments reached by the Tribunal, which were based upon the material in that case, including the circumstances affecting each of the properties and the hypothetical lettings. Not surprisingly we have not been shown or asked to review all that material. Although there is some evidential overlap between *York Museums* and this case (e.g. evidence in

relation to other museum, gallery and historic attractions), our conclusions must be based on the evidence presented to us and the submissions made, including those dealing with earlier authorities and decisions.

155. Mr Singh QC's first criticism is that the Tribunal failed to take into account, or to reflect in its decision, the principle that the absence of profit in the occupation of a property does not of itself indicate that there is no value in that occupation (see e.g. the *London School Board* case, *Erith* and *Scottish Exhibition Centre*). There is nothing in this criticism. As paragraph 45 of the Appellant's skeleton makes plain, it amounts to no more than a submission that the Tribunal did not acknowledge that a purely socio-economic or cultural motivation for the occupation of property could be valuable and thereby justify the assessment of a positive rateable value. It is plain from the Tribunal's decision that it did not make this elementary mistake (see e.g. [124-125], [235-237] and [249-252]).

156. Equally, there is no merit in the criticism that the Tribunal "took far too much out of *Hoare*" (para. 46 of Appellant's skeleton). It is plain from [126] that the Tribunal correctly appreciated that the decision in *Hoare* was based upon the evidence in that case, which we have already summarised. The principle it set out in [127] is unobjectionable. It is plain from the authorities that, merely because the occupation of a hereditament is necessarily loss-making and the R & E method points to a nil value, it does not follow that that method should be rejected and the CB used instead. The choice and weighting of valuation methods depends upon all factors affecting the hypothetical letting in each case. We also reject the complaint that because the Tribunal did not cite other passages from the *Scottish Exhibition Centre* case, it misdirected itself in law on statements of principle or their application. The decision must be read fairly and as a whole.

157. In his reply, Mr Singh QC even went so far as to submit that the Tribunal's finding of a nil valuation in respect of the York Museum was "*Wednesbury* unreasonable", in that no reasonable Tribunal could have reached that conclusion. If the Appellant had seriously considered that there was any merit in that contention it is particularly surprising that it was not raised before the Court of Appeal, because the implicit assertion is that the Tribunal's decision was unlawful when considered *as a whole*. But, of course, it is difficult to mount a challenge of this nature in relation to the decision of a specialist Tribunal acting within the scope of its expertise, even more so when the decision was so carefully reasoned and justified. It was therefore unsatisfactory that the Appellant made no real attempt to explain how its allegation of irrationality was founded. We utterly reject this suggestion. The Tribunal's conclusions were logically reasoned by reference to the circumstances and evidence relating to each hereditament. They were conclusions to which it was entitled to come.

158. The final legal error relied upon by Mr Singh related to [130], [143] and [184] of *York Museums*. In these paragraphs, the Tribunal referred to a "relationship" between the capital cost of constructing the "tenant's alternative" and the rental value of the actual hereditament. There can be no criticism of [130]. That was plainly derived from the passage cited at [129] from Lord Dunedin's speech in *Port of London Authority v Orsett Union Assessment Committee* [1920] AC 273. At [143] the Tribunal expressed the view that, in the case of historic buildings used as museums or for other cultural purposes, the CB is detached from reality, and the existence of the theoretical relationship between capital cost and value is difficult to accept. The Tribunal's

comment arose from the factual circumstances in that case, namely there was no reason to believe that a building like the subject property would ever be constructed. That was a matter of judgment for the Tribunal. We also note that the observation has been cited in Appendix B of the JPIRVF's guidance entitled "The Contractor's Basis of valuation for rating purposes" (2nd edition – August 2017) at p.16.

159. Mr Singh particularly criticised the passage in [184] where the Tribunal said that it could see no justification in the case of historic buildings used as museum or visitor attractions for the assumption underlying the CB that notional costs of construction bear some "consistent relationship to rental value". He submits that the adjustments to cost made at stage 2 make it plain that the CB method does not assume that there is a "consistent" relationship between cost and value (para. 49 of Appellant's skeleton). However, it is plain from reading [184] as a whole that the Tribunal had in mind consistency *with rateable value*, i.e. the requirements of the statutory hypothesis. It was referring to difficulties in a method which relies upon a decapitalisation of building costs of taking into account factors such as the expensive costs and inefficiencies of maintaining and occupying a historic building, the risks of having to comply with listed building legislation, lack of commercial viability and limitations upon resources to be able to afford a "commercial rent". Read fairly and as a whole, there was no error of law in the valuation judgments expressed by the Tribunal.

Summary conclusions on the analysis of legal principles and decisions

160. For the purposes of this case we have summarised the rating hypothesis in [15] to [24] above and general principles of rating law in [25] to [36] above. Every circumstance relevant to the application of the statutory hypothesis to the appeal hereditament must be taken into account in assessing its rateable value. The selection and application of valuation methods so as to satisfy that legal requirement is essentially a matter of valuation judgment based upon all the evidence relating to those circumstances. It must be remembered that valuation methods are a tool or guide for arriving at the rateable value of the hereditament in accordance with that hypothesis, but they are not a substitute for that statutory test.

161. We have summarised characteristics of the hypothetical letting in this case in [43] to [74] above. The hereditament is to be assessed as a museum. It is a mainly historic building and the owner (or hypothetical tenant) faces considerable ongoing responsibilities and costs for the maintenance and occupation of the property which are all the more onerous because of its age and status as a listed building. The hereditament is incapable of making a profit. Accordingly, it is beneficial for the hypothetical landlord to have a tenant who takes on those responsibilities. It is well established that such liabilities may have a negative effect on rental value and may even result in a nil rent being payable, provided that all relevant circumstances are taken into account by the valuer. Here the hereditament is occupied by the Respondent for socio-economic purposes which it considers to be important, but it is necessary to keep firmly in mind the "real value criterion" (see [26](vii) above). Although there is no other property available to the hypothetical tenant to occupy for the purposes of RAMM (or any similar-sized museum), the hypothetical landlord is faced with the position that (a) the tenant would have to be prepared to incur the ongoing costs and risk of operating and maintaining the museum, which would require a continuing and substantial subsidy, and (b) the actual occupier, the Respondent, would be the only bidder for the hypothetical

letting. The affordability of the rental value proposed by the Appellant is a highly material factor in this case, bearing in mind the range of public functions that the Respondent undertakes and the considerable proportion of its resources already devoted to RAMM. We also bear in mind that this is not a case where the Respondent (or even some other public body or interest) incurred the capital cost of constructing the major part of the hereditament in recent times. Far from it. The transfer to the Respondent took place nearly 150 years ago because the charitable status of the original foundation was unsustainable. For such reasons this is a highly unusual hereditament.

162. There is no general legal principle in England and Wales which requires the R & E or CB method to be used in any particular case, and certainly none which determines the outcome of the present dispute. In particular, there is no legal principle which would preclude the use of the R & E method in the present case and would require the CB to be used. Likewise, there is no legal principle or valuation practice which would preclude the modification of the R & E method for properties of the unusual kind we have in this appeal, e.g. by use of an appropriate overbid or uplift, or a revenue-based method (e.g. percentage of gross receipts), or perhaps a percentage or amount related to outgoings, to reflect a socio-economic or cultural motivation to occupy, so long as all relevant considerations are taken into account and weighed. However, we have previously explained why the Tribunal has not been asked to approach this appeal in that manner.

163. Even where a non-profit making hereditament is occupied for very important socio-economic or cultural purposes, the CB method may be inappropriate (because, for example, it would provide an unrealistically high valuation which cannot reliably be adjusted at stage 5), or the valuer's judgment is that the property has a nil value (see e.g. *Morecambe*, *Hingley* and *Hoare*). The property may have been constructed many years ago and there may be no reason to think that any party bidding for the hypothetical letting would be prepared to construct the building or any equivalent now.

164. The use of valuation judgment to assess the significance of factors such as socio-economic or cultural motivation, "a non-commercial aspect", affordability of rent, competing demands for the finite resources of a public authority is inescapable. That is so whether the valuer needs to make end allowances at stage 5 of the CB method, or adjustments to the outcome of an R & E valuation. An analysis of revenues and expenditure may assist the valuer in loss-making cases to weigh the significance of factors which are said to push the value upwards to judge whether the rateable value should ultimately be a positive figure (and, if so, how much) or a nil value. Judgments of this kind should be based upon evidence and valuation expertise and should be explained by the valuer (see e.g. [127] to [130] and [139] above). However, we recognise that there may be some cases where the material available for such adjustments is *justifiably* limited and the expert can explain why that is so. But a difficulty in arriving at such figures should not necessarily mean that the valuation method is rejected. For example, the valuer may use more than one method to produce a range of figures to show how he has arrived at his final judgment.

165. Although the selection and application of valuation methods is a matter of valuation judgment, consistency of approach is desirable for the valuation of "specialist properties" which can only be valued by indirect techniques such as the R & E or the CB methods. So, for example, it is common for utility undertakings operated with a view to making profits to be valued using the R & E method (see e.g. *British Telecommunications plc v Central Valuation Officer* [1998] RVR

86). Non-profit making properties occupied by public authorities in order to perform a statutory obligation or constructed by such bodies for socio-economic purposes (particularly if built relatively recently) are often valued using the CB (see e.g. *Eastbourne Borough Council v Allen*; *Scottish Exhibition Centre Ltd v Strathclyde Regional Assessor*). The CB method may also be used where a hereditament is occupied for profit-making purposes, but that operation forms an integral part of a larger enterprise and there are no accounts relating to the hereditament which may reliably be used in an R & E valuation. *Ryde* and the JPIRVF guidance documents provide many examples of types of hereditaments where the R & E method is commonly used and others where the CB method is used[8]. As we have said, our conclusions and observations in this decision are directed to the evidence and circumstances of RAMM and similar properties, and not more generally.

166. For the reasons given in [145] to [147] above, the decapitalisation rates for use in stage 4 of the CB method which have been prescribed to date should be treated as encompassing the financial cost of funding the construction of the hypothetical tenant's notional alternative property and "the Denning Discount", but not other circumstances affecting the hypothetical letting which have not already been taken into account in stages 1 to 3. Those other circumstances may continue to be taken into account in stage 5.

The choice of valuation method

Direct rental comparables

167. The parties agree there are no direct rental comparables which assist in the determination of the rateable value of RAMM.

168. In *York Museums* the Tribunal held that the evidence of listed buildings taken under lease by charitable trusts or commercial operators was relevant to the issues in that appeal [160]. The Tribunal said the limited evidence showed such buildings were sometimes let on internal repairing terms with the tenant paying a relatively modest base rent with a top-up payable if a threshold of visitor numbers was exceeded. By contrast, examples of lettings on full repairing and insuring terms ("FRI") were only at nominal rents. The Tribunal went on to say at [185]:

> "The general pattern is of peppercorn lettings or modest rents linked to visitor numbers or turnover, which suggest that tenants in this sector are either unable or unwilling to accept the risks and responsibilities which the statutory valuation hypothesis assumes".

169. Mr Singh QC submitted that the Tribunal in *York Museums* was wrong to rely on such limited evidence as setting a "general pattern" of peppercorn or modest rents in circumstances

[8] However, the circumstances in an individual case may call for a different approach, e.g. where a property of a type normally valued by the R & E method is said to be loss-making, the valuation may depend upon the likely duration of the tenancy (which may affect the return period for the capital investment in the project) and the valuer may have regard to a range of valuation techniques (see e.g. *Hardman v British Gas Trading* [2015] RA 254).

where it had said at [164] that it was "common ground that there was insufficient rental or assessment evidence to properly inform a reliable valuation of the subject properties."

170. Mr Hughes reviewed the four pieces of rental evidence in *York Museums* that related to hereditaments which he considered were in the same mode or category of occupation as RAMM. Referring to new evidence about them that was not before the Tribunal in *York Museums* Mr Hughes concluded that two of the transactions, the Tetley Art Gallery, Leeds and the Museum of Carpet, Kidderminster, both reflected "a degree of philanthropy" by the landlord and were therefore unreliable. This new evidence suggested that Carlsberg effectively gifted occupation of the Tetley Art Gallery to Project Spaces Leeds for the benefit of the local community and that Morrisons provided the Museum of Carpet as a community planning benefit in order to obtain planning permission for a new supermarket.

171. Of the other two rental comparables, Mr Hughes gave very little weight to the Quilt Museum, York because it was an order of magnitude smaller than RAMM and had a complex stepped rent and an unspecified turnover element. The Chard Museum was a much smaller museum located in a much smaller town. It was created as part of a regeneration project and Mr Hughes said it was not comparable to RAMM.

172. Mr Hughes did not consider two further rental comparables referred to in *York Museums* because he did not think they were in the same mode or category of occupation as RAMM. He said the Museum of Kent Life was a 28-acre working heritage farm with attractions such as donkey rides and a bouncy castle and Oxford Castle was a Medieval Building. Mr Hughes distinguished these as examples of historic/tourist attractions where the hereditament itself, rather than the contents or collections they contained, were the central attraction. A museum such as RAMM was essentially, vacant and to let, an exhibition space where visitors came to see its displays and collections and it would be possible to build a modern equivalent to house its contents. A modern equivalent of a historic visitor attraction such as Stonehenge would not be possible.

173. The Tribunal in *York Museums* used rental evidence as a check on the outcome of the R&E and CB valuation methods. Mr Hughes, having reviewed and rejected the rental evidence adduced in *York Museums*, referred to three additional pieces of rental evidence that were not before the Tribunal in that appeal.

174. The Tate Liverpool was let on a 147 year FRI lease from 1 June 1988 at an initial rent of £25,000 per annum with 15 year rent reviews to 15% of rack-rented office values. It appeared the initial rent excluded the value of the tenant's fit-out as a gallery, such works being a condition of the lease. Mr Hughes said the cost of the works was £9.5m between 1985 and 1988 (pre-opening) with a further £5.3m of expenditure in 1998. He analysed this transaction to give a rental analysis of £191.97 per m^2 as at the AVD but he gave it no weight because:

(i) the Tate Liverpool was a key element in the regeneration of the Albert Docks and Mr Hughes doubted that the transaction had truly been at arm's length;

(ii) the long lease and the long review pattern suggested the rent was more akin to a ground rent under a building lease than to a rent comparable with the rating hypothesis;

(iii) the effective date of the initial (shell) rent was 20 years before the AVD; and

(iv) the analysis of the rent and fit-out expenditure had required several large and unsubstantiated assumptions, making the result very unreliable.

175. The second new piece of rental evidence was the temporary letting of the Design Museum in Shad Thames, London, effectively by means of a sale and leaseback pending the completion of the new Design Museum in Kensington. The museum (a converted 1940s banana warehouse) was leased back for two and a half years from 7 June 2013 at £300,000 pa on FRI terms. This analysed to £83.19 per m^2. (Although the rent was fixed five years after the AVD Mr Hughes assumed no overall change in rental values over that period.) Mr Hughes gave this comparable moderate weight. He said it was a rare example of a market rent for a museum use in London but was let five years after the AVD and was by way of a sale and leaseback which was not such good evidence as a new letting. The museum was also 35% smaller than RAMM. Mr Hughes described it as a niche museum with less kudos than a typical municipal style of museum such as RAMM, but far more comparable to it than to the Quilt Museum or the Chard Museum.

176. The final piece of new rental evidence was the letting of the Saatchi Gallery, 100 Duke of York Square, London which Mr Hughes considered to be a good comparable. The building was let by the freeholder, the Cadogan Estate, to Marchill Investments LLP, a company which Mr Hughes said was operated by Charles Saatchi, for 15 years from 24 June 2008 at an initial rent of £1.4m pa on FRI terms. The landlord granted a one year rent free period and the tenant undertook £3.3m of improvements (assumed by Mr Hughes to be voluntary) to fit-out the building as a gallery. There was an annual rent review based on the retail price index. Mr Hughes analysed this rent at £279.96 per m^2. He gave this evidence the most weight because it was a new, relatively clean letting at a market rent fixed close to the AVD. The gallery was very similar in size (5,565.3m^2) to RAMM and was also a Grade II listed building located in a city centre.

177. Mr Hughes noted the numerical lack of rental comparables for museum lettings and the great variety in their physical characteristics. The rental evidence was of poor quality and often required extensive adjustment. Not all the comparable deals were done at arm's length. Mr Hughes concluded that it was not possible to use transactional evidence to make a comparative valuation of RAMM, but he said that if a valuation of RAMM was undertaken by reference to the most useful rental evidence (the Saatchi Gallery and the Design Museum) he failed to see how this would lead to a rateable value of only £1.

178. Mr Hunter did not accept that museums and art galleries formed a separate and distinct mode or category of occupation to historic visitor attractions. He thought museums were themselves visitor attractions whether it was the building or the contents that formed the primary exhibit. Visitor attractions were very diverse ranging from stately homes to theme parks.

179. Mr Hunter disputed the detail of Mr Hughes's analysis of the Quilt Museum but said he did not consider it to be helpful in valuing any other museum. He noted that the museum has not been able to afford an agreed increase in rent in year 3 of the lease. Although the landlord agreed to hold the rent at £30,000 and then reduce it, the museum did not achieve its projected visitor numbers and closed on 31 October 2015. Mr Hunter said this showed what could happen if an excessive rent was agreed.

180. Mr Hunter did not accept Mr Hughes's analysis of the Chard Museum which he said (i) had not justified a 5% increase in the rent from its review in April 2010 back to the AVD; and (ii) had made inadequate adjustments to the passing rent to put it into FRI terms. Mr Hunter exhibited a copy of the lease and noted that the rent included payment for a wide range of services and utilities. The tenant was only responsible for internal repairs and rates. Mr Hughes had only deducted 6% for landlord's external repairs and sundries, a total of £567. Mr Hunter deducted an estimated total of £8,500 for external repairs, electricity, insurance, cleaning and the provision of a fire extinguisher. This left a net rent of £500 pa. Mr Hunter concluded that the rent was primarily a payment for services provided by the landlord and that it was effectively let at a nominal rent.

181. Mr Hunter rejected Mr Hughes's opinion that the lettings of both the Tetley Art Gallery and the Museum of Carpet were philanthropic gestures by their respective freeholders. He thought both lettings were sound commercial decisions. Carlsberg disposed of the Tetley building as part of a wider plan to divest themselves of a redundant brewery site while Morrisons' letting of the Museum of Carpet was an element of planning gain to ensure the grant of planning permission for a new supermarket.

182. Mr Hunter said that the Museum of Kent Life was currently a registered museum although at the material day it was occupied on a commercial lease by Continuum (Kent Life Ltd) for a term of 25 years from 1 February 2008. There was a base rent of £1 with a turnover rent of 30% of net profits before tax. A reverse premium of £122,000 was also paid. No turnover rent was in fact paid and the lease was terminated in 2013, although Continuum occupied the property for another two years under a management agreement at which time a not-for-profit organisation took over the operation of the museum. The rateable value of the hereditament was determined on appeal by the VTE by taking a percentage of the fair maintainable trade.

183. Oxford Castle was not an accredited museum and was occupied as a commercial enterprise held on two leases with a total base rent of £10,000 plus total turnover rent of 30% of the net profit. Mr Hunter said the property could readily be classified as a museum and operated as such by a charity or a not-for-profit organisation without the need for any alterations.

184. Mr Hunter said that Oxford Castle and Museum of Kent Life were examples of Museums held under commercial leases both of which illustrated a model for rental determination which was in line with the R&E method.

185. Mr Hunter relied on three further rental comparables: SS Great Britain, The Mary Rose and Fulham Palace.

186. SS Great Britain is berthed and displayed at the Great Western Dockyard in Bristol. The site is owned by Bristol City Council and is let to the SS Great Britain Trust on a long lease at a peppercorn rent. The Trust underlet part of the site for residential redevelopment in return for a substantial premium and a peppercorn rent. The development included the provision of accommodation for the Trust which was sub-let back to it at a peppercorn. Mr Hunter said this arrangement was akin to the Trust having been provided with an endowment for the long term preservation of the historic elements of the dockyard and the ship with the council benefiting from passing the responsibility for the property to a third party at no cost and enabling the broader regeneration of the dockside area.

187. The Mary Rose Museum was built in 2013 over a grade I listed dry dock in the centre of Portsmouth Historic Dockyard. The building was designed to house the remains of the Tudor warship, the Mary Rose. The dockyard is held on a long lease by Portsmouth Naval Base Property Trust from the Secretary of State for Defence and is sublet to the Mary Rose Trust for a term of 72 years from 31 December 2012. The rent is a peppercorn plus a turnover rent based on retail income, catering services and corporate hospitality events but excluding admission charges and internet income. The rateable value of £89,000 equated to 30% net profit according to Mr Hunter who acted for the ratepayer, or 2.5% of fair maintainable trade ("FMT") according to the VO.

188. Fulham Palace was a 15th Century former Church of England Bishop's Palace. It is a part Grade I and part grade II listed building. It is owned by the Church Commissioners and let on a long lease to Fulham and Hammersmith Council who sublet to the Fulham Palace Trust for approximately 64 years from 1 April 2011 at £62,500 pa, the same as the Council's head rent. Both the landlord and the headlessee waived the rent from 1 April 2012 for the remainder of the lease due to the high costs of maintaining the property. Parts of the main building are let out as offices to commercial tenants. The remaining accommodation is occupied as a museum.

189. Mr Hughes did not consider these three comparables to be museums similar to RAMM. They were either historic ship attractions (SS Great Britain and The Mary Rose) or akin to a stately home of National Historic importance (Fulham Palace). As such he gave them no weight. He thought that, given Bristol City Council's vested interest in seeing the SS Great Britain attraction succeed for the greater benefit of the city, the letting might not be commensurate with the statutory rating hypothesis. He also considered that the parties to the headlease and sublease of the Mary Rose building were connected persons "to some degree" and he queried whether these truly represented open market transactions.

190. Mr Hunter also referred to five settled appeals with which he was involved. Chatham Historic Dockyard was valued on the CB method in the 2010 list but it was eventually agreed with the VO that this was not the appropriate valuation method. The appeal was settled following the VO's offer to value by reference to 2.5% of FMT.

191. Arbeia Roman Fort, South Shields was occupied by the Tyne & Wear Museums Service and was assessed as a museum at £20,250 in the 2010 list. It was agreed with the VO that it should not be valued on the CB method. A settlement was reached at £1,000 without any breakdown of the valuation basis.

192. Segedunum Roman Fort contained reconstructed buildings and a Victorian Museum adjoining the Roman remains. It was included in the 2010 compiled list at £152,000 having been valued on the CB method. Settlement was reached at £5,500 without an agreed basis of valuation.

193. The Manor House, Hugglescote was a refurbished early 17th century house and gardens occupied by Leicestershire County Council. It was used to tell the social history of the house and the families that lived there. It was included in the 2010 compiled list at £10,000 and the 2017 compiled list at £36,000 with both valuations being undertaken on the CB method. Respective settlements of £1,300 and £1,400 were reached based on the income received for the property which charges for entry.

194. Bolling Hall, Bradford was a grade I listed manor house used to display its social history from the 13th to 17th centuries. Agreement was reached to reduce its 2010 list rateable value from £27,500 to £5,000 although the parties did not agree on the valuation method. Mr Hunter's approach was to estimate potential income based on visitor numbers and retail income (there being no separately recorded figures for just this property) and taking 2.5% of estimated gross receipts.

195. Mr Hunter concluded that these settlements showed that properties occupied by local authorities and charitable trusts had been valued by reference to receipts despite there being no profit motive in any case.

196. Mr Hughes disputed that any of the five settlements relied on by Mr Hunter were comparable hereditaments to RAMM. Chatham Historic Dockyard was a large and diverse hereditament with an array of attractions for which admission charges were made and was therefore appropriately valued by the shortened receipts approach. Both Arbeia Roman Fort and Segedunum Roman Fort were historic visitor attractions which were not obviously suitable for any of the recognised valuation methods. The VO had resorted to using spot figures. RAMM on the other hand had the option of being valued on the CB method. The Manor House, Hugglescote was akin to a stately home, albeit of a much smaller size than usual. There was a revenue stream from admission charges, although no profit motive, so a shortened receipts approach had been adopted by the VO. Bolling Hall, Bradford was also comparable to a stately home. There was no rental evidence, it was not run for profit and did not charge for admission, and it would be difficult to cost a replica building (there being no modern substitute). The VO had resorted pragmatically to taking storage values to reflect the use of the house as a depository for furniture and artefacts. Mr Hughes thought that Mr Hunter's choice of settlements had generally been agreed at low rateable values and gave three examples (Stonehenge Stone Circle, HMS Belfast and the Cutty Sark Clipper Ship) where significantly higher rateable values had been assessed using the shortened receipts basis in each case.

197. Turning to Mr Hughes's three new rental comparables, Mr Hunter said the low initial rent on the Tate Liverpool indicated that this was for a building in shell condition. The rent reviews were based on fully-fitted office accommodation but were limited to 15% of their market rent as offices. Mr Hunter did not accept Mr Hughes's rental analysis based on the fit-out costs which, *inter alia*, he criticised for amortising over 50 years (instead of the life of the lease) at an unrealistically high rate of 10%. Mr Hunter placed no direct weight on this evidence but thought

it demonstrated that the occupier of a museum that created wider social and economic benefits would expect a discount rather than to pay a premium rent.

198. Mr Hunter said the Saatchi Gallery was not a philanthropic undertaking and therefore, as had been agreed with Mr Hughes in respect of other such galleries, should be discarded as evidence. The commercial rent payable of £1.4m pa was not just for a museum/gallery but reflected a highly prestigious commercial venture and its profit earning potential. Entry to the gallery was free to the general public but the gallery was used for numerous exhibitions, for which charges were made, and was rented out commercially to major companies for the purpose of product launches. There was also a restaurant (with private dining facilities), a shop and a café/bar.

199. In reply, Mr Hughes reiterated his view that the reason the Saatchi Gallery should command weight as a comparable had more to do with a physical resemblance externally to RAMM than to commercial activity per se. The kind of commercial activity identified by Mr Hunter was common in museums and galleries and RAMM was no exception - multiple gallery spaces were available to hire at a cost. Acting in a businesslike manner and acting commercially for profit were not the same thing. Both the Saatchi Gallery and RAMM were run in a businesslike way but not for profit and both frequently reported losses. Mr Hughes considered that a commercial art gallery would be much smaller than the Saatchi Gallery and would display artwork that was for sale. He had seen no evidence of the displayed art in the Saatchi Gallery being sold; it was very much akin to a public art gallery. Mr Saatchi had sold some of his artwork but this was many years after the AVD and seemed to relate to his expressed desire to retire from the art world.

200. Mr Hunter placed no weight on the letting of the Design Museum because it was a sale and leaseback and therefore not an arm's length transaction.

Discussion

201. The parties agree, and we accept, that there is no rental evidence which can be used to value RAMM by a direct comparison. That being so it is perhaps surprising that the experts adduced so much rental and (to a lesser extent) settlement evidence. None of it was directly relevant to the valuation of RAMM. Instead the parties used the evidence indirectly to support their different theses about which of the other two valuation methods, CB or R&E, was the most appropriate to use. The parties attempted to use the available rental evidence to examine more broadly what valuation approach is taken in the real world for this mode or category of occupation during actual negotiations.

202. While the parties agreed that the mode or category of occupation of RAMM was a key factor which would influence the negotiations for a hypothetical tenancy and that RAMM was occupied as a museum and premises, they did not agree about the scope of "museums" or "museums and art galleries". As we indicated at [46] above, Mr Hughes saw the following "clear distinction" between such attractions and museums/art galleries:

(i) it is the content of a museum or art gallery which is of paramount importance whereas it is usually the hereditament itself which draws people to a historic visitor attraction;

(ii) there are practical difficulties in valuing a historic visitor attraction by the CB method since there is no modern equivalent and the hereditament cannot be replicated. There is no such problem in applying the CB method when valuing a museum/art gallery;

(iii) museums and art galleries often do not charge for admission whereas historic visitor attractions usually do, albeit they are not generally motivated by profit;

(iv) the contents of a historic visitor attraction such as a stately home or a historic ship will probably be closely associated with the hereditament and its occupants. The contents of a museum or art gallery while often themed are likely to be more diverse.

203. Mr Hughes's second ground for distinguishing historic attractions from museums is a clear example of putting the valuation cart before the mode or category horse. We referred at [48] above to the Court of Appeal decision in *Williams* which deprecated this practice. It is first necessary to identify the mode or category of occupation and only then consider what valuation method is most appropriate. A difficulty in applying a valuation method should not be used to create a separate mode or category of occupation.

204. It seems to us that Mr Hughes's approach focuses too narrowly upon what he acknowledges to be a broad spectrum of heritage assets[9]. The essential quality of such an asset is its cultural, artistic, historic or scientific value and significance. We do not think it is appropriate to categorise them too narrowly (and, at least in part, by inappropriate criteria) when undertaking a comparative exercise to see how they are valued in the market. We accept that differences between a specific museum such as RAMM and a specific visitor attraction such as Stonehenge may amount to relevant comparative factors, but we do not agree that there is a clear and material distinction between the two that warrants the one being, in effect, rendered ineligible to inform the type of broad analysis that is appropriate.

205. The mode or category of occupation as defined by the VTE and the Respondent is itself of a specialised nature and it is necessary to be prudent about introducing further subdivisions. There is a risk of ending up with highly specialised, relatively small groupings of property and the grounds upon which the subdivision is advanced may not be sufficiently clear or coherent. The factors put forward by Mr Hughes at [202] (i), (iii) and (iv) above may be found in properties belonging to each of the two sub-categories for which he contends. In our judgment it is more realistic and preferable for the purpose of applying the rating hypothesis in this appeal to recognise that there is a broader, single mode or category containing a range of properties rather than claiming that there are narrower categories which are self-contained.

206. Neither expert relied on the rental evidence from the Tate Liverpool and we think they were right not to do so for the reasons they gave (see [174] and [197] above). Mr Hughes concluded

[9] See, for instance, his comments about the variety of museums at paragraph 66 of his expert report.

that two rental transactions provided moderate (Design Museum) to good (Saatchi Gallery) evidence of museums and art galleries which were operated by the tenant for philanthropic purposes rather than for profit and where the rent was significant. Mr Hughes said:

> "Bearing in mind the lack of quantity and quality of available [rental] evidence, I would seriously question whether it provides any usefulness for modifying or rejecting a different valuation method. However the limited useful evidence that is available, specifically Saatchi and Design, does not suggest that the results of a CB approach are unreasonable."[10]

Mr Hughes also said:

> "However even if a valuation were to be performed by reference to the most useful rental evidence (ie Saatchi Gallery and Design Museum), I fail to see how this would lead to an RV outcome of £1."[11]

207. Mr Hughes therefore relies upon two pieces of rental information, both from properties in London, to form his view (i) that the CB method applied to RAMM produces a reasonable result; and (ii) that a nominal rateable value of £1 for RAMM is not justified.

208. The experts agree that the letting of the Design Museum was a sale and leaseback arrangement under which the freehold was sold to Zaha Hadid Holdings Ltd for an unspecified sum and then leased back to the Design Museum at a rent of £300,000 pa for two and a half years commencing on 7 June 2013. Mr Hunter rejects this comparable outright as not being an arm's length open market transaction and he gives it no weight. Mr Hughes is more circumspect and while he acknowledges the transaction took place well after the AVD and that it was not "as clean evidence as a new letting" he still gave it "moderate weight".

209. The details of this transaction are sparse. There is no evidence that the purchaser/lessor was connected to the vendor/lessee. The Design Museum was a philanthropic venture of Sir Terence Conran, who founded it in 1989. It has now moved to a new site in High Street Kensington where it opened in November 2016. It seems to us likely that the sale and leaseback of the old Design Museum in 2013 raised capital that contributed towards the construction of the new Design Museum. There is no evidence that the old Design Museum was "sold for development" as stated in appendix 2F(i) of Mr Hughes's expert report.

210. We do not think a sale and leaseback of a smaller, newer building, which both experts agree is not clear evidence of an open market transaction, the details of which are largely undisclosed, and which took place five years after the AVD in a central London location, is of any assistance in informing us whether the result of a CB valuation of RAMM in Exeter is reasonable (particularly one in excess of £0.5m) or whether a rateable value of £1 is justified.

[10] First rebuttal report, paragraph 3 (67)
[11] Expert report, paragraph 69.

211. Mr Hughes places more weight on the letting of the Saatchi Gallery in Duke of York Square, London SW3, a grade II* listed building of very similar size to RAMM.

212. In cross-examination Mr Hughes accepted the following points:

(i) The Saatchi Gallery is a trophy building in a trophy location in the heart of London, accessible to tourists, high end businesses and a very large population. It is not a comparable location to RAMM in Exeter;

(ii) The Saatchi Gallery attracted 1.8m visitors per annum[12] compared with 0.25m at RAMM and charged up to £40,000 per day to hire compared with £870 per day for RAMM[13]. Corporate events took place at the Saatchi Gallery including product launches by several blue-chip companies;

(iii) The Saatchi Gallery (i.e. the tenant, Marchill Investments LLP, of which Mr Charles Saatchi was a designated member) made a profit of £1.4m in 2014/15 and £1.1m in 2015/16 whereas RAMM made a loss of £2.2m[14];

(iv) Free entry to the Saatchi Gallery when it opened in 2008 was enabled by a sponsorship deal with the Phillips de Pury auction house. There was no opportunity for such sponsorship at RAMM;

(v) There was an entry charge at the Saatchi Gallery for major exhibitions;

(vi) The tenant could afford to pay the rent of £1.4m pa under a 15 year lease from 24 June 2008 with annual reviews linked to inflation. Mr Charles Saatchi is recorded in the accounts as guaranteeing the rent but was not called upon to do so;

(vii) The other designated member of the LLP was Marchill Ltd, who provided a capital contribution of approximately £2.6m when the gallery opened in 2008. In the LLP accounts for the year ended 31 May 2008 Marchill Ltd is said to be the controlling party, on behalf of Upwards Pension Scheme, of which Mr Charles Saatchi was the sole beneficiary[15];

(viii) In the nine years between 2008/09 to 2016/17 the tenant operated the gallery as a going concern, i.e. there was a reasonable expectation that it had adequate resources to continue in operational existence for the foreseeable future[16]. There was no evidence of any subsidy of the gallery's operations. The tenant made capital movements between connected companies which was a hallmark of efficient tax planning;

[12] In 2017

[13] The figure for the Saatchi Gallery is for the entire gallery. In the submitted documents this figure is given as £31,500 excluding VAT. The extent of the accommodation included in the daily charge for RAMM was not stated in cross-examination or at all.

[14] The evidence showed a loss of £2m in 2017/18.

[15] As from the 2011/12 accounts Mr Saatchi was shown as the ultimate controlling party

[16] The LLP ceased trading after the balance sheet date for the 2017/18 accounts (31 March 2018), and those accounts were not prepared on a going concern basis. The trade and assets of the LLP were acquired by a third party on 17 January 2019 for £1.

(ix) The accounts showed that the gallery subsequently failed as a commercial venture (although Mr Hughes said that he thought Mr Saatchi had "stepped away" from the art world). Visitor numbers had dropped from 1.8m in 2017 to 1.2m in 2018 and the gallery made a loss in 2016/17. The loss in the final year of 2017/18 was due (at least in part) to the settling of loans in anticipation of a debt free transfer to a charitable trust;

(x) Excluding the last year of trading when the significantly increased loss was due to paying off debts[17], the LLP showed an overall net profit during the 10 years of trading at the gallery. Excluding rent, it showed a very high profit.

213. We are satisfied from the evidence that the Saatchi Gallery was not a philanthropic venture but a commercial operation to exhibit and promote works from Mr Charles Saatchi's personal collection. Mr Hughes sought to distinguish between acting in a businesslike way and acting for profit, but we do not think the Saatchi Gallery was run just with a view to defraying its administrative expenses without regard to profit. It was a substantial operation. In the 10 years from June 2008 to March 2018 it averaged some £3.9m turnover pa. Its main sources of income were corporate sponsorship, which decreased steadily between 2015 and 2018 from £3.7m to £2m[18], and gallery hire which had been relatively stable for the three last years, averaging just under £1.5m. It made relatively small losses during its start-up years[19] but eventually made a profit before being transferred to a charitable trust in 2019.

214. As a commercial gallery the Saatchi Gallery is not analogous with RAMM, a not for profit municipal enterprise. The experts agreed that other commercial galleries were not comparable with RAMM because of their commercial nature and we do not believe that the Saatchi gallery should be treated differently. The rent of £1.4m pa reflected a highly prestigious commercial venue that was not restricted to gallery use under the terms of the lease. Nor do we consider the rent payable for an art gallery in prime central London, with a very different visitor profile and catchment area, can assist in the valuation of a museum in Exeter, specifically RAMM. We therefore give no weight to this evidence.

215. Mr Forsdick QC submitted that the Tribunal's approach in *York Museums* was based upon a correct understanding of the underlying principles as revealed by the relevant case law. The starting point, said Mr Forsdick QC, was that the choice of valuation method should be evidence led and not determined as a matter of principle[20]. Mr Forsdick QC described this approach as looking for an evidential hook upon which to hang the chosen valuation method. It was true that the CB method had been used for a wide range of local authority hereditaments when there was no rental evidence and for which the R&E method was not appropriate because there was no evidential hook for it, e.g. *Eastbourne*, *Imperial College* and *Scottish Exhibitions*. But where, as here, there was open market evidence that the R&E method (or a derivative thereof) was used in the real world to value hereditaments of this mode or category of occupation, including where it led to a £nil output, it did not follow that that method should be rejected in favour of the CB method

[17] The turnover that year increased by nearly 10%.
[18] These are the only years for which a breakdown of turnover is provided in the accounts.
[19] The year 2011/12 showed a significant loss but this was a shortened financial year of 10 months and there is no analysis of the effect of that difference on the trading pattern.
[20] *York Museums* paragraph 141.

just because the hereditament was occupied for non-profit motives, nor in circumstances where the CB method did not resonate with the facts.

216. Mr Forsdick QC said the evidence of rental negotiations in the real world for hereditaments in this mode or category of occupation, whether defined in Mr Hughes's narrow sense or Mr Hunter's wider one, showed that where historic buildings used as museums were let for non-profit motives, the rent reflected their trading potential (akin to R & E) and not their cost of construction (akin to CB). Furthermore, the evidence showed that when the occupation of such hereditaments was burdensome the rent agreed was £nil.

217. Mr Forsdick QC said the rental comparables showed that in the open market rents were set by reference to the trading potential of the hereditaments. Where occupation was burdensome a £nil rent was agreed when analysed on FRI terms. In some cases an uplift in rent was payable if a turnover or visitor number threshold was exceeded. This pattern was found in all the various circumstances of ownership, funding, motive to occupy, size or location, whether the hereditament was a museum or historic visitor attraction. In short, it was invariably the case. He said there was no evidence of any properties in a remotely analogous situation to RAMM being let at substantive rents nor of any enhanced bids (overbids) being made to reflect the non-profit motives of the occupier. The burdensome nature of such hereditaments meant (i) a landlord would willingly let its premises for £nil or a nominal rent (adjusted to FRI terms, e.g. Chard); (ii) there was no competition between charitable trusts and local authorities for such facilities; and (iii) in several cases a private landowner was prepared to divest itself of possession for £nil (e.g. Morrison at the Carpet Museum, and Carlsberg at Tetley Art Gallery). The rental evidence was consistent and all pointed one way - towards the market having regard to the trading potential of the hereditament, i.e. an approach akin to the R & E method. The Appellant had shown no exceptions to this and had given no examples of an open market rent of a hereditament in this mode or category of occupation that was based on the CB method.

218. The settlement evidence referred to by Mr Hunter showed the VO had, in every case, substantially reduced the assessment from that based on the CB method. Mr Forsdick QC said the short point was that whenever challenged about the assessment of hereditaments in this mode or category of occupation the VO had accepted that the rateable value should be set by reference to turnover and not cost.

219. We find the overall thrust of Mr Forsdick QC's submissions to be persuasive. There is no evidential support in the market for the use of the CB method. This absence of any open market rental evidence based on the CB method of valuation or indeed by any reference to construction cost is striking. However, there is widespread evidence across the range of this mode or category of occupation that the R & E method, or a derivative of it based upon trading potential, is used in the market to determine rental value. Where occupation is not motivated by profit the resultant rents are either nil or a nominal amount. We are satisfied that the rental evidence, although of no direct assistance in valuing RAMM, does strongly indicate the lack of any market support for the use of the CB method in valuing hereditaments of this type.

Receipts and expenditure basis

220. The Appellant did not use the R & E method, arguing that it was inappropriate where a museum was not motivated by profit (or did not make a profit) because it would always lead to a nil value. It would not reveal the cultural or socio-economic value of the occupation and implicitly assumed that such value was always equal and opposite to the financial loss of the operation. We concluded above ([162]) that there is no legal principle or valuation practice which would preclude the use of the R & E method for unusual properties like RAMM. Socio-economic benefits could be factored into a valuation by considering an overbid or a revenue based method or perhaps a percentage or amount related to outgoings. The parties agreed that the R & E method (as conventionally applied) produced a rateable value of £1.

221. The parties agreed the financial information contained in Appendix D of the statement of agreed facts. This appendix is an extract from the Council's statement of case to the VTE and contains the same data as Mr Hunter relied upon in this appeal. The parties agreed that the actual museum visitor numbers between 2011/12 (part year only) and 2016/17 could be used to inform the R & E valuation, notwithstanding that Mr Hunter assumed the hypothetical tenant would charge for entry. RAMM does not charge for entry but Mr Hunter sought to establish the *maximum* income that could be achieved. The Respondent's evidence was that the imposition of admission charges would be likely to reduce the number of visitors[21].

222. The number of visitors was assumed to be 250,000 per annum; 182,000 adults at £5 each and a total of 68,000 children (including those on school trips) at £2.50 each. Allowing for Gift Aid contributions and other income of £100,000 the total receipts were taken as £1,307,500 per annum. Expenditure was £2,300,000 per annum. This gave a negative figure for receipts less expenditure of £992,500[22] and an adopted rateable value figure of £1.

223. Neither expert considered alternative approaches to valuing by reference to trading potential, such as an overbid or a percentage of revenue, although Mr Forsdick QC submitted that:

> "A shortened receipts approach of 2.5% of receipts is generally adopted for 'visitor attractions' occupied for non-profit motives – and is out of all proportion to the outcome of the CB. Here 2.5% of FMT with entrance fees charged would be just £30,000 RV."

By not exploring such alternatives we think the experts failed to consider properly the totality of the circumstances and conditions under which RAMM was occupied and therefore did not fully consider the value of the occupation to the hypothetical tenant. But we said above ([38-40] and [162]) that, given the stance taken by each party, properly advised, and the nature of the issues involved in this appeal, we do not consider it appropriate to defer our decision for further evidence to be given on valuation methods. Of course, Mr Forsdick QC's submission on a shortened receipts approach was no more than that; a suggestion made by leading counsel to support his proposition that the outcome of the CB method was unreasonable in this case. It did not amount to evidence or represent the expressed view of the Respondent's expert, Mr Hunter, on the value of RAMM.

[21] Mr Hedge's witness statement at paragraph 30.
[22] The actual deficit in 2017/18 was £2,180,064 (including depreciation)

224. The Appellant made no attempt to quantify and reflect the cultural and socio-economic benefits of operating RAMM in the R & E calculation. But Mr Singh QC noted that Mr Hedge had adduced evidence that showed RAMM's financial deficit in 2017/18 was £2.18m and had accepted in cross examination that the deficit averaged £2.17m between 2012/13 and 2016/17[23]. This compared with an estimated impact on the local economy attributable to RAMM of "at least £2.067m" and possibly as high as £2.64m[24]. These figures are the total estimated spend (in Exeter) of those adult visitors who said that if they had not visited RAMM they would have stayed at home or gone elsewhere outside Exeter (local visitors) or for whom RAMM was the main reason for their visit (day visitors and overnight visitors). The economic impact of RAMM is therefore not confined to RAMM itself but reflects benefits accruing to the city of Exeter as a whole. The study also identified several "additional impacts" and "catalytic and strategic arguments" that were not modelled or quantified but which were said to show the "wider value of RAMM to Exeter and Devon, and to its key partners." Such impacts included positivity from stakeholders; recognition of RAMM as a museum of national standing; local pride in the refurbished RAMM and its function as a venue for meetings.

225. In answer to questions from the Tribunal Mr Singh QC submitted that the fact the socio-economic and cultural benefits were enjoyed by the public generally and not just by RAMM was legally relevant. But we must keep firmly in mind the principle that it is the value of the occupation of the hereditament to the hypothetical tenant that determines the rateable value. In our judgment, although economic advantages for businesses and persons in a district, city or region which do not benefit the occupier of a hereditament financially may nevertheless hold some value for that occupier, they do not generally have as much value as those that do. The figures relied upon by Mr Singh QC were essentially generalised benefits throughout the local economy and not sums of money receivable by the Respondent. Such benefits do not equate to value to the occupier resulting in an increase in the rent he would be prepared to pay, pound for pound. In the circumstances of this appeal, they do not hold the same value to the Respondent as revenues it may earn through its occupation of the hereditament. The Appellant did not suggest any method for expressing the valuation impact of socio-economic benefits on rental value, and we are not aware of any. But it is plain to us that these benefits, even if taken as a whole, would not represent value to the occupier of RAMM sufficient to overcome the economic disbenefit of having to subsidise the ongoing operating costs and to result in a positive rental value, even without taking into account issues of affordability. They certainly could not justify a rental value of the level which the VO seeks to advance in this appeal. By way of example, we note that in the *Morecambe* case the rateable value assessed was relatively modest, despite the highly significant socio-economic benefits generated for that coastal resort by the beach, esplanade and related facilities.

226. The parties agreed that the R & E method would support an RV of only £1 (see [11] above). Even taking into account the socio-economic benefits arising from the occupation of RAMM as a factor to be weighed or set against the ongoing deficit between the museum's revenue and expenses, we cannot see how a rateable value exceeding nil or £1 could be justified.

[23] See paragraph 10 of the speaking note for Mr Singh QC's closing submissions. Mr Hedge accepted in cross examination by Mr Singh QC that the average figure of £2.17m could also be used for 2011/2012, i.e. the year in which RAMM reopened to the public.

[24] Economic Impact of the Royal Albert Memorial Museum and Art Gallery, Final Report, December 2012; Section 2: Key Quantitative Economic Impacts.

The contractor's basis

227. Both parties produced valuations on the contractor's basis of valuation. For the Appellant Mr Hulse says the rateable value is £690,000 and for the Respondent Mr Hunter says the rateable value is £430,000 (although he expressed reservations about the usefulness of the method to value RAMM). Details of their valuations are contained in Appendix 1. However, since the 2010 non-domestic rating list is closed the maximum rateable value that can be entered is £445,000, the figure that appeared in the compiled list[25].

228. In summary, the principle of the CB method is that the annual equivalent of the capital cost of constructing a hereditament can indicate the value of renting the hereditament on the statutory terms. The method assumes that a hypothetical tenant would be unwilling to pay more as an annual rent for the hereditament than it would cost him by way of annual interest charged on the capital sum necessary to build a similar hereditament.

229. We adopt the description of the five stages of the CB contained in *York Museums* at [129] to [140], subject to our determination at [166] above that the decapitalisation rate at stage 4 does not encompass circumstances affecting the hypothetical tenancy other than the financial cost of funding the construction of the hypothetical tenant's notional alternative property and "the Denning Discount". We would emphasise the importance of stage 5 of the CB method, where the valuer stands back and looks at the outcome of the previous four stages to see whether, in the context of all the relevant circumstances, the resultant figure is a fair and proper assessment of rental value on the statutory rating hypothesis. In this appeal those circumstances include the need for a subsidy to pay for the operating deficit, the operation of RAMM on a non-profit making basis, abnormal operating costs and the affordability of the rent to the occupier.

230. Although the experts agreed that the CB should assume the construction of a modern substitute building, they disagreed about its design and size. Mr Hulse adopted the actual area of the existing building (5,281.44m^2) because (i) there was evidence of similar sized modern museums that had been identified in relation to the assessment of cost under stage 1; (ii) Mr Caig said that the purpose of the redevelopment and improvement of RAMM between 2008 and 2011 had been to make more space available so that the amount of display, storage and public spaces were appropriate for a large regional museum; and (iii) the RICS Guidance Note[26] said that the valuer should not depart too far from costing the notional reinstatement of the actual property being valued.

231. Mr Hunter relied upon Mr Anderson's evidence about the replication of RAMM's existing facilities in an efficient modern layout arranged over two floors. Mr Anderson began by identifying the gross internal areas of all the elements of the existing building that needed to be replicated: galleries, conference/educational space, offices and staff rooms, archive stores and conservation rooms, general stores and ancillary space and plant rooms. The existing area of these elements was 3,468m^2. Mr Anderson said this area could be reduced to 3,190m^2 through more

[25] See Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009, regulation 14(7) and (8).
[26] The Contractor's Basis of valuation for rating purposes, 2nd edition August 2017 at paragraph 3.10.

efficient design of the general stores and ancillary space (saving 48.5m^2) and plant rooms (saving 229.5m^2). The remaining saving in floor space was achieved by reducing corridors, circulation space, stairs, lifts and toilets from 1,814m^2 to 790m^2. Mr Anderson's figure for the gross internal area of a modern equivalent building was therefore 3,980m^2 or approximately 75% of RAMM's existing floor space.

232. Mr Hulse made a deduction at stage 1 for contract size which he took at 9.41% of the total replacement cost. The principle of such an adjustment is explained at paragraph 3.1.14 of the RICS Guidance Note and is also referred to in the VOA Rating Manual where it is stated:

> "Contract size adjustments should be made and location factors applied in respect of this class in accordance with standard scales in the [2010 Rating Lists] Cost Guide."[27]

Mr Hunter made no adjustment for the contract size (but his modern equivalent building was 25% smaller than the existing building).

233. Both valuation experts deducted 16.29% at stage 2 for physical obsolescence, the figure that had been agreed between Mr Jones and Mr Anderson. In addition, Mr Hulse allowed 5% for functional obsolescence but nothing for technical obsolescence, while Mr Hunter made no allowance for functional obsolescence at this stage but 10% for technical obsolescence.

234. Functional obsolescence relates to the problems and deficiencies that may be present in the design of the building compared to current requirements.[28] Mr Hulse made a 5% allowance in respect of the layout of the museum. He said that the redevelopment of RAMM in 2011 had gone a long way to achieving the desired goal of creating a building that was physically accessible and efficiently laid out but accepted there was less flexibility in RAMM compared to a modern purpose-built museum. Mr Hulse made no allowance for external access which he thought to be good following the construction of newly formed rear goods and visitor entrances as part of the refurbishment project. Mr Hunter made no allowance for functional obsolescence because he accounted for the redundant space (circulation, storage and plant rooms) by adopting a gross internal area that related to a modern substitute building at stage 1.

235. Technical obsolescence arises where current technology has changed so that the building or plant to be valued has become significantly redundant, economically outmoded or an alternative use has been adopted.[29] Mr Hunter said that although RAMM's plant and machinery was renewed or repaired in the redevelopment completed in 2011, it had been made to fit around the old listed structure with roof-top plant decks located over whatever areas were available. A modern substitute building would be designed around the need to have easy access to plant and machinery. Also, the height and shape of the existing galleries, especially on the first floor, adversely impacted the air circulation and heating. Mr Anderson referred to the Display Energy Certificate ("DEC") of RAMM dated 28 June 2018 where the energy performance operational rating was shown as G-198. Properties rated G are the least energy efficient and the DEC states that an energy rating of

[27] VOA Rating Manual section 6, part 3: valuation of all property classes; section 715 Museums and Art Galleries, paragraph 4.1.
[28] RICS Guidance Note, paragraph 3.2.2(b).
[29] Ibid paragraph 3.2.2(c). It is referred to as technological obsolescence by the RICS.

D-100 would be typical for a building of this type. Mr Anderson said this illustrated that a modern substitute building would be more energy efficient. In the light of these factors, Mr Hunter made a 10% allowance for technical obsolescence. Mr Hulse did not agree that the renewed plant and machinery at RAMM was inefficient or that its location in the basement, under-croft and on the roof was detrimental to rental value. He referred to three modern purpose-built museums where the plant was situated on more than one floor but where no allowance had been made for technical obsolescence and he did not consider any such allowance was merited here.

236. The respective allowances for obsolescence were also deducted from the agreed value of the land at stage 3.

237. Mr Hulse made no further adjustment at stage 5. He noted that the RICS Guidance said that adjustments at this stage are to reflect factors affecting the value of the property as a whole, including items such as poor access, cramped site conditions and inadequate layout. But he had already allowed for poor layout and access at stage 2 and considered any further allowances at stage 5 would be double-counting. Mr Hunter made a stage 5 allowance of 15% to reflect inefficiencies in layout including a sloping and split-level site requiring two entrances, front and rear, relatively poor internal layout, split levels between the York Wing and the Main Gallery and poor access for loading and unloading exhibitions and large items. Mr Hunter referred to Mr Hulse's evidence of offices in Exeter where end allowances for layout had been made ranging from 7.5% to 15%. He considered the problems with access and layout at RAMM were worse than at those properties and so he adopted the higher end of this range. Neither expert made any adjustment at stage 5 to reflect abnormal operating costs, the operational deficit or affordability.

238. Mr Hunter also made an allowance of 6% at stage 5 for insurance overage based upon the difference in Mr Anderson's fire insurance valuation of the existing RAMM building (£39.16m) and its modern equivalent (£14.83m). This represented 164% overage on the insurance premium. Mr Hunter said the usual adjustment to rent to allow for insurance was 3.5% and therefore he made an adjustment of 164% x 3.5% or 5.74% which he rounded to 6%.

239. With regard to affordability, we have previously referred to figures relied upon by Mr Forsdick QC ([72] above). In addition, the R & E calculation agreed between the parties showed that even if it were to be assumed that RAMM charged for entry, there would still be a deficit of nearly £1 million after allowing for expenditure of £2.3m (see [221-222] above). This agreed calculation reflected the rating hypothesis in this case by assuming that RAMM was open to the public, but as at the AVD. Furthermore, we note that Mr Singh QC cross-examined Mr Hedge to obtain his agreement that the actual deficit between 2012/2013 to 2016/2017 averaged some £2.17m and that this figure would also fairly represent the deficit in 2011/2012 the year in which the museum reopened to the public[30]. Mr Hedge stated that RAMM is not an independent self-funding entity but is a service provided by the Council and funded from its General Fund. That fund is financed from a mixture of taxation and non-specific grant income supported by financing and investment income together with some income from direct charging to service users. RAMM's operational deficit was subsidised by the Council at a time when its finances continued to be under considerable strain. Mr Hedge denied the suggestion put to him in cross-examination

[30] See paragraph 224 above.

that because of the socio-economic benefits to which we have referred in [224] above, the Council would have agreed to pay £690,000 pa in rent (Mr Hulse's figure) rather than close the museum. He said that subsidising the deficit of the museum already meant spending some £2.2 million (which equated to the figure of £2.17m rounded). He said that it would be inconceivable that the Respondent's expenditure on RAMM could be increased to pay the rent suggested by the Appellant by making sacrifices elsewhere in the budget. Mr Hedge said it was not possible, as Mr Singh QC suggested, to have found the additional money "from somewhere" (see also [72-3] and [137] above).

240. In our judgment these suggestions by the Appellant amounted to little more than assertions of the kind which were not accepted in *Hoare* (see above). They also failed to have regard to legal restrictions on local government spending ([73] above). Looking at the overall material before the Tribunal in accordance with the rating hypothesis, we conclude that the Council could not afford to pay the rent contended for by the Appellant in respect of RAMM given the extent of the ongoing subsidy which it required in any event and the continuing pressures on the range of the Respondent's services.

Discussion

Stage 1: Gross Internal Area ("GIA")

241. The dispute between the experts about the correct GIA to adopt in the CB valuation represents the largest difference in their valuations. The RICS Guidance Note discourages the valuer from departing too far from the replacement of the actual property and highlights that the more the valuer strays from reality the less weight can be attached to the resultant valuation (paragraph B.10). However, it acknowledges there may be cases where it would be appropriate to cost a modern, simpler or smaller substitute building (paragraph 3.1.4) which must be of a design and specification to enable the use of the actual property to be carried out in a fully satisfactory manner (paragraph 3.1.18).

242. Mr Hulse's view is that the 2011 refurbishment of the property addressed the main operational problems facing RAMM in terms of lack of public gallery space and accessibility. The need for on-site storage and office space was reduced by the construction of a new 1,317m^2 storage facility known as The Ark, Exton Road, Exeter. Mr Hulse also took into account four modern purpose-built museums which had floor areas of between 4,000 – 5,000m^2 and which in three cases served populations smaller than that of Exeter. He said the size of these museums supported his view that the actual size of RAMM should be adopted at stage 1.

243. Mr Hunter, advised by Mr Anderson, moved a long way from the actual gross internal area of RAMM when undertaking his valuation, reducing it by 25%. This is mainly due to a reduction in corridors, circulation space, stairs and lifts through having the modern equivalent located on two floors rather than four and minimising wasted space. Mr Anderson accepted that he is not a museum designer and stressed that his indicative drawings served only to illustrate how a modern equivalent building could be configured in a more efficient manner.

244. There is no dispute about the need to reflect any lack of functionality in the CB valuation. The question is whether it is more appropriate to do so at stage 1 by excluding areas that are surplus to requirements (Mr Anderson) or at stage 2 by adjusting for functional obsolescence (Mr Hulse). To exclude 25% of floor space is a substantial change and Mr Hulse rejected the adjustment because it was so large as to have strayed too far from reality for it to be given weight.

245. In *Semilogistics Milford Haven Limited v Stephen Webb (VO)* [2018] UKUT 019 (LC) the Tribunal, His Honour Judge Huskinson and Mr PR Francis FRICS, said at [148]:

> "In *British Car Auctions Ltd (T/A) Blackbushe Airport Ltd v Hazell (VO)*[31] the Upper Tribunal recognised that in an appropriate case the first stage of the contractor's basis could properly contemplate the construction of a modern substitute, but that it was important that the modern substitute chosen must reflect the use of the actual hereditament which had to be valued and should be able to do the same basic job as the actual hereditament did – the choice of a modern substitute not being the opportunity to adopt a new business model."

The Tribunal continued at [161]:

> "As recognised in *Winchester City Council v Handcock*[32] the modern equivalent can depart from the physical circumstances of the hereditament (it would not be a modern equivalent if it did not do so) and there is no offence to the doctrine of rebus sic stantibus in contemplating for valuation purposes a modern equivalent that is different, possibly very different, from the hereditament to be valued – provided the substitute bears a sufficient relationship to the hereditament in question to be a useful method of valuing that particular hereditament and not some other quite different hereditament."

246. In *Semilogistics* the reasonable modern equivalent which the hypothetical tenant could be expected to have in mind when assessing the alternative of constructing their own property was designed by an expert Chartered Engineer of whom the Tribunal said at [150]:

> "…we are impressed by the care and expertise which Mrs Martin has brought to her analysis of the situation and her design of a modern equivalent."

This evidence was supported by a witness who was well acquainted with the site and "was in a particularly good position to give authoritative evidence as to what an operator at the site would consider to be a suitable design to adopt for a modern equivalent."

247. There is no such evidential pedigree to support the Respondent's design of a modern substitute building for RAMM. Mr Anderson is a building surveyor whose specific experience of dealing with museums and visitor attractions is limited to his involvement as an expert witness in *York Museums* where he "assumed the replacement of the hereditaments largely in their existing form" and did not consider modern substitutes. His design for a modern substitute for RAMM consisted of two virtually identical floor plans, the only difference in layout and size between them being in respect of a roof deck for plant and a longer corridor, both at first floor level. The design was apparently not informed by any curatorial expertise or advice other than the comments made

[31] [2015] RA 108
[32] [2006] RA 153

by Mr Hedge at paragraph 23 of his witness statement and which he said in cross-examination were based on his working knowledge of RAMM rather than any museum design experience. There was no evidence that this design would "be able to do the same basic job as the actual hereditament did" just by minimising the amount of corridor and circulation space and by putting the plant on the roof. The use of a simple block plan, prepared by someone with no working knowledge of museum design, to justify the adoption of a modern substitute building which is 25% smaller than RAMM, itself recently fully re-designed and refurbished, is not adequate, in our view, to support the adoption of a modern substitute building rather than the replacement of the existing floor space. We agree with Mr Hulse that Mr Anderson's approach has ventured "into a world of speculation"[33] and we prefer Mr Hulse's approach, namely to assume the existing floor space would be reproduced, and for any remaining functional and technical obsolescence allowance (after the refurbishment) to be made at either stage 2 or stage 5.

248. Mr Hulse gave examples for other museums of the percentage of the total GIA that comprised galleries. Of the six museums referred to[34] the average gallery space was 40.4%. Mr Anderson calculated that RAMM as existing had 35.8% of gallery space whereas his modern equivalent building had 46%. We think the relative lack of gallery space in RAMM is properly reflected in an allowance for functional obsolescence rather than by notionally redesigning the museum. The percentage of gallery space in Mr Anderson's design for a modern substitute is equally at variance with the average (13.9% higher compared to 11.4% lower for RAMM). That suggests to us that Mr Anderson's design has gone too far in minimising the amount of corridor and circulation space.

Stage 1: adjustment for contract size

249. Mr Hulse did not explain the basis of his contract size adjustment (i.e. deduction) of 9.41% at stage 1 of his CB valuation.

250. RAMM was entered in the 2010 non-domestic rating list with effect from 15 December 2011 at a rateable value of £510,000. This assessment was appealed by Gerald Eve and agreed at a revised figure of £445,000. In his CB analysis of this figure Mr Hulse gave the total area of RAMM as 5,468.4m^2, i.e. 3.5% larger than the finally agreed GIA in this appeal. But his adjustment for contract size was 6.35% compared (now) to 9.41%. In his expert report (submitted before the area was agreed) Mr Hulse changed this adjustment to 9.53%.

251. Mr Hulse gave CB analyses of 12 other museums varying in size from 1,187.10m^2 to 5,020.60m^2. All of them had an adjustment for contract size. These varied from 0.32% to 7.41%. As a rule, the larger the museum the larger the contract size adjustment, although there were several exceptions; e.g. the largest museum, the New Art Gallery, Walsall (5,020.60m^2) was adjusted for size by 7.00% whereas the slightly smaller World of Glass, St Helens (5,000.7m^2) was adjusted

[33] RICS Guidance Note at paragraph B.10

[34] Mr Hulse accepted that a seventh museum, the New Art Exchange Ltd, Nottingham, was not comparable to RAMM.

by 7.41%. We consider that Mr Hulse's uncontested figure of 9.41% for contract size is reasonable and we adopt it.

252. In cross-examination Mr Hunter said that he assumed the cost rate of £3,450 per m^2 agreed between Mr Anderson and Mr Jones already reflected an adjustment for size and therefore he had made no separate adjustment. If he was mistaken then an allowance should be made. There was no evidence that the agreed cost rate reflected any specific adjustment for size. It appears from Mr Anderson's evidence that the agreed cost rate was informed, at least in part, by average cost figures taken from museums of a range of sizes. Given that Mr Hulse and Mr Hunter assumed significantly different GIAs at stage 1 it seems to us that the cost rate would need to be adjusted differently in each case.

253. In his closing submissions Mr Forsdick QC acknowledged that the CB should include a contract size allowance. But Mr Hulse's figure of 9.41% would not apply to Mr Anderson's GIA of 3,980m^2. We have not been shown the VOA's 2010 Rating List Cost Guide upon which Mr Hulse presumably derived his allowance and those of the other 12 museums to which he refers. We have therefore referred to the closest such museum in terms of size to Mr Anderson's GIA for a modern equivalent building to RAMM. The Collection Museum, Lincoln has a GIA of 4,073.10m^2 which is 2.3% larger than Mr Anderson's figure. The CB valuation of this museum included an adjustment of 5.1% for contract size. We therefore conclude that Mr Anderson's CB valuation of RAMM should have included an adjustment of 5.0% for contract size at stage 1. The resultant rateable figure at the end of stage 1 of his valuation should therefore have been £410,000 (rounded from £412,550). However, we have rejected his assumption of a smaller modern substitute building in any event (see above).

254. It is also appropriate to adjust stage 1 costs for differences in location. Mr Hulse made such an adjustment whereas Mr Hunter did not. But as the adjustment factor for Devon used by Mr Hulse was 1.00 it did not affect the valuation and can be ignored.

Stage 2: Obsolescence

255. The experts agreed there should be an allowance of 16.29% for physical obsolescence.

256. Mr Hulse said he had allowed 5% for functional obsolescence because although the layout of RAMM had been improved in 2011 it remained deficient. He calibrated this figure against allowances made in respect of offices in Exeter where allowances of 7.5% - 15% had been made for poor access and layout. Given that RAMM was regular in shape and had been improved Mr Hulse thought the allowance for functional obsolescence should be less than the range for offices.

257. Mr Hunter accounted for surplus space by adopting an area for a modern equivalent building at stage 1 that was less than the existing GIA of RAMM. It was therefore unnecessary to make a further adjustment for functional obsolescence at stage 2.

258. Given we prefer Mr Hulse's approach, we agree with him that an allowance for functional obsolescence should be made at stage 2. His adjustment of 5% was said to be for both internal access and layout[35]. We do not think this adequately reflects the remaining functional inadequacies of the building following refurbishment which are largely due to the legacy of the piecemeal historic development of RAMM. We agree with Mr Hunter that there are still problems with external access and we allow 10% for layout and access. In addition we think an allowance of 5% should also be made to reflect the excessive corridor and circulation space which is indicated by the relative lack of gallery accommodation (see [247] above). We therefore allow a total of 15% for functional obsolescence.

259. Mr Hulse thought there was no need to adjust for technical obsolescence given the provision of new plant rooms and equipment as part of the 2011 refurbishment. Mr Hunter thought problems remained about access to plant and that its significant inefficiency was reflected in the poor DEC rating. Mr Hunter allowed for this by making a 10% reduction at stage 2.

260. The DEC rating of the existing RAMM building is poor although neither expert gave a comparative analysis with other modern museums. In re-examination Mr Anderson said he would expect the DEC performance of a modern equivalent building to be much higher than RAMM's rating. We think there are still problems with the plant in the refurbished RAMM which results from its historic layout, but Mr Singh QC submitted that this did not properly fall within the RICS guidance of what constituted technological obsolescence. We do not accept Mr Singh QC's objection. It is important to consider every relevant matter that would weigh in the minds of the hypothetical parties as they negotiate a rent on the statutory terms. Such consideration should not be constrained artificially by definitional quibbles about what the RICS Guidance Note means by "technological obsolescence". We note that such guidance states at 3.2.2:

> "The deficiencies that may be taken into account at Stage 2 can, *for convenience*, be grouped under the heading of 'obsolescence' and *usefully* subdivided into the following [types]…" (Our emphasis)

The guidance is clearly not prescriptive about the categorisation of obsolescence. We think this matter is properly considered under stage 2 as technical obsolescence, but we consider Mr Hunter's allowance is too high and does not adequately reflect the improvements that have been made as part of the refurbishment project. We would halve the allowance to 5%.

Stages 3 and 4

261. The value of the land is agreed at £1.125m and the experts have applied to it the same adjustments for obsolescence at stage 3 as they made at stage 2. However, Mr Hunter's deduction at Stage 3 is incorrect. He has deducted 27.29% instead of 26.29%, although this makes no difference to the result due to rounding.

[35] Mr Hulse's expert report at paragraph 88. Mr Hulse said he thought external access was good following the refurbishment of RAMM, see paragraph 85.

262. The experts proceeded on the basis the statutory decapitalisation rate took account of the affordability of the rent to the hypothetical tenant. We have found this is not the case and that the question of affordability should be addressed at stage 5 (see [147] above).

Stage 5

263. Mr Hulse believed that by making an adjustment for functional obsolescence at stage 2 it would be double-counting to make a further allowance for the same issues (layout and internal access) at stage 5. Mr Hunter allowed 15% for inefficiencies of layout at stage 5. Apparently he did not consider this to be double-counting with his adoption of a modern substitute building of reduced size and improved layout over only two floors. He said he had "accounted for the unnecessary space used for circulation, storage and plant rooms by adopting an area related to a modern substitute at stage 1 and made no allowance at stage 2 for this factor"[36]. Mr Hunter did not state in terms that the modern substitute building which he adopted reflected an improved layout or access. However, he criticised Mr Hulse for not following the RICS guidance regarding what a modern equivalent would be and because he had "simply adopted the areas of the actual museum and so is applying a modern cost to an historic layout and construction". The implication of that statement is that the modern substitute building reflected an efficient layout.

264. Paragraph 3.2.2(b) of the RICS Guidance Note, dealing with adjustments at stage 2, states that functional obsolescence "relates to the problems that may be present in the design of the property, which could be deficient by comparison with current requirements, for example, excessive ceiling heights, inappropriate layout…etc." It goes on to say at paragraph 3.5.2 that adjustments at stage 5 "are to reflect factors that affect the value of the property as a whole and may include such items as poor access, cramped site conditions, inadequate layout, etc." It therefore appears adjustments for layout can be made at either stage 2 or stage 5, but not both: see paragraph 3.1.20 of the guidance:

> "…Further adjustments required to take account of differences between the actual building and the substitute can still be reflected at Stage 2, or possibly Stage 5, but the valuer should take care to ensure that these adjustments…are not duplicated by way of allowances at Stage 2 or Stage 5."

265. Paragraph 3.2.4 of the RICS guidance states:

> "Where a modern substitute has been costed at Stage 1, allowances at Stage 2 should be restricted to the disadvantages of occupying the actual buildings in comparison with occupying the costed substitute (e.g. higher maintenance and running costs, etc.) since all other physical and *functional* obsolescence will have been reflected in the costing at Stage 1" (Our emphasis)

Such higher costs fall within the description of physical obsolescence in the RICS guidance for which the experts have agreed an adjustment at stage 2 of 16.29%.

[36] Mr Hunter's expert report and rebuttal, p47, paragraph 7.16(ii)

266. It seems to us that the functional obsolescence represented by the deficiencies (such as they were) in RAMM's layout and access after its refurbishment have been allowed for in Mr Anderson's design of the modern substitute building and that they should not have formed the subject of further adjustment by Mr Hunter at either stage 2 or stage 5 of his valuation. However, we have rejected the assumption of a smaller modern substitute building in any event.

267. Mr Hunter allowed 6% at stage 5 for what he described as insurance premium overage resulting from the much greater cost of reinstating RAMM as built compared with a modern substitute building. Mr Hunter's approach assumes that the insurance premium:

(i) is fairly represented by 3.5% of the rental value on FRI terms;

(ii) increases in direct proportion to the sum insured.

Neither of these assumptions was supported by evidence and nor was there any comparative analysis of the difference, if any, in insurance premiums between historic, listed museum buildings such as RAMM and modern museums. Mr Hunter gave no examples of such insurance premium overage having been allowed as a stage 5 adjustment in other CB valuations. In the absence of supporting evidence we consider this adjustment to be speculative and we do not accept it, especially since we adopt the existing GIA of RAMM.

268. The output of the CB method at the end of stage 4 adopting the adjustments that we have made in the light of the evidence is £561,644; see Appendix 2. We think Mr Hulse was correct not to make any further adjustments for obsolescence at stage 5 because the appropriate adjustments were made at stage 2. We do not accept Mr Hunter's suggested stage 5 allowance for insurance overage for the reasons we have given at [267] above.

Stand back and look

269. The key purpose of stage 5 is to enable the valuer to stand back and look at the result in the context of all the surrounding circumstances that would influence the parties when negotiating a rent on the statutory terms. The CB method must not be applied as a formulaic approach as the Tribunal observed in *Semilogistics* at [142]:

> "[The rateable value] is not defined as being the de-capitalised amount (at the appropriate decapitalisation rate) of £x, where this amount £x is the figure arrived at after precise and un-deviating application of a set of rules regarding the contractor's basis as extracted from RICS guidance and from decided cases. We agree with Mr Glover's submission that it is important not to allow the mechanics of the contractor's basis to obscure the crucial question in the case, namely what is the rent contemplated under paragraph 2(1) on the statutory assumptions. The assessment of figures pursuant to the contractor's basis will be relevant to the hypothetical negotiations between the landlord and the tenant, but it remains necessary to take into consideration every intrinsic circumstance which tends to push the rental value either up or down, see per Scott LJ in [*Robinson*]."

270. Mr Hughes said that "one must have faith" in the outcome of the CB method and that all valuation methods are sound in their own right. But in our judgment plainly such faith is misplaced if it is applied to the outcome of only the first four stages of the method. Stage 5 is an essential element of the process and requires the valuer to stand back and look at the result in the light of all the relevant circumstances. Not to do so would be contrary to case law and valuation practice and the core principles summarised in *Robinson Brothers*, *Erith* and *Scottish Exhibition Centre*. Not all relevant factors are, or can be, captured by stages 1 to 4. The suggestion that the CB method has intrinsic legitimacy is diminished by the recognition, accepted by Mr Hughes, that it may be regarded as a method of last resort. It is at best an indirect method of valuation. The circumstances in which it can be used are relatively narrow and depend upon the assumption that value can be assessed as a function of cost. Although all valuation methods are admissible that does not mean they are all of equal weight when considered against the key factors that the parties agree would influence the negotiations for the hypothetical tenancy and which we have discussed at [43 to 74] above. For example, as the Tribunal said in *Garton v Hunter*: "the greater the margin for error in any particular test, the less weight that can be attached to it" (see [111] above).

271. The CB method as applied by the experts in this case does not, in our opinion, give a reliable result because it has excluded from stage 5 any consideration (both individually and cumulatively) of abnormal repair costs, the subsidy required for a large, ongoing operational deficit, and the non-profit making nature of the museum (see also [224-5] above). Nor is its use supported by any rental evidence to which we give weight. Its use cannot be justified by saying that where a museum is operated on a non-profit making basis, and where there is no reliable rental evidence, the R & E basis cannot be used and the CB method must be used instead. There is no such legal or valuation principle.

272. Furthermore, it is clear from the evidence of the Council's accounts that the General Fund from which RAMM was subsidised was persistently under severe strain. We are satisfied that the Council as the hypothetical tenant could not have afforded to pay a significant rent of the order suggested by the CB method to stage 4, even if one assumes the higher level of income adopted in the parties' R & E valuation. It was already spending a substantial proportion of its budget on the deficit and we accept that it would not have been reasonable to expect it to afford, nor would it have been able to afford, a further £690,000 by way of rent (see [72-3], [137] and [239-240] above).

Conclusions on valuation methods

273. There is no direct rental evidence that can assist in the valuation of RAMM. The evidence of the open market lettings of the Design Museum and the Saatchi Gallery in London does not, in our judgment, indicate any support for the Appellant's valuation based on the CB method. The evidence of open market rents for other hereditaments in this mode or category of occupation suggest that the parties have regard to trading potential and not capital costs.

274. The R & E method produces a nominal value of £1. It is true that, as conventionally applied, the R & E method takes no account of socio-economic and cultural benefits which are not reflected in actual receipts. RAMM generates such benefits. In the Economic Impact of the Royal Albert

Memorial Museum and Art Gallery, Final Report, December 2012 some of the benefits were quantified as being between £2.067m and £2.64m per annum. But these represent benefits to Exeter (and, to a lesser extent, Devon) as a whole. They do not entirely accrue to the Council as the occupier of RAMM, but instead accrue, for the most part, to third parties. As we have explained at [225] above we do not consider that the socio-economic benefits viewed as a whole would represent value to the occupier of RAMM sufficient to overcome the economic disbenefits of having to subsidise ongoing operating costs and to result in a positive rental value. That is so even before taking the issue of the affordability of any rent into account.

275. The CB method indicates a figure, before stage 5 adjustments, of £561,644 (see Appendix 2). The valuer should stand back and look at this result in the context of the large operational deficit faced by the Respondent and the high level of annual subsidy that it must provide to sustain the museum in the face of competing demands for its limited resources. The valuer would also have to consider the hypothetical landlord's desire to divest himself of the considerable burdens of occupation (exacerbated by the abnormally high operating costs of a grade II historic building) and the non-profit motive for operating the museum. In the light of these factors the valuer must then ask whether the tenant's responsibilities were so great that occupation of RAMM was in fact burdensome and therefore would not command any positive rent (*Telereal* at [45-46] approving *Hoare*). In our judgment the evidence points unequivocally towards such a conclusion.

276. Affordability is also an issue that is properly considered at stage 5 (see [144] above). As we have explained, having regard to the submissions of both parties, the evidence of the Respondent's financial position shows that it could not reasonably be expected to increase its operating subsidy of RAMM to cover the payment of a rent of the order for which the VO contends.

277. RAMM is run in a business-like way but does not aim for, or produce, a profit and it cannot fairly be said that the result of the CB method produces a maximum rental value that the hypothetical tenant would be prepared to pay. That is manifestly not the case and we do not think the CB method can appropriately be applied in such circumstances. The hypothetical tenant would walk away from the deal at anything other than a greatly reduced rent to that produced by the CB method.

278. When viewing the matter and the circumstances as a whole and applying "the real value criterion" (see [26](vii) above), taking into account every intrinsic quality of the hereditament, the CB method does not sit well with the key factors that we identified in [43] above and in our judgment the result of the CB method is manifestly too high and we do not give it weight. We do not say the hypothetical tenant would necessarily be unable to pay any rent at all, because the parties did not explore the possibility of refinements of the R & E method such as a percentage of gross receipts or an overbid. We have explained above (e.g. [40]) why we have not been asked to consider this aspect further and why we do not think it would be appropriate for us to do so. Accordingly, the evidence before us leads to the conclusion that when RAMM is assessed in its mode or category of occupation as a museum, occupied not for profit but for the socio-economic benefits it generates, the hypothetical tenant could only reasonably be expected to pay no, or a nominal, rent on the statutory hypothesis. This conclusion is supported by the outcome of the R & E method and (indirectly as we have explained) by the approach taken to other hereditaments in this mode or category of occupation.

Determination

279. For the reasons given above we dismiss the appeal and uphold the VTE's decision that the rateable value of RAMM in the 2010 local non-domestic rating list should be £1 with effect from 15 April 2015.

280. The parties have agreed that there should be no order for costs in relation to this appeal, whatever the outcome. They also agree that the only order that the Tribunal should make is that the appeal is dismissed. We will make that order, thus making this decision final.

Dated 8 January 2020

The Honourable Mr Justice Holgate
Chamber President

A J Trott FRICS
Member

APPENDIX 1

CONTRACTOR'S BASIS OF VALUATION

	Mr Hulse	Mr Hunter (re-stated)
STAGE 1: Cost of modern equivalent		
Area:	5,281.40m^2	3,980m^2
Rate:	£ 3,450/m^2	£3,450/m^2
	£18,220,830	£13,731,000
Adjustment for contract size	£ 1,714,580 (9.41%)	£ 686,550 (5%)
	£16,506,250	£13,044,450
STAGE 2: Adjustment replacement cost		
Less obsolescence:		
(i) Physical	£2,688,868 (16.29%)	£ 2,124,941 (16.29%)
(ii) Functional	£ 825,312 (5%)	_
(iii) Technological	_	£ 1,304,445 (10%)
	£12,992,070	£ 9,615,064
STAGE 3: Value of land	£1,125,000	£ 1,125,000
Less obsolescence:	£ 239,512 (21.29%)	£ 295,762 (26.29%)
	£13,877,558	£10,444,302
STAGE 4: Decapitalisation		
Statutory decapitalisation rate (5%)	£ 693,878	£ 522,215
STAGE 5: Review		
Layout	_	£ 78,332 (15%)
Insurance overage	_	£ 31,333 (6%)
	£ 693,878	£ 412,550
say:	£ 690,000	£ 410,000

APPENDIX 2

UPPER TRIBUNAL CONTRACTOR'S BASIS OF VALUATION STAGES 1 TO 4

STAGE 1: Cost of modern equivalent	
Area:	5,281.40m^2
Rate:	£ 3,450/m^2
	£18,220,830
Adjustment for contract size	£ 1,714,580 (9.41%)
	£16,506,250
STAGE 2: Adjustment replacement cost	
Less obsolescence:	
(i) Physical	£2,688,868 (16.29%)
(ii) Functional	£2,475,937 (15%)
(iii) Technological	£ 825,312 (5%)
	£10,516,133
STAGE 3: Value of land	£ 1,125,000
Less obsolescence:	£ 408,262 (36.29%)
	£11,232,871
STAGE 4: Decapitalisation	
Statutory decapitalisation rate (5%)	£ 561,644