Landmark CHAMBERS

Annual Rating Conference
Recent Cases/ Trends

Jacqueline Lean and Katie Helmore

Effective Date of List Alteration: *BMC Properties & Management Ltd v Jackson (VO)* [2016] RA 1 (1)

House divided into 19 short term holiday lets since at least 1989. Entered into the 2005 list by alteration on 22 March 2011 with effect from 1 April 2005

Issues

- Whether the VO had power to make an alteration during the currency of the list

- The effective date of the alteration

Key points

- Unsurprisingly the VO did have power to make an alteration during the currency of the list

- VO could not make a proposal on grounds within reg.4(1)

- Act did not specifically empower VO to alter the list of his own volition

Effective Date of List Alteration: *BMC Properties & Management Ltd v Jackson (VO)* [2016] RA 1 (2)

- S.41 imposed a duty on a VO to maintain the list in an accurate state

- Insofar as necessary a power would be implied into the s.41 duty

- S.41 duty was to be facilitated by the processes in Part III of the Act which includes s.55 pursuant to which regulations about the alteration of lists by VOs may be made

- 'circumstances' in reg.14 included a subsisting inaccuracy in the list

- Reg.14(5) did not apply as the date the relevant circumstances arose (the inaccuracy in the list and the change of use) was reasonably ascertainable as it was known to exist prior to 1 April 2005

Repairs Held Uneconomic: *Barber (V0) v Cerep III TW Sarl* [2016] RA 20 (1)

Empty retail unit forming part of a redevelopment site. Unit had been vacant since 2008 was boarded up and had been vandalised leaving asbestos exposed. Immediately adjoining units had been surrounded by hoardings for several years.

Issue

- Following ***Monk*** was the VTE correct in holding the rateable value to be £0

Determination and Reasoning

- Following ***Monk*** there are 3 questions:

a) Are the premises in such repair as having regard to the age, character and locality of the property, would make it reasonably fit for the occupation of a reasonably minded tenant?

b) If not are the works required to put the premises in such condition works of 'repair'?;

c) Could these works of repair be carried out economically?

Barber (V0) v Cerep III TW Sarl [2016] RA 20 (2)

- Common ground that the premises were not in repair

- The work required were works of repair as:

a) They involved restoration by renewal or replacement of subsidiary parts of a whole not reconstruction of the entirety or substantially the entirety of the property;

b) Would not produce a building of a wholly different character;

c) Cost (£112,000) described as modest as against annual rent of £57,500

- However, repairs were <u>not</u> economic:

a) Hypothetical LL have regard to fact that property and others within the redevelopment area were vacant and hoarding had been erected;

b) Hoarding, boarding up dereliction and neglect followed the boundary of the planning permission

c) Owners who had allowed their properties to become derelict etc…since 2000 would be looking to redevelop sooner rather than later

Barber (V0) v Cerep III TW Sarl [2016] RA 20 (3)

d) Highly unlikely that hypothetical landlord would spend £112,000 on repairs;

e) LL faced with a risk that redevelopment come forward sooner rather than later and would be left with a 1960s building surrounded by a building site and then new development

<u>Implications</u>

- First practical application of ***Monk***

- Repairs costing 2 years rent not economic where rental return not sufficiently certain due to the risk of the 1960s property being surrounded by building works and then new development

- Test is whether a reasonable landlord would consider works economic not whether he would carry them out

- Monk listed in Supreme Court 16 July 2016 so watch this space!

Exemption- Redundant Retail Warehouse Used for Agricultural Purposes: *Wootton v Gill (VO)* [2016] RA 49

Redundant retail warehouse used by appellant farmer for agricultural storage during discussions with Waitrose. Appellant motivated in part by avoiding rates

Issue

The effect of temporary and opportunistic use where primary motivation was fiscal rather than agricultural on the agricultural exemption

Key points

- Appellant's motives behind the use were irrelevant;
- In any event the agricultural storage was beneficial and convenient;
- Use was temporary, opportunistic and primarily motivated by fiscal considerations however it was substantial, exclusive, beneficial and prolonged and should not be disregarded
- No additional test of reality or necessity in the relationship between the use of the building and the use of the land. The correct focus is on the use of the land and not the motive for such a use.

Transitional Certificates: *Dog & Gun (Oxenhope) Ltd v Howarth (VO)* [2016] RA 65 (1)

Country inn/ restaurant VOA requesting trading information since August 1995 provided in January 2011. In April 2013 VOA issued regulation 15 certificate with effect from 31.03.2010

Issue

- Circumstances in which VO can issue a regulation 15 certificate

Key points

- VO did not impermissibly impugn the list by issuing certificate;

- Reg. 15 certificate indicates what the assessment would have been if the VO had power to alter the list;

- Where VO considers RV shown in relation to a hereditament for 31.03.2010 is inaccurate he is obliged to issue a reg.15 certificate

Transitional Certificates: *Dog & Gun (Oxenhope) Ltd v Howarth (VO)* [2016] RA 65 (2)

- Reg.15 certificate should comply with reg.17 and be issued as soon as reasonably practicable after circumstances calling for the certification come to the VO's attention

- VO did not issue the certificate as soon as reasonably practicable (took over 2 years) causing undue hardship on ratepayer by backdating a significant rate liability

- However, the UT had no jurisdiction to alter or order the withdrawal of a reg. 15 certificate appeal is against the 'value do certified' only.

Premises Used for the early Stages of Mushroom Production Not Exempt: *Tunnel Tech Ltd v Reeves (VO)* [2015] RA 399 (CA) (1)

10 acre hereditament used for the production, almost exclusively within buildings, of compost containing mushrooms in their early stages of growth.

Issues

- Was it a market garden or nursery ground?
- If it was a nursery ground could that include buildings?

Key points

- It was not a market garden as the produce was not in a form to be consumed by the public but was subject to further processes on a different hereditament before capable of such consumption

- If it had been found to be a market garden it was difficult to see what would be within a nursery ground

Tunnel Tech Ltd v Reeves (VO) [2015] RA 399 (CA) (2)

- There is a historical distinction in rating legislation between agricultural land and buildings which is made clear in paras 3-7 of the Act

- The words 'anything which consists of' in para 2(1)(d) Sch.5 did not extend to a nursery ground comprised wholly of buildings

- Where all the agricultural activities are carried on within buildings in a market garden the exemption will apply

- Where all the agricultural activities are carried on within buildings in a nursery ground the exemption will not apply

- There is no obvious reason for the distinction which may have significant rates consequences for complication agricultural production processes.

Material Change of Circumstances for Temporary Period: *Pavlou (VO), Re the Appeal of* [2015] RA 301 (1)

Restaurant in Paternoster Square claim for reduction in RV due to Occupy London protest at St Paul's from 15 October 2011 to 28 February 2012, landlord gave tenant a 19% rent reduction

Issues

- Whether the material change in circumstances was too transient
- The relevance of the rent reduction

Key points

- Hypothetical T would have taken into account the nature and serious intent of Occupy London and placed it in the context of similar protests in other major cities;

Pavlou (VO), Re the Appeal of [2015] RA 301 (2)

- Hypothetical T would ask how long it would take for the protestors to make their point and would not suppose that it would disperse imminently

- In the circumstances the protest was not too transient

- The rent concession represented what would have been agreed between a hypothetical LL and T and should be given weight

- Of the 19% rent concession 9.5% was attributable to goodwill and 9.5% to rental value

ATMs separate rateable hereditaments: *Sainsbury's & ors v VO*

- ATMs separate rateable hereditaments to host stores (*Woolway* applied)
  - Each of the ATM sites is a self-contained piece of land
  - Each site meets the test set out by Lord Neuberger in *Burn Stewart: "there is a clear defined physical area";*
  - That land is not used by the host store but by the operator as a site for an ATM
  - Appellants wrong to focus on whether host store was itself self-contained: correct approach was to focus on identifying the hereditament in dispute and then determine who was in occupation

ATMs separate rateable hereditaments: *Sainsbury's & ors v VO*

- ATM operator in paramount occupation (*Westminster Council v Southern Railway and W H Smith & Sons Ltd* applied)
  - The fact that the ATMs were subject to licences or agreements rather than leases not determinative;
  - The obligations / restrictions in those licences or agreements did not "*interfere with the enjoyment by the ATM operators of the premises in his possession for the purposes of which he enjoys them";*
  - The restrictions / obligations were "*all simply within the spirit of the Westminster decision".*

Completion Notices

Sainsbury's Supermarkets Ltd v Eden District Council [2016] RA 40

- Application for an extension of time to appeal against 19 completion notices, specifying 1 November 2012 as date of practical completion.
- Notices apparently sent to CBRE, who acted in landlord and tenant matters (not ratings matters) and were not, in any event authorised to accept service. Notices not received by agents until September 2013.
- Subsequent errors in filing appeals / applications for extensions of time: not rectified until July 2014.

Completion Notices

Sainsbury's Supermarkets Ltd v Eden District Council [2016] RA 40

- VTE granted the extensions.

    - Although no one involved in the proceedings (including the VTS) could fully escape blame, all having made errors, the errors all started because of the failings around the issue of the completion notices. In particular, the billing authority's failure to utilise the methods of service specified in Schedule 4A para 8 of the Local Government Finance Act 1988, with the protections afforded thereby

Completion Notices

Westminster City Council v (1) UKI (Kingsway) Limited and (2) Mr Dunlevey (VO) [2015] UKUT 0301 (LC)

- Completion Notice addressed to “the Owner” hand delivered to the subject building, and handed to receptionist employed by Eco FM (company employed to manage the building)
- Receptionist transmitted copy electronically to UKI (Kingsway) Ltd.
- Neither receptionist nor Eco FM authorised to accept service
- UKI (Kingway) Ltd appealed on basis (1) notice invalid as addressed to “the Owner” and (2) invalid service
- VTE allowed the appeal

Completion Notices

Westminster City Council v (1) UKI (Kingsway) Limited and (2) Mr Dunlevey (VO) [2015] UKUT 0301 (LC)

- Lands Chamber reversed:
  - Sufficient that a notice was addressed to "the Owner": it did not have to name him
  - Billing authority does not have to have made 'reasonable enquiries' in order to be able to serve notice addressed to "the Owner" (only if it wants to rely on para 8(c) for service)
  - "Service" did not come to an end when notice left with receptionist: onward transmission to the intended destination by one or more stages did not prevent the eventual receipt from being effective;
  - Onward transmission in electronic form was sufficient

Completion Notices

Westminster City Council v (1) UKI (Kingsway) Limited and (2) Mr Dunlevey (VO) [2015] UKUT 0301 (LC)

- Some strong words for the billing authority:

"*As the President subsequently pointed out in his decision, the appellant could at that stage have mitigated any further risk by accepting that the completion notice was or might be invalid and by issuing a new one. In what might be seen as a high risk strategy the appellant chose instead to rely only on the original completion notice served in the manner I have described. I was told at the hearing of the appeal before me that even then, three years after the sufficiency of the completion notice had first been challenged, and almost a year after the President's decision, no further completion notice had yet been served. It seems quite likely that the whole of this interesting but arcane dispute would have been avoided if the appellant had taken that elementary step in March 2012.*"

"*In making this decision I should not be taken to condone sloppy procedure in the addressing or delivery of completion notices or any other important document.*"

Appeals

Wonder Investments Ltd v Jackson VO

- [2015] RA 449
  - UT (LC) has jurisdiction to entertain an appeal against VTE's refusal to reinstate an appeal which has been automatically struck out for a failure to serve a statement of case in time

- [2016] RA 33
  - Approach to be taken by UT (LC) is not a rehearing.
  - Application was premised on statement of case being filed in time, but rejected due to lack of evidence / good explanation as to why not received by VTE/VO
  - "No grounds" for providing relief sought

Appeals

Taissa Wassiljew-Jones (VO) v Done Bros (Cash Betting) Limited t/a Betfred [2015] UKUT 0499 (LC)

- Strict approach to time limits also applies to VO
- VO had failed to file its statement of case within the time directed, and thus was automatically barred from taking any further part in proceedings
- Did not attend (and was not represented) at appeal hearing
- Was therefore not entitled to appeal against VTE's decision pursuant to regulation 42
- As VO had not appeared (or been represented) at VTE hearing, UT did not have to determine whether a party who had been debarred for failing to comply a statement of case could appeal against the substantive decision.

Better result on ratepayer's appeal

Trevor Sorbie v Mike Dunlevey (VO) [2016] UKUT 167 (LC)

- VO assessed RV of hairdresser's salon in Covent Garden at £130,000. On appeal, VTE determined RV of £108,000.
- Ratepayer appealed. UT (LC) found, on evidence, that RV of £140,000 made out, but that RV should be reinstated at assessed value of £130,000
- Ratepayer contended that UT (LC) could not, as a matter of law, increase RV above that determined by VTE
- Rejected by UT (LC): rule 22 did not apply, and

> *"In any event, this was a rehearing and, as Mr Conneely indeed acknowledged, under regulation 42(5) of the Valuation Tribunal for England Regulations 2009, this Tribunal is able to "confirm, vary, set aside, revoke or remit the [VTE] decision or order, and* ***"may make any order the VTE could have made"***

Changes afoot?
2015 Consultation: *'Check, challenge, appeal: Reforming business rates appeals."*

- A new 3 stage system: check, challenge, appeal

- **Check**: rate payer can confirm existing facts or provide relevant new facts to the VOA, with the aspiration that the VOA will be able to alter the list quickly, if appropriate, or at least ensure that all material facts are known to all parties prior to an appeal;

- **Challenge**: ratepayer to set out the grounds on which it says the assessment is not correct, supported by evidence, including an explanation as to how a different valuation has been arrived at, and any relevant legal arguments;

Changes afoot?
2015 Consultation: '*Check, challenge, appeal: Reforming business rates appeals.*"

- **Appeal:**
  - Potential for some appeals to be determined on the papers
  - Control of new evidence?
    - Only by agreement, or in exceptional circumstances?
    - Where not by agreement, stay for consideration?
  - An introduction of fees on appeal, reflecting the approach proposed for other tribunals such as the Tax Chamber, which would be refunded to successful appellants.