Landmark CHAMBERS

Annual Rating Conference
Recent Cases/Trends

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Street Trading Area Rateable: New Milton Town Council v Gidman (VO) [2017] RA 111 (1)

A street trading area which was part of the public highway was operated once a week by an independent operator who paid a fee to the appellant council. Each Wednesday the road was closed to traffic and temporary barriers were erected between approximately 07.00 and 17.00 to allow the traders to set up and operate. The stalls were not physically attached to the highway and the traders paid the operator on a pay as you go basis.

Issues

- Whether the street trading area entered in the rating list as a market constituted a rateable hereditament.

Key Points

- The street trading area was a rateable hereditament, despite the intermittent nature of the activity all four ingredients of rateable occupation were present; actual occupation, beneficial occupation, exclusive possession and permanence.

New Milton Town Council v Gidman (VO) [2017] (2)

- Actual occupation: the market had been run for 11 years prior to the material day by an independent operator on behalf of the appellant council.

- Beneficial occupation: the payment by the operator of a significant amount for the right to operate the market (profit was not a prerequisite)

- Exclusive occupation: to be determined by reference to the nature of the hereditament. Although the general public retained rights of access only the operator had the exclusive right to occupy a market. Further, members of the public could only trade with a trading licence, permission of the operator and payment of a daily rate

- Permanence: the market had been in operation for around 11 years prior to 1 April 2010.

Air Handling System in Retail Warehouse valuation of plant: Iceland Food Ltd v Berry (VO) [2017] RA 1 (1)

Retail warehouse operated by Iceland with a large number of integral cabinets and an air handling system to control the heat generated by such cabinets.

Issue

- Whether the air handling system was non rateable plant used mainly as part of trade processes

Key points

- There is not a two stage approach to trade processes. The issue should not be addressed by asking if the relevant activity is a "process", and then by seeking to relate it to the trade of the ratepayer.

- Both the conjunction of the expression with manufacturing operations and that it is an exception to a general rule point to a less expansive approach to the scope of trade processes

Iceland Food Ltd v Berry (VO) [2017] RA 1 (2)

- The common defining characteristic of manufacturing operations and trade processes is activity bringing about a transition from one state or condition to another
- Since all retail warehouses require heating, cooling and ventilation, the plant and machinery installed to provide those services cannot properly be regarded as being used as part of manufacturing operations or trade processes.
- The display of goods for retail sale is the antithesis of a trade process. The fact that Iceland required more substantial equipment did not turn the air handling system into plant or machinery used mainly as part of trade processes.
- The requirement that the plant is used in connection with services *mainly* as part of a trade process is a secondary control, but not a primary one. It must first be established that the relevant activity is a trade process.

Valuation- Restrictive Covenant Disregarded: Pearl Group Services Limited v Alexander (V0) (1)

Sports ground and sports centre in Nene Park with a restrictive covenant against user as a private sports ground for a major employer of personnel close to Peterborough

Issue

- Whether the restrictive covenant had the attributes of a statutory restriction and should be taken into account in ascertaining rateable value

Key points

- The restrictive covenant did not have the attributes of a statutory requirement and would not be taken into account
- Covenants in a lease do not affect rateable value. Statutory restrictions which are 'attached' to the hereditament are taken into account as they are an inherent or intrinsic part of the hereditament: *Port of London Authority v Orsett Union Assessment Committee* [1920] AC 273

Valuation- Restrictive Covenant Disregarded: Pearl Group Services Limited v Alexander (V0) (2)

- Covenants which are in substance statutory requirement may be taken into account: *Burnell v Downham Market UDC* [1952] 2 QB 55

- Although the headlease was granted by a development corporation with statutory powers, Peterborough Development Corporation, upon the disposal to a company limited by guarantee, Nene Park Trust, PDC's statutory obligation was discharged

- The fact that NPT is regulated under the Companies Act 2006 and by the Charity Commission does not mean that its rights and obligations under the lease have the attributes of statutory rights and obligations

- The existence of the right for the appellant to apply for a release or modification of the restrictive covenant pursuant to section 84 Law of Property Act 1925 demonstrated that it did not have the force of a statutory requirement.

Nominal Value for Offices Rejected: Hewitt (VO) v Telereal Trillium [2016] RA 349 (1)

Purpose built office block previously occupied by HMRC and DWP where, as at the AVD, they had indicated an intention to vacate and had done so by 01.04.2010

Issue

- Where there was nobody in the real world who would be prepared to pay or bid a positive price for the property as at the AVD although comparable office properties were let was a nominal value appropriate

Key points

- A nominal value was not appropriate and the property would be valued by reference to the 'general demand' as demonstrated by the occupied comparable properties

- It must be assumed that a hypothetical LL and a hypothetical T will agree terms for a letting even where nobody in the real work would take the property

Hewitt (VO) v Telereal Trillium [2016] RA 349 (2)

- A nil value will only be appropriate where either:
  - The hereditament is intrinsically valueless and "struck with sterility in any and everybody's hands"; or
  - The responsibilities of the tenancy are so great as to result in the occupation being burdensome rather than beneficial in the commercial sense (*Hoare (VO) v National Trust* [1998] RA 391) ;

- It is only permissible to attribute to the hypothetical tenant the characteristic of not wanting the tenancy at all where either i) the hereditament is intrinsically valueless or ii) where the responsibilities of are such that no beneficial occupation is possible in a commercial sense.

- Permission to appeal to the Court of Appel was granted by the Lands Chamber on 3 August 2016

Valuation of a Retail Store: Debenhams v Commissioner of Valuation for Northern Ireland [2016] RA 217

Large Debenhams store at the entrance to a shopping centre with an unusual layout and limited display frontage valued as a retail store

Issue

- Whether the hereditament should be valued as an 'ordinary shop' on the zoned basis or as a 'retail store' on the overall approach

Key Points

- The distinction between an ordinary shop and a retail store is a matter of expert judgment with the primary factor being size. Where a unit is close to the threshold based on size if the display frontage of a large retail unit is limited to something significantly less than that of an ordinary or standard unit this would support treatment as a retail store.

Costs- No Exceptional Circumstances: Brophy v Simmonds (VO) [2016] UKUT (LC) 0217 (1)

Appeal against the decision of the VTE determined under the simplified procedure. On 16.11.2015 the Tribunal indicated the appeal would be heard on 12.02.2016 and on 22.02.2016 the VO emailed the Tribunal to agree the appeal.

Issue

- Whether the appellant was entitled to costs

Key Points

- Costs in appeals proceeding on the simplified procedure may only be awarded where there is unreasonable behaviour: para 12.8 Practice Direction

- In most case the simplified procedure is the informed choice of both parties made in the expectation that it is essentially a no costs jurisdiction and that they would have to bear their own costs even if wholly successful.

Brophy v Simmonds (VO) [2016] UKUT (LC) 0217 (2)

- Early settlement of appeals should be encouraged: *McDonough (VO) v O'Keefe* [2015] RVR 385

- The question of whether costs would have been awarded if the matter has proceeded to a hearing is relevant: *Total Fulfilment Logistics Ltd v May (VO)* [2014] RVR 300.

- 'Unreasonable behaviour' is a high threshold:

  > *"Unreasonable'… means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case…The acid test is whether the conduct permits of a reasonable explanation"*
  >
  > *Ridehalgh v Horsefield* [1994] Ch 205 per Bingham MR

- The VO's conduct was not unreasonable, the merits were not hopeless as the VTE had rated the loose boxes:

Valuation of small private independent primary schools: Turnball (VO) v Goodwyn School and others [2016] RA 85

VO's appeal against VTE's determination that three, small, independent primary schools in North London were to be assessed on contractor's basis of valuation

Issue

- Contractors basis v rental basis – could the VO that there was a rental market in small independent primary schools, and that there was sufficient evidence from that market to enable RVs to be determined in that way for the schools at issue

Determination

- Appeal dismissed – "*whether looked at as individual items or as a whole, the rental evidence presented by the valuation officer is not sufficient to determine the rateable value of the three respondent schools.*"

Turnball (VO) v Goodwyn School and others [2016] RA 85

Key points

The Tribunal highlighted:

- potential issues with the reliability of the information provided on the Forms of Return (which asked if the person filling out the form had a connection with the landlord, rather than the tenant);
- the size of the "sample" (12/371); and
- the geographical extent of the 'sample' compared with the number of comparators derived from the same.

End-stage allowances reflecting bargaining position between the parties: Celsa Steel (UK) Ltd v Webb (VO) [2017] UKUT133 (LC)

3 appeals relating to the RV of Tremorfa Steelworks, Cardiff, in the 2005 and 2010 ratings list.

Issue

- Should an additional 15% discount be made at stage 5 to reflect the bargaining position as between hypothetical landlord and hypothetical tenant?

Determination

- Appeal dismissed

Celsa Steel (UK) Ltd v Webb (VO) [2017] UKUT133 (LC)

Key points

- No basis for further allowance on grounds of increased costs of operating across two sites
- Celsa was the most likely hypothetical tenant – thus "*most of the points taken by Celsa Steel vanish. There is a guaranteed user for the billets and there is no risk that Castle Works will purchase its billet elsewhere. The operation will continue precisely as it did before. We take this into account under the principle of reality …*"
- No additional allowance for imbalance of bargaining power: "*there are many examples under the Contractor's basis where the occupier is the sole possible hypothetical tenant - Sellafield was cited as a prime example. We do not think that that is sufficient to justify a stage 5 reduction*"

Assessment of self-catering holiday units: Beaconside Country House & Cottages v Gidman (VO) [2017] RA 61

2 separate appeals against RV of self-catering holiday units at Beaconside Country House, Bideford, and Stowford Lodge, Torrington

Issues

- Working expenses
- Apportionment of divisible balance in light of *Redrose Ltd v Thomas (VO)* [2015] RA 538

Determination

- Both RVs reduced on the basis of expenses/costs
- No variation of divisible balance

Beaconside Country House & Cottages v Gidman (VO) [2017] RA 61

Key points

- Beaconside Country House
  - Generally, ratepayer's position on costs/expenses preferred
- Stowford Lodge
  - 5,500 was included for cleaning - no reason to conclude that less than the' standard, widely accepted amount' (ie 10% of turnover), was appropriate
  - VO's approach to land maintenance costs rejected - £20 per week for maintenance of "such an important feature as the grounds" was "entirely reasonable" (if not a little on the light side)

Beaconside Country House & Cottages v Gidman (VO) [2017] RA 61

Divisible balance

- A move away from the default 50/50 split
- *"it is necessary in every case, once the FMT and working expenses have been established, to "stand back and look" and to ask what the hypothetical landlord and tenant would agree would be a sufficient return to reward those efforts. The correct answer is unlikely to be the same in every case."*
- *"less than 10% of turnover would seem on the face of it to be an unattractive level of return for the effort required" … "if the additional allowances to the accounts argued for by Mr Morrish and accepted by me had not been incorporated, then it would have been necessary to adjust the divisible balance"*

Beaconside Country House & Cottages v Gidman (VO) [2017] RA 61

"[62] I would add in conclusion that these appeals, and the tribunal's decision in Redrose, suggest that the adoption of a conventional 50/50 split of net profit before rent without critically considering whether the resulting figure properly reflects the sum at which the hereditament might reasonably be expected to be let from year to year on the statutory assumptions, is unsound. Both Redrose and these appears were conducted under the tribunal's simplified procedure (which is appropriate for cases which raise no issue of valuation principle). It may soon be necessary for the tribunal to address this issue under its standard procedure in order to give guidance on these important assessments."

One hereditament or two?: Clements v Secretary of State for Transport [2017] UKUT 0135 (LC)

Blight notice served in respect of 3 parcels of land – 2 to the south of Yarlet Lane ("Plot 1"), 1 to the north ("Plot 2"). Plot 2 was included within safeguarding for HS2 Phase 2A. SST contended that the notice was invalid as the parcels of land did not comprise a single hereditament, and served two separate counter-notices (Plot 1 not "blighted land", no "qualifying interest" in Plot 2)

Issues

- Did the claimants' land comprises a "single hereditament" within the meaning of Part VI, Chapter II of the Town and Country Planning Act 1990.
- This depended solely on whether the plots were to be treated as a single "hereditament" applying rating law principles.

Clements v Secretary of State for Transport [2017] UKUT 0135 (LC)

Key points

- Plots 1 and 2 did not constitute a "single hereditament" applying the geographical test in *Mazars*
  - no visual or cartographic unity;
  - separated by a public highway;
  - ownership of highway subsoil not sufficient;
  - ducts/calvert through subsoil connecting the plots not sufficient
  - BUT – a point which could be considered in the future:

    "We are not persuaded that the examples given in [Mazars] were necessarily intended to delimit the type of link which might satisfy the geographical test. They may have been influenced by the nature of the properties and the land use under consideration. But this point has not been fully argued before us, and must await another case."

Clements v Secretary of State for Transport [2017] UKUT 0135 (LC)

- Plots 1 and 2 did constitute a single hereditament applying the functional test
  - the use of each plot was necessary for the effectual enjoyment of the other
    - Test was "effectual enjoyment" – not the more restrictive approach argued for by SST
  - Neither plot was separately lettable for the purposes for which it was currently used
    - User limb of *rebus* principle applied to "separately lettable" test
    - "separately lettable" criterion applies to each of the separate areas of land under consideration - not just one of them

Potential developments in 2017

- Further consideration of *Woolway v Mazars*
- HR compatibility of retrospective alterations to the list?
- Unusual properties – further guidance from UT?
- Revisiting the approach to divisible amount post *Redrose*?

Potential developments in 2017

- Guidance on the new Regulations?
- In particular:
  - What constitutes sufficient “particulars of the grounds of the proposal”? (New NDR reg 6(4)(b));
  - How detailed do the “details of the proposed alteration” need to be? (New NDR reg 6(4)(c));
  - Has the meaning of “not well founded” (reg 13) changed, given the changed approach on appeal?
  - What is the test for “not reasonable”? (New NDR reg 13A(2))