Annual Rating Conference: Recent cases/ trends

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

Facts

1. The appeal hereditament was part of the public highway at Station Road, Mew Milton, Hampshire and had been designated as a consent street for street trading under the Local Government (Miscellaneous Provisions) Act 1982.

2. As at the material date:

 2.1 The trading area was being run by the operator who paid a fee to the appellant council pursuant to an agreement;

 2.2 The road was closed to traffic each Wednesday between approximately 07.00 and 17.00 and temporary barriers were erected to allow the traders to set up and operate and traders operated from between approximately 08:00 and 16:00 on that day;

 2.3 There were no permanent markings or physical features within the highway which defined the trading area and the stalls were not physically attached to the highway;

 2.4 Street traders paid a fee to the operator on a pay as you go approach in respect of the days when they carried out street trading.

Issue

3. Whether an area of highways used once a week as a street trading area and entered in the rating list as a market constituted a rateable hereditament.

Determination and reasoning

4. 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.

5. There was actual occupation as the market had been run for around 11 years prior to the material day by an independent operator on behalf of the appellant council. Although the

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

occupation was intermittent there was no significant difference with other markets which are assessed.

6. Beneficial occupation was evidenced by the fact that the operator was prepared to pay a significant amount for the right to operate the market on behalf of the appellant. Whilst the amount the operator was prepared to pay had reduced over time the making of a profit was not a prerequisite for the occupation to be of benefit: *Kingston Upon Hull v Clayton (VO)* [1961] RVR 478:

   > "*whether a profit could be made from these uses is beside the point. The test for beneficial occupation is not whether a profit could be made but whether the occupation is of value (London County Council v Erith Parish and Dartford Union Assessment Committee)*"

7. In terms of exclusive occupation:

   7.1 Although the general public retained rights of access over the highway even on market days only the operator had the exclusive right to occupy a market. Further members of the public may only trade with a trading licence, permission of the operator and payment of a daily rate;

   7.2 The question of whether a party is in occupation of a particular hereditament must be decided by reference to the nature of the hereditament in question: *Vitesse Networks Ltd v Bradford (VO)* [2006] RA 427;

   7.3 The hereditament was the area of land for which consent had been given to operate a weekly market and it was only the operator who had the right to use this area of land as a market.

8. The test of permanence was met as the market had been in operation for around 11 years prior to 1 April 2010.

<u>Implications/ key points</u>

9. The question of whether a party is in occupation of a particular hereditament must be decided by reference to the nature of the hereditament in question. Here, the appellant's occupation was exclusive notwithstanding that members of public also had access as the only party with a right to use the hereditament as a weekly market was the operator.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

10. Permanence may be established where an area was used intermittently as a market once a week and had been so used for some 11 years prior to the material date.

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

Facts

11. The appeal property was a small retail warehouse operated by Iceland for the sale of primarily chilled and frozen food. As at the material day there were 82 refrigerated cabinets at the store of which 81 were 'integral cabinets'.

12. Integral cabinets use refrigeration and condensers installed within the body of the cabinet itself an expel heat to the environment immediately surrounding the cabinet. By contract remote cabinets employ refrigeration equipment at a distance from the cabinets and heat is absorbed via a liquid refrigerant conveyed to the cabinet through pipes permanently installed in the store and expelled remotely through condensers located outside the building.

13. As integral cabinets are designed to operate below an ambient temperature the heat generated from the cabinets themselves must be controlled to ensure that the cabinets continue to function. Due to the large number of integral cabinets at the store an air handling system with a correspondingly large cooling capacity was required.

Issues

14. Whether an air handling system mainly used for the sale of refrigerated products in cabinets was rateable plant used or intended to be used in connection with services to the hereditament or part of it or non rateable plant used mainly as part of trade processes

Determination and Reasoning

15. Class 2 of Schedule 1 to the Valuation for Rating (Plant and Machinery) (England) Regulations 2000 is as follows:

> *"Plant and machinery specified in Table 2 below (together with the appliances and structures accessory to such plant or machinery and specified in paragraph 2 of the List of Accessories set out below) which is used or intended to be used in connection with services to the hereditament or part of it, other than any such plant or machinery which*

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

is in or on the hereditament and is used or intended to be used in connection with services mainly or exclusively as part of manufacturing operations or trade processes.

In this Class, "services" means heating, cooling, ventilating, lighting, draining or supplying of water and protection from trespass, criminal damage, theft, fire or other hazard."

16. The Court of Appeal was in substantial agreement with the reasoning of the Upper Tribunal that:

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

16.2 The scope of the general rule was that plant or machinery within any of the categories or classes set out in Schedule 6 is assumed to be part of the hereditament and therefore rateable. Only plant or machinery not within any of the classes has no rateable value. There are limited exceptions, the most important of which is plant and machinery in connection with the supply of services used mainly or exclusively in connection with manufacturing operations or trade processes.

16.3 It cannot have been intended that the exemption in Class 2 for manufacturing operations or trade processes should be interpreted so widely as to reduce the service plant and machinery liable to rating to such as has no trade connection at all;

16.4 The statutory language speaks for itself. Both the conjunction of the expression with manufacturing operations and the fact that it is an exception to a general rule point to a less expansive approach to the scope of trade processes.

16.5 The common defining characteristic of manufacturing operations and trade processes is activity bringing about a transition from one state or condition to another, including by the creation, completion, repair or improvement of the subject matter of that activity.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
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While there may be exceptions, the display or storage of goods in itself could not ordinarily be said to involve any trade process. The creation of an environment conducive to the display or storage of goods (at least in the context of a retail warehouse) is not properly regarded as involving a trade process.

16.6 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.

17. The Court of Appeal concluded at paragraphs 45 and 46:

"45. As it seems to me, however, the display of goods for retail sale is the antithesis of a trade process… More prosaically, I can imagine that the process of freezing chickens rather than just keeping them frozen to be offered for sale would in all likelihood be a trade process. But I agree with the Upper Tribunal that the fact that the environment appropriate to the storage and display of the goods of a particular retailer requires more substantial, powerful or even complex equipment than is normally found in retail premises does not turn plant and machinery used for cooling the air in and ventilation of Iceland's shop into "plant or machinery … used … in connection with services mainly or exclusively as part of … trade processes".

46 … It is not, in normal parlance, a trade process to apply "a continuous treatment of refrigeration at all times using equipment to maintain food in an artificial condition where but for the refrigeration it would be rendered worthless". … keeping food in its same frozen state so that it may be sold is not any kind of trade process… the question is not whether the plant serves the hereditament or the tenant, but whether the plant is used in connection with services mainly or exclusively as part of a trade process. Retail warehouses undertake a trade but not normally any trade process, certainly not so far as keeping the shop or the equipment therein at an appropriate temperature is concerned. Mr Kolinsky places too much weight on the requirement that the plant is used in connection with services mainly as part of a trade process. That is a secondary control, but not a primary one. Service equipment will be rateable unless it is used as part of a trade process. Keeping Iceland's freezers cool is not, in my judgment, a trade process, properly so called. "

Implications / key points

18. The display of goods for retail sale is the antithesis of a trade process. The fact that a particular retailer requires more substantial powerful or complex equipment than is

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

normally found in retail premises did not turn the air handling system into plant or machinery used mainly as part of trade processes.

19. Keeping food in a frozen state so that it may be sold is not a trade process. The question is not whether the plant serves the hereditament or the tenant, but whether the plant is used in connection with services mainly or exclusively as part of a trade process.

20. 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) VTE (Appeal No 054017371184/537NO5)

Facts

21. The appeal hereditament was a sports ground and sports centre within Nene Park which was purpose built in the late 1980s for employees of Pearl Assurance plc who were relocating from London to Peterborough. Pearl relocated to Peterborough as part of the regeneration promoted by the Peterborough Development Corporation ("PDC") which was established by central government under the New Towns Act 1946 and the Peterborough new Town Designation Order 1967 which provided PDC with statutory powers to fulfil its objectives including the provision of Nene Park and the development of the new town.

22. PDC refused to sell the freehold of the appeal hereditament to Pearl in 1988 and instead agreed to grant a long lease as they believed any commercial benefit should be applied exclusively to support the Nene Park Trust ("NPT"). The long lease required the consent of the Secretary of State for the Environment who did not object.

23. NPT then granted a lease dated 31 July 1989 of the appeal hereditament for a term of 998 years to Pearl. That lease contained a restriction on user at clause 2(10) as follows:

"to the intent that the obligations may continue throughout the term hereby granted HEREBY COVENANTS with (NPT)…Not to use the Demised Premises for any purpose or in any manner other than as described as follows: (a) as a private sports ground with ancillary

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

and associated buildings and recreational facilities for the Lessee (party hereto) or a major employer or personnel in or close to Peterborough"

24. A head lease was then granted by PDC to NPT on 23 September 1988 for a term of 99 years. PDC was dissolved on 31 December 1988 the freehold reversion to the headlease having been transferred to Peterborough City Council.

25. NPT is a company limited by guarantee and a registered charity which exists solely to hold and operate Nene Park. NPT has no express statutory basis, is financially independent and does not received funding from local or central government or any public body.

Issues

26. The sole issue was whether a covenant had the attributes of a statutory restriction and should therefore be taken into account in ascertaining rateable value.

Determination and Reasons

27. The hereditament is to be valued by reference to the hypothetical tenant on the basis that it is vacant and let. As such restrictive covenants entered into between the actual landlord and the actual tenant are to be disregarded for the purposes of the rating hypothesis: *Robinson Brothers (Brewers) Ltd v Houghton & Chester-Le-Street Assessment Committee* [1938] AC 321.

28. The hypothetical tenant will however be affected by statutory powers or obligations which are 'attached' to the hereditament:

> *"the actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament"*
>
> *Port of London Authority v Orsett Union Assessment Committee* [1920] AC 273 per Lord Buckmaster at 305

29. Restrictions under a deed of trust of land may be taken into account where for the trust are in effect statutory trusts for example where the conveyance operated by virtue of the Open Spaces Act 1906: *Burnell v Downham Market UDC* [1952] 2 QB 55.

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e: clerks@landmarkchambers.co.uk | @Landmark_LC
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30. The restrictive covenant did not have the attributes of a statutory restriction and should not be taken onto account in ascertaining rateable value as follows:

30.1 Although the headlease was granted by a development corporation with statutory powers to a company limited by guarantee (NPT) that company was a non statutory financially independent charity established solely to hold Nene Park. Once PDC had granted the headlease to NPT PDC's statutory obligation was discharged;

30.2 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;

30.3 NPT's negotiating position over the waiver or release of the restrictive covenant albeit informed and constrained by its charitable purposes pointed away from the view that the restrictive covenant was essential to the hereditament itself "the appeal hereditament is a sports ground and sports centre whether employees of a particular employer or the general public of Peterborough play sport there.";

30.4 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.

<u>Implications / key points</u>

31. The starting point is that covenants in a lease between the actual landlord and the actual tenant do not affect the hypothetic tenant and thus rateable value. Statutory restrictions which hare 'attached' to the hereditament are however to be taken into account on the basis that they are an inherent or intrinsic part of the hereditament. It is possible for covenants which are in substance statutory requirement to be taken into account.

32. The existence of the power pursuant to section 84 Law of Property Act 1984 to vary or modify a restrictive covenant demonstrates that such a covenant does not have force or character of a statutory requirement.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
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Nominal Value for Offices Rejected: Hewitt (VO) v Telereal Trillium [2016] RA 349

Facts

33. The appeal property, Mexford House, was a detached three storey office block purpose built in 1971. As at the AVD Mexford House was occupied or partly occupied by HMRC and DWP both of whom had used the offices continuously since 1972 although they had indicated an intention to leave and Mexford House was unoccupied at the material day.

34. The parties agreed that:

34.1 Had the property been on the market as at the AVD (1 April 2008) nobody in the real world would have been prepared to occupy the property and pay a positive price; and

34.2 If the rating hypothesis requires a) the existence of a hypothetical tenant to be assumed and b) the rateable value to be assessed by reference to the 'general demand' as evidenced by the occupation of other office properties with similar characteristics, the rateable value should be determined at £370,000.

Issues

35. Where there was nobody in the real world who would be prepared to pay or bid a positive price for the subject office building as at the AVD and other office properties with similar characteristics were let was a nominal value appropriate or should the property be valued by reference to the 'general demand'

Determination and Reasoning

36. The Tribunal helpfully set out various legal principles as follows:

36.1 "thus the true test is whether the occupation is of value, and not whether it is one by which pecuniary profit can be made. If land is "struck with sterility in any and everybody's hands, whether by law or its inherent condition, so that its occupation is, and would be of no value to anyone, then it cannot be rated." (paragraph 43);

36.2 "Mexford House must be assessed as offices and not for some other potential form of occupation such as storage. The hypothetical tenant, in framing its bid, would be aware that it would be entitled to carry out minor alterations to the property" (paragraph 53);

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

36.3 It must be assumed that a hypothetical landlord and a hypothetical tenant will agree terms for a letting:

> *"If only one potential bidder has been identified, a conclusion that the bidder would not be willing to take the yearly tenancy is not one that is permissible. The statutory formula insists that the tenancy is taken up"*
>
> *Hoare (VO) v National Trust* [1998] RA 391 per Sir Richard Scott

37. A nominal valuation was not appropriate:

37.1 It must be assumed that that a hypothetical landlord and a hypothetical tenant will agree terms for a letting on the statutory terms. It is not permissible to assume that no bidder can be found to take the tenancy;

37.2 If there is something in the hereditament which makes occupation of it intrinsically valueless then a nil value will be appropriate. This would be the case, where the hereditament was "struck with sterility in any and everybody's hands";

37.3 A nil value may also be appropriate where although occupation may be beneficial the responsibilities of ta tenancy are so great as to result in the occupation being burdensome rather than beneficial in the commercial sense;

38. The hypothetical negotiations on the statutory terms between the hypothetical landlord and the hypothetical tenant should be considered in circumstances where the hereditament is not intrinsically worthless, comparable premises were being beneficially occupied at substantial rents and the responsibilities of a tenancy would not be so great as to render the occupation burdensome. In such circumstances the hypothetical landlord and the hypothetical tenant each acting prudently and making the best of their respective bargaining positions would not agree upon a rent of £1. The rent would be negotiated by reference to the 'general demand' as demonstrated by the occupation of comparable office premises;

39. The respondent accepted that there has to be a tenancy granted on the statutory terms and that it is not open to say that no hypothetical tenant would be prepared to take any tenancy at all. However, the respondent then incorrectly attributes to the hypothetical tenant the characteristic of not wanting the tenancy at all. It is only permissible to attribute such a characteristic to the hypothetical tenant where i) the hereditament is intrinsically valueless or

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
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ii) where the responsibilities of are such that no beneficial occupation is possible in a commercial sense.

Implications / key points

40. It must be assumed that a hypothetical landlord and a hypothetical tenant will agree terms for a letting notwithstanding that in the real world, as at the AVD, there was nobody who have been prepared to occupy the property and pay a positive price.

41. A nil value will only be appropriate where either:

41.1 The hereditament is intrinsically valueless and "struck with sterility in any and everybody's hands"; or

41.2 The responsibilities of the tenancy are so great as to result in the occupation being burdensome rather than beneficial in the commercial sense;

42. Where there were comparable properties beneficially occupied at substantial rates as at the AVD the rent would be negotiated between the hypothetical tenant and the hypothetical landlord by reference to the 'general demand' as demonstrated by the occupation of such properties.

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

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

Facts

44. The appeal hereditament was a large Debenhams store at the entrance to a shopping centre with an unusual configuration have been formed by the addition of a large extension at both ground and first floors to the side and rear to an ordinary unit.

Issues

45. Whether the hereditament should be valued as an 'ordinary shop' on a zoned approach or as a 'retail store' at the same price per square metre.

Determination and Reasoning

46. The essential difference between a zoning approach and an overall approach was said to be as follows:

"Zoning is based on the concept that frontage, whether to a street or mall, is of key importance. In this case the approach was to divide up the ground floor of each shop into up to four zones back from the frontage with each zone priced at half the rate of the zone in front. The importance attached to frontage by zoning was illustrated by the fact that a square metre at the front of a deep retail shop was treated as being eight times a valuable as a square metre at the rear. Whereas on an overall approach, no additional value is attributed to frontage- a square meter at the front is treated as being of the same value as one at the rear"

47. A zoning approach is appropriate for an ordinary shop whereas an overall approach is appropriate for a retail store. The primary factor for determining whether a unit is an ordinary shop or a retail store is primarily a question of size. Debenhams at about 1,500 and:

"…close to the threshold between an ordinary shop, which would be valued by zoning, and a retail store, which would be valued overall, the question which side of the threshold a unit lies is a matter for expert judgment. It is primarily a question of size. But here the display frontage of a large retail unit is limited to something significantly less than that of the ordinary or standard unit, that would support treatment as a retail store, These probably are not the only factors that may be relevant in all cases".

48. The Tribunal also noted that, although not the issue before them, there may be categories of hereditaments perhaps by virtue of custom and practice that fall to be assess on an overall basis such as for example anchor stores.

49. On the basis of size and limited display frontage that Debenhams was with in the retail stores sector and should therefore be valued on an overall basis by reference to comparables in the same shopping centre. Had size been the only factor Debenhams would probably be treated as within the retail stores sector although the decision would have been more marginal.

Implications / key points

50. The distinction between a retail store (to be valued overall) and an ordinary shop (to be valued by zoning) is a matter of expert judgment with the primary factor being size. Where a

unit is at the margin or very 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

Facts

51. The ratepayer appealed against a decision of the VTE of 27 February 2015 in respect of loose boxes which, she argued, were not liable to non domestic rating as they were within the curtilage of her home. The appeal was directed to be determined under the simplified procedure.

52. On 16 November 2015 the tribunal indicated that the appeal would be heard on 12 February 2016 and on 22 January 2016 the tribunal received an email from the VOA's litigation team setting out that the VO was prepared to agree the appeal and delete the entry in the rating list. Following which a consent order was made.

53. The appellant said that the appeal had been ongoing for almost 5 years she had attended three appeal hearing and had studied rating law and previous decisions and that such a borderline case should never have been brought.

54. The VO submitted:

54.1 That the original view that the losses boxes should be rated was upheld by the VTE;

54.2 A series of test cases in front of the President of the VTE concerning whether equestrian facilities should fall to be treated as appurtenances to domestic property had helped the VOA rationalise its approach; and

54.3 Following the VO's inspection of the appeal property for the first time on 18 January 2016 and the decisions of the President of the VTE he decided that the case did not present a sound basis upon which to proceed.

Issues

55. Whether costs should be awarded in respect of a rate payer's appeal proceeding by the simplified procedure which was allowed by consent about three weeks before the hearing date.

Determination and Reasoning

56. The Tribunal has power to award costs in appeals from the VTE pursuant to rule 10(6)(d) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. This is however modified in a simplified procedure case by paragraph 12.8 of the Practice Direction:

"*12.8 Simplified and written representations procedure*

Where proceedings are determined in accordance with the simplified procedure…costs will only be awarded if there has been an unreasonable failure on the part of the claimant to accept an offer to settle, or if either party has behaved otherwise unreasonably, or the circumstances are in some other respect exceptional"

57. It would be unusual for a case to be dealt with under the simplified procedure if a party objected to that course and in most case the simplified procedure is the informed choice of both parties made in the expectation that they would have to bear their own costs even if wholly successful.

58. Two recent examples of applications for costs on respect of appeals from the VTE which were dealt with under the simplified procedure emphasise that the early settlement of disputes is to be encouraged and the question of whether costs would have been awarded if the matter has proceeded to a hearing is relevant: *McDonough (VO) v O'Keefe* [2015] RVR 385 and *Total Fulfilment Logistics Ltd v May (VO)* [2014] RVR 300.

59. '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, and it makes no difference that the conduct s the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

Ridehalgh v Horsefield [1994] Ch 205 per Sir Thomas Bingham MR

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

60. The VO's conduct was not unreasonable:

60.1 The merits of the appeal property being entered into the rating list were not hopeless as the VTE had determined that it should be assessed;

60.2 By inspecting the property very soon after taking over the case the VO came to a different view from his predecessor and in agreeing that the entry should be deleted saved both parties the costs of attending the hearing;

60.3 There was nothing to suggest that the appellant would have been awarded her costs had the matter proceeded to a hearing and a determination her favour;

60.4 The tribunal has no power to award costs in respect of expenses incurred before the VTE.

Implications / key points

61. For costs to awarded on an appeal from the VTE proceeding under the essentially no costs simplified procedure unreasonable conduct must be demonstrated. This is a high hurdle and parties should not be penalised for the early settlement of disputes:

"In ordinary circumstances, and in the absence of unreasonable behaviour, appellants should not be discouraged from withdrawing an appeal, or respondents conceding, in a simplified procedure case owing to the threat of a costs order being made against it"

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

Facts

62. The VO appealed against a determination of the VTE that three, small, independent primary schools in North London (Goodwyn School, Annemount School and Gower House School) were to be assessed at RVs of £34,250, £8,900 and £18,750 respectively on the contractor's method of valuation.

Issues

63. The VO contended that the VTE had been wrong to use the contractor's method of valuation as there was sufficient rental evidence for the assessments to be determined on the rentals basis. The VO sought to rely on 12 comparables (9 or 10 relating to primary schools), out of a potential 371 private primary schools in London, having excluded (inter alia) (1) schools in Central London (2) schools above 1000 sq m (3) secondary schools (4) schools where no rental evidence was available or dates were conflicting or unclear (5) adult learning centres (6) private tuition centres (7) some day nurseries (8) all schools save one in South London and (9) schools where some capital contribution was paid.

64. The ratepayers contended that comparators were insufficient to enable RV to be assessed on the rental basis, and that the contractor's method remained the correct basis of valuation.

65. The LC stressed that this was not a test case (see para 4), and identified the issue it had to determine as whether the VO had demonstrated, to the relevant standard of proof, 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 and Reasoning

66. The appeal was dismissed:

> *"[74] … as discussed above, the flaws in each item in the valuation officer's collection are such as to make each item either useless or of very limited value. Standing back and looking at this collection of items as a whole does nothing to improve its value. We see in these rents, individually and taken together, no evidence that there is in fact a market (rather than a collection of rents determined on rent review or otherwise than through negotiation); and the quality of each item is such that little or no useful information can be drawn from it as t the rent that any of the respondent schools would fetch on the – or on an- open market. Moreover, there are far fewer items of evidence than we would expect to see in an exercise of this kind. We are inclined to agree with Mr Bacon that what we have here looks rather like the sort of evidence that would be discarded from a much larger collection of evidence prior to its use, rather than a useful collection in itself.*
>
> *[75] Accordingly, 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."*

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
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67. In particular, the LC highlighted (1) 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); (2) the size of the "sample"; and (3) 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) Limited v Webb (VO) [2017] UKUT133 (LC)

Facts

68. The ratepayer appealed against a decision of the VTW in respect of 3 appeals relating to the RV of Tremorfa Steelworks, Cardiff, in the 2005 and 2010 ratings list. Tremorfa Steelworks comprises a melt-shop and caster for the production of steel billet – with a capacity to produce 1.2 million tonnes of steel billet per annum – and an on-site section mill which utilised 350,000 tonnes of the billet produced by the meltshop. The ratepayer also owned and occupied the nearby steelworks known as Castle Works (approx. 1 mile by rail from Tremorfa Steelworks). Castle Works forms a separate hereditament for rating purposes and consists of a rod and bar mill which has a capacity of 850,000 tonnes per annum.

Issues

69. It was agreed that the valuations were to be carried out on the Contractor's Basis and, by the date of the hearing before the VTW, Stages 1 to 4 had also been agreed. The dispute before the VTW related solely to Stage 5. The VTW accepted the VO's suggestion that the figures arrived at the end of Stage 4 fell to be reduced at stage 5 by 12.5% in respect of the 2005 valuations (7.5% for site/layout and 5% to reflect the state of the market at AVD) and, in respect of the 2010 valuation an allowance was made of 7.5% for site layout (no allowance made for state of the market). The VTW rejected the ratepayer's claim that there should be an additional 15% reduction (on all three assessments).

70. The ratepayer contended that the relationship between Tremorfa Steelworks and Castle Works justified an additional 15% reduction as:

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

70.1 Castle Works could be operated as a viable, stand-alone facility without Tremorfa Steelworks (specifically, it could buy in billet from elsewhere, and the cost of doing so would be a 'close match' with that of using billet produced at Tremorfa);

70.2 Tremorfa Steelworks could not be operated as a viable, stand-alone facility without Castle Works;

70.3 Tremorfa Steelworks was unlikely to be an attractive proposition for a hypothetical tenant who is not also the occupier of Castle Works, having regard (inter alia) to the excess steel billet which would need to be sold on the open market (only around 25% being used by the sectional mill at Tremorfa) and the state of the market for the sale/export of that product;

70.4 In the event that there was a potential tenant other than the occupier of Castle Works, it is likely that their rental bid would be at least substantially discounted to reflect those factors (inter alia);

70.5 The most likely hypothetical tenant of Tremorfa Works would therefore be the occupier of Castle Works (e.g. Celsa Steel).

70.6 By reason of the foregoing, the occupier of Castle Works (the most likely hypothetical tenant) would therefore be in a strong bargaining position vis-a -vis the hypothetical landlord, given the absence of any real competition for the hereditament, and the fact that Castle Works could be viably operated without Tremorfa Works.

71. The VO contended that there were, to the contrary, considerable advantages to Castle Works in having a ready and guaranteed supply of steel billet on its doorstep as opposed to importing it from elsewhere. The value of Tremorfa Works should take into account the actual use. In any event the most likely hypothetical tenant of Tremorfa Works would be Celsa Steel, and Celsa Steel would operate the two facilities together as was the position at present. The VO also did not accept that the ratepayer had demonstrated that any significant additional costs arose due to the distance between the two plants which would justify a further allowance being made. There was therefore no basis for an additional 15% allowance at stage 5.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

Determination and Reasoning

72. The LC did not consider that there was an basis for a further allowance to be made at stage 5. It did not consider that a claim for a further reduction due to increased costs of operating two separate plants was made out. Nor did it consider that there was likely to be any other realistic tenant than the occupier of Castle Works, and 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 …".* The LC was also not satisfied that the disparity of bargaining position as between the hypothetical landlord and hypothetical tenant would justify a further reduction at stage 5:

> *"[51] The only basis that could be raised to persuade the landlord to reduce the rent would be that there is no pool of tenants and that of itself should justify a reduction under stage 5. However, 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. Thus we agree with the Valuation Officer that there should be no additional reduction in this case."*

Potential implications/key points

73. Given the views of the LC set out above, query what role remains for considering the respective bargaining positions of the hypothetical landlord and hypothetical tenant *per se* at stage 5 of the contractor's basis.

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

Facts

74. The ratepayers appealed against the decision of the VTE determining the RV of a self-catering holiday unit at Beaconside, Bideford and at Stowford Lodge, Torrington, at £30,500 and £9,900. The ratepayers sought reductions to £7,950 and £3,650 respectively on the basis of (i) working expenses and (ii) apportionment of divisible balance.

75. Beaconside House and Cottages comprised a large, detached Victorian house with 8 bedrooms, and 4 smaller cottage conversions. The complex provided, in total, 32 single bed spaces. There were a number of shared facilities, including heated indoor and outdoor

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
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swimming pools, children's play area, tennis court and boules lawn, and was a licensed wedding venue (albeit the licence had not been obtained at AVD).

76. Stowford Lodge consisted of a complex of former farm buildings that had been converted into four self-contained holiday units together with a newly constructed log cabin, offering in total 23 single bed spaces. The units were set within 6 acres, and enjoyed a children's play area, wooded walks and a small indoor swimming pool.

Issues

77. In respect of Beaconside, the expenses in dispute were cleaning/staff costs (including laundry), motor expenses, provisioning, land maintenance and depreciation.

78. In respect of Stowford Lodge, the expenses in dispute were insurance, cleaning, repairs, computer costs, motor expenses, consumables, sundries, subscriptions, depreciation and land maintenance.

79. The appointment of divisible balance had not been raised as an issue before the VTE (the parties having agreed that the usual 50/50 split applied). However, following Redrose Ltd v Thomas (VO) [2015] RA 538, the ratepayers contended that the "normal" 50/50 apportionment should be varied, as in that case, to 75%/25%.

80. The parties had agreed (and VTE accepted) that the receipts and expenditure method was the appropriate methodology to use, given that there was no comparable evidence relating to rental values for properties of the type in issue (the vast majority of self-catering holiday units being owner operated freeholds). The parties had also agreed, prior to the hearing, that the level of fair maintainable trade for Beaconside and for Stowford Lodge were £135,000 and £55,000 p/a respectively.

Determination and reasoning

81. In respect of Beaconside, the ratepayer's evidence on cleaning/staff costs, and land maintenance was preferred. On motor expenses, the LC concluded that a hypothetical tenant would wish to build in a more significant allowance than the £900 suggested by the

VO, and the ratepayer's suggestion of £2,000 was not unreasonable. Provisioning of £6,200 was allowed as it was based upon two years actual expense. As to depreciation, the LC considered that 10% of FMT was an appropriate figure, assuming a 10 year replacement cycle (as opposed to the 5 year replacement cycle proposed by the ratepayer).

82. In respect of Stowford Lodge, the LC noted that there was little between the parties on the issue of insurance, and split the difference down the middle at £1,125. £5,500 was included for cleaning, as there was no reason to conclude that less than the standard, widely accepted amount (ie 10% of turnover), was appropriate in this case. On motoring expenses, the VO considered the ratepayer's allowance of £2,500 to be too high as they lived on the premises. The LC rejected that argument, noting that the hypothetical tenant cannot be assumed to occupy the same accommodation as the actual operator unless that accommodation is also part of the hereditament, and accepted the ratepayer's suggested allowance of £2,500. The LC also rejected the VO's approach to land maintenance costs, noting that £20 per week for maintenance of "such an important feature was the grounds" was "entirely reasonable" (if not a little on the light side). On depreciation, the LC adopted the average of the depreciation figures in the accounts for the previous two years.

83. The LC considered divisible balance at paras 46-63 of the judgment. The critical reasoning is at paras 55-57:

> "*[55] If I were to determine that the divisible balance should be split 50/50 on the basis of the figures determined above, the rateable values would be, at 10.7% and 14.2% of FMT respectively, a lesser percentage than the range found in the valuation officer's sensitivity checks from comparable SCHUs (17.2 to 19%). However this, in my judgment, is not the point. The crucial issue, as pointed out in Redrose, is that the rating hypothesis assumes a tenancy from year to year. At the end of this tenure, the lessee walks away with nothing. There is no anticipation that capital growth will provide an additional return to the tenant to supplement the income derived from the profits of the enterprise. So, if the tenant builds up an outstanding business, there is no benefit from the growth in the value of the freehold that these efforts have achieved.*
>
> .
>
> *[56] The "labour of love" expended in running the operation and the risks associated with the business therefore need to be reflected wholly in a reasonable annual profit. With the current "traditional" system of dividing the divisible balance equally, 50% of any additional profit that the operator makes converts into an equal increase in rateable value. That cannot be right.*
>
> *[57] So, 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. In the case of Beaconside, a divisible*

balance of just under £30,000 has been established. At 50% of this, the return to the tenant of about £15,000 pa (less than 10% of turnover) would seem on the face of it to be an unattractive level of return for the effort required. However, the allowance made for cleaning costs at 10% of FMT including laundry, which were not referred to in the accounts needs to be reflected also (which it was not in Redrose), and this has the effect of bringing the "return" up to a more realistic level of around £25,000.

[58] I do not therefore consider that it is necessary to adjust the apportionment of the divisible balance in this case away from the 50/50 split that had previously been argued for. But for the sake of clarity, I record here that 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. To do so where such allowances have been made would indeed be double counting."

84. In respect of Stowford Lodge, the divisible balance amounted to 28.4% of FMT, the tenant's share therefore being 14.2% which the LC considered to be a reasonable return.

85. No variation was therefore made to divisible balance in respect of either hereditament, but the RVs were adjusted, by reason of the conclusions reached on working expenses, to £14,500 and £7,800 respectively.

Potential implications/key points

86. The LC identified that the question of the "conventional" 50/50 split, and how divisible balance should be approached, might require further consideration by the LC in the near future:

"[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 n 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)

Facts

87. In March 2016, the claimants served a blight notice on the Secretary of State for Transport in respect of two parcels of land situated to the south west of Yarlet Lane, Marston (collectively

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

referred to as "plot 1" in the judgment), and one parcel of land to the north east (referred to as "plot 2"). Part of the latter parcel of land was safeguarded for the proposed route of Phase 2A of HS2. The notice treated all three parcels of land as forming one hereditament, and requiring the Secretary of State for Transport to purchase the whole.

88. The Secretary of State objected to the validity of the blight notice on the sole ground that it did not relate to a single hereditament. However, rather than requiring the claimants to submit two new blight notices, the Secretary of State was prepared to treat their notice as comprising two notices, one in respect of plot 1 and one in respect of plot 2.

89. The Secretary of State served two counter-notices. The first, in respect of plot 1, stated that no part of the land comprised 'blighted land'. The second, in respect of plot 2, was to the effect that the claimants did not have a "qualifying interest" in the property in that they did not have an interest in either a (rateable) hereditament or an agricultural unit.

Issues

90. The President of the LC listed the case for consideration of a single preliminary issue: whether the claimants' land comprises a "single hereditament" within the meaning of Part VI, Chapter II of the Town and Country Planning Act 1990. As the Tribunal stated at para 52 of the judgment, this depended solely on whether the plots were to be treated as a single "hereditament" applying rating law principles.

Determination and Reasoning

91. Plots 1 and 2 did not constitute a "single hereditament" applying the geographical test set out in *Woolway v Mazars LLP* [2015] AC 1862. There was no visual or cartographic unity between the plots. They were separated by a public highway. Although the claimants were presumed to own the subsoil of Yarlet Lane (owning a parcel of land on either side of the road) this was not sufficient:

> *"[74] We accept that in the present case there is a degree of contiguity whereas in Mazars there was none at all. However, we do not consider that the contiguity of ownership beneath of the surface of the highway and the narrow width of the highway go towards satisfying the geographical test. These arguments could be replicated in many similar situations, but they fail to accord with the principles laid down in Mazars.*

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

> *As Lord Sumption pointed out, "unity is not simply a question of contiguity". If adjoining houses in a terrace do not intercommunicate and so access from one to another has to be gained via other property, such as a public street, of which the common occupier of the houses is not in exclusive possession, this is a strong indication that they are separate hereditaments. That is the position in the present case. In order to gain access between the two plots, the claimants have to cross the public highway. By definition, they do not have exclusive possession of that area of land which separates the two plots."*

92. Nor were the ducts laid in a culvert beneath Yarlet Lane sufficient to satisfy the geographical test, contrary to the submission of the claimants' counsel:

> *"[76] On the facts of this case we do not agree. As Mr Whale pointed out, the "direct communication" described in paragraph 12 of Mazars was a doorway or staircase inserted into a boundary wall, or in other words a passage which would have enabled humans to pass from one property to another. We are not persuaded that the examples given in that decision 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. For present purposes, we need only say that we do not accept that the ducts and the water supply in this case amount to a sufficient connection for the 0.838 ha area of land on plot 1 to be treated as a single geographical unit with the 2.095 ha area of land on plot 2 from which it is separated by Yarlet Lane. Instead, the water supply is a factor to be considered when applying the functional test."*

93. Plots 1 and 2 did, however, constitute a single hereditament applying the functional test. The Tribunal was satisfied, on the evidence before it, that the use of each plot was necessary for the effectual enjoyment of the other, and arrived at the same conclusion by considering whether each of the plots could be separately let.

94. The Tribunal rejected the Secretary of State's argument on both tests. In respect of the first, the Tribunal considered that the Secretary of State was arguing for a test which was more restrictive than that laid down in *Mazars*:

> *"[94] … The true test is whether the use of one unit is necessary to the functional enjoyment of the other or whether, as Lord Gill put it in paragraph 39 of his judgment, there is a necessary interdependence of the separate parts that is objectively ascertainable. In order to satisfy that test it is unnecessary for all the key constituents of the mix of uses on one plot to be present on the other. The test does not require equivalence between the precise uses or activities taking place in the two areas."*

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | T: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
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95. In respect of the second, the Tribunal considered that the Secretary of State erred in focussing on whether plot 2 could sensibly be let or occupied without plot 1. *"That formulation ignores the requirement in Mazars that the "separately lettable" criterion be applied to* each *of the separate areas of land under consideration and not just one of them.* Mutual *dependency is not essential"* (para 101). The Tribunal also stressed that the user limb of the *rebus* principle applied when considering the "separately lettable" criterion of the functional test, contrary to the submissions of the Secretary of State (para 99).

Potential Implications / Key points

96. It would appear from the LC's judgment that in order to satisfy the geographical test, there needs to be some means by which a person can pass from one parcel of land to another, and that mere physical connections are insufficient. However, this is expressly identified as an area in which further consideration is likely to be required. It is also clear from the LC's judgment that when considering the functional test, the Tribunal should consider whether either parcel of land can be separately let for the purposes for which it is currently used, and the fact it could be used for other purposes (eg grazing) would therefore seem to be irrelevant.

Jacqueline Lean and Katie Helmore

Landmark Chambers

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