

Riding the Rollercoaster
MCC after the Decision in *Merlin*

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KEY RECENT CASES

- *Merlin Entertainments v. Cox (VO)* [2018] UKUT 0406 (LC)
- *Wigan Football v. Cox (VO)* due to be heard in UT in October 2019
- *CEMEX UK Operations Ltd v. O'Dwyer (VO)* [2019] UKUT 106 (LC)

Key Underlying Issue – see paras 5 – 11 in *CEMEX*

Principle of Uniformity

Economic factors and levels of demand taken as at Antecedent Valuation Date

v.

Reality Principle

Matters specific to hereditament and locality (para 2(7)) taken as at Material
Day

(Compilation Date or Alteration / Proposal Date)

In other words:

“The principle underlying the LGFA 1988 is that changes in the subject matter of the valuation after the compilation of the list are taken into account, but always by reference to values subsisting at the same point in time, the AVD”

(Merlin, para 51)

Material Change of Circumstances

- To alter RV part way through the list, must demonstrate an MCC has occurred causing the compilation RV to be inaccurate (proposal under Reg 4(1)(b) of the Non-Domestic (Alteration of Lists and Appeals) (England) Regulations 2009 (the “Regs”));
- MCC is defined as ‘a change in any of the matters mentioned in para 2(7) of Schedule 6 to the LGFA 1988 (see reg 3(1) of the Regs).

Questions to consider when arguing MCC

- What is the 'matter' relied on?
- Does it fall within para 2(7)?
- Has a change in that 'matter' caused the RV to become inaccurate?

Merlin – the facts:

- Concerned RV of Alton Towers theme park;
- Crash on the ‘Smiler’ rollercoaster resulting in serious injury (2 June 2015);
- Significant drop in visitor numbers after the accident;
- Proposal to alter RV on basis that “*the crash on 2 June 2015 involving the Smiler ride within Alton Towers has resulted in a diminution in the value of the hereditament*”;
- Material day – 24 March 2016

Potentially relevant 'matters' in para 2(7) of Sch 6

- (a) matters affecting the physical state or physical enjoyment of the hereditament (But rollercoaster was not part of 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 (No change in physical state of locality – but drop in attendances physically manifest in the locality?)

So, what was the ‘matter’?

- Public attitude to thrill rides (argued could be within 2(7)(d) if “physically manifest in the locality”)
- Because valued on an R & E basis, change in that could potentially cause RV to be inaccurate;

Issue for Determination in *Merlin*:

“Whether the attitude of members of the public to thrill rides, and to thrill rides at Alton Towers in particular, as a result of the Smiler crash, was a matter which was physically manifest in the locality of the hereditament at the material day such that it falls within the LGFA 1988, Sch 6 para 2(7)(d)”

Arguably:

Change in attitude of members of the public to thrill rides was physically manifest in the locality as at the material day because:

- Change in attitude led to....
- drop in attendances which led to....
- drop in traffic on local roads that was observable at material day.

Argument Failed due to:

- Purposive construction, rather than strict focus on meaning of words in para 2(7);
- “The context for understanding the scope of that provision includes the rules which govern its operation” (*Merlin* para 47) i.e ‘reality factors’ intrinsic to hereditament and locality v. purely economic factors;
- Matter in para 2(7) has to be an ‘intrinsic’ or ‘essential characteristic’ of the hereditament or locality;
- If concerned with hereditament itself, must affect ‘physical state’ and not be concerned with way in which business is operated or reaction of customers to business (paras 77 & 79 & 93);

Other Observations in *Merlin*:

Para 2(7)(d) matters:

- if concerned with locality – to be ‘intrinsic’ the *matter itself* must be physically manifest in the locality (para 73 and 146);
- just because some economic or other intangible matter has caused or resulted in some physical manifestation in the locality is not sufficient to make it a para 2(7) matter (para 143);
- but such matters do not have to be discernible visually or by the senses to be ‘manifest’; sufficient if can be measured or calculated (para 153);
- when assessing ‘change’, no need for artificial comparisons between one hour with another or one day with another – can assess material change over a longer period of time (para 183).

What about football club relegation?

- Can relegation (or promotion) be an MCC?
 - VTE said no – *Wigan Football Club v. Cox (VO)* – But appeal to UT (October 2019)
 - Some might say *Merlin* doesn't help;
- BUT
- Change in league status *causes* RV to be inaccurate (not least due to broadcasting revenue);
 - Change that is itself physically manifest in the locality?
 - Change in mode or category of occupation (under para 2(7)(b));
 - Note para 80 in *Merlin* that different considerations may apply where there is only one hypothetical tenant.

CEMEX UK v. O'Dwyer (VO)

- *Cemex* not really a case about MCC;
- But relevant because includes an examination of key underlying issue, namely Uniformity Principle (AVD) v. Reality Principle (material day)
- Concerned with effect of para 2(7)(c): “the quantity of minerals or other substances in or extracted from the hereditament”
- Matter to be taken at compilation date (or material day) rather than AVD

CEMEX Facts

- Hereditament included cement production plant works (the “Works”) and chalk and clay quarry (the “Quarry”) and conveyor linking the two;
- Chalk and clay from the Quarry via the conveyor essential to production at the Works;
- Lower rate of extraction from the Quarry and lower production at the works led to one of two kilns being partially redundant from 2009 onwards;

CEMEX: The Argument

- *Cemex* argued:
- Para 2(7)(c) – encompassed rate of extraction;
- So when valuing hereditament, had to take rate of extraction as at 1 April 2010 (rather than at AVD);
- Therefore – impact of lower 2010 rate of extraction must feed directly into the valuation of the Works part of hereditament.

CEMEX: The Result

- Argument unsuccessful;
- Para 2(7)(c) does not fix the rate of extraction which it must be assumed will be achieved in the future (para 48);
- Does not limit the capacity of the hereditament that must be considered;
- “It is concerned only with the subject of the valuation, not with the method which is then adopted to value that subject.” (para 50)
- Economic circumstances are those which existed at the AVD

Concluding thoughts....

- These MCC cases concern specialist hereditaments and can appear quite niche;
- But illuminate (or complicate(!) fundamental rating principles;
- Worthy of considerations beyond MCC issues.

THE END

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