Issue 34

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VALUATION TRIBUNAL SERVICE

Valuation in Practice

VALUATION TRIBUNAL SERVICE OCTOBER 2014

News in Brief

A new home

On Monday 20 October our London office relocated to:

2nd Floor
120 Leman Street
London
E1 8EU

The phone numbers and email addresses stay the same as now: the national phone number for Operations is 0300 123 2035; for Head Office it's 0207 426 3900.

This is also the address of the new hearing rooms, which replace those in Black Lion House; tribunal notices will show the new venue details.

Christmas closure

The VTS offices will be closed on 25-26 and 31 December 2014 and 1-2 January 2015.

The offices will be staffed on 29-30 December and will re-open following the holidays on Monday 5 January.

Valuation in Practice

The next publication is planned for January 2015. Any feedback is welcome from our readers, as always.

VTE Practice Statements

There have been no changes to Practice Statements since Issue 33.

VTE Practice Statements are available to download from our website.

Sign up to receive our email alerts for Practice Statement news.

http://www.valuationtribunal.gov.uk/email/pract-state.asp?mail=5

Inside this issue:

Others' publications

Business Rates Information Letter, BRIL 9/2014

This covers payment of authorities' costs associated with Autumn statement measures.

Decision from the High Court

R on the application of 3 Claimants v Sandwell MBC, and Equality and Human Rights Commission (the intervener) [2014] EWHC 2617 (Admin)

The residence requirements outlined in the billing authority's council tax reduction schemes for 2013-14 and 2014-15 were found to be *ultra vires* and unlawful for the following reasons.

- Under the 1992 Act, the council had no power to define a class for the purposes of section 13A(2)(b) by reference to non-financial criteria.
- It is trite law that a council acts unlawfully if, in making a decision, it fails to take into account a material consideration. Here Sandwell failed to have regard to two associated material considerations, namely the Secretary of State's policy objectives and the wider consequences of other authorities adopting a similar requirement.
- The consultation processes had not been fair as there were insufficient attempts to elicit informed views. For its 2013-14 scheme, the council erred in not consulting on the residence requirement at all; for 2014-15, there was a vague request for feedback on the scheme as a whole.
- Even if the residence requirement had been *intra vires*, it would have failed for being discriminatory and as a barrier to freedom of movement within the EU.
- There was no evidence that the council conducted any assessment of the race or gender impact of the residence requirement at or before it adopted the 2013-14 scheme and scant evidence that it did so prior to the 2014-15 scheme. Sandwell MBC was in breach of its duty under Section 149 of the Equality Act 2010.

As it was a rolled-up hearing, 'the claim' was allowed.

Decisions from the Upper Tribunal (Lands Chamber)

SJ & J Monk v Newbigin (VO) [2014] UKUT 0014 (LC), RA/62/2012

This appeal was lodged against a VTE decision made in October 2012, dismissing the case for altering the entry in the rating list. The issues to be determined by the Upper Tribunal (UT) in this appeal were whether, in that decision, the VTE erred in:

- identifying the correct material day; and
- upholding the valuation officer's position that the appeal hereditament had a rateable value (RV) of £102,000, or whether it ought to have been £1 because at the material day it was undergoing refurbishment.

The UT determined that the VTE had not erred in its identification of the material day, as the proposal giving rise to the appeal had been completed as though the grounds for alteration were on the basis that there had been a material change of circumstances.

AJ Trott FRICS was satisfied that, at the material day, the appeal property was not capable of beneficial occupation due to its actual physical state; it had been stripped out to such an extent that to replace major building elements such as an entire electrical circuit, heating and air conditioning systems would go beyond the meaning of repair, regardless of whether such works were economic. The hypothetical tenant would not pay more than a nominal amount for it in its assumed physical state at the material day.

The decision was that the entry in the list should be amended to show RV £1, with the description of "building undergoing reconstruction", with effect from 1 April 2010.

BMC Properties and Management Ltd v Jackson (VO) [2014] UKUT 0093, RA/12/2013

This appeal concerns the effective date of an alteration to the 2005 rating list to include a rateable hereditament which had previously been omitted from the list in error.

The Victorian house on five storeys comprised 19 self-contained units used by the appellant for short-term holiday letting since 2007 and by his predecessor since at least 1989.

Through negotiation it had been agreed that the premises should have a rateable value of £62,500. However, the date from which the alteration should take effect was in dispute. At the hearing, the valuation officer's position was that the effective date should be the date on which the list came into force, 1 April 2005. The appellant believed that the effective date should be 22 March 2011, being the date on which the alteration had been made. In considering Regulation 14 of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulation 2009, the VTE panel determined that the effective date of the alteration to the list was 1 April 2005, because the hereditament was in existence on that date.

The Upper Tribunal's Deputy President decided that it could be said, with assurance, that the list had been inaccurate on the date it was compiled and the appeal was dismissed.

Decisions from the Upper Tribunal (Lands Chamber)

Total Fulfilment Logistics Ltd v May (VO) [2014] UKUT 0354 (LC), RA/64/2013

An appeal to the Upper Tribunal was withdrawn by the appellant ratepayer, shortly before the hearing date, but after receipt of the respondent's statement of case and expert report, because the appellant "could not afford the costs and risk attached in pursuing the case further to a full Upper Tribunal hearing". The valuation officer (VO) indicated by email on 30 May 2014 that it would only agree to the withdrawal of the case if the appellant met its abortive costs. The VO's solicitor argued that there had been no meaningful attempt by the appellant's representative to discuss the case. Instead, he had preferred to wait and see what was in the VO's report before advising his client to withdraw. This, he maintained, amounted to unreasonable behaviour within the meaning of para 12.8 of the Tribunal's Practice Directions and in the circumstances the VO requested a contribution towards his costs.

Consent was given to the withdrawal under Rule 20(2) of the Tribunal's Procedure Rules 2010, so that the parties avoided further costs. The consent was subject to representations on costs and a request was made for the appellant's response to the respondent's submission; no response was received in the timescale.

No order for costs was made but it was emphasised that under its Simplified Procedure the Tribunal expects the parties to co-operate with each other and with the Tribunal openly and promptly, to avoid wasted costs. A withdrawal application should be made as early as possible for the parties' benefit, but also so that judicial resources can be reallocated. The Tribunal will consider applications for wasted costs where it considers that one of the grounds in the Practice Statement has been met, and it is open at any time to the Tribunal to transfer a case to the Standard Procedure where it considers the Simplified Procedure is being abused.

Reeves (VO) v Tunnel Tech Ltd [2014] UKUT 0159 (LC), RA/1/2013

The appeal was against a VTE decision granting exemption for the appeal property as a market garden under para 2(1)(d) and 3(b) of Sch 5 of the Local Government Finance Act 1988. These provisions specify exemptions for agricultural land (which includes "anything which consists of a market garden, nursery ground, orchard or allotment") and agricultural buildings (which includes "forms part of a market garden and is used solely in connection with agricultural operations at the market garden").

The VTE President found that the activities carried out there were not inconsistent with those of a market garden. Though the appeal hereditament did not produce something that would appear in that form on a supermarket shelf, elaborate or extensive treatment was not needed to turn it into the final product.

In reviewing the legislation, HH David Mole QC concluded that the term "market garden" in the statute was specific and deliberate and that, "as a matter of fact and degree the operations at the appeal property were not those of a market garden but of a nursery". Although "nursery ground" would qualify for exemption as "agricultural land", the appeal property comprised agricultural buildings, and "nursery" was not included in the list of properties which were exempt as "agricultural buildings".

The appeal was allowed.

It is understood that this decision has been appealed to the Court of Appeal.

Redrose Ltd v Thomas (VO) [2014] UKUT 0311 (LC), RA/15/2014

The Upper Tribunal allowed an appeal against a Valuation Tribunal for Wales decision that a complex of nine self-catering units should be in the rating list at rateable value (RV) £11,750. The appellant sought RV £6,000.

The Wales Association of Self Catering Operators had held discussions with the VOA to try to understand how their RVs were arrived at and, though a revised form of return had been produced, WASCO members felt there was still a need for transparency and clarity.

The appellant contended that the receipts and expenditure method should be used and that directors' salaries should be included in the exercise, or a recognition of the duties they were called upon to cover.

NJ Rose FRICS agreed that the receipts and expenditure method was appropriate and his own calculation used this, but did not include directors' salaries as these would be accounted for in the tenant's share of the divisible balance, which he agreed should be weighted more towards the tenant (75%). He found little assistance from the 'single bed space' tone, calculated and used by the valuation officer, as there was so little rental evidence.

Commissioner of the Police of the Metropolis v Woolway (VO) [2014] UKUT 0183, RA /1/2009

This decision records that the Commissioner and the Valuation Office Agency (VOA) had been in dispute about the rateable value (RV) of **New Scotland Yard** for 13 years. The RV in the 2000 rating list was £6,754,000. The Upper Tribunal considered three legal issues that had arisen and determined that:

- an appeal against the RV had not been settled by oral agreement in 2002 at a revised RV of £5,400,000, and that the valuation tribunal had been correct in concluding this; the requirements of the 1993 Regulations had not been met;

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Decisions from the Upper Tribunal (Lands) continued

(continued from p3)

- the valuation tribunal had also been correct in accepting a form signed by both parties as a withdrawal of an appeal;
- the withdrawn appeal should not have nevertheless been considered by the tribunal, because there had been no "procedural unfairness or abuse of process by the VOA" and no reinstatement process was available at that time.

On valuation matters, the Upper Tribunal then determined that:

- the corridors should not now be excluded from the agreed NIA;
- the rental evidence from comparable properties pointed to an appropriate rate per m^2 of £195, uplifted to £200 per m^2 for raised floors;
- though the air conditioning system did not comply with modern standards and did not prove effective in 10% of the building in summer, a 5% allowance was warranted;
- there was no difference in value between covered and uncovered parking spaces nor was there a difference because of height;
- there should be a single end allowance to reflect the effects of size and layout and this should be at 13.5%, applied to the whole hereditament, including parking spaces.

The resulting RV was £6,450,000 and the appeal was allowed to that extent.

Interesting VT Decisions—Non-Domestic Rating

Brown asbestos

A terraced shop had been vacant since May 2008 and vandalised sometime between then and October 2012 when the property had been inspected by asbestos surveyors. Brown asbestos was discovered to have been disturbed and the RV was reduced to £0 with effect from 1 July 2013 when demolition works commenced.
The two issues for the VTE panel to consider were:

- in the period up to 1 July 2013 was the property capable of beneficial occupation?
- if it was capable of beneficial occupation, what valuation approach should be taken?

The appellant argued that, as the site was a development site behind hoardings, no one would bid for the property and the rateable value should be £0. There was no evidence of the exact date when the property had been vandalised and the brown asbestos had become exposed, however, his expert witness estimated that it would in all probability already have occurred by 1 April 2010. He contended that the property would have been incapable of beneficial occupation since then. This was supported by a further witness, a health and safety expert, who referred the VTE panel to the decision of in *S J & J Monk* v *Keith Newbiggin (VO)* [2014] and contended that following that decision any calculations as to the state of repair were irrelevant.

The valuation officer contended the works at the appeal property did not include extensive stripping out, as in *S J & J Monk* v *Keith Newbiggin,* and they were therefore covered by the repairing assumption in Sch 6(2)(1)(b) to the Local Government Finance Act 1988, ("that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic). As major stripping out had not occurred, he considered that the removal of the asbestos and making good the access/egress were repairs a landlord would carry out in order to let the property.

The VTE panel determined that the exposure within the property of the brown asbestos went beyond the reasonable repair assumption. The expert witness had stated that in his experience it was likely that, as the property had been empty since 28 May 2008, it would have been vandalised by 1 April 2010. Neither party had inspected the property at that time but the panel accepted that this was a reasonable assumption and determined that, because of the exposed brown asbestos, the property had been incapable of use from 1 April 2010 and it reduced the rateable value to £0.

Appeal no: 227022176758/144N10

Car park – rateable occupation and exclusive occupation

Deletion of the entry in the 2010 rating list was sought on the grounds that, because of third party rights, there could be no exclusive occupation.

The appeal hereditament is a multi-storey car park arranged over four levels. There are express inseparable rights flowing from the lease, namely that "the customers of the Tenant shall have 2 hours free parking after which such persons shall pay for car parking at the same rate as other members of the public". The tenant is a fitness centre.

The management statement set out how the car park was to be operated and included eight important requirements. The VTE Vice-President concluded that all four ingredients of rateable occupation existed. There was no evidence that the use by members of the fitness centre restricted the use of the car park by the appellant to such an extent that they could not operate the car park in the manner to which they intended it to be used. The appellant's contention that the lease or management statement prevented the use of the car park by the public was not accepted and the appeal was dismissed.

Appeal no: 424521874811/538N10

Interesting VT Decisions—Non-Domestic Rating

Material change of circumstances

A VTE Vice-President considered lead appeals in respect of three shops in a secondary location in Bolton. 70 or so other appeals citing similar grounds to these lead appeals had been stayed and would be bound by the decisions made in respect of the lead appeals. The appeals were in relation to a material change of circumstances (MCC), namely the opening of The Rock shopping centre in Bury. The Vice-President externally inspected the shops and visited The Rock.

An agreed allowance of 12.5% for this MCC had already been conceded by the valuation officer for shops in a primary location, following discussions in 2012 between an RSA Committee (that had reviewed rental evidence) and G L Hearn.

The Vice-President reviewed the rental evidence for the secondary location between 2010 and 2012. While he determined that the recession had affected both primary and secondary areas and had to be disregarded, rental evidence showed a further fall of 6.5% because of the opening of The Rock.

Though the appellants had variously sought allowances of 9.5% and 7.5%, an end allowance of 6.5% was awarded from 16 July 2010 and this would be directed to apply to the properties covered by the stayed appeals.

Appeal no: 420517688020/538N10

Merger of indoor market stalls

The appellant ratepayers contended that their two market stalls in Fleetwood Market should be shown in the rating list as one assessment with effect from 10 January 2011. They were located side by side, but separated by a public walkway.

Prior to the entry of the appeal properties in the List in January 2011, the whole of the Market was assessed as a single hereditament. The VO confirmed that as a result of the stallholders' licences being changed to leases, notices were served to include over 140 stalls as separate rental assessments.

The appellants confirmed that the stalls were occupied together as one business, trading under one business name, with one set of accounts and one tax bill. Unusually, the council had allowed the appellants to trade from the two stalls, both selling greeting cards for 30 years. The appellants confirmed that the cash register was operated from one stall, however, customers could be served from either stall as staff carried a cash float in their belt. A request to move the stalls together had been declined for health and safety reasons.

Following the principles established in *Gilbert (VO)* v *Hickinbottom (S) & Sons Ltd* [1956], the valuation officer contended that the stalls were not contiguous, as they were separated by a public walkway, and while the stalls were close together, this was a matter of convenience rather than being functionally essential.

From Section 64 (1) of The Local Government Finance Act 1988, Section 115 (1) of the General Rate Act 1967, and the leading case of *Gilbert* v *Hickinbottom*, the VTE panel concluded that each stall was a separate hereditament; each stall was held under

a separate lease, with a separate rent, and therefore each was a hereditament in its own right. This could be distinguished from the situation where there were two stalls held under one lease, with one rent payable; in that case the hereditament would include both stalls.

The stalls were not contiguous because they were separated by a public walkway, so in order for these two stalls to be regarded as a single hereditament, there had to be a sufficiently strong functional connection between them. In this case the panel found that the location of the stalls side by side was a matter of convenience, rather than a functional necessity, and the appeal was dismissed.

Interesting VT Decisions — Council Tax

Valuation

Increased banding without a relevant transaction

The appeal property was in band C; a fire in a neighbouring property caused damage to the house which made it uninhabitable. The appellants requested that the property be removed from the list whilst the works to render it habitable took place; the listing officer (LO) agreed that it should be removed from the list. However, whilst the property was being renovated, a small extension was added.

When the property was ready to be reinstated into the list it was the LO's opinion that it should now be in band D.

As the appellants had requested that their property be removed from the list, the VTE panel found that the now extended appeal property had to be valued in its renovated state. On examining the sales evidence, the panel concluded that it would reasonably have sold for a value within band D at 1 April 1991.

The appeal was dismissed.

Appeal no: 3650680074/084CAD

Planning condition

A planning condition attached to a new, mid-terrace house property in Cornwall restricted its sale price to a maximum of 60% of open market value. A further planning condition limited occupancy to a person with a strong local connection. The appellant purchased the property, subject to the above restrictions, at the discounted price of £107,995 in December 2011.

The VTE panel had regard to the statutory basis of valuation, under which the value of a dwelling for banding purposes is the amount that it might reasonably be expected to have realised if it had existed and been sold on the open market at the antecedent valuation date of 1 April 1991, subject to a number of statutory assumptions. The assumptions included that the dwelling was sold "free from any rentcharge or other incumbrance".

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Interesting VT Decisions — Council tax

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The panel found that the restriction on the sale price of the appeal property was a financial restriction that fell within the meaning of an "incumbrance". It therefore had to be disregarded. The panel did not disregard the, non-financial, condition limiting occupation effectively to persons with a connection to Cornwall, but it did not find this to be particularly restrictive and considered it unlikely to have a significant effect on the value of the property.

Little weight was placed on evidence given by the appellant of sales of nearby houses that were subject to the same restrictions. Although the prices paid in these transactions were stated to be based on a percentage of open market value, the panel had regard to the evidence that the assessment of open market value in each case was made, or certified, by an independent chartered surveyor, rather than being the result of actual testing on the open market in a freely negotiated transaction between landlord and prospective purchaser.

The panel therefore placed much greater weight on the evidence of unrestricted sales of comparable houses in the locality. It found that this evidence showed that similar, mid-terrace houses with three bedrooms had values for council tax purposes that fell within the band C range. The appeal was dismissed.

Appeal no: 0840613241/176CAD

Liability

Class G

The appellant claimed Class G exemption for a vacant retirement dwelling in Liverpool because the age restriction only allowed occupation by a household that included someone aged 65 or more. The owner was under this age.

It was argued that exemption may apply under Class G, part (a), namely an unoccupied dwelling the occupation of which is restricted by a condition which -
(i) prevents occupancy, and
(ii) is imposed by any planning permission granted or deemed to be granted under Part 3 of the Town and Country Planning Act 1990.

Although the occupancy restriction was the result of the planning permission on the property, the VTE panel held that no exemption was applicable. Simply put, paragraph (a) (i) referred to a condition which 'prevents occupancy'. The panel held that the planning condition in respect of the appeal property did not prevent occupation, it essentially placed a restriction; as long as there was someone who was aged 65 years or over the appeal property could be occupied.

The decision was consistent with *Tower Hamlets London Borough Council* v *St Katherine's by the Tower Ltd* [1982], where it was held that an unoccupied property was not exempt from rates since the occupation of it was not prevented, but only limited by planning restrictions.

Appeal no: 4310M117773/254C

Could a Trust be liable?

The appellant claimed that he was not the liable person for council tax but that the liability should be in the name of Trust 1 and later Trust 2. The billing authority (BA) had made the appellant liable in accordance with Section 6 of the Local Government Finance Act 1992 as the registered legal (non-resident) owner for the relevant periods. In support of this, the BA's representative provided the VTE panel with a copy of the Register of Title from the Land Registry, a planning application for the appeal property in the name of the appellant, a Listed Building and Conservation Consent in the appellant's name, Declarations of Trust between the appellant and 'Trust 1' and between the appellant and 'Trust 2', and a copy of an Assured Shorthold Tenancy agreement between the appellant and a tenant. The Land Registry search showed the appellant as the owner from the date he purchased the property in 2005. For the periods the appellant had been billed for council tax there were no other residents living at the property. A letter from the appellant's solicitor stated, "It is inappropriate for a Declaration of Trust to be registered at Land Registry. It is not a document of title." The Land Registry had also confirmed that the appellant was the legal owner of the appeal property and that they would not register the property in the name of a Trust, only note that the Trust existed. It was explained that a Trust, unlike a company incorporated under the Companies Act 1985, is not a legal person.

The appellant contended that the appeal property was held in Trust for the beneficial owner, 'Trust 2', set up for the benefit of his children; he was the sole trustee and the title holder but he did not reside at the property.

From the evidence presented, the panel found the appellant liable to pay council tax for the periods when the property was not tenanted, based on the following facts:

- the appellant was the registered freehold owner of the appeal property and had been for all the periods in dispute;
- Land Registry's confirmation that the appellant was the freehold owner and that it would not register the property in the name of a Trust;
- title to the property did not therefore pass from the appellant to the Trusts when these were created or handed control of the property;
- the Trust documents stated that the appellant would be indemnified against any cost due to the property being in his name, implying that there would be such costs for the legal owner of the property;
- the tenancy agreement of tenant 1 held the landlord as the appellant and not that of the Trust;
- there was no evidence of any leasehold interest in the property being granted by the appellant to the Trusts for six months or more, so the Trusts did not have a material interest in the property, only the appellant had.

Appeal no: 3940M109559/176C

Where we show an appeal number, this can be used to see the full decision on our website, valuationtribunal.gov.uk. Click on the Listings & Decisions tab, select the appeal type and use the appeal number to search Decisions.

Interesting VT Decisions — Council tax

Determination of main residence

The appellant was self-employed and a tenant at the subject property in the past. He had purchased it in 2007 in a state of some disrepair from his former landlord with the intention of refurbishing the property and letting it out. The appellant left the property empty for several years and rented a room in a different part of the country where he was working and when that work dried up he came back to live in the subject property. The dispute related to the appellant's contention that the subject property had become his main residence with effect from 1 April 2013.

The billing authority (BA), being sceptical that his change of address had coincided with its determination to adopt a 150% council tax charge on the property, contended that he did not live at the subject property. An inspection had revealed the property to be in a poor state, undergoing or in need of building repairs.

The appellant provided compelling evidence that he lived in one room at the property as had been shown to the BA's inspector. The appellant lived a frugal life and the room was furnished with a bed, television, DVD player, computer, fridge, microwave and toaster. The bathroom had an electric shower. The room was well insulated so that he had only needed the electric heater on twice in the past year. He worked a long day, but invited the BA and the VTE panel members to make an unannounced visit, any evening, to verify his sworn affidavit that he lived at the subject property. Evidence of TV licence, electoral registration and use of services were also provided.

The VTE panel decided that the reasonable onlooker would consider the appellant had his main residence at the appeal property. Even if he had made the decision to return to the property because of the increased council tax charges, that reasoning did not deny his residence. The panel held that the subject property was the main residence of the appellant and allowed the appeal.

Appeal no: 4225M130333/254C

Statutory periodic tenancy

While trying to gain access to the appeal dwelling to resolve an issue reported by the tenant, the landlord established that the tenant had moved out without giving notice. The billing authority determined that the landlord was liable for the council tax from 22 April to 3 June 2013 and quoted *MacAttram v Camden LBC [2012]*. The landlord contended that he should not be held liable until he gained legal possession (4 June 2014).

Whilst the VTE panel found the *MacAttram* judgment helpful it was not identical to the subject appeal. The panel agreed that the lease was still in force until 4 June 2013 and noted that statutory periodic tenancies were commonplace and if they made landlords liable for unpaid council tax then they would never be used.

Appeal no: 5480M129833/084C

Disability reduction

A VTE Vice-President allowed an appeal against the billing authority (BA) decision not to award a reduction for disability.

The room for which relief was sought contained specialist electronic and computerised equipment for the appellant's use. It was installed to assist and allow the appellant to pursue leisure interests, work as a volunteer for the RNIB, continue with social science research and enjoy many of the pastimes that a sighted person would take for granted.

The BA's argument was that the resource room should be regarded as a 'home office', that all of the equipment was portable and could be moved to another room. Referring to *South Gloucestershire Council v Titley & Clothier* [2006], they did not accept that there was a causative link between the appellant's disability and her use of the room.

The Vice-President determined that the room provided something extra that was required for meeting the needs of a disabled person. The room was of major importance to the appellant's well-being and quality of life. The equipment it housed was sensitive and expensive and it would be impractical for it to be moved.

Appeal no: 2710M130673/254C

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