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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 3136 (Admin)



No. CO/1940/2021

Royal Courts of Justice

Friday, 5 November 2021

Before:

SIR ROSS CRANSTON

B E T W E E N :

SALISBURY & Anor

Appellants

- and -

DAWN BUNYAN (LISTING OFFICER)

Respondent

MR L. WILCOX (instructed by Swinburne Maddison, Durham) appeared on behalf of the Appellants.

MS S. SACKMAN appeared on behalf of the Respondent.

J U D G M E N T

SIR ROSS CRANSTON:

Introduction

- 1 The appellants appeal the decision of the Valuation Tribunal for England ("the Tribunal") issued on 4 May 2021 to dismiss their appeal against the Listing Officer's decision that their home at 24 Lathbury Road Oxford ("the Property") contains two self-contained units, which are now listed separately for the purposes of Council tax. No permission is required for appeals from the Tribunal to this court, but they are confined to errors of law. The appellants contend that there are three errors of law in the Tribunal's decision. The respondent's case is that this is a merits appeal dressed up as an error of law challenge.

Background

- 2 The appellants own the Property which is a large semi-detached town house in North Oxford. It was built in 1908. The Property comprises accommodation on the ground, first, and second floors. The upper floors have always been accessed from a single centre staircase and a single front door. In 1974 the property was divided into three self-contained flats. The appellants purchased the property in 1985 and began restoring it to its original state as a single house. All internal partitions were removed except a fire door to the second floor, which was required by fire regulations.
- 3 In 1993 the Property was entered as a single dwelling at Valuation Band H on the compilation of the Council Tax Valuation List. A year later, in October 1994, the Property was split into two assessments, the main house at Valuation Band E and the flat on the second floor at Valuation Band A. Legal proceedings were commenced by the appellants, but compromised, and the agreement in July 1996 between the appellants and the Listing Officer reconstituted the property into a single-entry in the Council Tax Valuation List at Valuation Band G.
- 4 In April 2019 Oxford City Council, the billing authority for the area, raised a report to the Valuation Office Agency. It detailed the comments of the Council's inspector following a visit in January 2019. That report was as follows:

"The house is occupied by the appellants who for some time now have been letting out the bedrooms on the top floor of the house which whilst currently empty is going to be occupied soon. ... I have visited the flat on the second floor of the house this morning accessed by the community hallways of the Property. In my mind it is without doubt a self-contained unit."

- 5 On the basis of that information, in July 2019 the Listing Officer altered the Council Tax Valuation List to disaggregate the property. With effect from that date the main house was shown at Valuation Band G and the flat was shown at Valuation Band B. Later that month the appellants challenged the decision to disaggregate. The respondent confirmed in September that no alteration to the Council Tax valuation list would be made, and an appeal was made to the Tribunal.

Appeal to the Tribunal

- 6 The first appellant's statement of case before the Tribunal explained how, in effect, the central staircase of the Property opens on the first floor to a landing; how that landing was in 1985 restored to its original room size and fitted with furniture and (then novel) home computer equipment; and how since then it has been in continuous use as a private study or

office. The first appellants' case explained that this was convenient because it was away from the public rooms on the ground floor and permitted the appellants to use it for their private affairs. Occasionally, they explained, it was used as a playroom, formerly by the appellants' children and by then by their grandchildren.

- 7 After accepting that the bricks and mortar test based on the physical attributes of the accommodation was the correct test to apply, the appellants' case made three main points by way of submission. First, the first-floor landing was used as a living-room. Because it was used for access to rooms in the house did not mean, it was said, that no other use for it could be relevant or that thereby it ceased to be a living room. Secondly, the first-floor landing had been in constant use as a living-room since the appellants had bought the house in 1985 and had always been furnished as an office. In 1985 – appellants' case continued -- it was made the principal entry point for IT services and that remained the case. It was the electronic hub of the house.
- 8 Thirdly, the appellants' case contended, owing to the private nature of the use of the landing it was unconscionable that the second floor of the house could be considered to be anything other than part of the house. Those allowed occasionally to occupy the second floor were friends coming to Oxford to study.
- 9 After outlining the background and the law, the Tribunal noted that there was no dispute between the parties as to the Property's particulars. In summary these were that the Property was a three-storey semi-detached house -- the ground floor consisting of an entrance, a hallway, a sitting room, a playroom, a breakfast room, a scullery, a food prep space and a larder. On the first floor there were landings, one (the one used as an office) and two (ancillary to the first), and bedrooms one to four, and bathrooms one and two. On the second floor there was landing three, a store, a kitchen, bedrooms five and six and bathroom three. In the course of this judgement when I refer to "the landing", I am referring to what, in the description, is landing one which is at the top of the staircase on the first floor.
- 10 The Tribunal then considered an issue as to the lawfulness of the 2019 alteration, which is no longer at issue in this case and I need say no more about it.
- 11 The Tribunal then turned, as it said, to make a factual judgment of the Property to determine whether it consisted of two self-contained units. It observed that the parties agreed that in determining whether there was one or two self-contained units at the Property, the appropriate legal test was that of "bricks and mortar" based upon the physical attributes of the Property. The Tribunal continued that the appellants did not dispute that the second floor contained a separate unit of living accommodation, but they contended that the main house was not self-contained from the upper floor -- in other words the second floor -- as a person would have to pass through the main house in order to access it. The Tribunal noted that the appellants relied mainly upon *Batty (Listing Officer) v Merriman* [1995] RA 299 in which access to an annex could only be achieved by passing through a living-room and to Ognall J's express sympathy for the taxpayers' contention that there was no separate unit. The Tribunal then said this at paragraph 58:

"The appellant contends that landing one is in fact a living-room rather than a landing. The appellant and his household use landing one as a domestic office and has been so used since 1985. He argues that landing one is sufficient(sic) large to constitute a living-room. Further, it is the electronic hub of the house being the principal point of entry for IT services."

12 The Tribunal then observed that there were a number of photographs of landing one showing a desk with a computer, two chairs, a filing cabinet, a printer, a shredder as well as other cabinets and paperwork trays.

13 The Tribunal recorded, at paragraph 59, that the respondent's representative submitted that the landing was not a living-room and that the appellants' use of it was irrelevant when considering the bricks and mortar test. The Tribunal then said this:

"60. Having objectively considered [the] bricks and mortar test, the Tribunal Panel is satisfied that landing one is not a living-room. Stripping back the appellants' use of the room, which is irrelevant in applying a bricks and mortar test, the Tribunal Panel considered that the only basis on which it could be considered a room is because of its size but nevertheless the Tribunal Panel(sic) any objective view of the space would lead to the conclusion that it is a landing, the central space of the stairs and joining the various rooms. Whilst large, this alone was insufficient to characterise it as anything different.

"61. Following that finding that the landing one is not a living room, it naturally follows there was no impediment on access to the self-contained unit on the second floor of the kind which prompted the judge's comment in *Batty v Merriman*. The appellant has already conceded that the second floor has the features of a self-contained unit.

62. Accordingly the Tribunal panel finds that there are two self-contained units at the subject property."

14 The Tribunal then set out its formal finding that the property consisted of two self-contained units constructed or adapted for use as separate living accommodation, and accordingly should be shown in the Council Tax Valuation List as two dwellings.

Legal Framework

15 Council tax, under the Local Government Finance Act 1992 ("the 1992 Act"), must be levied by councils on all chargeable dwellings and is payable by residents pursuant to a freehold or leasehold interest or owners of dwellings (sections 4 and 6). "A dwelling" is any property which is a hereditament, meaning for the present purposes a self-contained piece of property that is not included in the non-domestic rating list (section 3). Council tax is charged with reference to valuation bands which are calculated on the basis of the value of a dwelling (section 4).

16 Section 3(5) of the 1992 Act provides that the Secretary of State may by order provide that in prescribed cases anything which would (apart from the order) be one dwelling is to be treated as two or more dwellings.

17 Under this power, the Secretary of State made the Council Tax (Chargeable Dwellings) Order 1992 ("the 1992 Order"). The definition part of the Order, article 2, defines: "self-contained unit" as "(a) a building or a part of a building ... which has been constructed or adapted for use as separate living accommodation". Article 3 deals with disaggregation and provides:

"Where a single property contains more than one self contained unit for the purposes of Part I of the Act, the property shall be treated as comprising as many dwellings as there are such units included in it and each such unit shall be treated as a dwelling."

- 18 There has been rich jurisprudence concerning whether a unit is to be regarded as self-contained and thus a chargeable dwelling subject to Council tax.
- 19 The parties took me to five High Court decisions, although in their submissions made reference to other judgments. The first in time was the *Batty* case which the appellants had relied on before the Tribunal, *Batty (Listing Officer) v Merriman*, [1995] RA 299. That case involved four Tribunal decisions concerned with annexes, colloquially known as 'granny flats'. In the course of his judgment Ognall J said that to give account to the level of communal living in relation to such annexes was to introduce a consideration which was outwith the relevant criteria required in order to test properly the definition in question. He continued that albeit that in most cases the actual degree of communal living would be or probably would be significant, that could not assist in answering the question as to whether the annex in question was constructed or adapted for use as a separate dwelling.
- 20 *Clement (Listing Officer) v Bryant & Ors* [2003] EWHC 422 (Admin), [2003] RA 123 was a decision of Sullivan J. He held that:
- "... it is plain from the definition of 'self-contained unit' in article 2 of the 1992 Order that the definition is concerned with how the building has been constructed or adapted. It is not concerned with who occupies the building or the manner in which it is used by particular occupiers." [8]
- 21 Later in his judgement Sullivan J observed that one was concerned with what he described as "bricks and mortar", which has given rise to what is often described as "the bricks and mortar test".
- 22 The third case I was taken to was *R (Williams (Listing Officer) v Royal National Institute for the Blind* [2003] EWHC 1308, [2003] RA 158. In the course of his judgment in that case Mitting J said, at para.15, that judgments of the High Court have identified factors which either should not be taken into account at all or should not be treated as a decisive effect. He said that as to those which should not be taken into account at all, first was the use to which a part of a building was actually put, and cited in support the judgment of Ognall J in *Batty (Listing Officer) v Burford*, and another judgment, *Beasley (Listing Officer) v National Council of YMCA* [2000] RA 429
- 23 In *Corkish (Listing Officer) v Wright & Hart* [2014] EWHC 237 (Admin), [2014] RVR 233, Popplewell J quashed a decision of the Tribunal because it had not applied the correct test when considering the annex at the taxpayer's property. That case was a statutory appeal by the listing officer. It involved a garage which had been converted into accommodation. It comprised a single room of living area with a kitchen work surface with sink and storage cupboards, but no cooking facilities. There was no separate public access, access being through a door in the main hallway of the house. Popplewell J observed, in para.13, that in his view,

"... the material before the Tribunal would have entitled it to conclude that the annex was not a self-contained unit by reference to its physical characteristics, including in particular its size and cooking facilities as well as the access arrangements."

24 However, the Tribunal had applied the wrong test. The only two factors it had identified, he said, at para.14, supporting its decision, were the actual use to which the annex was being put and the access arrangements. The former was of no weight, and the latter incapable of being determinative.

25 In the course of his decision Popplewell J offered a synthesis of the case law, referring amongst other cases, to *Clement (Listing Officer) v Bryant & Ors* and *Williams (Listing Officer) v Royal National Institute for the Blind & Ors*. At para.5(2) he said:

"(2) The question is to be answered by reference to the physical characteristics of the building. That was sometimes referred to as a 'bricks and mortar' test, but the epithet does not accurately capture the wide range of physical characteristics which may be of relevance, including services and fixtures."

26 At para. 5(5) Popplewell J said there was a divergence in the authorities as to whether actual use to which the building had been or is being put is capable of being a relevant consideration. He said that the decision attached to the dwelling house through changes of ownership and use such that actual use at any given time would rarely help to inform the result of applying an objective test based on the physical characteristics of the building.

"I prefer the view that actual use may in some cases be of some relevance. If, for example, the part of the property has in fact been used, or is being used, for occupation by persons who do not form part of a single household with those who occupy the remainder of the property, that may be a factor which supports a conclusion that its physical characteristics make it suitable for such occupation. However actual use is not the test, and even in cases where it may be of some relevance it will not usually be a factor of significant weight. At most it may reinforce a decision reached by reference to the physical characteristics of the building."

27 He then went on at para.5(6) to refer to access which he said is one aspect of the physical characteristic of a building, adding -

"But access is not a factor which can be determinative without considering the other physical aspects of the building.

28 Finally there is *Coll (Listing Officer) v Mooney* [2016] EWHC 485 (Admin), [2016] RA 125. As with *Corkish*, this was an appeal by a listing officer. It involved a Grade II listed house which had been built as one dwelling on three floors but had been converted into two dwellings and was the subject of two separate entries in the Valuation List. After the respondent purchased the whole building in 2014, the result was that on the lower floor where there had been two rooms plus kitchen and bathroom, there was now installed a laundry/utility room with a new staircase running just outside the utility room to the ground floor kitchen. Upon completion of the works, the ground floor comprised a kitchen, sitting area, dining room, two bedrooms and a shower room, and a hall leading to the main external entrance to the house. The first floor comprised a drawing room, study, bedroom, and bathroom with dressing area. The judgment noted that, because of the building's Grade II listing, there were severe restrictions on the changes that it had been possible to make.

29 The Tribunal had held that the property must be shown as one entry in the Valuation List, instead of two. The listing officer appealed and submitted, as one of the grounds, that the

Tribunal had erred in law because it determined that the lower ground floor was not a self-contained unit on the basis that the utility room was the laundry room for the whole house, thereby impermissibly relying on the use to which the room was actually put.

30 Lang J held that the Tribunal did not misdirect itself and that on the evidence its conclusion was a reasonable one. In the course of her judgment at para.28 she said that the focus had to be on the physical characteristics of the building, as presently constructed and adapted for use. She agreed with what Popplewell J had said in *Corkish* at para.5. At para.31 Lang J deprecated the listing officer's initial submission that, when applying the test, the property had to be assessed as if it had been stripped back to the bare bricks and mortar, thus disregarding internal layout, fittings and services. She said:

"The physical characteristics of the building include physical facilities installed for essential living functions such as cooking, washing and laundry.

31 At para.34 she set out the relevant physical characteristics in that case, which included the installation of the lower ground floor utility room, fitted with a butler sink, electric plumbing and waste facilities for a washing machine, and electric and extraction facilities for a vented tumble dryer, which comprised an opening through an external wall into which a hose was fitted to extract warm damp air from the dryer.

32 At paragraph 40 Lang J observed that although the manner in which the building was being used by particular occupiers is clearly not the legislative test, evidence of actual use may properly be considered. At paragraph 41 she observed:

"41 ... The key question was whether the panel went on to apply the correct legislative test, namely, had the building been 'constructed or adapted for use as separate living accommodation'. This focuses on the use for which the building has been physically constructed or adapted, not the way in which the occupants were actually using it."

33 There is no avoiding the fact that there is a difference in the authorities. My reconciliation of them is as follows:

- (1) The tests in Articles 2 and 3 of the 1992 Order as to whether a single property contains more than one self-contained unit concerns the physical characteristics of the building as presently constructed and adapted for use.
- (2) The physical characteristics of the building may include access and physical facilities, such as those installed for essential living functions: cooking, washing and laundry as in *Corkish* and *Coll* cases, although these will not be determinative without considering the building's other physical characteristics.
- (3) Actual use of the building, including communal living, is not the test as to whether the property contains more than one self-contained unit as laid down in the 1992 Order.
- (4) However, in making its factual finding as to whether there is more than one self-contained unit, the Tribunal is entitled to have regard to evidence of actual use, but actual use is not a mandatory factor to be considered, and there need be no reference to it.
- (5) Indeed, actual use will not usually be a factor of significant weight and at most may reinforce a decision reached by reference to the physical characteristics of the building.

The grounds of appeal

- 34 In his attractively advanced and cogent submissions, Mr Wilcox contended that overall the Tribunal had taken an unrealistically simplistic and bright line approach to the issue, and had addressed it in a legally incorrect way. The Tribunal considered that if the landing were a living-room the appeal should have been allowed; whereas if it was a landing the appeal should be dismissed. Mr Wilcox submitted that there were three specific errors of law.
- 35 The first error concerned the relevance of use. The Tribunal, he contended, had regarded use of the landing as legally irrelevant to the bricks and mortar test and in consequence declined to consider that aspect of the appellants' submissions for the use of the landing in assessing its status. There was no consideration and no explanation as to why there was no consideration of the actual use and whether it might be relevant. In that regard he contended that the Tribunal had misdirected itself. In the course of his submissions, he cited *Coll v Mooney*. In his submission actual use of the landing as a living room was capable of informing the question as to whether it was a living room or a conventional landing.
- 36 It will be evident from what I have already said in my synthesis of the authorities that it was a matter for the Tribunal whether it considered that actual use would have assisted it in reaching a decision by reference to the physical characteristics of the building as to the issue of whether there were two self-contained units. The Tribunal obviously concluded that this was not one of those unusual cases where actual use would assist in the task. That being the case, there was no need for it to consider actual use and therefore no need to mention it as a factor in its consideration. In any event, the first appellant had accepted that the bricks and mortar test, based on the physical attributes of the accommodation, was the correct test to apply and that was recorded, as I have noted, as common ground between the parties as to what was the correct test in determining whether there was one or more self-contained units.
- 37 The second error which Mr Wilcox contended the Tribunal had fallen into was the failure to consider the physical characteristics of the landing. The appellants had referred not only to the actual use of the landing but to its physical configuration, and in particular to the fact that it formed the electronic hub for the IT wiring for the whole of the Property.
- 38 In Mr Wilcox's submission the IT wiring on the landing was conceptually identical to the wiring for the utility room white goods in *Coll v Mooney*. The IT structure indicated that the room was adapted for use as an office and thus as a living room in the house, in the same way that the presence of the service wiring and pipework indicated that the lower ground floor in *Coll v Mooney* was a utility room. Although the role of the IT infrastructure was a central feature of the appellants' case, there was no mention of it by the Tribunal.
- 39 In my view, this ground cannot succeed. The tribunal was aware of the presence of the IT equipment on the landing. I have quoted para.58 of the Tribunal's decision. As indicated earlier, the bricks and mortar test is not limited to the actual bricks and mortar of the Property, and includes all the Property's physical characteristics. However, it was a matter for the Tribunal's judgement as to whether the furniture and IT equipment were physical characteristics of the Property. In para.60 the Tribunal concluded that it did not, with its reference to stripping back the appellants' use of the room. As to Mr Wilcox's submission that the wiring was part of the Property itself and analogous to the position of the services in the utility room in *Coll v Mooney*, I cannot see any analogy with the fixtures which Lang J described, including the plumbing in of the washing machine and the ventilation through the wall for the tumble dryer.

- 40 Mr Wilcox's third legal error was the failure on the part of the Tribunal to consider whether the house was a self-contained unit. The status of the house, and in particular the implications for the house of the access arrangements for the second floor, had been the focus of the appellants' case to the Tribunal, and yet the Tribunal did not at any point consider the implications of the access to the second floor for the status of the house itself. In particular it did not consider the privacy implications of access to the second floor via the appellants' office. The finding that the landing was a conventional landing was insufficient to resolve the issue of the status of the house.
- 41 I find this submission somewhat puzzling in that the appellants accepted that the second floor had features of a self-contained flat. The Tribunal also expressly recorded its decision that there were two self-contained units at the subject Property; it declared that it was satisfied that it consisted of two self-contained units constructed or adapted for use as separate living accommodation, and accordingly should be shown in the Council Tax Valuation List as two dwellings. As to the privacy aspects raised by the appellants, this went to the communal use of the landing, which the Tribunal was entitled to ignore.

Conclusion

- 42 For the reasons I have given I dismiss the appeal.
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CERTIFICATE

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This transcript has been approved by the Judge.