UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 118 (LC)
LT Case Number: RA/41/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – proposal – validity – agreed alteration taking effect at beginning of financial year in which proposal made – further proposal made referring to VT decision – object to achieve earlier effective date for alteration – whether proposal valid – held that it was – Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 regs 4A, 5A, 7 and 13A

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE MANCHESTER SOUTH VALUATION TRIBUNAL

BETWEEN	**JILL TUPLIN (Valuation Officer)**	**Appellant**
	and	
	FOCUS (DIY) LIMITED	**Respondent**

Re: Retail warehouse and premises,
Unit 1, Richmond House Retail Park,
Tyldesley Road, Altherton,
Greater Manchester M46 9DD

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
On 23 June 2009

David Forsdick instructed by HMRC Solicitors for the applicant
The respondent did not appear

The following cases are referred to in this decision:

Canning (VO) v Corby Power Ltd [1997] RA 60
Thomas's London Day School v Jorgensen (VO) [2005] RA 222

DECISION

Introduction

1. This is an appeal by the valuation officer against a decision of the Manchester South Valuation tribunal dated 10 April 2007 by which it decided, contrary to the VO's contention, that a proposal made by the respondent, Focus (DIY) Ltd, was valid. The proposal was to alter the entry in the list relating to a retail warehouse, Unit 1, Richmond House Retail Park, Atherton, Manchester, on the ground that a decision by the VT on another hereditament gave Focus reason to believe that the subject premises were wrongly assessed.

2. The premises were first brought into assessment with effect from 10 April 2000 at a rateable value of £319,000 by an alteration to the list dated 6 March 2001. On 30 March 2004 Focus's agent made a proposal to alter the list on the ground that the rateable value was inaccurate (ie under regulation 4A(1)(c) of the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993). The proposal was settled by agreement in August 2005 at £195,000 RV. The alteration made in consequence of this agreement took effect on 1 April 2003, the first day of the financial year in which the proposal was served (under regulation 13A(13)(a)(iii) of the Regulations).

3. On 30 September 2005 Focus's agent made a further proposal to reduce the rateable value to £195,000 on the ground that the rateable value was shown, by reason of a VT decision in relation to another hereditament, to be or to have been inaccurate (under regulation 4A(1)(d)). If that proposal were to be successful the alteration to the list that would fall to be made would take effect on 10 April 2000 (under regulation 13A(12)).

4. Under regulation 7(1), when the VO receives a proposal, he may within four weeks serve a notice on the proposer stating, for reasons set out in the notice, that he considers that the proposal has not been validly made. The proposer then has four weeks within which to serve a further proposal (regulation 7(3)). He thus has opportunity to correct the defects to which the VO's invalidity notice alludes. The VO did not serve an invalidity notice in relation to the proposal in the present case. She nevertheless contended before the VT that the proposal was invalid. She was able to do this because regulation 7(11) provides that nothing done under the regulation is to be construed as preventing any party to an appeal from contending for the purposes of that appeal that the notice was not validly made.

5. The contention of the VO was that the proposal was invalid because it failed to meet the requirements of regulation 5A(2) which sets out what it is that a proposal must contain. The VT rejected this contention and held that the proposal was valid.

6. Although the ratepayer responded to the appeal to the Lands Tribunal it did not appear at the hearing. I have before me report from the VO, Jill Tuplin IRRV, in which she sets out the relevant facts and her reasons for considering that the proposal fails to meet the requirements

of the regulations, and I have heard submissions from Mr David Forsdick. For reasons that I shall give, my conclusion is that the appeal must fail.

The facts

7. Unit 1, Richmond House Retail Park, is a purpose-built, stand-alone, retail warehouse that was erected in 2000. It consists of a steel portal frame with brick and profile metal cladding and has parking for 80 cars. It has a ground floor sales area of 2558 sq m. There is a fenced garden centre to the rear. Internally the unit is heated by warm air blowers and contains partitioned offices and storage areas. Attached to it is a lean-to structure with a glazed roof used for the sale of garden equipment. The retail warehouse is situated in an out of town location fronting the main A577 Tyldesley to Atherton road approximately 12 miles north-west of Manchester. Following the proposal made by the Hanover Partnership on behalf of the ratepayer on 30 March 2004 under regulation 4A(1)(c) contesting the VO notice inserting the hereditament in the list at a rateable value of £319,000 with effect from 10 April 2000 a VT hearing was set for 12 August 2005. Before this discussions took place between the VO's representative and the ratepayer's agent. These discussions centred on the rent of the property, which was £238,000 per annum from 25 March 2000 with a rent free period of 5 months, and the fact that rent post-dated the antecedent valuation date by two years in a rising market. Full agreement was reached on 10 June 2005 at a revised RV of £195,000 with effect from 1 April 2003, and the VO gave notice of his alteration to the list giving effect to this agreement on 11 August 2003.

8. On 30 September 2005 the Hanover Partnership served a further proposal under regulation 4A(1)(d). It sought a reduction in the rateable value on the following grounds:

> "We propose that the Rating List entry for the above property should be altered to £195,000 with effect from 10-4-2000, the date the list became inaccurate for Unit 1 Richmond House Retail Park. The entry is wrong by reason of a decision dated 24-6-2005 of the Manchester south Valuation Tribunal in respect of Big W Elizabeth Street Manchester M8 8BE, Appeal No.42155752084/113N00. The decision is relevant because it considers/corrects the level of value on similar sized premises within the locality as the subject to this appeal. Accordingly, the subject of this appeal should be reduced".

9. The Big W is a retail warehouse with a sales area of 8980 sq m. It is situated in Manchester, some 12 miles away from the subject hereditament. The VT decision of 24 June 2005 was to reduce the rateable value of the hereditament from £1,197,000 to £935,000 following agreement between the parties

10. No invalidity notice was served in relation to the proposal under regulation 7(1), but in discussions the VO's representative expressed the view to the ratepayer's agent that the proposal was invalid as there was no causal link between the appeal hereditament and the VT

decision that was relied on. This view was not accepted, and the appeal was heard by the VT on 20 October 2006.

The Regulations

11. In the 1993 Regulations, which are the relevant regulations for the purposes of the present appeal, regulation 4A(1) lists some 15 grounds for making a proposal. I note the first 7 of these because they include the two grounds of immediate relevance and give an idea of the range of matters covered:

> "(a) the rateable value shown in the list for a hereditament was inaccurate on the day the list was compiled;
>
> (b) the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day when the list was compiled;
>
> (bb) the rateable value shown in the list for a hereditament is inaccurate by reason of an amendment to the classes of plant and machinery set out in the Schedule to the Valuation for Rating (Plant and Machinery)(England) Regulations 2000 which comes into force on or after the day on which the list was compiled;
>
> (c) the rateable value shown in the list for a hereditament by reason of an alteration made by a valuation officer is or has been inaccurate;
>
> (d) the rateable value or any other information shown in the list for a hereditament is shown, by reason of a decision in relation to another hereditament of a valuation tribunal, the Lands Tribunal or a court determining an appeal or application for review from either such tribunal, to be or have been inaccurate;
>
> (e) the day from which an alteration is shown in the list as having effect is wrong;
>
> (f) a hereditament not shown in the list ought to be shown in that list; ..."

12. Regulation 5A is headed "Manner of making proposals and information to be included", and it provides:

> "(1) A proposal to alter a list shall be made by notice in writing served on the valuation officer which shall –
>
> (a) state the name and address of the proposer and the capacity in which he makes the proposal;
>
> (b) identify the property to which the proposal relates;
>
> (c) identify the respects in which it is proposed that the list be altered; and
>
> (d) include –
>
> (i) a statement of the grounds for making the proposal and ...

(iv) in the case of a proposal made on the grounds set out in regulation 4A(1)(d), the information specified in paragraph (2) ...

(2) The information required by paragraph (1)(d)(iv) is –

(a) the identity of the hereditament to which the decision in question relates;

(b) the name of the tribunal or court which made the decision;

(c) the date of the decision;

(d) the reasons for believing that the decision is relevant to the rateable value or other information to which the proposal relates; and

(e) the reasons for believing, in the light of that decision, that the rateable value or other information to which the proposal relates is inaccurate ..."

13. Regulation 7 is entitled "Proposals treated as invalid", and it includes the following paragraphs:

"(1) Where the valuation officer is of the opinion that a proposal has not been validly made, he may within four weeks of its service on him serve notice (an 'invalidity notice') on the proposer that he is of that opinion, and stating –

(a) his reasons for that opinion, and

(b) the effects on paragraphs (3) to (6) ....

(3) Unless an invalidity notice has been withdrawn in accordance with paragraph (2), the proposer may within four weeks of its service on him,

(a) subject to paragraph (4), make a further proposal in relation to the same property ...., or

(b) appeal against the notice to the relevant valuation tribunal ....

(11) Nothing done under this regulation shall be construed as preventing a party to an appeal under regulation 12 from contending for the purpose of that appeal that the proposal to which the appeal relates was not validly made."

The VT decision

14. The VT heard both argument and evidence on the issue of invalidity. It concluded that there was no ambiguity in the intent of the proposal, as the VO had contended. Since the regulations did not distinguish between a decision issued after hearing evidence from both parties and one giving effect to an informal agreement between the parties, it considered that the Big W decision was capable of founding a proposal on ground (d). While the Big W was situated in a different locality from the subject hereditament and had approximately three times the retail floorspace, the tribunal said that it was satisfied that the ratepayer's agent had lodged the proposal because he believed that the Big W decision had relevance to appeal property. To

that extent he had provided sufficient information and reasons to justify that belief and satisfy the requirements of the regulations. The decision, therefore, was that the proposal was validly made.

The VO's case

15. For the appellant valuation officer Mr David Forsdick submitted that the proposal was invalid because it failed to comply with regulation 5A(2) in that it did not state (as required by sub-paragraphs (d) and (e)) the proposer's reasons for believing the VT decision on the Big W to be relevant or its reasons for believing, in the light of that decision, that the rateable value of the subject hereditament was wrong. More fundamentally, he submitted on the basis of *Canning (VO) v Corby Power Ltd* [1997] RA 60) that a proposer relying on ground (d) of regulation 4A(1) had to show a causative link between the VT decision relied on and the inaccuracy of the entry that was the subject of the proposal. On the facts as they existed at the date of the proposal, in September 2005, it could not be said that the rateable value in the list was inaccurate because that was the value for which the ratepayer in its proposal was contending. The rateable value could not be shown to be inaccurate by reason of the decision in the Big W because the issue of the inaccuracy had already been raised and determined in advance of that decision. As a matter of principle, Mr Forsdick submitted, to allow a ratepayer, who had had a proposal determined on any of the grounds (a) to (c), to come back with a fresh proposal on ground (d) in order to secure an earlier effective date, would be to distort the statutory scheme. It would be contrary to the public interest to do so.

16. Mr Forsdick placed reliance on the witness statement of the VO to the extent that it provided the factual basis for his contentions. In that statement the VO made three principal points. Firstly, she said, the decision of the VT in the Big W case was not a reasoned decision. It simply gave effect to the agreement reached by the parties. Unless the decision relied on explains why the decision was reached, she said, no reason exists for believing that the assessment of another hereditament is inaccurate by reason of the decision.

17. Secondly, the VO said, the Big W was not a comparable property. It was very much larger and fell within a different sector of the retail property market in terms of size. Moreover it was 12 miles away from the subject hereditament, and valuation considerations could not be assumed to be constant over such a distance. The Big W was valued at £100 per sqm, whereas the subject hereditament was valued at £70.70 per sqm. The VO expressed the view that an experienced valuer would find no useful comparability between the subject hereditament and the Big W retail warehouses, so that the value of the Big W had absolutely no relevance.

18. Thirdly, the sequence of events surrounding the settlement of the original appeal and the submission of the proposal in the present appeal did not support the existence of a causal link. The evidence showed that the proposer first became aware that the subject hereditament was inaccurately assessed and, having established this point, it then looked around for a peg on which to hang another proposal. The second proposal was made seven weeks after the settlement of the first proposal. The proposer was, the VO said, already aware that the entry in

the list was from his point of view inequitable, although not inaccurate. This knowledge was not dependent on the VT decision in the Big W, which neither created nor added to the proposer's perception.

Conclusions

19. The advantage of being able under ground (d) to rely on a VT decision as the basis for a proposal, so that an alteration made in consequence of such a proposal would take effect at an earlier time than one resulting from a proposal on some other ground, has long been known to rating surveyors. In *Canning (VO) v Corby Power Ltd*, on which the VO relies in the present case, the ratepayer made a proposal on ground (d) in respect of Corby Power Station in Northamptonshire by reference to a VT decision on a shop in Gwent. In his decision Judge Marder QC, President, said ([1997] RA 60 at 65) that the proposer did not pretend that the decision in the case of the Newport shop had any relevance to his proposal to reduce the power station assessment, nor did he suggest that he had formed the opinion that the power station assessment was incorrect by reason of the decision in the Newport case. The President accepted the VO's submission that it was a condition precedent to the marking of a valid proposal that the proposer should have formed the opinion that the existing entry was rendered incorrect by the VT decision that he relied on. Unsurprisingly the proposal was held to be invalid.

20. In *Thomas's London Day School v Jorgensen (VO)* [2005] RA 222, a school hereditament was entered in the list, following alterations made by the VO and agreements reached on proposals by the ratepayer, at £47,900 RV with effect from 1 April 1990 and £69,800 RV with effect from 1 April 1992. The ratepayer was later advised that, because of the operation of transitional relief, it would have been advantageous if the higher assessment were to have effect from 1 April 1990, and a proposal was made on ground (d) in an attempt to achieve this result. The proposal referred to a VT decision, but (see paragraph 8, of the decision) in contending that the Tribunal should determine 1 April 1990 as the material date, the substantive point in issue, the ratepayer placed no reliance on the decision. The notice was held to be invalid.

21. In the present case the ratepayer made a proposal in which it said that the assessment should be altered to £195,000 with effect from 10 April 2000; that the entry was wrong by reason of the Big W decision; and that that decision was relevant because it considered or corrected the level of value for premises of similar size within the locality. The contentions of the VO that this proposal was invalid comprise, as I understand them, six arguments:

(i) It was not open to the ratepayer to make the proposal because the rateable value had already been determined by the agreement reached and the alteration made in consequence of the first proposal.

(ii) The proposal could not claim that the rateable value was inaccurate because as at the date of the proposal, in September 2005, the value shown in the list was the value for which the ratepayer in its proposal was contending.

(iii) The proposal fails to comply with the requirements of regulation 5A(2)(d) and (e) because it does not give the proposer's reasons for believing that the Big W decision is relevant to the rateable value of the subject hereditament and that that value is inaccurate in the light of that decision.

(iv) The Big W decision was not a reasoned decision, so that it could not constitute a reason for believing that the assessment of the subject hereditament was wrong.

(v) The Big W was not a comparable property in view of its size and its distance from the Focus retail warehouse.

(vi) The proposer had no belief, or could not have had any belief, that the Big W decision showed the rateable value of the Focus retail warehouse to be inaccurate.

22. I will take these arguments in order. I do not accept Mr Forsdick's contention that the determination of the rateable value of the hereditament pursuant to the first proposal precluded the making of a proposal on ground (d). There is nothing in the Regulations to suggest this. Where a proposal is made on any of the grounds, in my judgment, the issue to be determined (by the VO initially and by the VT if there is an appeal) is simply whether the ground stated in the proposal is substantiated. If it is, then the list must be altered, and it must be altered with effect from the date that is relevant to the ground for alteration that has been held, by the VO or the VT, to apply.

23. I do not think that the fact that a reduction in rateable value has been achieved on ground (c) precludes the making of a further proposal on ground (d) in respect of the period before the effective date of the ground (c) alteration. It does not seem to me that there would be anything inappropriate or anomalous about it. Indeed it could well be that such a proposal might in the circumstances of a particular case overcome an anomaly that, as Mr Forsdick accepted, is inherent in the Regulations. This anomaly arises where a proposal is made on ground (c) in respect of one of a number of exactly comparable hereditaments. For example, a proposal for a reduction in the assessment might be made on one shop, shop A, in a group or parade of exactly similar shops, to which identical improvements were made during the currency of the list. Assuming the same timing as in the present case, the ratepayer, if successful (perhaps after an appeal to the VT and then to the Lands Tribunal), would see the list altered from 1 April 2003. The occupiers of the other shops, who had done nothing previously to seek an alteration, would then be able to serve proposals on ground (d) and achieve the same reduction, but from the date of the alterations, 10 April 2000. If there were a VT decision in relation to some other comparable shop premises I can see no reason why the shop A ratepayer should not make a further proposal, on ground (d), in reliance on this and attempt by this means to achieve parity with the occupiers of the other shops in the group. Of course, for the proposal to be successful the VO or VT would have to be satisfied that the VT decision did indeed show that the assessment on shop A was wrong.

24. I would add that I have not considered whether, in relation to other grounds among the 15 listed in regulation 4A(1), a proposal would be precluded by reason of an earlier proposal on another ground having led to an alteration in the list, but in principle I think that it would not.

As I have said, it will simply be a case of seeing whether the ground on which the proposal was made has been substantiated.

25. There is nothing, in my view, in argument (ii). Under ground (d) the question is whether the rateable value is shown by reason of the VT decision to be or have been inaccurate. Mr Forsdick accepted, rightly in my view, that the proposal was directed at the inaccuracy in the rateable value in the list for the period 10 April 2000 to 31 March 2003. I can see no reason why, because the ratepayer accepted that, following the alteration made in consequence of the first proposal, the rateable value was correct from 1 April 2003, it could not claim that it was inaccurate in relation to the earlier period.

26. I cannot accept the VO's contention (argument (iii)) that the proposal failed to comply with regulation 5A(2) and (e) and that it was in consequence invalid. It stated that the entry was wrong by reason of the Big W decision, which it said was relevant because it considered or corrected the level of value on similar sized premises within the locality and of the subject hereditament, and it said that, accordingly, the assessment of the subject hereditament should be reduced. I do not see how it can be seriously contended that that failed to state the ratepayer's reasons for believing that the Big W decision was relevant to the assessment of the subject hereditament and that, in the light of that decision, that the assessment was inaccurate. The difference between a proposal in these terms and those in *Corby Power* and *Thomas's London Day School* is obvious. In each of those cases it was clear on the face of the proposal that the VT decision had no relevance to the claimed inaccuracy in the list, and in neither case did the ratepayer seek to rely on the decision as showing that the entry was invalid. In the present case, by contrast, the relevance of the VT decision was made explicit by the proposal. Of course, the VO may be right that the Big W is not sufficiently comparable in terms of size and location to warrant the conclusion that it shows the assessment of the subject hereditament to have been inaccurate. But that is a matter for the VT to judge in the light of the evidence.

27. I would add that I am not unhappy to reject this particular contention on the part of the VO since she failed to serve an invalidity notice on the proposer as provided for by regulation 7(1) and thus deprived it of the opportunity of serving a further notice to make good the claimed deficiency under regulation 7(3). In such circumstances, it seems to me, a VT may often be able to treat the fact that the VO did not serve an invalidity notice as a good indication that the proposal was not invalid.

28. I cannot accept that because the Big W was not a reasoned decision it cannot show the assessment of the Focus retail warehouse to be wrong (argument (iv)). The decision was to reduce the assessment of the Big W. If that reduced assessment provides comparable evidence to support the claimed reduction for Focus it may show that the Focus assessment is wrong, so that ground (d) is made out. That is a matter of evidence. Whether the Big W is indeed a reliable comparable will be for the VT to decide, and I do not think that this is a case in which lack of comparability is so manifest that the VT decision is not capable of being relied on. I therefore reject argument (v), as the VT did.

29. Argument (vi) – that the proposer had no belief, or could have had no belief, that the Big W decision showed the assessment of the subject hereditament to have been wrong – is in my judgment also without foundation. The assertion is that, because the assessment had been shown to be inaccurate on ground (c) on the basis of rental evidence, the proposer could not have believed that the Big W decision also showed it to be wrong. But there is no reason why such a belief could not have been held. If the Big W decision does indeed show the assessment to have been wrong, it does not matter that there was also material – and no doubt obviously persuasive material in the form of the rental evidence – to justify a reduction. It will be for the VT to determine whether, on the facts and in the light of valuation evidence, the Big W decision itself shows the assessment of the Focus retail warehouse to be inaccurate.

30. In my judgment, therefore, the VT was correct to hold that the proposal was not invalid, and the appeal must be dismissed. There is no application for costs, and this decision is accordingly final.

Dated 1 July 2009

George Bartlett QC, President