IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 266 (LC)
Case No: RA/71/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Proposal – whether failure to specify rent and mis-description of ratepayer as "owner/occupier" made proposal invalid – proposal substantially compliant with requirements of regulation and therefore valid – reg.6(3), Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

MR IMTEKHAB ALAM **Appellant**

and

ARTHUR STOYLES (VALUATION OFFICER) **Respondent**

Re: Shop and Premises,
32 Wellington Street,
Luton
LU1 2QH

Martin Rodger QC, Deputy Chamber President and P D McCrea FRICS

Royal Courts of Justice, Strand, London WC2A 2LL
on
1 August 2018

Louise Wise of Relatus Ltd for the appellant
Jacqueline Lean, instructed by Her Majesty's Revenue and Customs, for the respondent

The following cases are referred to in this decision:

Elim Court RTM Company Ltd v Avon Freeholds Ltd [2018] QB 571

Imperial Tobacco Group Ltd v Alexander (VO) Nos. 306018810109/511N05, 306018810330/511N05 and 306018810247/511N05

Kendrick (VO) v Mayday Optical Co Ltd [2013] UKUT 548 (LC)

Mainstream Ventures Ltd v Woolway (VO) [2000] RA 395

Mayday Optical Co Ltd v Kendrick (VO) No. 524017577018/072N10, [2013] UKUT 548 (LC)

Natt v Osman [2015] 1 WLR 1536

Newbold v The Coal Authority [2014] 1 WLR 1288

R v Northamptonshire Local Valuation Court, ex p Anglian Water Authority [1991] RA 93 CA

R v Secretary of State for the Home Department ex p. Jeyeanthan [2000] 1 WLR 354

R v Soneji [2006] 1 AC 340

R v Winchester Area Assessment Committee, ex.p Wright [1948] 2 KB 455

Tuplin (VO) v Focus (DIT) Ltd [2009] UKUT [LC] 118, [2009] RA 226

Introduction

1. Balti Nights ("the Property") is a restaurant on the ground floor of 32 Wellington Street, in Luton. There are a number of other restaurants and shops in the same street and the prevailing tone of the 2010 Rating List is well-established.

2. Mr Alam, the appellant, is the proprietor of the restaurant. On 3 June 2013 he took a lease of the Property for a term of 15 years at a rent of £17,000 a year. On 31 March 2015 his agents, Relatus Ltd, submitted an electronic proposal to reduce the rateable value of the Property from £12,000 to £1. In their proposal they stated correctly that Mr Alam was the occupier of the Property but also stated that the Property was "owner/occupied". The proposal was completed in that way because of a misunderstanding between the appellant and his agent. As a result, the agent did not include any information in response to the question "if not owner/occupied, is a rent or licence fee paid?" and, in particular, did not state the rent payable, the date it had first become payable and the date of the next rent review, all of which was information required by regulation 6(3) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 ("the 2009 Regulations").

3. The issue in this appeal concerns the consequence of the appellant's mis-statement of the capacity in which he occupied the Property and the omission of any information about the rent payable.

4. By a decision given on 12 September 2017 the Valuation Tribunal for England ("VTE") found that the proposal was invalid, explaining:

> "… in whatever circumstances to omit the rent from the proposal was a substantial failure to comply with the Regulations. The panel was therefore persuaded that the error was so fundamental that the proposal could not in any circumstances be treated as valid."

5. The parties agree that if the proposal was valid, the rateable value of the Property should be altered from £12,000 to £10,250 with effect from 1 April 2010.

6. At the hearing of the appeal the appellant was represented by his agent Mrs Louise Wise of Relatus Ltd, and the respondent by Ms Jacqueline Lean of counsel. We are grateful to them both for their assistance.

7. At the end of the hearing we gave the parties the opportunity to make further written submissions on matters raised by the Tribunal during the hearing, and we subsequently received these and have taken them into account.

Relevant statutory provisions

8. Schedule 6 of the Local Government Finance Act 1988 ("the 1988 Act") makes provision for valuation for non-domestic rating. Paragraph 2(1) provides that the rateable value of a non-domestic hereditament (none of which consists of domestic property and none of which is exempt from local non-domestic rating) shall be taken to be an amount equal to "the rent at which it is estimated the hereditament might reasonably be expected to let from year to year" on certain assumptions.

9. Section 55 of the 1988 Act empowers the Secretary of State to make regulations regarding the alteration of lists. The regulations may include provision as to the manner and circumstances in which a proposal may be made and may include provision that, where there is a disagreement between a valuation officer and another person making a proposal about the validity of the proposal, an appeal may be made to a valuation tribunal.

10. The relevant regulations are the 2009 Regulations. Regulation 4(1) sets out the grounds for making a proposal, which include in paragraph 4(1)(a) that the rateable value shown in the list for a hereditament was inaccurate on the day the list was compiled. By regulation 4(2)(a) a proposal may be made by an interested person (referred to as an "IP") who has reason to believe one of the grounds in paragraph 4(1) exists.

11. Regulation 6, so far as presently relevant and in force at the time, provided:

> "6 (1) A proposal shall be made by notice sent to the VO which shall --
>
> (a) state the name and address of the proposer;
>
> (b) [state the capacity of the proposer]
>
> (c) identify the property to which the proposal relates;
>
> (d) identify the respects in which it is proposed that the list be altered; and
>
> (e) include --
>
> (i) a statement of the grounds for making the proposal;
>
> (ii) to (vi) …….
>
> (vii) in the case of a proposal made on one or more of the grounds set out in regulation 4(1)(a) …. in respect of a hereditament occupied under a lease……, the information specified in paragraph (3).
>
> (2) ……
>
> (3) The information required by paragraph (1)(e)(vii) is --
>
> (a) where the proposer is the occupier, the amount payable each year by the proposer, as at the date of the proposal, in respect of the lease……., or
>
> (b) ……."

12. Regulation 8 contained provisions regarding disputes as to the validity of proposals. By regulation 8(1), where the Valuation Officer ("VO") considers a proposal has not been validly made, the VO may serve an invalidity notice on the proposer stating the reasons for that opinion, and the effect of paragraphs (6) to (10) which, amongst other things, explain the proposer's rights to make a further proposal or appeal against the invalidity notice. The VO may not serve an invalidity notice more than 4 weeks after the making of a proposal unless the maker of the proposal agrees (reg.8(3)).

The relevant facts

13. The appellant's proposal was made by his agents, Relatus Ltd, on 31 March 2015, the last date on which a valid proposal could be made to alter the 2010 rating list. The proposal was made electronically and provided information on the form required by the Valuation Office Agency ("VOA"). The appellant's name was given as that of the occupier. Question 7 asks whether the Property is "owner/occupied", to which the appellant's agents answered "yes", apparently on the instructions of their client. Question 9 asks "if not owner/occupied, is a rent or licence fee paid?" The appellant's agents gave no answer to that question, nor did they provide details of the amount of the rent payable.

14. In Part B of the proposal it was proposed that the rateable value be altered to £1 with effect from 1 April 2010. Part C requires a statement of the grounds for the proposed alteration with detailed reasons; in answer, it was said that the rateable value was inaccurate and the appellant's reasons for believing so were that:

> "There is some space valued at Zone ABC factors that should have been assessed at a lower factor."

15. Relatus described the capacity in which they made the proposal as "agent for Owner/Occupier".

16. The proposal was not accepted as well-founded by the VO but nor was a notice of invalidity served, as might have been done under regulation 8(1) of the 2009 Regulations had it been appreciated at that stage that the description of the appellant as owner/occupier was inaccurate. Instead, the proposal was referred to the VTE as an appeal under regulation 13 of the 2009 Regulations.

17. Coincidentally, and in anticipation of the general revaluation to be undertaken in 2017, the VOA sent the appellant a form of return on 7 May 2015 asking for information about the Property. Although the information sought by the form of return is substantially the same as in the electronic proposal form, the questions designed to elicit the information are expressed differently. In particular, having asked for the name and address of the occupier in question 1.3, question 1.4 in the form of return asks "do you own the property? (not simply the business)". A side note explains "for the purpose of this form, you own the property if you own it freehold and do not pay a rent, or have a leasehold or written agreement that lasts for more than 60 years at a low rent".

18. The appellant completed the form himself and returned it on 4 June 2015. He named himself as the person who occupied the Property. He answered "no" to the question "do you own the property? (not simply the business)", and "yes" to the question "do you pay rent for the property?" He explained that the lease had been granted on 3 June 2013 for a term of 15 years and that the rent was to be reviewed every 5 years. Other relevant information about the basis on which the rent had been agreed, whether there had been a rent-free period or any capital sum had changed hands, and as to responsibility for repairs and insurance were all assiduously provided by the appellant.

19. Nothing further was heard from the VOA and it is not to be expected that the information contained in the form of a return was considered alongside the previous proposal - by the time the form of return was received the appeal was already on its way to the VTE.

20. The entirety of the appellant's case before the VTE was that the premises had been valued on an incorrect zonal basis and that certain ancillary areas should have had a lower factor applied to them. Specifically, he proposed that the kitchen area be valued at only 10% of the Zone A value and that no value be attributed to the toilets. The VO's rate of £300 per square metre Zone A was not challenged, and resulted in a value of £10,312 which the appellant's agents rounded down to £10,000.

21. In his own statement of case for the VTE the VO contended only that the proposal was invalid because the appellant had failed to provide details of the rent payable. The VO had not yet inspected the Property and did not answer the appellant's valuation case.

22. Two days before the hearing before the VTE, and on the basis of additional information from the appellant's agents about the construction of a wall dividing the property, the VO revised his opinion of the value of the Property to £10,250 (based on a rate of £300 per square metre Zone A rounded down to the nearest £250). Having received advice the VO's position remained that the proposal had been invalid and that the effective date of the reduction in rateable value would be 1 April 2015 (rather than 1 April 2010, as would have been possible if the proposal had been valid).

The proper approach to the validity of proposals

23. This appeal concerns the proper approach to be taken to a failure to comply with the procedure for making a proposal to alter the rating list laid down by regulation 6 of the 2009 Regulations. Appeals of this type are quite common in a whole range of statutory contexts. In *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2018] QB 571, Lewison LJ observed that:

> "It is a melancholy fact that whenever Parliament lays down a detailed procedure for exercising a statutory right, people get the procedure wrong."

24. The proper approach to be taken to the validity of a proposal is the same approach as is taken by courts and tribunals to the consequence of procedural errors in the other statutory contexts. There are no special rules for rating. We understood that to be accepted by Miss Lean on behalf of the VO, who referred the Tribunal to the decision of the House of Lords in a case concerning the confiscation of the proceeds of crime, *R v Soneji* [2006] 1 AC 340, as a modern statement of the proper approach to non-compliance with statutory requirements.

25. In *Natt v Osman* [2015] 1 WLR 1536 at [24] Etherton C explained that where a statute lays down a process or procedure for the exercise by a person of some right conferred by the statute, and the statute does not expressly state what is the consequence of the failure to comply with that process or procedure, the consequence used to be said to depend on whether the requirement was mandatory or directory. If the requirement was mandatory the failure to comply was said to invalidated everything which followed; if it was directory the failure to comply would not necessarily have that effect. That approach is now regarded as unsatisfactory and has been replaced:

> "The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole."

26. As Etherton C explained at [25]-[29] in cases in which the decision of a public body is challenged or which concern procedural requirements for challenging a decision (in which category we would place the making of a proposal to alter the rating list), the courts have asked whether the statutory requirement can be fulfilled by "substantial compliance" and, if so, whether on the facts there has been substantial compliance even if not strict compliance. Among the best known examples of this interpretative approach is the decision of the Court of Appeal in *R v. Secretary of State for the Home Department ex p. Jeyeanthan* [2000] 1 WLR 354, in which Lord Woolf MR commented, at [11]:

> "Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between."

27. At [16] Lord Woolf identified the sort of questions which it is necessary to ask in cases such as this:

> "I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows:
>
> > (a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial

compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)"

28. The same approach has been applied by the VTE in two cases of its own to which we were referred, and which it relied on in determining that the proposal in this case was invalid. *Imperial Tobacco Group Ltd v Alexander (VO),* and *Mayday Optical Co Ltd v Kendrick (VO)* were decisions of the then President of the VTE, Professor Zellick QC, on 24 April 2012.

29. In *Imperial Tobacco*, the ratepayer's agent had made proposals against a 2005 rateable value, in which the rent passing was stated to be £40,500 a year, rather than the correct figure was £44,019. The VO raised the issue of validity at the hearing. Although the discrepancy was small, and it was agreed that the rent was not a material factor in determining the substantial dispute over rateable value, the VO's position was that any but a minor clerical error or omission in complying with regulation 6 of the 2009 regulations rendered a proposal invalid.

30. Having been addressed on the questions posed by Lord Woolf in *ex p. Jeyeanthan* (see paragraph 27 above) the President expressed the view at paragraph 22 that acceptance of the draconian approach urged by the VO would be "inimical to the interests of justice". He preferred the approach of Scott LJ in *R v Winchester Area Assessment Committee, ex.p Wright* [1948] 2 KB 455, 460 had said "the language of proposals … should … be read without too much legal strictness; … the requirements … must be substantially satisfied if the proposal is to be effective and valid."

31. The President next referred to the view expressed by the Office of the Deputy Prime Minister in a consultation paper which was taken to reflect the policy behind the introduction of regulation 6(3), but refused to accept that the degree of strictness insisted on by the VO was consistent with the statutory scheme. In particular, the VO had the power to overlook an error or omission and was not required to serve a notice of invalidity in every such case, so an absence of all but the most minor clerical errors could not render a proposal void. Nevertheless, at paragraph 25 the President did accept that certain failures in recording the passing rent would be fatal to the validity of a proposal:

"A failure to put any figure on the form, or to put a figure that was wildly and arbitrarily inaccurate, invites a finding of invalidity, …"

32. Having therefore concluded that substantial compliance was capable of being good enough the President identified four categories into which departures from the requirements of regulation 6 might fall, with different consequences:

"30. First are errors of or omissions of a clerical nature which are trivial, insignificant and *de minimis*. These have no impact on the proposal's validity and should be ignored.

31. Secondly, there are errors and omissions of substance but not the result of a deliberate attempt to mislead which do not impair the VO's ability to consider the appellant's case and which have no adverse impact on an assessment of the correct rateable value. This encapsulates two questions: (a) Has there been substantial compliance? (b) Has it caused the VO any prejudice? If the answer to (a) is yes and to (b) no, these failures do not render the proposal invalid.

32. Thirdly, there are errors or omissions of a kind that misrepresent the appellant's case or mislead the VO in considering the matter on its merits. Such error or omission will render the proposal invalid if the VO decides so to treat it. But if in the exercise of his discretion he chooses to disregard it and proceeds on the basis that the proposal is valid, that is entirely proper and the VO may either adjust the rateable value or allow the case to proceed to appeal before the Tribunal, but he may not thereafter raise or rely on the invalidity.

33. I draw attention to the comment of the President of the Lands Tribunal in *Tuplin (VO) v Focus (DIT) Ltd* [2009] UKUT [LC] 118, [2009] RA 226, 237, para 27, where he expressed some pleasure in rejecting the VO's argument as to invalidity –

> "Since she failed to serve an invalidity notice on the proposer … and thus deprived it of the opportunity of serving a further notice to make good the claimed deficiency … In such circumstances, it seems to me, a valuation tribunal may often be able to treat the fact that the valuation officer did not serve an invalidity notice as a good indication that the proposal was not invalid."

34. Finally, there will be errors or omissions so fundamental that the proposal cannot in any circumstances be treated as valid (as in *R v Northamptonshire Local Valuation Court, ex p Anglian Water Authority* [1991] RA 93 CA, where a sewage works that no longer existed was named in the proposal instead of one half a mile away; and in *Mainstream Ventures Ltd v Woolway (VO)* [2000] RA 395, where the proposer was not qualified to make the proposal as he was not the occupier). In this category, the VO has no alternative but to pronounce the proposal (in his opinion) invalid; and should such a proposal come before the Tribunal, whether on appeal against an invalidity notice or otherwise, the Tribunal, whatever stance taken by the VO, would have to declare the proposal invalid and either uphold the invalidity notice or strike out the appeal on the basis that the Tribunal had no jurisdiction to entertain it."

33. The President decided that the non-compliance fell into the second category he had identified and that the appeal should be allowed. The error was "not only insignificant but of no relevance to the consideration or determination of the issue in dispute."

34. Whether the four categories identified in *Imperial Tobacco* are a reliable guide has not been the subject of argument in this appeal, and it is not necessary for us to comment on them.

35. In *Mayday Optical* the President of the VTE applied his own reasoning in *Imperial Tobacco* to a proposal in which the passing rent was stated to be £9,500 a year, whereas the correct figure was later found to be £10,000 (a discrepancy to which the VO was alerted by the ratepayer's form of return). Given the number of proposals received the President did not think it would be right or reasonable to expect the VO to have been aware of the information in the ratepayer's form of return and found that the absence of an invalidity notice did not prevent her from raising the issue of invalidity at the hearing. He regarded the mis-statement of the rent by £500 or 5% as neither trivial nor fundamental, and he put the error into category 2 or 3 of his *Imperial Tobacco* classification. The ratepayer's agent had not explained how the error had come about, and had advanced no evidence or argument, and the President therefore considered that the error rendered the proposal "potentially invalid".

36. In order to decide whether that "potential" invalidity was one which the VO was entitled to rely on the VTE next posed the question whether the VO would be acting lawfully in doing so. The VO had a discretion whether to treat the proposal as valid or invalid (whether by issuing a notice of invalidity, or arguing for invalidity on the appeal). Although the President took the view that reliance on the error by the VO was irrational and therefore unlawful as a matter of public law, that part of his decision was reversed by the Tribunal (HHJ Huskinson) on the VO's appeal (*Kendrick (VO) v Mayday Optical Co Ltd* [2013] UKUT 0548 (LC)).

37. In *Kendrick* the Tribunal considered that the VO was entitled to raise the invalidity point, and that the extent of the error was sufficient to mean that the Proposal was not substantially compliant with the requirements of the regulation (para.34). Moreover, the Tribunal accepted that the VO had been prejudiced by the error, for the reason given by her counsel (recorded at para.25); three reasons were relied on: first, "the VO might rely upon the information given and might in consequence reduce the rateable value"; secondly, she "could be put to substantial work in researching the matter"; and, thirdly, the proposal was a public document and if it mis-stated the rent this "might encourage other persons to make other proposals in respect of similar properties in the belief that the rent stated was accurate." The VO had therefore been entitled to treat the proposal as invalid.

38. The Tribunal did not agree with the VTE that it was necessary in every case to consider whether the VO was acting lawfully in relying on an error in a proposal. Whether it would be open to a proposer to argue before the VTE that the VO was acting unlawfully in public law by treating a proposal as invalid because of an error, or whether the proposer could only do so by applying to the High Court for judicial review were questions which it was not necessary for the Tribunal to decide. The task given by the statute and the regulations to the VTE was to decide whether the proposal has been validly made (and to decide on any estoppel argument if raised). It was not for the VTE routinely to raise an issue of public law, especially one not raised by the proposer.

The VTE's decision in this appeal

39. In its decision the VTE recorded the VO's submission that the failure to state the passing rent in the proposal meant that the proposal was invalid. As a result of that failure the VO was said to have suffered prejudice, although no indication is given in the decision of the nature of that prejudice.

40. The VTE noted that the VO had not served notice of invalidity within the four weeks allowed by regulation 8 of the 2009 Regulations. It explained that the question of validity could nevertheless be raised at the hearing before it and, having the decision of the VTE in *Imperial Tobacco* and that of the Tribunal in *Kendrick*, it concluded at paragraph 13:

> "Having fully considered the arguments of both parties the panel was of the opinion that in whatever circumstances to omit the rent from the proposal was a substantial failure to comply with the regulations. The panel was therefore persuaded that the error was so fundamental that the proposal could not in any circumstances be treated as valid."

For that reason the appeal was dismissed.

Submissions on the appeal

41. On behalf of the appellant Mrs Wise submitted that there was no justification for treating the proposal as irremediably defective. Despite the omission to specify the passing rent, the proposal was wholly valid.

42. Mrs Wise made two submissions about the proper approach to the issue of substantial compliance. First, she contended that the requirements of regulation 6 as a whole had been substantially complied with, and that it was not appropriate to consider whether, viewed in isolation, there had been substantial compliance with the requirement to state the rent. Secondly, it was necessary, she submitted, the question of substantial compliance ought to be considered in the context of the facts of the particular appeal. If the information which had been omitted was immaterial to the appeal, a failure to supply it would not prevent the proposal from being substantially compliant with regulation 6.

43. In this case it was clear from the proposal that the appellant's sole challenge was to the manner in which the established tone had been applied to the subject property. The appropriate Zone A value was not challenged and in giving the appellant's detailed reasons for regarding the entry in the list as inaccurate it had been explained that it was the Zone A B C factors, rather than the Zone A rate itself which were questioned. There was an important difference between a proposal which mis-stated a rent (as in *Kendrick*) and which therefore invited reliance on inaccurate information, and a proposal which omitted to state a rent at all, and which was incapable of misleading the VO. In any event, the rent agreed when the appellant took his lease in March 2013, and which was missing from the proposal, was 5 years after the antecedent valuation date by reference to which the Property was valued in the 2010 list, and so was of little or no relevance to any valuation which had to be undertaken.

44. The omission had been unintentional and had come about as a result of a simple misunderstanding. As to the question of prejudice, since the tone was not in dispute, and the appellant was not relying on the passing rent in support of the proposal, the omission was simply irrelevant and had caused no prejudice at all. The VO had eventually agreed a revised rateable value, at more than 10% below the value in the compiled list, without the need to consider the passing rent.

45. On behalf of the VO Miss Lean was less inclined in oral argument than in her written material to support the VTE's view that the defect in the proposal was sufficiently serious to render it a nullity. She acknowledged that it may go too far to regard any proposal which omitted information about a passing rent, where it was available, as so fundamentally flawed that it could not in any circumstances be treated as valid. Where premises were held on a long lease at a ground rent, for example, the occupier would be an "owner/occupier" but the rent would have no relevance to the statutory valuation and its omission from a proposal would be difficult to regard as fundamental. Miss Lean submitted that the omission to specify the passing rent in this case fell within the second category of errors identified by the President of the VTE in *Imperial Tobacco*. It was therefore necessary to consider whether there had been substantial compliance with the statutory requirement and whether prejudice had been caused to the VO.

46. Miss Lean invited the Tribunal to reject the appellant's submission that the issue of substantial compliance should focus on the extent of compliance with regulation 6 as a whole and suggested instead that the question should be addressed to the specific piece of information which had been omitted or mis-stated. She referred to material produced by the Office of the Deputy Prime Minister cited at paragraph 24 of *Kendrick* which explained the policy behind the requirement that the passing rent be specified. Regulation 6 had been drafted with a view to the provision of specific pieces of information of value to VOs generally in assessing rateable values for all of premises of comparable value, and it was not possible to regard a proposal which entirely omitted that important information as substantially complying with the requirement that it should be stated.

47. Miss Lean also suggested that the issue of prejudice should be assessed at a systemic level rather than with regard to the facts of any particular case. Information about rental values was of fundamental importance to valuation officers in undertaking their statutory function and its omission deprived them of information which might be significant in the instant case or in other cases. If VOs were not able to accept information in proposals at face value without undertaking time consuming investigations of their own their ability to maintain an accurate list would be prejudice. That prejudice could only be avoided by taking a strict approach to compliance, whether or not the information omitted or mis-stated would have made a difference in the particular case.

48. At the conclusion of the hearing we gave the parties the opportunity to make further written submissions on the issues left open by the Tribunal in *Kendrick*, namely, whether it was open to the appellant to challenge the legality of the VO's decision to issue an invalidity notice (or to challenge the validity of a proposal at a later stage) on public law grounds before the

VTE or the Tribunal, or whether a challenge of that type could only be raised by applying to the High Court for judicial review .

49. On behalf of the VO Miss Lean submitted the Tribunal's role in considering an alleged invalidity is limited to considering whether the VO's case that the proposal is invalid is made out, or whether the VO has waived or is otherwise prevented from asserting invalidity. She submitted that the Tribunal's role does not extend to deciding whether the VO has otherwise acted lawfully in contending that the proposal was not valid, or maintaining an objection to its validity. A consideration of whether a VO has acted irrationally or made some other public law error in maintaining an objection to the validity of a proposal is separate from the first question which has to be considered by the Tribunal under the statutory scheme, namely whether it is seized of a valid proposal. Miss Lean submitted that any such alleged public law issue should be a matter for judicial review in the High Court. The VTE is not a superior court of record, and the Upper Tribunal's jurisdiction to entertain judicial review proceedings is limited by section 18, Tribunals, Courts and Enforcement Act 2007 to cases which fall within a class specified in a direction given in accordance with Part I of Schedule 2 to the Constitutional Reform Act 2005; no such direction has been made in respect of applications falling within the jurisdiction of the VTE or the Lands Chamber.

50. On behalf of the appellant Mrs Wise made limited submissions confirming that the appellant would not pursue an application for judicial review in the High Court and inviting the Tribunal to make a determination on the material before it.

Discussion and determination

51. We are grateful to both representatives for their submissions on the issue identified in *Kendrick* and, without reaching a concluded view, we are sympathetic to those of Miss Lean. Like the Tribunal in *Kendrick* we do not regard it as necessary or desirable that the VTE should consider the legality of a valuation officer's decision to serve a notice of invalidity or take a validity point at a later stage. The VTE must of course consider the substantive issue of invalidity if it is raised, but we emphatically disagree that "in all cases" it must ask itself the additional question posed by the President of the VTE in *Kendrick* "is the VO acting lawfully in asserting invalidity?" In view of the submissions we have received it is not necessary to deal with that issue at any greater length in order to decide this appeal.

52. We do not regard it as of any significance in this case that the VO did not serve a notice of invalidity. The nature of the error in the notice was not apparent on its face, or from information which might readily have been to hand, and the VO was under no duty to investigate whether what the proposer said about his status was correct. This is not a proposal of the type considered by the Tribunal in *Tuplin* at [27] where the fact that the VO did not raise the alleged invalidity of the proposal until a late stage could be taken as a good indication that the proposal was valid.

53. It was common ground in this appeal that the ratepayer need only substantially comply with the requirements of regulation 6 and that not every omission or error will be fatal to its validity. It would be surprising if an excessively strict or rigid approach were required in this context in view of the fact that the making of proposals is intended to contribute to the maintenance of an accurate rating list. As we explained in paragraph 9, section 55 of the 1988 Act, gives power to the Secretary of State to make regulations providing for the alteration of rating lists. Those regulations may make provision as to who (other than a valuation officer) may make a proposal for the alteration of a list "with a view to its being accurately maintained" (s.55(4)(a)). The 2009 Regulations were made under the power conferred by section 55 and in considering whether some failure to comply to the letter with the Regulations is sufficient to invalidate a proposal altogether it is relevant to bear in mind that role of the proposal is to improve the list by enabling it to be made more accurate.

54. It is also common ground that the 2010 list was inaccurate and that the proposal made on behalf of the appellant correctly identified the cause of the inaccuracy, namely, that in applying the zonal approach to valuation the VO had applied too high a factor to part of the space to be valued. The parties also now agree that if the proposal was valid, the rateable value of the appeal property should be altered from £12,000 to £10,250 with effect from 1 April 2010. It is ironic that the VO, who is tasked by section 41(1) of the 1988 Act with maintaining an accurate list, adopted a position before the VTE and in this appeal which, if successful, will result in the list remaining inaccurate.

55. Mrs Wise is obviously correct, in our judgment, when she submits that the question whether a proposal is valid or invalid must be determined in light of the particular proposal and the circumstances in which it was made. That is clear from statements of the highest authority to which we were referred, of which we need mention only two to illustrate the point.

56. In *ex p. Jeyeanthan* Lord Woolf said (at 359C):

> "In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances."

57. In *R v Soneji* the same point was made in a number of places including by Lord Carswell at [67]:

> "What will constitute substantial performance will depend on the facts of each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid."

58. We do not accept the submission by Miss Lean that the proper focus is on whether there has been substantial compliance with the requirement to state the passing rent. In cases such as

this it will always be necessary to identify the requirement which has not been complied with and the extent to which information has not been provided, but once that has been done it is necessary to consider whether that degree of compliance was sufficient in the circumstances to amount to substantial compliance with the procedural requirements as a whole. Were it otherwise a failure to answer a question (as opposed to the provision of an inaccurate answer) would always have fatal consequences, yet in other fields the law does not invariably insist on that level of compliance. For example, in *Newbold v The Coal Authority* [2014] 1 WLR 1288 (a case concerning compliance with the statutory procedure for claiming compensation for mining subsidence) Sir Stanley Burnton said at [70]:

> "Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties."

There will of course be cases where the consequence of omitting a single piece of information is that substantial compliance has not been achieved, but there may be others where the missing information adds little of importance to what has been provided and where the requirements of regulation 6 have been substantially complied with despite its absence.

59. We do not consider that the appellant's description of himself as an "owner/occupier" meant that the proposal failed to comply with the requirements of the 2009 Regulations. A proposal is not required to be made on the form provided by the VO; regulation 6(1) requires only that it be made by notice to the VO and that it contain certain information. Regulation 6(3)(a) does not require the proposer to state whether they occupy the hereditament under a lease or licence; it requires only that "where the proposer is the occupier" the proposal must include "the amount payable each year by the occupier, as at the date of the proposal, in respect of the lease, easement or licence to occupy". The appellant is the occupier, and he was therefore required to state the amount payable by him each year under his lease. His proposal was therefore non-compliant because of the omission of that information, but not because of his description of himself as "owner/occupier".

60. The circumstances in which the proposal was made in this case, and its contents, tend in our judgment to minimise the significance of the passing rent of the Property as a factor of relevance to the maintenance of an accurate list, and therefore to minimise the significance of the appellant's failure to include it in the proposal. We have in mind, first and in particular, that the grounds of the proposal were stated in terms which made it clear that the proposer did not seek to challenge the tone of the list which had come to be established in the locality. The appellant's concern was that there had been an error in applying that tone to his premises because the conventional approach to zoning had not been adopted.

61. It is also material that the appellant's proposal was made at the end of the period of the 2010 list. At the beginning of a list accurate rental information is likely to be of considerable value to the VO, especially if only limited details have been obtained through forms of return issued to ratepayers. In the expiring days of a list such information is of much less

significance, especially if it concerns a rent agreed long after the antecedent valuation date for the list. Not only will the tone of the list be firmly established, but the details of a rent agreed in 2013 will be of little or no significance to a valuation to be conducted by reference to values in 2008. The VO was not deprived in this case of valuable information.

62. Additionally, there is no suggestion in this case that the VO was in fact misled, or might have taken a different approach to the proposal if a correct statement of the rent had been supplied. For the reasons already given the rent actually agreed for a single restaurant, five years after the valuation date, was not liable to influence the VO's view of the appropriate rateable value. Moreover, the appellant did not provide an incorrect figure, he provided no figure at all. At a different stage of the life of the list that omission might have been fatal, but in the circumstances of this proposal, coming when and where it did, the omission of any rental information was immaterial.

63. As for prejudice to the VO, Miss Lean did not suggest that any had been caused to the VO in the circumstances of this case looked at in isolation. At this stage of the list at least, we consider that that is the correct perspective. We do not accept Miss Lean's submission that the VO is prejudiced generally by the provision of incorrect information in the manner summarised by the Tribunal in *Kendrick* at paragraph 25. In this case the VO was not being asked to rely on incorrect information capable of justifying a reduction in rateable value; nor was the VO put to additional work in undertaking research to verify information incorrectly provided or omitted, since the missing information was not material to the grounds of the proposal; finally, because of the timing of the proposal, on the last day for making alterations to the 2010 list, and the nature of the omission, there was no risk that other ratepayers might be misled by inaccurate information into making further proposals.

64. Our conclusion therefore is that the proposal was substantially compliant with the requirement of regulation 6, notwithstanding its failure to state the rent. The proposal was therefore valid, rather than invalid, and the appeal will be allowed.

Martin Rodger QC
Deputy Chamber President

P D McCrea FRICS

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17 December 2018