

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2018] UKUT 366 (LC)
UTLC Case Number: RA/88/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Hereditament – occupation - Coach Park provided by Council – whether situated on highway maintainable at public expense – whether Council in rateable occupation of the Coach Park – Held – Coach Park was situated on highway – Council not in rateable occupation – Entry to be removed from Rating list. Appeal allowed.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE
VALUATION TRIBUNAL FOR ENGLAND MADE ON 31 OCTOBER 2017

BETWEEN:

MILTON KEYNES COUNCIL

Appellant

and

MRS JANET ALEXANDER
(VALUATION OFFICER)

Respondent

Re: CMK Coach Park, Marlborough Gate, Milton Keynes MK9 3ZN

Before: His Honour John Behrens

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

on
30 October 2018

Luke Wilcox (instructed by Legal Services, Milton Keynes Council) for the Appellant.
The Valuation Officer took no part in the Appeal.

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The following cases are referred to in this decision:

John Laing and Son Ltd v Kingswood Assessment Committee and Others, [1949] KC 344

Dorset C C v Reeves (the Wareham decision) VTE decision 23 December 2014

Lambeth Overseers v London CC[1897] AC 62

Hare v Putney Overseers (1881) 7 QBD 223

Kingston-Upon- Hull Corp v Clayton (VO) [1963] AC 28

DECISION

Introduction

1. This is an appeal by Milton Keynes Council ("the Council") against the decision of the Valuation Tribunal for England ("the VTE") of 31 October 2017 dismissing its appeal against the Valuation Officer's ("the VO") decision to enter property known as CMK Coach Park, Marlborough Gate, Central Milton Keynes, Milton Keynes MK9 3NZ ("the Property") in the 2010 Rating List with effect from 1 April 2010.

2. The sole issue before the VTE was whether the Property should be shown in the Rating List as a hereditament. The Council contended that the Property is highway land used for highway purposes and, as such, is not capable of being a hereditament. In those circumstances it should not be included in the 2010 rating list. It submitted that the case was indistinguishable from a decision of the Vice President of the VTE Martin Young dated 23 December 2014 in relation to a car park in Wareham Dorset ("the Wareham decision").

3. In its decision the VTE rejected the Council's arguments.

1. It held that the facts of this case were distinguishable from those in the Wareham decision.

2. In particular, the Property is situated away from the main highway. There is a clear demarcation between the main highway and the appeal site. A grass border with miniature wooden pillars provides an effective barrier between the main thoroughfare and the appeal site. Although the local authority highways department may maintain the land, the coach park is not situated on a highway. The signage on display at the entrance makes it clear that only buses and coaches can access the coach park. [paras 33 and 34].

3. The four tests of rateability had been met. The hereditament in question was the 18 marked coach bays which were clearly in the rateable occupation of the Council and not the general public at large.

4. Mr Wilcox, on behalf of the Council submitted that the decision is wrong on the law, wrong on the facts and internally inconsistent. He has submitted a detailed Statement of Case setting out the law and facts in considerable detail. The Statement of Case is supported by the evidence of Luciana Smart, the Council's Highway Schemes and Adoptions Manager. The VO has taken no part in the appeal. In those circumstances Mr Wilcox provided a relatively short skeleton argument which in effect adopted the submissions in the Statement of Case. At the hearing he took me through the relevant law and facts. I am grateful to him for the care and clarity with which he has presented the Appeal.

Factual Background

5. The Property is in central Milton Keynes, at the junction of Marlborough Gate and Midsummer Boulevard. On the material day (1 April 2010) the primary entrance to the Property was from Marlborough Gate although there was a secondary entrance to the Property located on Midsummer Boulevard. Signage was present at the Marlborough Gate entrance,

which described the Property as a "Coach Park". The Property comprises 18 marked parking bays, laid out and sized for use by coaches and buses. The parking spaces were provided free of charge.

6. Since the material day there have been a number of developments. At some point bollards were placed across the Midsummer Boulevard entrance to the Property. The effect of those bollards was to prevent car-sized or larger vehicles from using Midsummer Boulevard to enter or exit the Property. The bollards had no effect on the use of that entrance by bicycles or pedestrians.

7. Since 19 December 2016, the Property has been subject to the Council of the Borough of Milton Keynes (Central Milton Keynes) (Prohibition of Entry) Order 2016 ("the 2016 TRO"), which prohibited vehicular use of the Midsummer Boulevard entrance to the Property. The 2016 TRO had no impact on the use of that entrance by either bicycles or pedestrians. In that sense, the 2016 TRO replicated legally what the bollards achieved physically.

8. Since April 2017, the Property has been subject to parking charges on a pay and display basis.

9. On 24 March 2016 the VO entered the Property in the 2010 Rating List, with a description of "car park and premises" and a Rateable Value ("RV") of £75,000 with effect from 1 April 2010. On 21 July 2016 the Council made a proposal seeking the deletion of the Property from the List with effect from 1 April 2010.

10. The VO has since accepted that, if (contrary to the Council's position) the Property should be in the List, its RV is too high. The VO has therefore reduced the RV of the Property to £21,500 by unilateral notice with effect from 1 April 2015.

Was the Property a Highway maintainable at public expense?

11. The matters in support of the Property being a highway maintainable at public expense are helpfully collated in the evidence of Ms Smart.

1. Milton Keynes is a New Town created by the North Buckinghamshire (Milton Keynes) New Town (Designation Order) 1965. Construction of infrastructure carriageways was undertaken under an agreement dated 1976. Development of the central shopping area in Milton Keynes and the construction and adoption of parking areas was carried out pursuant to an agreement between Milton Keynes Development Corporation ("MKDC") and Buckinghamshire County Council ("BCC") dated 29 March 1985. Mr Wilcox referred me to a number of parts of the agreement.

1) Recitals (1) and (6) which clearly indicate an intention that the car park circulation roads should become highways maintainable at public expense.

2) Clause 3 which required the Engineer to issue a certificate of completion of the works and thereafter required BCC to adopt them as highways maintainable at public expense.

Under the proviso to Clause 3 MKDC were required to provide the Engineer 3 copies of a plan indicating the layout of the roads as at the date of the certificate.

3) Clause 5 which declared that as from the date of the certificate the roads would remain for ever open to the use of the public for all purposes.

2. Ms Smart has exhibited a copy of a drawing (CMK/5102) drawn up in May 1985 of roads adopted as highways on 1 April 1985 for the Central Milton Keynes central area. This includes highways round the shopping centre including Malborough Gate, Midsummer Boulevard and clearly shows the Property as an adopted highway.

3. The Council is required under s 36(6) Highways Act 1980 to keep an up to date list of highways maintainable at public expense. Ms Smart has exhibited a plan for the Malborough Gate area (post code MK9 3NZ). This plan clearly shows the Property coloured blue signifying it as part of the highway.

4. A number of Traffic Regulation Orders have been made under s 45 of the Road Traffic Act 1984 which affect the Property. These include orders in 2002 (which limits parking on the Property), in 2016 (which related to the No Entry signs) and in 2017 (which permitted parking charges to be paid electronically). TRO's made under s 45 can only be made in respect of adopted highways. Whilst it is possible (under s 44 of the Road Traffic Act 1984) to make TRO's in respect of unadopted highways none of these orders have been made under that section.

12. The 1985 Agreement and the drawing CMK/5102 are more than enough evidence to satisfy me that the Property is part of the highway adopted by BCC on 1 April 1985. Whilst there is nothing in s 36 of the Highways Act 1980 which provides that inclusion in the list of highways is deemed to be conclusive evidence of the existence of a highway, I agree with Mr Wilcox that inclusion is evidence of what was believed at the time. A not dissimilar point can be made about the TRO's. Plainly the Council believed and believes that the Property is part of the adopted highway. In my view that belief is well founded.

Use of the Highway.

13. Mr Wilcox submitted that the use of the Property as an on-street area for coaches and buses was "a highway purpose". In order to show me the characteristics of a highway he referred me to a passage from the Encyclopaedia of Highway Law:

- 1) A highway must be open to the public at large-rather than a way open only to the owners, occupiers and lawful visitors of particular properties.
- 2) The public must have the right to use the highway-as distinct from using it under licence or permission, express or implied.
- 3) The nature of the public right to use a highway is primarily one of passage.
- 4) There must be a known and identifiable route over which the right of passage is exercisable by the public.

14. If a highway is maintainable at public expense, then its ownership is vested in the local highway authority. However, a highway authority is subject to a number of special constraints. Its ownership of the highway is there for a specific purpose-to facilitate the safe and unobstructed use of the highway by the public. It is a creature of statute and its responsibilities in relation to the highway are governed by statutory restrictions and impositions-mainly related to the authority's duties owed to highway users.

15. Traffic authorities have power to make Traffic Regulation Orders for the purposes specified in s 1 and 2 of the Road Traffic Act 1984. Under s 35 of the Act the Council is empowered to specify, *inter alia*, the class of vehicles which can use parking spaces. In this case it restricted parking at the Property to buses. Under s 45 a traffic authority may by order designate parking places on highways for any class of vehicles and the authority may make charges for vehicles left in a parking place so designated.

16. Mr Wilcox referred me to the 2002 TRO. Art 10 and Sch 4 clearly identify the Property as the relevant land (by reference to a plan referred to as "BP1"). Under Art 10(1) and (3) there is specific authority for the parking of buses on the Property. Under Art 10(2) no other type of vehicle was entitled to park on the Property.

17. Thus, he submitted that the effect of the order was to take away the right to park on the Property for all vehicles except buses. He pointed out that it did not affect the right of the public to pass and repass over the Property (unless obstructed by a parked bus) either as pedestrians bicyclists or car drivers. Accordingly, he submitted that the use of the Property was plainly a highway use. He distinguished the case from situations where parts of the highway are, for example, used as a Market under express authority or for a telephone appliance. Such uses would not be highway uses.

18. I agree with Mr Wilcox that the Property was being used as a highway. I agree with his analysis of the TRO. The parking of buses on designated parts of the highway is plainly within the objectives at which a TRO could be aimed.

Rating of car parks on the highway.

19. The four necessary ingredients of rateable occupation as approved by the Court of Appeal in *John Laing and Son Ltd v Kingswood Assessment Committee and Others*, [1949] KC 344 per Tucker LJ at 350 are:

“First, there must be actual occupation; secondly, it must be exclusive for the particular purposes of the possessor; thirdly, the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period.”

20. In paras 19 and 20 of the Statement of Case Mr Wilcox referred to 3 cases where this area of law has been considered:

19 The public highway has long been recognised as a classic example of land which is incapable of rateable occupation (so that public highways are not entered into the Rating List). The principle was stated by the House of Lords in *Lambeth Overseers v London CC* [1897] AC 625 (in respect of a public park) as follows (per Lord Halsbury LC):

"The main question, and, indeed, as it appears to me, the only question, is whether it is now rateable at all, and I am of opinion that it is not. I do not think there is here a rateable occupation by anybody. The "public" is not a rateable occupier; and I think that one sentence disposes of the case."

20 Lord Halsbury derived that statement of principle from *Hare v Putney Overseers* (1881) 7 QBD 223, in which the Court of Appeal held that a road over a bridge and open to the public in a manner analogous to a highway was not rateable. See also *Kingston-Upon-Hull Corp v Clayton (VO)* [1963] AC 28, where those two cases were interpreted by the House of Lords as arising on the basis that in each case the fact of perpetual dedication to the public meant that the land could not be used for any profitable purpose, and so was not capable of beneficial occupation.

21. In the Wareham decision the Vice President of the VTE had to consider whether the provision of parking places by a local authority on a public highway for which a charge was levied amounted to rateable occupation. He held it did not. It was argued that it did because it went beyond the provision of a highway. The Vice President rejected the argument in para 26 of the decision:

I do not accept that submission. The reality, both in fact and in law, is that the Appellant is not occupying the land as a car park. Rather, it is regulating the flow of traffic and parking on the highway in accordance with its statutory powers and duties as highway authority. Subject to that regulation, by the Order and by its powers of temporary closure, the Appellant has no power to exclude the public from the appeal land. As it is a highway, the public are free to pass and repass over it and use it for lawful parking. It must be maintained by the Appellant for that purpose. This distinguishes the appeal land from an off-street car park on land which is not a highway.

22. The Vice President went on to consider in para 27 the question of beneficial occupation:

If I am wrong about that and the Appellant is in actual occupation and exclusive possession of the appeal land for the purpose of usage as a car park then, in my judgment, such possession is not of value or benefit to the Appellant for the purposes of being liable to rating, as submitted by the Appellant on the basis of the decisions in the cases about public parks.

23. After referring to judicial review decisions relating to the effect of s 55 of the Road Traffic Act 1984 the Vice President said (at para 30):

I accept, as submitted by the Respondent, that there need not be profitable occupation for there to be beneficial occupation for the purposes of rating of land. I also accept that, because of the charges for parking (at least to the extent of access by those members of the

public who wish to park), this case may distinguished from the parks cases relied on by the Appellant, now the subject of specific exemption under paragraph 15 of Schedule 5 of the Local Government Finance Act 1988 where a local authority occupier allows the public free and unrestricted access to parks. However, the constraint placed on a highway authority imposed by the charging regime under section 55 of the 1984 Act leads me to conclude that such occupation as may be found, contrary to my decision, cannot be beneficial for the purposes of rating.

24. In my view the Council were not in rateable occupation of the Property. It has to be remembered that at the material day there were no parking charges in respect of the Property. Thus, the three decisions cited by Mr Wilcox in paras 19 and 20 of the Statement of Case are directly in point. I also agree with the Vice President's analysis in para 26 of his decision. It is, in my view, not necessary for me to consider what the position would have been if there had been parking charges or the extent to which I agree with the Vice President's view in para 30 of his decision. As the VO has taken no part in the Appeal and I have not heard any contrary argument I prefer not to do so.

25. In the result the appeal will be allowed, and I shall direct that the Property be removed from the Rating list with effect from 1 April 2010.

John Behrens

Judge John Behrens
9 November 2018