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CO/4224/2015

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 28 January 2016

Before:

MR JUSTICE MITTING

Between:
JOSEPHINE COLL (LISTING OFFICER)
Claimant

v

DR KEITH WALTERS
MRS P WALTERS
Defendants

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(Official Shorthand Writers to the Court)

Mr C Ormondroyd(instructed by HMRC Solicitors) appeared on behalf of the Claimant
The Defendants appeared in person

JUDGMENT
(As approved by the Court)

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MR JUSTICE MITTING: By a conveyance dated 8 April 1971, the Goodwood Estate Company Ltd conveyed the freehold property known as "The Hollies", Westerton, to a Mr and Mrs Phillips. Then and now, "The Hollies" was a two bedroom house and garden backing on to the Goodwood Estate. Within the curtilage of the house was an outbuilding, since converted into a two bedroom annex to the main house. The annex is physically capable of being occupied as a dwelling separate from the main house, but services, electricity and water, are supplied in a manner common to both; the electricity is not separately metered, both are heated by oil from a tank situated within the grounds. The conveyance contained a

restrictive covenant for the benefit of the Goodwood Estate "not to use or permit the use of the said property except for a single private residence in one occupation only".

On 29 May 2014 the property, by now registered, was transferred to Dr and Mrs Walters. The transfer was subject to the restrictive covenant in the conveyance of April 1971. Until the transfer, the main house and the annex were entered in the council tax valuation list as a single dwelling house in Band G. On 18 August 2014, the valuation officer notified Dr and Mrs Walters of an alteration to the entry in the valuation list to show the main house and annex as separate dwellings in Bands F and C respectively, with effect from 29 May 2014.

Dr and Mrs Walters exercised their right to seek a review of the decision, but the decision was maintained on 18 December 2014. They then exercised their right of appeal to a Valuation Tribunal for England. For present purposes, it is accepted that the annex should be entered on the list as a single dwelling separate from the main house. Their contention before the Valuation Tribunal was that because of a number of factors of which the restrictive covenant was part, it should be treated as having a value that fell within Band A and not Band C as entered in the list. The Valuation Tribunal by their decision of 7 August 2015 agreed with their submission and ordered the Listing Officer to alter the list to show Band A for the annex.

The heart of the panel's reasoning was contained in paragraphs 16 and 17 of its written decision:

"16. The panel noted that there was not a planning restriction on the appeal dwelling stating that the appeal dwelling could not be sold separately from a main house. In this instance the appeal dwelling had a restrictive covenant which stated, 'Not to use or permit the use of the said property except for a single private property in one location only'. This is similar wording when there is a planning restriction. When there is a planning restriction it is assumed that an annex has minimal value and therefore those properties are normally placed in Band A.

17. The panel, aware that the appeal dwelling could not be sold separately from The Hollies and that it shared its utilities with The Hollies, considered that the appeal dwelling should also have a nominal value which would place the dwelling into Band A."

Mr Ormondroyd, who appears for the Listing Officer in this appeal, does not accept the reasoning that a property subject to a planning restriction of that kind should be treated as having only a nominal value, but that forms no part of his grounds of appeal. The grounds of appeal are simply that the panel was wrong in law to hold that the restrictive covenant was capable of affecting the valuation of The Hollies and the annex for the purpose of council tax listing.

Since 1992, dwellings listed for the purpose of council tax must be valued in accordance with the scheme set out in Regulation 6 of The Council Tax (Situation and Valuation of Dwellings) Regulations 1992 (SI number 550). It has been amended since, but the parts with which I am concerned have not been amended. Regulation 6(1) provides:

"Subject to regulation 7 [which is not material], for the purposes of valuations under section 21 (valuations for purposes of lists) of the Act, the value of any dwelling shall be taken to be the amount which on certain assumptions (mentioned in paragraphs (2) and (3) below), the dwelling might reasonably have been expected to realise if it had been sold in the open market by a willing vendor on 1 April 1991."

The basic valuation technique is therefore the market value of the dwelling as at 1 April 1991. However, there are statutory assumptions set out in paragraphs (2) and (3). For present purposes, I am only concerned with three of the assumptions in subparagraph (2):

"The assumptions are:

- (a) that the sale was with vacant possession;
- (b) that the interest sold was the freehold, or in the case of a flat, a lease for 99 years at a nominal rent;
- (c) that the dwelling was sold free from any rent charge or other incumbrance."

No issue arises about the first assumption, or about the second. All sides accept that the approach to valuation should be on the basis that the sale was with vacant possession and was of the freehold.

Mr Ormondroyd for the Listing Officer submits that before the third assumption in paragraph (2)(c) is to be considered, a general principle derived from non-domestic rating law must first be taken into account. The principle is to be found in *Dawkins v Ash Brothers & Heaton Ltd* [1969] 2 AC 366 in the speech of Lord Pearce at 381G to 382E. The issue in that case was whether or not the likely demolition of the hereditament under the exercise of statutory powers by the Local Authority, and the adverse effect which that would have on the annual letting value of the hereditament, could properly be taken into account. The valuation officer, Mr Dawkins, contended that it could not be. The respondents, Ash Brothers & Heaton Ltd, contended that it could be and should be. Lord Pearce posed the question in this way at 381G:

"My Lords, the question here is whether reduction in value due to an impending demolition order comes within area where realities are acknowledged or within that where necessarily fiction prevails over fact. It is near the borderline which separates those areas. One has a natural inclination to prefer reality to fiction if and where this is compatible with the basis of rating, with the statute, and with the cases.

Rating seeks a standard by which every hereditament in this country can be measured in relation to every other hereditament. It is not seeking to establish the true value of any particular hereditament, but rather its value in comparison with the respective values of the rest ..."

He then explained why the annual letting value is an appropriate standard and how that cannot be applied to certain categories of hereditament, for example sewage works or portions of railway lines.

"So one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some estimate of what value should be attributed to a hereditament on the universal standard, namely a letting 'from year to year'. But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded insofar as they are accidental to the letting of a hereditament. They are acknowledged insofar as they are essential to the hereditament itself." (382B)

He gave as an example the fact that a house by the sea may lead people to pay more for it. He then discounted from the valuation exercise the fact that an individual owner might have shrewdly been able to negotiate a high rent from an individual tenant.

Turning to the facts of the case, he observed:

"In the same way I think it would be accidental to the hereditament that its owner intended to pull it down in the near future. For the hereditament might have had a different owner who would not pull it down. So the actual owner's intentions are thus immaterial since it is the hypothetical owner who is being considered. But when a demolition order is made by a superior power on a hereditament within its jurisdiction different considerations apply. The order becomes an essential characteristic of the hereditament, regardless of who may be its owner or what its owner might intend ..."

Mr Ormondroyd contends that those observations apply on the facts of this case and do so in a particular way. He concedes that if, as a result of the exercise of state power, for example by the imposition of a planning restriction, occupation of The Hollies and the annex was restricted to one dwelling in single occupation only, then that would be a relevant factor in the valuation exercise, but he submits that ordinarily an obligation imposed in favour of a private individual does not have a similar effect. He qualifies that, however, by conceding that where an obligation or right exists, the exercise of which is necessary to a private owner other than the owner of the hereditament in question, then that too would fall within Lord Pearce's principle.

For my part, I cannot see that there is a principled basis upon which that distinction can be made. What Lord Pearce was referring to was the exercise of a superior power, by whomsoever that power may have been exercised. What he had in mind, I think, was that it was the exercise of a power which the person subject to it could do nothing unilaterally to remove. Thus the removal of a planning obligation would require the consent of the local planning authority, or perhaps on appeal, the Secretary of State; in my judgment, so too in the case of a covenant of this nature imposed by an adjoining landowner. It would require that landowner to be persuaded by the owner of the hereditament for the restriction which must in practice affect the value of the hereditament to be removed.

The question which must ultimately be answered is that posed by Lord Pearce in his introductory paragraph: is this within an area of "fiction" "where realities are acknowledged or within that where necessarily fiction prevails over fact"? The reality of the situation, on the facts which I have recited, is that the Goodwood Estate will enforce its covenant to preserve the amenity of the estate. That must affect the value of The Hollies and the annex, whether sold separately or together. Unless, therefore, the statutory scheme contained in the 1992 regulations requires otherwise, there is no need to substitute fiction for reality.

Mr Ormrod submits that the statutory scheme does have that consequence, because of the wording of Regulation 6(2)(c), "that the dwelling was sold free from any rent charge or other encumbrance". A rent charge is defined in section 1 of the Rentcharge Act as:

" ... any annual or other periodic sum charged on or issuing out of land, except --
(a) rent reserved by a lease or tenancy; or
(b) any sum payable by way of interest."

Plainly that saving has no relevance on the facts of this case.

Mr Ormrod submits that "other encumbrance", however, does. As Lord Cranworth Lord Chancellor observed in *Evans v Evans* [1853] 22 LJ Ch 785 at 790:

"The word 'incumbrance' has no strictly technical meaning."

However, as far as I can tell in the 19th century cases, it was treated as meaning something akin to a claim, lien or liability attached to property. In Stroud's *Judicial Dictionary of Words and Phrases* Eighth Edition, Volume 2, page 1423, precisely that definition is first cited. It comes from observations of Romer J in *Jones v Barnett* [1899] 1 Ch 620. The common law understanding of "incumbrance" is reflected in section 205(1)(vii) of the Law of Property Act 1995, which defines incumbrance as including:

"... a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum."

It would have been straightforward for the draftsman, if he had intended that a restrictive covenant of this kind should be included in the matters to which no regard was to be paid in the valuation exercise, to have provided that the assumption should include "or any other restriction on the use of the dwelling imposed by a covenant", or words to that effect. The fact that he has deliberately chosen a word which initiates most significant statutory definition in the 1925 Act, and in the old authorities, refers to "a claim, lien or liability attached to property", suggests that he had in mind something of that nature rather than restrictive covenants of this kind.

Accordingly, I do not accept Mr Ormondroyd's submission that the statutory scheme requires the substitution of fiction for reality. Any buyer of The Hollies and the annex, or of either of them, would buy subject to the covenant in favour of the Goodwood Estate, and any valuer of The Hollies and the annex would have to take into account the fact or probability that the covenant would be enforced by the state. The panel were, in my judgment, right to take the covenant into account, and having done so, in the light of the concession made about other reasoning by Mr Ormondroyd, were entitled to come to the conclusion that they did that the annex should be entered in the list as Band A. This appeal must therefore be dismissed.

Before I leave it entirely, however, I should make an observation about a concession made in a non-domestic rating case, *Williams v Scottish & Newcastle Retail Ltd and Allied Domecq Retailing Ltd* [2001] EWCA Civ 185, noted at paragraph 23 of the judgment:

"It is common ground between the parties that the statutory hypothesis, as explained in case law, takes account of statutory restrictions on the use of a hereditament but not of restrictions imposed by the covenants in a lease or by restrictive covenants affecting freehold property."

That was not, as Mr Ormondroyd submits, an obiter dictum of the court, it was simply the court noting a concession that was common ground between the parties. The concession was made in a different context from section 21 of the Local Government Finance Act 1992, and Regulation 6 of The Council Tax (Situation and Valuation of Dwellings) Regulations 1992. The statutory context in *Williams* was paragraph 2(7) of schedule 6 to the 1988 Act.

It is not necessary for me to set out a detailed explanation as to why the context is different. I am simply satisfied that the two statutory schemes are distinct and that the council tax valuation exercise is not identical to that required in the non-domestic rating scheme, not merely because it deals with the capital value of freehold land or a long lease rather than the annual letting value, but also because the statutory approach to valuation is not identical.

The outcome of this case therefore has no consequence for the non-domestic rating scheme, and nothing that I have said should be taken as applicable to it.

MR JUSTICE MITTING: Dr Walters, you have won. Do you have any applications arising out of your successful resistance of this appeal?

THE RESPONDENT: I think what would be important to us, my Lord, is whether your ruling is -- can be appealed or not, inasmuch as we really want an end to the matter as far as we're concerned, and I don't know whether that's something that in my ignorance is --

MR JUSTICE MITTING: It can go to the Court of Appeal, but by a rather restrictive test. Because this is a first appeal, any appeal to the Court of Appeal will be a second appeal and the Court of Appeal only can grant permission for that, and only on the basis that in effect it involves an important point of law of general importance or there is some other compelling reason for the appeal to be permitted. I can't give permission to appeal. I can't speak for the Court of Appeal. But that of course requires first of all that the other side seek permission to appeal. If they don't, then that's an end to the matter.

THE RESPONDENT: Yes. The second matter was in regard to the amount of time and our expenses in defending ourselves against this.

MR JUSTICE MITTING: In this court, you have been a successful respondent to an appeal, and in principle you are entitled to have a modest reimbursement of your costs and expenses and an allowance of your time that you have reasonably spent as a litigant in person.

THE RESPONDENT: Thank you.

MR JUSTICE MITTING: Do I understand you to apply for that?

THE RESPONDENT: Yes, and we understand it would be modest, we're not seeking to --

MR JUSTICE MITTING: It doesn't apply below, either, there's nothing I can do about the costs you have incurred of dealing with the valuation office or in presenting your case to the Tribunal.

THE RESPONDENT: No, I understand, my Lord. Thank you.

MR JUSTICE MITTING: Let me see what Mr Ormondroyd has to say about it.

MR ORMONDROYD: My Lord, just before I get on to that, there were just one or two points for the transcript writer, really. I think once or twice your Lordship referred to articles in the 1992 regulations.

MR JUSTICE MITTING: Oh, should I have said regulations.

Could you correct that then, put "regulation" instead of "article", certainly.

MR ORMONDROYD: Right at the end there was a reference to section 21 of the Local Government Finance Act 1988.

MR JUSTICE MITTING: That's the wrong thing.

MR ORMONDROYD: It's 1992.

MR JUSTICE MITTING: It's 1992, you're quite right, thank you very much for that correction.

Again, could you correct that for me, so when I refer to section 21, it is to the 1992 Local Government Act. The reference to the schedule is still 1988.

MR ORMONDROYD: As to the matter of costs, my Lord, you will have seen set out quite clearly in our grounds of appeal that we weren't intending to seek our costs against Dr and Mrs Walters if they were successful. In my submission there was no need for them in fact to attend today or to make submissions on this appeal, and with all due respect to them, your Lordship on the legal points has not particularly been assisted by what they have had to say, so I do resist the application for costs.

MR JUSTICE MITTING: The fact that you have generously, and in my opinion rightly, disclaimed in advance any costs against them, provided that they behave reasonably, which they did, doesn't mean that they're not entitled to have their costs against you if they win.

MR ORMONDROYD: It doesn't mean they're not entitled to, my Lord, no, it's just given that we'd made that very clear that they need have been in no anxiety about any possible costs liability, they needn't have participated.

MR JUSTICE MITTING: I'm afraid the answer is that they are entitled to have their costs against you on the usual modest litigant in person basis.

MR ORMONDROYD: Yes.

MR JUSTICE MITTING: I will have to direct, I'm afraid, because I don't have a schedule from them, obviously --

MR ORMONDROYD: I don't have a schedule either.

MR JUSTICE MITTING: -- that that must be the subject of a detailed assessment, if not agreed.

MR ORMONDROYD: Yes.

MR JUSTICE MITTING: But may I give Dr Walters a word of advice.

Dr Walters, what you should do now is to set out what costs you claim, and there is provision somewhere in the rules for the amount that you can claim, I think it's something like 9an hour.

THE RESPONDENT: We read it was 18an hour.

MR JUSTICE MITTING: Or 18, I'm completely out of touch with it, I don't know what it is, but you've carefully looked up the law here and I've no doubt you can find out what that is.

THE RESPONDENT: We did put something together, my Lord, so we could submit that if it is appropriate to do so.

MR JUSTICE MITTING: Yes, you may do so. My advice to you is to confine it to that which is strictly necessary, and you know the rates at which you can claim your time, and as far as expenses go, your costs of travelling here and going back, and any photocopying you may have done, those sort of things are recoverable, but not anything extravagant.

THE RESPONDENT: Thank you, my Lord.

MR JUSTICE MITTING: All right. Thank you all of you for your submissions in an interesting little point.