

IN THE HIGH COURTS OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT OFFICE AT CARDIFF
Neutral Citation No: [2019] EWHC 3792 (Admin)

Case No: CO/2320/2019

Courtroom No. 12

2 Park Street
Cardiff
CF10 1ET

Thursday, 17th October 2019

Before:
THE HONOURABLE MR JUSTICE SWIFT

B E T W E E N:

MEDHURST

and

VALE OF GLAMORGAN BILLING AUTHORITY

THE CLAIMANT appeared In Person
MR O JAMES appeared on behalf of the Defendant

JUDGMENT
(Approved)

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MR JUSTICE SWIFT:

1. This is an appeal against a decision of the Valuation Tribunal for Wales, dated 30 May 2019, following a hearing that took place on 16 and 17 April 2019. This appeal is brought pursuant to Regulation 44 of the Valuation Tribunal for Wales Regulations 2010, and is an appeal on a point of law only.
2. The Tribunal decision addresses two issues concerning Karen Medhurst's liability to pay Council Tax, in respect of premises at 3 Greenlawns in Barry, which I will refer to in this judgment as the Property. That liability concerns the period between 6 October 2011 and 1 July 2013. Mrs Medhurst is the Appellant in this appeal.
3. The first issue before the Tribunal was whether the Property was a Class C exempt dwelling during the period 6 October 2011 to 5 April 2012. By section 1 of the Local Government Finance Act 1992, Council Tax is payable in respect of dwellings. Section 3 of the 1992 Act defines, 'dwelling'; there is no dispute, in this case, that the Property was a dwelling. Section 4 of the 1992 Act, states that Council Tax is payable in respect of any dwelling which is not an, 'exempt dwelling'. In turn, 'exempt dwelling' is defined as meaning any dwelling, 'of a class prescribed by an order made by the Secretary of State'.
4. The Secretary of State has made such an order, The Council Tax (Exempt Dwellings) Order 1992. In this case, the Tribunal considered and applied the Class C exemption. The material part of Article 3 of the 1992 order states as follows:

'A dwelling is an exempt dwelling for the purposes of Section 4 of the Act on a particular day, if on that day it falls within one of the following classes... Class C, a vacant dwelling which has been such for a continuous period of less than six months, ending immediately before the day in question'.
5. By Article 2 of the 1992 Order, a dwelling is vacant on any day if, on the day the dwelling is unoccupied and substantially unfurnished. In turn, unoccupied dwelling is defined as meaning a dwelling in which no one lives. Thus, so far as concerns the Class C exemption, the matters for the Tribunal to decide, were whether the Property was substantially unfurnished, and whether anyone lived in it.
6. The appeal before the Tribunal concerned Mrs Medhurst's liability to pay Council Tax. Section 6 of the 1992 Act identifies who is liable to pay Council Tax, by reference to a list at section 6(2), which is applied in order of priority. It was accepted, for the purposes of the tribunal proceedings, and is accepted for the purposes of this appeal, that at the material time, Mrs Medhurst had a freehold interest in the property. By section 6(2)(a) of the 1992 Act, she would be liable to pay Council Tax on the property if she was resident in it. By section 6(5) of the 1992 Act, a person is resident in a dwelling if she is aged 18 or more, and has her sole or main residence in the dwelling. Thus, in the circumstances of the case before the Tribunal, the issue with respect of entitlement to the Class C exemption, other than the substantially unfurnished issue, was whether Mrs Medhurst lived in the property as

her sole or main residence.

7. The second issue before the Tribunal was whether a discount applied to the property. By section 12 of the 1992 Act, the National Assembly of Wales has a power to prescribe that certain classes of dwelling, identified either by reference to their physical characteristics, or on the basis they are unoccupied dwellings, are entitled to a discount. The relevant regulations are the Council Tax (Prescribed Classes of dwellings) (Wales) Regulations 1998, and specifically, regulation 5A which is as follows,

‘The class of dwelling as described in this regulation (Class C), comprises every chargeable dwelling in Wales; (a) which is unoccupied; and (b) which is substantially unfurnished’.

8. The 1998 Regulations define an unoccupied dwelling as a dwelling in which no one lives. The effect of section 11 of the 1992 Act is that the discount applicable was 50%. The matter for the Tribunal to decide in the appeal before it, was whether the Class C discount applied to the Property during the period 6 April 2012 to 1 July 2013. Thus, the Tribunal had to decide: (a) whether during that period the property was substantially unfurnished; and (b) whether anyone lived in the property. As to the latter, the specific matter for the Tribunal to decide was whether Mrs Medhurst lived in the property, there being no suggestion that anybody else did.
9. In my view, in the circumstances of this case, the matters for the Tribunal to decide whether or not during each of the relevant periods, the Property was substantially unfurnished and whether or not Mrs Medhurst lived in the Property as her sole or main residence, were questions of fact, or matters of factual evaluation. On the first, whether the Property was substantially unfurnished, the Tribunal’s conclusion was that for each relevant period, it was substantially unfurnished; see the Tribunal’s decision at paragraphs 9 and 10. There is no appeal against that conclusion. This appeal is directed to the Tribunal’s conclusion on the other issue, whether Mrs Medhurst lived in the Property as her sole or main residence.
10. The material parts of the Tribunal’s decision are paragraph’s 6 – 7 and 11 – 18. The salient points emerging from both paragraphs are as follows. *First*, that Mrs Medhurst’s case was that prior to July 2013 she did not live at the Property at any point, and no one else did either. She contended that because the property was substantially unfurnished, it would not have been possible for anyone to live there. *Second*, the Council advanced circumstantial evidence in terms of records of Mrs Medhurst’s attendance at appointments with a local GP, bank statements, credit card statements, and statements for phone accounts set up in the relevant periods, that indicated that the Property was Mrs Medhurst’s address. The Council also pointed to an earlier decision of the Valuation Tribunal for Wales, which had decided that the Property had, in the relevant period, been Mrs Medhurst’s sole or main residence. *Third*, the fact that the Property was substantially unfurnished in the relevant period was not determinative of whether the Property was unoccupied or Mrs Medhurst’s sole or main residence. *Fourth*, notwithstanding Mrs Medhurst’s denial, there was some evidence in a statement made by Deborah James, that at least at some point in the relevant period, Mrs Medhurst did live in the Property; this directly contradicted Mrs Medhurst’s evidence that she had never lived in the property. *Fifth*, although the circumstantial evidence presented by the Council was not of itself determinative, it did, ‘*at the very least*’ show there were definite periods when Mrs Medhurst was in the Barry area. The evidence also suggested that the Property would have been a, ‘*useful and convenient*’, place for

Mrs Medhurst to stay. *Sixth*, Mrs Medhurst was not, in the Tribunal's assessment, a credible witness; her answers to questions were evasive; her evidence lacked the detail that might reasonably be expected of her in terms of where she said she did live during the relevant periods. The Tribunal described this lack of detail as, '*unsatisfactory and evasive*'. It noted that one would have expected a person to be able give evidence as to where they had lived during a relevant period, and to provide some documentary evidence to support any such contention. The Tribunal's view was that there were, '*too many lacunae*' in her evidence.

11. Overall, the Tribunal concluded, at paragraph 17 of its decision that on balance, Mrs Medhurst probably did live at the Property at least, '*at points during the period with which we are concerned*', and having reached that conclusion, went on to conclude that it accepted as correct, the conclusion reached by the earlier tribunal, that the Property was Mrs Medhurst's sole or main residence during the whole of the two relevant periods. Thus, the Tribunal concluded that the Property was not unoccupied, because Mrs Medhurst had lived in it during each of the relevant periods. The consequence was that the Class C exemption did not apply in the first period, and the Class C discount was not available in the second period; for these reasons the Tribunal dismissed Mrs Medhurst's appeal.
12. Mrs Medhurst has represented herself in this appeal, and has made her case by reference to two detailed, but extremely clear written documents. She pursues a number of grounds of appeal, but I will focus first on a ground that concerns the procedure followed at the Tribunal hearing on 16 and 17 April. It appears that the general sequence of events on those days was this. Mrs Medhurst made her submissions by reference to a written document and a bundle of documentary evidence throughout day one of the appeal and into the beginning of day two. Thereafter, the Council presented its case for the remainder of day two, until shortly before 3.30pm. I should add that when Mrs Medhurst was presenting her evidence, she was questioned by Mr Russell who was presenting the case for the Council, and when Mr Russell presented the Council's case he in turn was questioned by Mrs Medhurst. There is some difference of view for what happened after the Council had concluded its case. In its Grounds of Resistance in this appeal at paragraph 19, the Council states as follows,

‘At the end of the second day the Tribunal had stated that, “The Tribunal has decided not to take any closing submissions, as we have sufficient material, and a thorough understanding of the parties’ respective positions concerning the appeal”’
13. Mrs Medhurst's recollection of what happened is slightly different. She recalls that at the end of the Council's case, the Tribunal said that they would adjourn, and then rose for a short period. When the Tribunal returned, the Tribunal chairman informed her that the Tribunal would not be hearing closing submissions. Mrs Medhurst says that she objected to that course of action, and I should say that there is no dispute between the parties that when it was suggested that there would be no opportunity for closing submissions, Mrs Medhurst did object to that course of action. Returning to Mrs Medhurst's account, she says that there was no substantial reply to her objection, the Tribunal simply left the room, she assumed to leave the building.
14. Mrs Medhurst's submission is that that approach by the Tribunal, not allowing closing submissions from either party, was unfair, and indeed amounts to unfairness that comprises an error of law. I have been referred to the Valuation Tribunal for Wales

Best Practice Protocol 2A, which relates to the conduct of hearings. At paragraph 1, the document says this:

‘The Tribunal/Appeal Panel, must conduct the hearing in such manner as it considers most [inaudible] to the clarification of the issues before it, and generally to the just handling of the proceedings; and must so far as appears to it appropriate, seek to avoid formality in its proceedings’.

15. The document continues under a heading, ‘The Hearing’, at paragraphs 15-19:

’15. The chairman will open the proceedings in accordance with the introductions set out in Appendix 1;

16. The Clerk will introduce each case by referring to the grounds of the appeal;

17. The Tribunal’s normal order of proceedings is as set out in Appendix 2, however the Tribunal may conduct the hearing as it sees fit;

18. The Tribunal will normally reserve its decision, and the chairman will give an indication of the timescale for issue;

19. The Tribunal/Appeal Panel, may decide to inspect the appeal premises and/or its locality (Appendix 3)’

16. Appendix 2 to the Best Practice Protocol, lists the sequence of events, as they should occur, in each hearing before the Tribunal. That sequence ends with an opportunity for the Valuation Officer to summarise his case, and then an opportunity for the appellant to summarise her case. The question for me is not whether here the Tribunal failed to follow this guidance. On the evidence it is undisputed that the Tribunal did not follow this guidance, and it is perhaps notable that regardless of which version of events was what happened on 16 April, the Tribunal does not appear to have provided any substantial reasons for why it did not think it appropriate or necessary to follow the Best Practice Protocol guidance on this occasion. Rather, the question for me is whether what happened amounted to procedural unfairness to the extent of comprising an error of law.

17. My conclusion is that there was unfairness amounting to an error of law. The failure to permit closing submissions was a matter of particular significance, because Mrs Medhurst did not have the opportunity to respond either to the Council’s case, or to make points arising from the evidence of the witness she had questioned or, indeed, her own evidence given in response to questioning in the earlier part of the appeal proceedings. Written cases had not been exchanged prior to the hearing, and therefore, Mrs Medhurst could not be expected to anticipate what the Council’s case would be, and deal with it in her opening remarks. To the extent that any reason was given by the Tribunal for choosing not to have

closing submission, that is to say that it was not necessary because it had sufficient material and a thorough understanding of the parties' respective positions, those reasons are not coherent. Absent hearing closing submissions, it cannot be said that the Tribunal could be confident that it did have a thorough understanding of the parties' final positions following the evidence and submissions that had been made in the course of the hearing.

18. I am not able to reach the conclusion that permitting closing submissions would have served no purpose, or could have made no difference to the outcome of the appeal. Either conclusion would be a speculation too far. The submissions, had they been permitted to be made, would likely to have focussed on conclusions of fact the Tribunal should reach. Such submissions would plainly be capable of being relevant in a case such as the present, where the evaluation of evidence was critical. The opportunity provided by closing submissions, for each party to draw matters together, is a matter of true importance. Further, the importance of a fair procedure, goes beyond simple considerations of the quality of the ultimate decision. The ability of appellants, such as Mrs Medhurst to participate is also important. Mrs Medhurst feels that, given the procedure that was followed, she did not have a fair opportunity to put her case. In this case, given that it is apparent to me that Mrs Medhurst did have points that she wanted to raise, the importance attaching to the value of allowing participants to judicial proceedings fully to participate in them has genuine importance in its own right. This hearing was not, in my view, conducted fairly. That unfairness amounted to an error of law.
19. I will allow this appeal on that ground. The consequence is that the Tribunal decisions on the Class C exemption and the Class C discount, must be set aside, and those matters must be the subject of a re-hearing. Given that conclusion and those consequences, I will make only brief comments on the remaining grounds of appeal.
20. The first was that the Tribunal erred in failing to refer to amendments made to the 1998 Regulations by the Council Tax (Prescribed Classes of Dwellings) (Wales) (Amendment) Regulations 2017 SIC2017/42. I do not consider that this complaint discloses any error of law on the part of the Tribunal. The 2017 Amendment Regulations only amended criteria for the Class B discount; they did not affect the Class C discount. Moreover, the Regulations came into force only on 15 February 2017, and they had prospective effect only. Any alterations made by the Amendment Regulations, would therefore be incapable of affecting the Tribunal's evaluation of the two issues before it, which concerned the period prior to July 2013.
21. Second, Mrs Medhurst relies on errors made by the Council, prior to the Tribunal decision. My view is that those matters, even if they were errors of law on the part of the Council, do not comprise errors of law on the part of the Tribunal that engage my jurisdiction in this appeal. None of the Council's errors were adopted by the Tribunal or, in my view, affected the conclusions that the Tribunal reached.
22. Third, there are a number of grounds, all of which were directed to the Tribunal's evaluation of the evidence. *First*, that the Tribunal ought to have inferred from the conclusion that the property was substantially unfurnished, that it was not plausible to reach a conclusion that Mrs Medhurst lived in the property. Mrs Medhurst relies on guidance provided by the Department of Communities and Local Government, in a letter dated 23 September 2014. That letter refers to its contents as a, 'informal view', that a property

that is not substantially furnished is unlikely to be a property that is capable of occupation. *Second*, that the Tribunal failed to attach proper weight to information given by Mrs Medhurst to the Council in 2012 and 2015, as to whether or not she was living at the Property. *Third*, that the Tribunal failed to attach weight to errors made by the Council in its assessment of the Council Tax payable by Mrs Medhurst, during the period 2010-2015, and the Council's own failure in that period to make enquiries it could have made as to where Mrs Medhurst was living. Mrs Medhurst contrasts this with the Tribunal's reliance in the gaps in her own evidence as to where she lived in those periods, and the inference adverse to her that the Tribunal drew from those gaps. *Fourth*, that the Tribunal was wrong to evaluate Mrs Medhurst's evidence as, 'evasive'. *Fifth*, that the Tribunal wrongly assessed the evidence in the statement of Deborah Jones.

23. These points were clearly and cogently advanced by Mrs Medhurst. Given that the substantive matters are to be remitted for reconsideration, it is best that I say little about these points, save to observe that under the provisions of the 2010 Regulations, it is the Tribunal, not this court, that is the primary evaluator and adjudicator of fact. The weight attaching to competing considerations in the evidence is a matter for the Tribunal. This court can interfere only if conclusions of fact or conclusions of factual assessment are made that are unsupported by evidence; that is a high bar for any appellant to meet.
24. This applies, even in connection with the points made by reference to the DCLG informal view, in its letter of 23 September 2014. The contents of that letter are not statutory guidance. That letter, in those circumstances, is not a statement that affects the proper interpretation or application of either the 1998 Regulations or the 1992 Order.
25. In this context I will also say something more about one further specific matter raised by Mrs Medhurst. She relied on the judgment of the Court of Appeal in *R v D* [2019] EWCA Crim 209, for the proposition that in evaluating the evidence, the Tribunal was not entitled to place any weight at all on gaps in her evidence. In *R v D*, the Court of Appeal criminal division, concluded in the context of an appeal under section 58 of the Criminal Justice Act 2003, and in the context of a prosecution under the Fraud Act 2006, that a Council Tax payer was under no legal duty to notify a Council Tax Authority of her place of residence. That conclusion says nothing as to the exercise required of the Tribunal in this case, a finding of fact as to whether during the relevant periods, Mrs Medhurst lived at the Property; that exercise was a freestanding evidential exercise to be conducted on the basis of evidence that was available, and taking account of any apparent limitations to that evidence. The conclusion of the court in *R v D* seems to me to be immaterial to that exercise.
26. Likewise, the fact that particular evidence is not referred to in a Tribunal's reasons will not, in most instances, permit any inference that evidence has been left out of account by the Tribunal. All I emphasise, in respect of the present case, is that when the matter of the Class C exemption and the Class C discount are considered again by the Tribunal, that must be on the basis of full reconsideration of matters by a differently constituted tribunal, which will form its own view on the evidence that is available.
27. A further ground of appeal advanced by Mrs Medhurst, was a contention that the Tribunal in this case, conflated the criteria for the Class C exemption, and those for the Class C discount and in consequence, applied the wrong test. In support of that submission,

Mrs Medhurst contended that the Tribunal focussed on whether the property was her sole or main residence, rather than whether or not she lived there. I do not consider there was any substance to this point since it is clear from the judgment of the Court of Appeal in *R (Williams) v Horsham District Council* [2004] 1WLR 1137 that a person cannot be resident in a dwelling unless they actually live there.

28. Turning to the remitted hearing, there is one further point I would like to make before I finish this judgment. In respect of the evidence available, Mrs Medhurst informed me that at the Tribunal hearing, the Tribunal pointed out that she could have obtained statements from others, for example members of her family, as to where she was living in the relevant periods. The hearing, as I have already indicated, finished on 17 April, immediately before the Easter weekend. Over that weekend Mrs Medhurst saw and obtained a statement from her father. She sent that statement to the Tribunal on 24 April. On 25 April she received an email from the clerk to the Tribunal, saying that the statement had been received and passed on to the Tribunal. She heard nothing more. It is apparent that the Council heard nothing more about the matter either, although it had been provided with a copy of the statement. The Council was not asked for representations either on whether the statement ought to be admitted, or as to the substance of any matters contained in it. The document itself is not referred to in the Tribunal's decision. There is no indication in that decision whether the Tribunal decided to admit this document as late evidence or not. While I would not categorise that failure as a failure amounting to any error of law, it is clearly unsatisfactory that the Tribunal gave no indication at all as to how it treated the document. It should, at the least, have said something about whether it had decided to admit the document or not. As matters now stand, this document can be considered at the re-hearing of the appeal before the valuation tribunal.
29. I am conscious that I may not specifically have addressed all of the grounds relied on by Mrs Medhurst, however, for the reasons I have already explained, it is not essential for me to do so. This appeal is allowed on the fairness ground. The issues determined by the Tribunal in its decision dated 30 May 2019 must be considered afresh by a differently constituted tribunal.

End of Judgment

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