IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 324 (LC)
Case No: RA/5/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Alteration of rating list – historic flooding – whether risk of future flooding constituted a material change of circumstances – whether affecting the physical state or physical enjoyment of the hereditament – whether affecting the physical state of or physically manifest in the locality – Local Government Finance Act 1988 Sched 6 para 2(7) - appeal allowed

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

BY:

JO MOORE (VALUATION OFFICER) **Appellant**

Re: Motor Depot Ltd
Hessle Dock Site
Livingstone Road
Hessle
East Yorkshire
HU13 0EA

PETER D McCREA FRICS

DECISION ON WRITTEN REPRESENTATIONS

The following cases are referred to in this Decision:

Merlin Entertainments Group Ltd v Cox (VO) [2018] UKUT 0406

DECISION ON A PRELIMINARY ISSUE

Introduction

1. Can the risk of future flooding of a property, some sixteen months after the last flood, constitute a material change in circumstances ("MCC") upon which a valid proposal to alter the property's assessment in the rating list can be made? That is the question in this unopposed appeal by the Valuation Officer, Ms Jo Moore ("the VO") against a decision of the Valuation Tribunal for England ("VTE") dated 11 January 2018.

Background

2. The appeal property is an extensive "car supermarket" at the Hessle Dock site on the banks of the Humber in Hull. It is unnecessary to describe it in any detail save to say that it comprises a 1950's warehouse, refurbished in 2010, on a large site which can accommodate many hundreds of cars. The property was entered into the 2010 non-domestic rating list at a rateable value of £103,000 with an effective date of 1 July 2012.

3. The VO accepts that on 5 December 2013 the appeal property was extensively flooded, resulting in around 800 cars being written off at a loss to the tenant ratepayer of around £2 million. Having been placed within a flood risk Zone 3 area (the most prone to flooding) by the Environment Agency, the property could no longer be insured against flooding. A 25% rent reduction was agreed with the landlord.

4. On 30 March 2015, the ratepayer's agent made a proposal to reduce the rateable value of the appeal property with effect from 6 December 2013 because: "the site was extensively flooded in December 2013, insurance is an issue and the rent was reduced as a result of the flood threat. The RV should be reduced accordingly with effect from 6 December 2013".

5. The proposal was initially accepted as valid by the Valuation Office Agency ("VOA"). However, before the VTE the VOA's representative raised validity as a preliminary issue, submitting that at the material day of 30 March 2015 (being the date of the proposal) there was no flood and no material change of circumstances, and as such the proposal was invalid. The VTE agreed to determine this as a preliminary issue.

The VTE's decision

6. In its decision dated 11 January 2018, the VTE accepted that the appeal property had flooded on 5 December 2013, and that there was a high risk, depending on the weather, of it flooding again. The fact that it was no longer insurable against flooding and that a rent reduction had been agreed clearly demonstrated that the "rental/rateable value" had been affected beyond the immediate inundation. Although at the material day of 30 March 2015 there was no actual flood, there was still the high risk of a flood in existence and the VTE was

satisfied that this constituted a material change in circumstances. Finding the proposal valid, the VTE directed that in the absence of agreement on the substantive issue of rateable value, the appeal should be remitted to it to determine.

The basis of appeal

7. In short, the VO submits that the risk of future flooding is not a valid material change in circumstances.

8. The VO submits that had the flooding caused damage sufficient to render the property incapable of rateable occupation, it would be regarded as having no rateable value. But that is not the case. Where flooding is a periodic occurrence, this would be reflected in the rental evidence available at the antecedent valuation date ("AVD" - 1 April 2008 for the 2010 rating list). If it had not happened for many years, where flooding occurs before the AVD, a perceived higher risk would be reflected in the subsequent rating list at revaluation.

9. Current flooding events are not considered to be a change in the physical state of the locality unless they result in a major physical change, such as bridges or roads being swept away. Under usual circumstances a flood is seen as a transient phenomenon, which recedes or clears up within a few days. While floodwaters are present, they can be seen as the physical manifestation of a marginal risk. Proposals made during the time of the flooding of a locality may be valid, provided the normal timescales are met. In such a case any change in attitude of prospective tenants that would have occurred at AVD due to any heightened expectation of flooding can be taken into account. However, when the flood has ended, any subsequent proposal made in respect of the flood cannot take into account the flooding as it is not then physically manifest on the material day.

10. The appeal was made on 31 March 2015, quoting as an MCC a flood which took place on 6 December 2013. Since there was no actual flood on the material day, any heightened risk of flooding cannot be taken into account, and at that time there was no disrepair visible. The flood of December 2013 had receded, and any physical impact was not evident in the locality on the material day.

11. Accordingly, the VO submitted, there was no MCC and the proposal was therefore invalid.

Legislation

12. The VO is responsible for compiling and thereafter maintaining rating lists for each billing authority area. This appeal concerns the 2010 rating list which was effective from 1 April 2010 to 31 March 2017. Each rating list must contain those "hereditaments" (or properties) qualifying for non-domestic rating, and for the 2010 rating list the VO ascribes a rateable value to each hereditament, based its rental value on certain assumptions at the AVD.

13. The VO's determination of rateable value is open to challenge. Regulation 4 of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 ("the 2009 Regulations") defines the circumstances in which an interested person may make a proposal to alter the rating list. Such a proposal is limited to the grounds set out in Regulation 4(1) which include that "(b) the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled."

14. A material change of circumstances is defined under Regulation 3 of the 2009 Regulations as "a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the Local Government Finance Act 1988." Those matters, which are assumed to be as they are on the material day, include:

> "2(7)(a) matters affecting the physical state or physical enjoyment of the hereditament,
>
> …
>
> 2(7)(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there"

15. As the Tribunal has recently confirmed in *Merlin Entertainments Group Ltd v Cox (VO)* [2018] UKUT 0406 (LC), sub-paragraphs 7(a) and 7(d) are mutually exclusive – the "locality" referred to in (d) is an area external to the hereditament, and does not include it.

16. The material day is defined in the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 and as I indicate above in this appeal the material day is 31 March 2015, the day on which the proposal was served on the VO (Regulation 3(7)(b)(i)).

Discussion

17. I can deal with this appeal relatively briefly. In *Merlin* the Tribunal provided guidance on how it should be determined whether something falls within para. 2(7), at [193]:

> "In most cases it is relatively straightforward to identify whether something falls within para. 2(7) of [the 1988 Act], either when a list is compiled or subsequently when a material change of circumstances occurs. Where the issue is not straightforward, it may be helpful to consider issues in the order set out below, whether dealing with circumstances as at the compilation of the list or subsequently during the lifetime of that list:-
>
> (i) Does the matter concern an intrinsic characteristic of the hereditament or of the locality, or is it an extraneous matter, for example, something to do with the personal attributes of the actual occupier or the way in which a party conducts its business? If the latter, then generally it will not fall within para. 2(7);

(ii) Does the matter concern a characteristic of the hereditament? If so the issue is whether it falls within para. 2(7)(a) or (b) (or either (c) or (cc) in the case of minerals or waste deposit hereditaments);

(iii) If the matter does not concern a characteristic of the hereditament, does it concern a characteristic of the locality in which the hereditament is situated? If so, does it fall within para. 2(7)(d) or (e)?

(iv) If the matter concerns a characteristic of the locality, but does not affect the physical state of the locality or concern the use or occupation of other premises there, does it nonetheless fall within the second limb of para. 2(7)(d)? Under that limb the question is whether the matter is *itself* physically manifest in the locality."

18. The VTE relied on several matters. Those that concerned the hereditament itself and so might fall within sub paragraph 2(7)(a) were the rent reduction and that the fact that the hereditament was uninsurable against flooding. Secondly, the allocation of the appeal property (and, one assumes, the locality) within flood zone 3, which might fall within sub paragraph 2(7)(d).

19. Taking those in turn, the rent reduction is not something which is physically manifest. Levels of rent are considered as part of the VO's quinquennial revaluations, and changes in levels of rent, whether by a voluntarily agreed reduction, a new letting, rent review or lease renewal, do not give rise to a material change in circumstances. If they did the rating system would be awash with MCC-based proposals. Neither is an insurer's commercial decision to decline insurance cover for flooding. It might be different (although I am not required to decide the point) if for instance insurance requirements dictated that the appeal property was required to be sandbagged in a way which restricted access, but that is not the case. Accordingly, as far as the requirements of sub-paragraph 2(7)(a) are concerned, at the material day there was no material change in circumstances on which a valid proposal could be founded.

20. Secondly, there is no evidence that the effect of the allocation in flood zone 3 physically affected the state of the locality, nor was itself physically manifest at the material day. There must be some physical effect which has to be observable on the ground.

21. It follows that the VTE was wrong to determine that a heightened risk of flood constituted a material change in circumstance, and the appeal must be allowed. I therefore find the proposal invalid.

Dated: 19 December 2018

P D McCrea FRICS