IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 452 (LC)
Case No: RA/29/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING - valuation – 2010 rating list - material change in circumstances – Touchwood shopping centre, Solihull – opening of new "Resorts World" centre six miles away – whether any effect on rental values - appeal dismissed

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

BETWEEN:

FABULOUS COLLECTIONS LTD **Appellant**

- and -

MIKE SMITH (VALUATION OFFICER) **Respondent**

Re: 3 Poplar Arcade,
Touchwood
Solihull
West Midlands
B91 3GH

Hearing date: 1 November 2017

P D McCrea FRICS

Royal Courts of Justice, London WC2A 2LL

- -

Mr Kevin Priestland MRICS for the Appellant
Ms Jane Canney MRICS for the Respondent

The following cases are referred to in this Decision:

Woolway (VO) v Mazars [2015] RA 373

DECISION

Introduction

1. On 21 October 2015, a £150m mixed use complex called "Resorts World" opened, close to the National Exhibition Centre just outside Birmingham. It comprises 50,000 sqm over seven stories and includes retail, hotel, cinema, and food and drink facilities, together with reportedly the largest casino in the UK. Perhaps appropriately for a building that opened on Trafalgar Day, it is designed to have the outward appearance of a ship, and it is the first such development in Europe – there being other Resorts Worlds in New York, Singapore and Manila.

2. Six miles south-west, and one junction along the M42, the Touchwood shopping centre is located in Solihull town centre. It opened in 2001. Within it, the appellant ratepayer, Fabulous Collections Ltd, occupies unit 3 Poplar Arcade ("the appeal unit") from which it sells mainly jewellery.

3. On 8 February 2016 (therefore the material day), the appellant's agent, Commercial Valuation Services ("CVS") made a proposal, alongside seven others, to alter the appeal unit's assessment in the 2010 rating list, contending that the opening of Resorts World constituted a material change in circumstances ("MCC") which had a detrimental effect on the rental value of retail units in Solihull, including those in Touchwood.

4. The Valuation Officer did not consider the proposals to be well founded, and the subsequent eight appeals were heard together by the Valuation Tribunal for England ("VTE") on 23 February 2017. In its decision dated 22 March 2017, the VTE dismissed all eight appeals. Of the eight, only Fabulous Collections Ltd now appeals that decision.

5. Prior to the hearing before me, there were some procedural developments. Since it is likely that similar cases will arise, it is helpful to outline these in some detail.

6. Under Regulation 6(1)(c) of The Non-Domestic Rating (Alteration of Lists and Appeals)(England) Regulations 2009 SI 2268 (as amended), the property that was identified as the subject of the appellant's proposal was "3 Poplar Arcade, Touchwood, Solihull, West Midlands, B91 3GH" described in the compiled list as shop and premises, and having a rateable value of £71,000, effective from 1 April 2010. The unit of assessment comprised ground-floor retail space with a small amount of first-floor storage.

7. In preparing his case for the Tribunal hearing, the Valuation Officer, Mr Mike Smith IRRV(Hons), concluded that in the light of the Supreme Court's decision in *Woolway (VO) v Mazars* [2015] RA 373, the assessment should be altered to show the ground and first floors as two separate hereditaments.

8. On 3 October 2017, Mr Smith split the assessment into two with an effective date of 1 April 2015. The new assessments were the ground floor of "3, Poplar Arcade, Touchwood, Solihull," described as shop and premises with a rateable value of £70,000; and "1st Flr Store above 3, Poplar Arcade" described as store and premises having a rateable value of £1,900.

9. The effect of this alteration was that the assessment that was the subject of the appeal to the Tribunal had been deleted, since the new effective date pre-dated the material day under the MCC proposal. However, following discussions with the Tribunal, and mindful that there remained a live and substantial valuation dispute between them, the parties agreed that in principle the appeal would proceed on the basis of the new assessment of the ground floor shop being substituted for the deleted assessment and that they would have the opportunity to make submissions at the hearing on this point.

10. The appeal was heard under the Tribunal's simplified procedure. The appellant was represented by Mr Kevin Priestland MRICS, a regional director of CVS, who acted both as advocate and expert witness. Mr Smith gave evidence and was represented by Ms Jane Canney MRICS, a technical adviser employed by the Valuation Office Agency ("VOA"). The hearing proceeded on the assumption that the appealed assessment was that of the ground floor only, and both parties produced revised valuations on this basis.

11. Mindful of future cases, at the hearing I asked Ms Canney to subsequently confirm in writing the VOA's position in such circumstances. In her email of 10 November 2017, Ms Canney confirmed that the Valuation Officer had taken the decision to split the assessment in the light of *Mazars,* and that the effective date of this alteration was 1 April 2015 in accordance with the provisions of the non-domestic rating appeal regulations. Ms Canney confirmed that VOA's policy in relation to the alteration of assessments following *Mazars* was, in circumstances where the effective date of that alteration predated both the proposal date and the date of an MCC identified in the proposal, that in the interests of fairness and so as not to disadvantage an appellant (since the amended assessment could not have been the subject of a proposal at the material day) appellants would be given the opportunity to have their proposal relinked to one of the amended assessments in relation to any proposed alteration. Mr Priestland subsequently confirmed his agreement to this.

12. What was not, in the end, a live point before me was whether that linking had the effect of keeping the material day the same as it had been under the now otiose MCC-based proposal. That will no doubt be considered in a future case.

13. On 10 November 2017 I made an unaccompanied inspection of Touchwood and Resorts World.

Facts

14. In the light of the evidence and my inspection I find the following facts.

15. The appeal property is in the Poplar Arcade within Touchwood close to the John Lewis department store. Among the other 70-80 retail units there are familiar names including Next, River Island, Monsoon and French Connection. At first-floor level there is a range of eating outlets and a Cineworld cinema.

16. Resorts World comprises around 50 retail units, 18 bars and restaurants, an IMAX cinema, Santai Spa, Genting hotel and casino, and a conference centre. It is adjacent to the NEC, and close to Birmingham International Airport. At the material day under the MCC proposal, the use of the retail units was restricted by planning permission in two ways. First, that the units would only be used for factory outlet shopping, defined as 'groups of shops specialising in selling seconds and end-of-line goods at discounted prices' and not for any other use falling within Class A1 of the Town and Country Planning (Use Classes) Order 1987 (as amended). Secondly, that all retail sales … shall only be by manufacturers selling their branded seconds, surplus stock, or discontinued lines all at discounted prices or other retailers selling rejects, returned goods, seconds, clearance goods and surplus stock directly supplied to them by such manufacturers all at discounted prices." This second condition was later varied, (although after the material day of the MCC), to allow general retail under use class A1 from units of up to 150 sqm.

17. I was not made aware of any similar planning restrictions affecting Touchwood.

Statutory Provisions

18. Section 56 of the Local Government Finance Act 1988 gives effect to Schedule 6 to the 1988 Act which sets out the statutory basis on which the rateable value of a hereditament is determined. Rateable value is taken to be equal to the rent at which the hereditament might reasonably be expected to let from year to year on certain statutory assumptions.

19. Those statutory assumptions are set out in paragraph 2(1) of Schedule 6, as follows:

> "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 these three assumptions –
>
> (a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;
>
> (b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from the assumption any repairs which a reasonable landlord would consider uneconomic;
>
> (c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other

expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above."

20. Section 55 of the 1988 Act empowers the Secretary of State to make regulations relating to the alteration of the rating list. The material regulation for present purposes is regulation 4(1)(b) of the Non-Domestic Regulations (Alteration of List and Appeals) (England) Regulations 1999 which provides that a proposal to alter the rating list may be made on the ground that:

> "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 date on which the list was compiled."

21. Paragraph 2(6) of Schedule 6 to the 1988 Act provides that where the rateable value is to be determined with a view to making an alteration to the list which has been compiled, the matters specified in sub-paragraph (7) shall be taken to be as they are assumed to be on the material day.

22. The matters specified in sub-paragraph (7) include:

> "(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."

Issues

23. The valuation officer did not dispute that the opening of Resorts World was capable of constituting an MCC. The issues between the parties were whether an end allowance was justified to reflect a reduction in the rateable value of the appeal property within the terms of the rating hypothesis, and if such an allowance was justified, the amount of such allowance. The basic valuation was agreed, as follows:

Ground floor Retail Zone A	65.90 sqm @ £945.00	£62,276
Retail Zone B	16.60 sqm @ £472.50	£7,844
		£70,120

24. Mr Smith's valuation rounded the above figure to arrive at a rateable value of £70,000. Mr Priestland applied an end allowance of 10%, which when rounded arrived at a rateable value of £63,000.

Evidence

Mr Priestland

25. Mr Kevin Priestland MRICS is a chartered surveyor, and a regional director of CVS. He has 39 years' experience in valuation, and prior to joining CVS was employed by the VOA from 1978 to 2011, most recently as rating team leader for the Sheffield area.

26. There was a change in emphasis between Mr Priestland's written report and his subsequent oral evidence. In his written report, a major element of the appellant's case was based upon a fall in trade at the appeal property, which Mr Priestland said was as a result of the opening of Resorts World. He had produced a schedule of his client's trade figures for the years 2014, 2015 and half of 2016, which he said showed a dramatic reduction in turnover during the first six months of 2016 compared with 2015.

27. At the hearing, Mr Priestland effectively abandoned this argument, after it became apparent that his clients had lost the right to sell Pandora jewellery, when Pandora opened an outlet of its own several doors away in September 2015 – shortly before Resorts World opened. Mr Priestland accepted that his clients had been "severely affected" by Pandora opening, and said that his evidence of trade data "came with a health warning". In the light of those concessions I place no weight on the appellant's trade evidence.

28. As before the VTE, no other retailer's trade evidence was submitted, which is relevant to the second major plank of Mr Priestland's case - the decision of the Tribunal in *GPS (Great Britain) Ltd v Bird (VO)* [2013] UKUT 0527 (LC), in which an allowance of 10% was made to assessments at Fosse Park, Leicestershire, owing to the effect on rental levels of the opening of the Highcross centre in Leicester. However, in that decision the Tribunal said this, at [102]:

> "It is true that, since a hereditament is to be valued vacant and to let, it is not usually helpful for the valuer to base his valuation simply on the turnover of the occupier. That is because other potential tenants might be able to trade more profitably and to afford a higher rent. But the appellants in these appeals do not rely on a single set of turnover figures. They have produced details of turnover at 50% of the terraced retail units at Fosse Park. These figures….show a consistent picture, namely that turnover performed less well after the opening of Highcross."

29. Accordingly, even had Mr Priestland continued to rely upon the significance of his client's trade data, in my judgment the specific trade data of only one retailer is of very limited use, in the absence of supporting evidence. The hypothetical tenant may not be in the same line of business.

30. As regards rental evidence, Mr Priestland accepted in his oral evidence that this was "pretty confusing" and was "all over the place". He had produced a table of lettings in Solihull

between 2007 and 2016, in which he compared the effective rents achieved (after deduction of rent free periods or other incentives) with both the 2010 and 2017 rateable values of those properties. The table appeared to show that rents were generally higher than rateable values between 2007 and late 2014, after which they dipped below rateable values for the first time.

31. Mr Priestland accepted that there was no corroborating evidence in support of the rents as outlined, but even if the pattern was taken at face value the weakness of his approach, which he also accepted, was twofold. First, there was no indication as to whether the 2010 rateable values quoted were the subject of outstanding proposals, nor whether the 2017 assessments would be reduced following the check challenge and appeal process. Consequently, a comparison with them was inconclusive as the rateable values might ultimately reduce (or indeed increase). Secondly, there was a significant period of time between for instance a letting in Autumn 2015 and the AVD for the 2010 rating list of April 2008. I consider both of those factors to be sufficient for me to have reservations about the utility of Mr Priestland's table.

32. What might have been of more assistance was a table showing rents on a per square metre, in terms of Zone A basis, showing any specific change in rental levels before and after the MCC, if any, all other things being equal.

33. Mr Priestland also produced a table of changes in the occupation of retail units in Solihull, which had been formulated from data secured as a result of an FOI request to the local authority. In many cases the owner was liable for rates, which Mr Priestland assumed meant that the unit was vacant. Of the others, some were also referenced in his rental comparison table. When I asked Mr Priestland what conclusion he was inviting me to draw from his table, he said that it simply demonstrated that he had tried to obtain as much information as possible, but in reality that there was little true rental evidence.

34. I am not persuaded that the rental evidence or occupier information, such as it is, is sufficiently robust to be of assistance in determining whether there has been an effect on rents in Touchwood as a result of the opening of Resorts World.

35. In addition to his client's trade information, and the patchy rental evidence, Mr Priestland relied upon a range of documents which he said were in the public domain. The first was an officer's report to the Overview and Scrutiny Management Board of Solihull Metropolitan Borough Council on 4 December 2013, written to update the Board on major developments proposed within the town centre. It detailed the conclusions of an assessment carried out by CACI (a nationally recognised retail analyst company) as background to proposals for an expansion of Touchwood and investment in Mell Square – an adjoining centre. CACI had concluded that in a "do nothing" scenario, the "market potential" (Mr Priestland could not provide a precise meaning of this) of Solihull would decrease by 8.5% as a direct result of the impact of neighbouring developments across the Midlands. As one of the options for development, the report outlined discussions for an extension of Touchwood, but these had not come to fruition.

36. The second was a later CACI report, dated September 2015, prepared for the owners of Touchwood to examine the changes to the retail catchment which would result from its expansion. In this, the analyst indicated that if the centre were not extended – the "do nothing" scenario – would have several implications. First, Solihull would lose £39.3 million (or 11.3%) in "market potential". In calculating this, the analyst had considered pipeline developments and "particular focus [was] paid to the Grand Central Shopping Centre in Birmingham, the Resorts World Designer Outlet and the impacts the two will have on Touchwood". Secondly, the town would drop from 47th to 55th in the national UK retail footprint ranking table. This demotion appears on the report not to be due to Resorts World, but to pipeline developments in Birmingham and Coventry.

37. The report also showed market share within Touchwood's total catchment area. At the date of the report, i.e. in September 2015, Solihull was in second place with 6.5%, after Birmingham (16.7%) but above Coventry (5.5%). On a "do nothing" basis, by 2018, Solihull would drop to third place with 5.9%, after Birmingham (17.1%) and Coventry (6.7%). I noted that Resorts World was ninth, with 2.0% of market share.

38. The wheels of development moved on slowly, and during the summer of 2016 a planning inspector commenced an Inquiry to consider proposals for the council's proposed compulsory purchase order to facilitate an extension to Touchwood of some 10,876 sqm for which planning permission had been granted on 9 December 2015. The third document Mr Priestland relied upon was the Inspector's report to the Secretary of State dated 5 September 2016, in particular the his acceptance that in order for Solihull to retain its position in the regional retail hierarchy, it was necessary that investment in the town centre continued in the face of competition from other regional centres that have had major enhancements to their retail provision, and that investment in the town centre was required if the town was to retain its position.

39. Mr Priestland accepted that at the date of the MCC, the CPO had not been made nor had planning permission been granted, but said that the hypothetical tenant would have been aware of the proposals to extend Touchwood. His view was that the identification of the need for more shops showed that the centre's "offer" was less attractive than that of competing sites. He said that the hypothetical tenant would have been aware of the CACI report and other evidence in the public domain, and that at the relevant date the Grand Central development and Resorts World were "physically manifest there" for the purposes of the legislation.

40. The fourth document relied upon by Mr Priestland was a Practice Note from the VOA's rating manual, regarding factory shop outlets, which indicated that:

> "most factory outlet villages had ridden the recession well and many had prospered. This might be because Factory Outlet retail is considered by many of its customers as a leisure experience. There is an appetite for designer goods at a bargain price – even if they are slightly sub-standard."

41. The Practice Note mentioned Resorts World specifically, and went on to say that "centres are very tightly managed and this coupled with the appeal for fashion has enabled strong growth compared to mainstream retail".

42. He dealt with two other minor points. First, as regards planning, Mr Priestland accepted that at the material day the units within Resorts World operated under a restricted planning permission, whereas Touchwood did not, but his view was that retail consumers were not concerned with what planning permission a unit had. Shoppers only had to go to Resorts World rather than Touchwood in one of ten visits for it to have an effect. Secondly, he noted that Mr Smith had submitted as an appendix to his report footfall figures for Touchwood, which he had procured from the centre's managing agents. Mr Priestland noted that these showed consistent reductions in footfall throughout the year following the MCC.

43. In the conclusion to his expert report, Mr Priestland wrote: "I assert that the -10% end allowance sought in the appealed valuation[s] is supported by the trade information provided on [the appeal property] showing a significant downturn in 2016 (after Resorts World opened) compared with 2015. Further to this, achieved rents have seen a significant decline on the levels of rent achieved, before Resorts World opened."

44. This emphasis shifted in his oral evidence, when he focussed primarily on the two CACI reports that referred to falls of 8.5% and 13.4%, which Mr Priestland submitted warranted a reduction of 10% as a result of the MCC.

Mr Smith

45. Mr Mike Smith IRRV(Hons) is a caseworker in the non-domestic rating unit of the VOA, for whom he has worked since 1982. He has been based in Coventry since 2008. He has been responsible for setting the rateable values in Solihull billing authority area in both the 2010 and 2017 rating lists, and took the lead in discussions with the RSA and the settlements of appeals for Touchwood and other shops within Solihull town centre. He lives in the Solihull area.

46. Mr Smith's expert report comprised six pages - two of which were introductory or factual statements – plus appendices. The remaining four pages comprised rebuttal of Mr Priestland's report, which can be summarised as follows:

> (1) Resorts World has a restricted planning consent, it hopes to be the leisure destination of choice, with factory outlet shops distinct from high street shops; the planning statement contained within the original application indicated that the development would complement the retail and leisure in nearby centres including Touchwood. The prospective hypothetical tenants for the locations are therefore different.

(2) Mr Priestland had only submitted one set of trade data, despite acting for a number of retailers in Solihull. The trade data that had been submitted showed a fall in turnover which was attributable to Pandora opening nearby.

(3) The relevance of the rental evidence submitted was unclear. Evidence considered in Touchwood and Solihull for the 2017 rating list revaluation showed a small fall in rental levels between lists – but of all the shopping centres in the Central area, Solihull showed one of the smallest reductions between AVD's. Discussions with CBRE, the agent for the owner of Touchwood, indicated that there had been no change in rental levels since September/October 2015 that can be attributed to the opening of the Grand Central development in Birmingham or Resorts World.

(4) As regards rating evidence, there has been a very limited number of proposals on retail properties in Solihull, and only one remains outstanding, which supported Mr Smith's view that no allowance was warranted. There had been no central discussions with the RSA town committee due to the limited number of appeals.

(5) As regards the proposed expansion of Touchwood, Mr Smith thought that this highlighted the success of the centre. Had vacancy levels been high there would have been no need for further retail provision. Indeed, the VOA's data showed that there was no noticeable change in levels between April 2015 and June 2017.

(6) As regards footfall figures, there was a small decrease leading up to the MCC date, with a further small increase in October 2015. Given the lack of trade data, this might have been the impact on the cinema and restaurant footfall.

47. In Mr Smith's opinion, the appellants case had not been proven, and the appeal should be dismissed.

Discussion and conclusions

48. Parties are encouraged to limit evidence to that which is relevant, and avoid the inclusion of evidence for its own sake, especially in a simplified procedure case. In this appeal, the valuation officer chose to limit himself to rebutting Mr Priestland's case. But if a valuation officer, benefitting from statutory powers which are not available to ratepayers, has obtained information from which, for example, he draws a conclusion that rental levels have been unaffected by an MCC, he should include the basic form of that evidence in his report. Otherwise he is merely making an assertion which is of little assistance to the Tribunal without exposure of the material upon which it is based.

49. Be that as it may, I accept Mr Smith's submission that it is for the appellant to show that the VTE was wrong. In short, Mr Priestland has not done so. Whilst he fought a rear-guard action based on the other documents in the public domain, the central plank of his case – both before the VTE and in his export report was that there had been a drop in his client's trade.

Once that effectively fell away, the remaining evidence was, at best, rather thin. I place no weight on the rental evidence, nor that of assessments or vacancies for the reasons given above.

50. The difference between the facts in this appeal and those in *GPS v Bird* is that in that case the background documents which suggested a fall in trade served to reinforce the trade data of a number of retailers. Here, the effect on trade of one occupier, owing to specific reasons unrelated to the MCC, was of no assistance. Whilst there were some indications in reports that there might be an effect on Solihull of competing retail centres, it can be put no stronger than that.

51. I am not persuaded that Mr Priestland has achieved anything approaching the required level of evidence to show that there has been any effect on rental levels at Touchwood as a result of the opening of Resorts World, and the appeal is therefore dismissed.

52. I should mention one further point. In the weeks before the hearing it was necessary for the Tribunal to indicate to both parties that their expert reports were not compliant with the RICS Practice Statement – Surveyors acting as Expert Witnesses, 4th edition, despite claiming to be so. Both Mr Priestland and Mr Smith were required to re-draft the relevant paragraphs. Experts should not simply pay lip service to this document, upon which the Tribunal places importance. It is necessary for both the Statement of Truth and the Declaration contained within Practice Statement 5.4 to be made, verbatim and in full, if the expert report is to comply[1].

Disposal

53. The appeal is dismissed. The hearing took place under the simplified procedure under which costs are awarded only in exceptional circumstances. The parties confirmed that there were no such circumstances and accordingly I make no order for costs.

Dated: 20 November 2017

P D McCrea FRICS

[1] The document is available on the RICS website at http://www.rics.org/Global/Surveyors_acting_as_expert_witnesses_4E_June2017.pdf