UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2018] UKUT 153 (LC)
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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – PROCEDURE –appeal to VTE appeal struck out as "no exceptional reasons" shown for appellant's failure to comply with case management directions – appeal allowed

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

BY:

RYAN FISHER CARPET AND VINYL SHOWROOM

Appellant

Re: Unit B, Birstall Retail Village,
895 Bradford Road,
Birstall,
Batley,
West Yorkshire

Decision following written representations

The following cases are referred to in this decision:

BPP Holdings v Commissioners for Her Majesty's Revenue and Customs [2017] 1 WLR 2945

Denton v TH White Ltd [2014] 1 WLR 3926

Simpsons Malt Ltd v Jones [2017] UKUT 0460 (LC)

1. This is an appeal by Ryan Fisher Carpet & Vinyl Showroom, a company, against a decision of the Valuation Tribunal for England (VTE) made on 11 October 2017 to strike out its appeal against a notice of invalidity issued by a valuation officer in response to a proposal by the appellant to reduce the rateable value of its retail premises in the 2010 rating list.

The facts

2. The appeal arises in this way.

3. The appellant occupies, as lessee, a carpet and flooring showroom at Unit B, Birstall Retail Village, in Batley, West Yorkshire. Early in 2016 it installed a new mezzanine floor in the premises at its own expense. The VO then gave notice increasing the rateable value of the premises in the 2010 list from £18,250 to £23,500 on account of the improvement. Acting without professional assistance the appellant challenged the VO's alteration of the list by a proposal received by the VO on 8 September 2016. The VO considered the proposal to be invalid and invited the appellant to submit a fresh proposal or exercise its right of appeal.

4. The appellant submitted an appeal to the VTE within the time permitted and received an acknowledgement on 2 December 2016. The appeal was not resolved by agreement and the VTE subsequently gave notice that it would be heard on 21 September 2017.

5. As an appeal listed to be heard after 1 April 2017 the VTE's Consolidated Practice Statement applied. The appellant was directed to make contact with the VO to discuss the appeal not later than 10 weeks before the date of the hearing. It was required to send a statement of its case to the VO 6 weeks before the hearing and ought to have received the VO's case 2 weeks later. There is nothing in the material before me to suggest that these steps were not taken.

6. Finally, the appellant was directed that 2 weeks before the hearing it must send a full bundle of evidence for the use of the VTE.

7. On 5 September 2017 (more than two weeks before the date of the hearing) the appellant's managing director, Mr Ryan, contacted the VTE by email to request the postponement of the hearing. He explained that he would be away on holiday on 21 September and asked that someone contact him to arrange for the hearing to be re-scheduled.

8. Replying on the same day a VTE case officer informed Mr Ryan that his reasons for requesting a postponement had been considered but that the case officer "believes it premature to grant a postponement at this stage before the bundle is submitted to the tribunal."

9. The appellant did not provide a hearing bundle by 7 September but on 13 September Mr Ryan sent a further email again saying that he would be on holiday on the day of the hearing and that he "hadn't heard back about a re-scheduling".

10. On 15 September a different case officer responded to Mr Ryan's email saying his request for a postponement had been declined on 5 September. That was not strictly correct, the request having been described as premature, with the implication being that it would be considered at a later date. The case officer went on to explain that "the reason why your request has been declined is while I appreciate you are on holiday on the date of the hearing you should have submitted an evidence bundle in accordance with the direction no later than 5pm on 7th September." That explanation also contradicts the suggestion that the request had been declined on 5 September, but it appeared to accept that Mr Ryan would indeed by on holiday on the day of the hearing.

11. In reply Mr Ryan protested that his request had not previously been refused and said that he had his evidence ready for the hearing but again asked that it be re-scheduled. The suggestion that the request was now being refused because the hearing bundle had not been submitted in time was repeated in a final response by the case officer, who informed Mr Ryan that he would "need to submit something in writing for the panel to consider whether to adjourn the case in your absence." The case officer made it clear that the panel would not hear the case, and Mr Ryan was told he could not bring evidence with him on the day.

12. The day after his final exchanges with the VO Mr Ryan submitted a detailed letter and a small number of additional documents explaining why he considered the rateable value of the appellant's premises should be reduced. He included confirmation of the rent payable for his own premises and information about the rateable value of nearby premises occupied by a direct competitor where the rateable value was significantly lower. Mr Ryan apologised to the VTE for his absence, which he explained was due to his "only holiday of the year", and asked the panel to consider the information he had provided and to reduce the rateable value to a level equal to that of the appellant's local competitor.

The VTE's decision

13. Neither Mr Ryan nor any other representative of the appellant attended the hearing on 21 September. The notice of decision issued by the VTE on 11 October states that the appeal had been heard on the allotted day, but the hearing seems not to have involved any consideration of the substance of the matter. I assume that the VO was not represented by a case officer with sufficient knowledge to respond to the material submitted in writing by Mr Ryan, and that the only practical courses available to the VTE were to adjourn the appeal to a future date, or to dismiss it summarily.

14. The reasons given by the VTE for its decision to dismiss the appeal were as follows:

> "The appellant did not attend the hearing to explain why he failed to submit a full bundle of evidence to the Tribunal and the Valuation Officer no later than two weeks prior to the hearing in accordance with the direction.
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> The appellant requested a postponement which was declined as he had not complied with the direction. He was asked to submit written representations to explain why he had not complied. Instead of explaining why the direction had not been complied with, the appellant submitted his case for the panel to consider in the appellant's absence.
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> In the panel's view, there were no exceptional reasons provided for the appellant's failure to follow the direction; the appeal was therefore dismissed."

The appeal

15. The grounds of the appeal prepared by Mr Ryan were that the appellant had wanted a fair hearing of the appeal but had been unable to attend the listed hearing because of a family holiday. The request for a postponement having been refused (a decision which Mr Ryan said showed "no leniency") the VTE ought to have considered the evidence he had presented in writing, but this had not been done despite the time it had taken Mr Ryan to prepare it.

16. The VO chose not to participate in the appeal and informed the Tribunal that she had "no issue with … any of the issues raised in the Notice of Appeal." Quite what that statement is intended to mean is unclear; does the VO agree with the appellant's analysis of the appeal, or choose simply not to challenge it? I do not know.

17. In *Simpsons Malt Ltd v Jones* [2017] UKUT 0460 (LC) the Tribunal warned that, on procedural appeals from the VTE: "In future valuation officers will be expected to adopt a more principled approach from the outset." One of the issues raised in the notice of appeal in this case is whether the decision of the VTE to strike out the original appeal should be set aside and the case remitted to it for re-consideration. It would have been more helpful for the VO to say clearly whether or not she consented to that course, rather than saying only that she has "no issue" with the notice of appeal. Given the VO's ambiguous response I have assumed that she does not consent to the appeal being allowed, but does not actively resist it.

18. Paragraph 4 of the VTE's 2017 Consolidated Practice Statement explained the approach it would take to requests for the postponement of listed hearings. Postponements were only to be granted "if there are (exceptional) good and sufficient reasons for doing so and it is in the interest of justice to do so."

19. In *Simpsons Malt Ltd* the Tribunal gave detailed consideration to the proper approach to be taken by the VTE to compliance with its own practice directions and case management orders. It is not necessary to repeat what was said in that

decision. The Tribunal confirmed that the VTE is entitled to insist on compliance with its directions and is entitled to require a proper explanation of any default before considering the exercise of its power to relieve against the imposition of a sanction, including the extreme sanction of summary dismissal or striking out of an appeal. In exercising its jurisdiction to strike appeals out the VTE should have regard to the requirement to deal with cases justly, and in considering relief against sanction it should carefully follow its published policy of applying the systematic approach now used by the civil courts, explained by the Court of Appeal in *Denton v TH White Ltd* [2014] 1 WLR 3926, and by the Supreme Court in *BPP Holdings v Commissioners for Her Majesty's Revenue and Customs* [2017] 1 WLR 2945. The stages of that systematic approach are described in *Simpson's Malt* at paragraphs 53 to 55 and 257 to 263.

20. At paragraphs 47 and 48 of its decision in *Simpson's Malt* the Tribunal explained why it was unlawful for the VTE to adopt a policy of dismissing all appeals where there had been non-compliance with a procedural direction unless exceptional reasons could be relied on to excuse the breach:

> "The 1988 Act read together with the 2009 Regulations does not allow the VTE to lay down or apply any such "exceptional circumstances" test as the sole basis for determining whether its powers to strike out, or to bar participation, or to refuse reinstatement should be exercised. Furthermore, this practice is inconsistent with the approach explained in the Practice Statements with which this appeal is concerned (especially with paragraph 3 of PS/C2). For the future, it is also inconsistent with the approach required by *BPP Holdings*, which the VTE has now expressly adopted in CPS 2017 and which we endorse.
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> It is common for statutory decision-makers, including tribunals, to adopt policies or practice statements to provide guidance on what matters they expect to influence their decisions on the exercise of their powers. Such statements are expected to promote transparency, coherence and consistency in decision-making. But they must not be formulated or applied so as to prevent the decision-maker from exercising its discretion in individual cases; they must not "fetter" the exercise of discretion. Consequently, it is said that such a statement must be not applied in a "blanket" manner."

21. The VTE's decision in this appeal was made three months before the Tribunal published its decision in *Simpson's Malt.* The facts suggest that the requirement of "exceptional reasons" was then being applied to requests for the postponement of appeals, even where the VTE (or its case officers to whom postponement decision appear to be delegated) was satisfied that a good reason had been demonstrated for the request. I understand that that approach is no longer being applied, but for the reasons explained in *Simpson's Malt* it was not permissible at the time of the VTE's decision. It is clear from the decision that the VTE, finding no exceptional reasons for the appellant's failure to provide a hearing bundle, considered that was fatal to the continuation of the appeal. That was not the approach directed by the Consolidated Practice Statement, which says expressly

that the VTE will apply the *Denton* jurisprudence. The application by the VTE of that impermissible policy makes it inevitable that the appeal must be allowed.

22. Mr Ryan's request to postpone the hearing, made more than two weeks before the appointed date, was accepted by the case officer without requiring any more detailed explanation ("I appreciate you are on holiday on the date of the hearing") yet the request was still refused. It is of concern that the case officer considered that the request ought to be regarded as premature, and therefore ought not to be considered on its merits, until the date for the appellant to provide hearing bundles had passed. The case officer would presumably have anticipated that a failure to file the bundles would result in the appeal being struck out (unless "exceptional reasons" were provided). If, after considering the application on its merits, the proper course would have been to postpone the hearing, it is not at all obvious why the immediate provision of a hearing bundle should be required. The case officer's insistence that the hearing bundle should first be complied with before the application could be considered looks like the introduction of an improper and irrelevant pre-condition to the exercise of the VTE's discretion.

23. The VTE ought to have considered whether, having regard to the seriousness and consequences of the breach of its direction and all of the circumstances, it was just to strike out the appeal, or whether some lesser sanction would be more appropriate. It ought in particular to have taken into account the fact that the application was not made at the last minute, and (as the VO accepts) was for an apparently good reason which nobody had thought necessary to probe further. Proper consideration of that application at the time it was made, instead of the wait and see approach adopted by the VTE's case officer, would have avoided any waste of resources on the part of the VO or the VTE itself. Mr Ryan had provided some at least of the required documents late, but as soon as it was made clear to him that the postponement had been refused. The VTE did not consider these matters but based its decision exclusively on the absence of exceptional reasons justifying the breach. In my judgment it was not entitled to do so.

Disposal

24. The appeal must therefore be allowed and the matter remitted to the VTE for further consideration.

25. It will be for the VTE to determine whether the appeal should be relisted for hearing on its merits or whether anything is to be gained by further consideration of the circumstances in which the appellant failed to provide a bundle of evidence sufficiently in advance of the previous hearing. Mr Ryan should apply to the VTE within 28 days of the date of this decision for further directions in that regard, and should provide a copy of this decision with his application.

26. If the VTE indicates that it wishes to consider the appellant's failure to comply with the direction to provide a hearing bundle two weeks before 21 September 2016, Mr Ryan should be prepared to provide a full explanation. If the VTE

chooses instead to proceed directly to a hearing of the merits of the appeal Mr Ryan should pay particular attention to any directions it gives, and should comply with them fully and in good time.

Martin Rodger QC

Deputy Chamber President

2 May 2018