UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2018] UKUT 170 (LC)
UTLC case number: RA/43/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – procedure – appeal to VTE – whether notice of hearing received – appeal struck out – appeal allowed

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

BY:

BENCHMARK FURNITURE LIMITED **Appellant**

Re: 1 Tealgate Charnham Park
Hungerford
Berkshire
RG17 0YT

P D McCrea FRICS

Decision on written representations

The following case is referred to in this decision:

Simpson's Malt Ltd v Jones [2017] UKUT 460 (LC)

Introduction

1. This is an appeal by Benchmark Furniture Limited ("the appellant") against a decision of the Valuation Tribunal for England ("VTE") made on 25 May 2017 in which the VTE refused to reinstate proceedings that it had struck out following the appellant's failure to file a statement of case in respect of a proposal to delete the assessment of one of its properties from the 2010 rating list.

2. The respondent before the VTE was the valuation officer, who considers that owing to the subject matter of the appeal he cannot usefully participate. The appeal therefore proceeds unopposed.

Statutory Provisions

3. The proceedings were struck out under Regulation 10 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 ("the Procedure Regulations"). It is convenient at this point to outline the relevant parts of those regulations and the VTE practice directions that were in force when the VTE made its decision.

4. Insofar as relevant, the Procedure Regulations provide:

> "3. Discharge of VTE's functions: general
>
> In giving effect to these Regulations and in exercising any of its functions under these Regulations, the VTE must have regard to—
>
> (a) dealing with appeals in ways which are proportionate to the importance of the appeal, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the VTE effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> ….
>
> 10. Striking out proceedings
>
> (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (2) …
>
> (3) The VTE may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or that part of them;

…

(5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

…

15. Sending and delivery of documents

…

(6) The VTE and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary."

…

42. Appeals to the Upper Tribunal

1) An appeal shall lie to the Upper Tribunal in respect of a decision or order given or made by the VTE on a [non-domestic rating] appeal…

…

(5) The Upper Tribunal may confirm, vary, set aside, revoke or remit the decision or order, and may make any order the VTE could have made"

5. Since the notice of hearing was issued in September 2016, the March 2017 consolidated VTE Practice Statement ("CPS 2017") was not yet in force and the former suite of individual practice statements applied.

6. Practice Statement A2 ("PS/A2") concerned the listing of rating appeals, and provided:

"5. All appeals which have been placed in a programme by the VO will be listed after the submission or target date has been reached …

It is the intention of the Tribunal, wherever possible, to arrange for the first hearing of an appeal within 12 weeks of the programmed target date…

The [Procedure Regulations] require parties to receive a minimum of 14 days' notice of the hearing, although a shorter period is permissible, with the parties consent or in exceptional or urgent circumstances. Wherever possible, the Tribunal will aim to provide at least six weeks' notice of the first hearing and in all cases sufficient time to comply with the Standard Directions.

…

13. Direct contact will be made by Tribunal staff with unrepresented appellants at least two weeks before the hearing date to ascertain whether a hearing is required."

7. Practice Statement A7 ("PS/A7") set out the VTE's expectations of the parties leading up to the hearing, and provided:

"1. This Practice Statement applies to all non-domestic rating list appeals arising under the Rating List 2010 where the notice of hearing has been issued after 1 January 2011.

2. In all these cases, the standard directions set out in Annex 1 below will be issued to the parties together with the notice of hearing.

…

4. If the appellant substantially fails to comply with the standard directions, the appeal will be automatically struck out in accordance with reg 10(1).

…

6. Substantial failure for the purposes of paragraph 4…means a complete failure to provide the required statement by the due date (in which case the appeal will be struck out without reference to the senior member)….

8. An application (under reg. 10(5)) to reinstate an appeal which has been struck out will be considered by a senior member without a hearing."

8. The relevant standard directions contained in Annexe 1 to PS/A7 were:

"(1) No later than six weeks prior to the date of the hearing, the respondent shall serve on all other parties to the appeal details of any evidence covered by reg. 17(3) of the Procedure Regulations on which it intends to rely. Failure to comply with this direction may result in the exclusion of any such evidence at the hearing.

(2) No later than four weeks prior to the date of the hearing, the appellant shall serve on the Tribunal and all other parties to the appeal (including the respondent) a statement of case which will include a statement of the reasons for the appeal and the decision sought from the Tribunal, together with a summary of the evidence and any legal argument relied on. In addition, the statement for the Tribunal must specify how and when it was served on the other parties. Failure to comply with this direction will result in the automatic striking out of the proceedings."

9. Practice Statement C2 ("PS/C2") dealt with applications for reinstatement following striking out, and provided:

"1. An appeal that has been struck out or withdrawn may on application in writing by the appellant within one month be reinstated..

2. An application for reinstatement… may either be on the ground that there was compliance with the relevant direction and the decision to strike out was therefore in error or that there are reasons to excuse the non-compliance which justify relief from the sanction of striking out….

3. Reasons to explain or excuse non-compliance may include illness, compassionate circumstances, or any other reasons or circumstances judged to be compelling and reasonable. Relevant considerations include the interests of the administration of justice, whether the application has been made promptly, whether the failure to comply was intentional, accidental or negligent, whether there is a good explanation for the failure, and the effect on the parties of granting the application.

4. It is for the applicant to satisfy the senior member that the reasons are such that it is in the interests of justice to reinstate the appeal… There is no presumption in favour of doing so and reinstatement will not be ordered merely because the striking out will deprive the appellant of having the appeal determined on its merits.

…

6. An application for reinstatement must give the reasons, together with any supporting documentation. It is for the appellant to provide adequate reasons and proof and it is not for the Tribunal to seek amplification or explanation. Where it is asserted that a notice of hearing or other relevant notice was not received, the appellant should, wherever possible, identify the steps that have been taken to support that assertion, e.g. checking postal records, mail book or electronic systems.

...

14. Applications which challenge the initial decision as to compliance must be referred to a Vice-President.

15. Written reasons must be given for the decision.

16. …

17. A decision on the application is final and may not be renewed or form the subject of a request for review under reg. 40."

Facts

10. The appellant's head office is at Barton Court, Kintbury, Hungerford, Berkshire, RG17 9SA ("the head office"). At some point in the past it had vacated a manufacturing property in Hungerford – 1 Tealgate, Charnam Park, RG17 0YU ("the appeal property") – but retained a liability for non-domestic rates.

11. On 17 November 2015 a non-domestic rates demand dated 14 November 2015 in respect of the appeal property was delivered to the appellant at the head office. The following day Ms Judy Miller, the appellant's financial controller, emailed photographs and copies of estimates for work to the Valuation Office Agency ("VOA") requesting that the appeal property be "removed from rating". The VOA allocated this a case reference of 26374545.

12. Following telephone discussions with the VOA, on 23 December 2015 Ms Miller made an online proposal on the VOA website to alter the assessment in the 2010 rating list in respect of the appeal property, on the grounds that it was not capable of occupation following the theft of copper plumbing and wiring. The address provided for correspondence was the head office, and Ms Miller gave her email address as the appellant's point of contact. She did not print or retain a digital copy of the proposal.

13. On 8 January 2016, Ms Miller received by email a letter from the VOA which confirmed receipt of the proposal (assigned reference 26530896) and requested further information, including photographs and estimates of repair costs. Whilst the letter was delivered by email, and confirmed that the appeal property was the subject of the proposal, it was addressed to Ms Miller at the head office. In her reply of the same day, Ms Miller pointed out that she had already sent photographs and estimates on 18 November 2015. On 12 January, the VOA confirmed that she did not need to resubmit the documents, noting that the photos and estimates were being held under case reference 26374545.

14. Ms Miller heard nothing further until late summer. On 3 August 2016 she received, at the head office, a letter from the VOA which placed her proposal into a programme that had started on 16 June 2016 with a target date for discussions of 17 August 2016 (so only two weeks after the letter was received). The letter indicated that:

> "If we cannot agree the valuation, your case will be heard by an independent Valuation Tribunal. The Tribunal expects us to have fully discussed the case before the target date…….The Valuation Tribunal will need certain documents in advance of the hearing, and they will write to you about this…"

15. On 12 September 2016, the VTE issued a notice of hearing which would have included standard directions as provided by paragraph 2 of PS/A7. Whether the notice was sent to the head office, and whether it was received by Ms Miller, is in dispute.

16. By a letter from the VTE dated 14 October 2016, addressed to her at the head office, Ms Miller was informed that the proceedings had been struck out under Regulation 10(1) of the Procedure Regulations owing to "a failure to provide the required Statement of Case by the due date in accordance with the standard directions issued by the Tribunal with the notice of hearing". The letter confirmed that the appellant could apply under regulation 10(5) for the proceedings to be reinstated, and advised reference to Practice Statement C2 (see paragraph 9).

17. On 9 November 2016, Ms Miller applied for the case to be reinstated, by way of a brief email – "the reason being – we have not received The Notice of Hearing or any other associated correspondence from you."

Ms Miller's evidence

18. Ms Miller's evidence (received by the Tribunal in writing) is that the head office building is home to only two related companies. When the post is delivered every morning, it is placed on a table inside the front door, two metres from her desk. A colleague opens and distributes the post to each named addressee. There are only 11 people in the office, all of whom sit in the same room. If a letter is simply addressed to the company, she and her colleagues discuss which of them will deal with it. There are no pigeon holes, sorting trays etc, and Ms Miller considers that it is inconceivable that post might lie undetected. She kept a separate file relating to rates at the appeal property in which she kept copies of all documents received – the notice of hearing was not one of them.

19. Ms Miller says that she was shocked by the notice striking out the proceedings, and that on receiving it she telephoned the VTE and was told that it appeared from the VTE's records that the notice of hearing had in fact been sent to the appeal property, rather than the head office. She was given the impression that an application to reinstate should be a formality

The VTE's decision

20. The application to reinstate was refused by a senior member of the VTE on 25 May 2017. The reasons given were that "The Notice of hearing was issued to the correct address by postal service and as the Notice was not returned undelivered it must be assumed the Notice was deemed to have been served."

21. The appellant's subsequent challenge to the refusal to reinstate the application was referred to one of the VTE's Vice Presidents under paragraph 14 of PS/C2. On 19 June 2017 a team leader at the VTE emailed the appellant to give the Vice-President's decision:

> "The applicant's understanding that the notice of hearing was issued to [the appeal property] is incorrect. The notice of hearing was issued to Judy Miller at [the head office] which was the address provided for service. This correspondence was not returned undelivered and no evidence was put forward to suggest why it was not likely to have been received.
>
> This is the address to which the strike out notice was sent also.
>
> There is no reason to interfere with the decision of the senior member to refuse to reinstate this appeal."

22. The team leader informed the appellant that the reinstatement process had been exhausted and the VTE considered the matter closed. Benchmark then instructed solicitors, who wrote to the VTE to request copies of the notice of hearing and any directions orders and correspondence and to reiterate that Ms Miller had been told by a VTE officer that the documents were sent to the appeal property and not to the head office.

23. The VTE team leader responded, declining to comment on what his colleague might have said, but confirming that there was nothing in the VTE's records to suggest that notice had been issued to the appeal property rather than the head office. The correspondence

address used by the VOA was the head office, and this would have been adopted by the VTE when the VOA electronically transmitted details of the proposal to it. There was nothing to suggest that the correspondence address had been amended between the point that the proposal became an appeal to the VTE and the point that the appeal was struck out for failure to comply with standard directions. He concluded that the notice of hearing dated 12 September 2016 was issued to the head office. Since the appeal had been cleared from the VTE's system, he was unable to provide a copy of the notice of hearing.

Grounds of appeal

24. The appellant's statement of case for the appeal was prepared by Ms Katie Helmore of counsel. The grounds of appeal were two-fold. First, that the notice of hearing was sent to the wrong address. The head office was the address provided by the appellant and all correspondence and documentation should have been sent to that address, in accordance with regulation 15(6) of the Procedure Regulations. This was consistent with the basis of the appeal, namely that the property was incapable of occupation and was therefore unoccupied. It was suggested that the notice of hearing was sent to the appeal property in error. Secondly, even if the notice of hearing was sent to the head office, it is clear from Ms Miller's evidence that the appellant did not receive it.

Discussion

25. The strike out occurred under Procedure Regulation 10(1), since the VTE considered that the appellant had failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings i.e. the VTE's standard direction requiring an appellant to serve a statement of case not later than four weeks before the date fixed for a hearing.

26. But an appellant can only fail to comply with a direction of which it is aware. If the notice of hearing sent out by the VTE was either a) sent to an address which was not the address notified in accordance with regulation 15(6) of the Procedure Regulations (namely the head office), or b) was not in fact received by the appellant, it could not be said that the appellant had "failed to comply" with a direction so as to be liable to the sanction of automatic strike out under regulation 10(1).

27. The decision of the senior member refusing the application for reinstatement on 25 May 2017 stated unequivocally that the notice of hearing was issued to the correct address. It must be assumed, in context, that the "correct address" referred to was the head office but as there was a question mark over the address to which the notice had been sent it would have been preferable for that to have been made explicit.

28. What the VTE did not do was to consider the appellant's case that the notice of hearing had not been *delivered* to "the correct address". The senior member's view, subsequently endorsed by the Vice President, was in essence, "we sent it so you must have received it". That is clear from the statement in the decision refusing reinstatement: "as the Notice was not returned undelivered it must be assumed the Notice was deemed to have been served." The reference to the notice being "deemed" to have been served may have been to the effect of section 7 of the Interpretation Act 1978, by which, whenever a statute authorises

service of a document by post, service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Section 7 would apply to directions sent by the VTE, but the deeming of service which it provides for is subject to the important qualifying words "unless the contrary is proved".

29. It was therefore not enough for the VTE to be satisfied that the standard directions and the notice of hearing had been addressed to the appellant at the head office. It was also necessary for it to consider whether the evidence proved that the directions had not been delivered. What seems not to have occurred before the application to reinstate was determined was a proper consideration of the appellant's case that the documents had not arrived. That consideration was a necessary first step before the VTE could go on to consider the variety of matters identified in paragraph 3 of PS/C2 which were relevant to the application to reinstate: whether non-compliance with the direction could be explained or excuse by reasons or circumstances judged to be compelling and reasonable; the interests of justice; whether there was a good explanation for the failure; and the effect on the party granting the application.

30. As the Tribunal has explained in *Simpson's Malt Ltd v Jones* [2017] UKUT 0460 (LC) the VTE must give reasons for its decisions, including decisions striking out or refusing to reinstate appeals. I am satisfied that the VTE's consideration of this case fell below the required standard by omitting to deal in its decisions with the substance of the appellant's case for reinstatement. Put another way, it was not open to the VTE to rely on the statutory deemed service of the notice of hearing and directions without also dealing clearly with the appellant's attempt to prove that service had not in fact occurred. For that reason the VTE's decision refusing reinstatement must be set aside.

31. It would be disproportionate to remit the appeal to the VTE for further consideration since it is unlikely that any more evidence would be available than is currently before me. The better course is for this tribunal to make a determination on the application for reinstatement.

32. There are only a limited number of possibilities for what may have occurred. The first is that the appellant may have received the notice of hearing and done nothing with it. That is possible, but Ms Miller's conduct throughout was a model of efficiency, and her evidence was that that the notice did not reach her. The second possibility is that the notice of hearing was sent to the appeal property, as Ms Miller says she was told by a member of staff at the VTE. Again, that cannot be ruled out, but on the other hand, the VTE inherits contact addresses from the Valuation Office, and all other correspondence seems to have arrived safely at the head office. The third possibility is that the notice of hearing was addressed to the head office but was lost in the post. The fourth is that the notice of hearing reached the head office but did not reach Ms Miller. Her evidence as to the size of the office and the arrangements for the delivery of post would cast doubt on this (her detailed evidence as to the postal arrangements at the head office does not seem to have been before the senior member and so could not have been taken into account under paragraph 9 of PS/C2, but it is available to me).

33. It is unnecessary (and it would be difficult on the limited material before me) for me to make a confident finding of fact as to which of these possible versions of events occurred. The first seems the least likely, given the manner in which the Ms Miller conducted herself. Far more likely is any one of the second to fourth possibilities, each of which would lead me to conclude that the application to reinstate should be granted. I reach that conclusion because if the notice was not delivered at all, or went to the wrong address, any breach of the standard directions was entirely outside the appellant's control. If the notice was delivered to the head office, but somehow did not come to Ms Miller's attention, it is easier to regard the directions as having been breached, but the breach was nevertheless unintentional. In any of these events, the interests of justice favour reinstatement. Refusal to reinstate in the circumstances of this case is an inappropriately draconian approach which would deprive the ratepayer, who in all other respects had carried out their interaction with the VTE in good faith, from pursuing an appeal. I therefore direct that the proceedings shall be reinstated, to be considered by the VTE in due course under the usual procedures.

Disposal

34. The appeal is allowed. The VTE shall reinstate the appeal and issue a fresh notice of hearing to the appellant.

Dated: 5 July 2018

P D McCrea FRICS