IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 288 (LC)
Case No: RA/54/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – ALTERATION OF RATING LIST – ***effective date of alteration - whether ratepayer's Convention rights breached by inability to alter from earlier date – whether VTE having power to back date to earlier date to avoid breach – whether VTE or Tribunal having power to award damages for breach of Convention rights - regulation 14(2) Non-Domestic Rating (Alteration of Lists and Appeals) England Regulations 2009 - section 6(1), Human Rights Act 1998 – appeal dismissed***

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

BETWEEN:

MRS EMILY SHIRLEY **Appellant**

and

MR CLIFFORD PARK
(VALUATION OFFICER)
Respondent

Re: Old Harbour Station,
Elizabeth Street,
Dover
CT17 9EF

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London WC2A 2LL
on
16 August 2018

The appellant appeared in person
Jacqueline Lean, instructed by HMRC Solicitor's Office on behalf of the respondent

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The following cases are referred to in this decision:

Secretary of State for Work and Pensions v Carmichael [2018] 1 WLR 3429

Chief Adjudication Officer v Foster [1993] AC 754

NKM v Hungary [2013] ECHR 546

R (Corus UK Ltd) v Valuation Office Agency [2001] EWHC Admin 1108

National Car Parks Ltd v Baird (VO) [2004] EWCA Civ 967

Introduction

1. The Old Harbour Station, Dover is a Grade II listed building designed by Sir Gilbert Scott as the Channel terminus of the London and South Eastern Railway Company. It opened for use as a railway station in 1861 and served the Company's passengers until 1927. It was then used variously as a bonded warehouse, a morgue, and as a training centre for P&O Ferries from whom it was purchased by the appellant and her husband on behalf of their own pension fund in May 2013. By that time much of the building was in a dilapidated condition and Mrs Shirley's intention, which has gradually been realised, was to undertake substantial works to restore the building and convert it for use as a number of small office units.

2. This appeal is against a decision of the Valuation Tribunal for England ("VTE") in respect of the appellant's proposal, made on 26 July 2016, that the rateable value of the portion of the building referred to as "left-hand side" should be reduced in the 2010 rating list from £15,000 to nil by reason of its condition. The valuation officer agreed with the appellant on the question of value and the VTE made the proposed reduction with effect from 1 April 2015. Mrs Shirley also argued unsuccessfully that fairness required the reduction to be effective from 1 May 2014 when P&O vacated the building and the appellant and her husband occupied a small part of it, but the VTE refused that request on the ground that it had no power to backdate the alteration to any earlier date having regard to the date of the proposal.

3. An unusual feature of this appeal has been that, as long ago as 7 months before the hearing in this Tribunal, the local billing authority had agreed to cancel the appellant's liability to pay the rates due in respect of the unoccupied parts of the building for almost the whole of the period before 1 April 2015 with which the appeal is concerned. Since January 2018 the appeal has therefore been pursued by the appellant in an attempt to obtain vindication of her complaint of defects in the rating system, including a suggested failure by the valuation officer to maintain an accurate list, and compensation for the considerable trouble and stress which she and her husband have experienced, including the loss of opportunities which are said to have been the result.

4. The valuation officer's conduct of this matter is said by the appellant to have breached her rights under Article 1 of the First Protocol to the European Convention on Human Rights by which every person is entitled to the peaceful enjoyment of their possessions. The appellant's case has also been that both the VTE and this Tribunal are prohibited by section 6(1), Human Rights Act 1998, from acting in any way which is incompatible with her convention rights. This is said to have two consequences. First, that in order to avoid acting incompatibly with her rights, the Non-Domestic Rating (Alteration of Lists and Appeals) England Regulations 2009 ("the 2009 Regulations") ought to be applied in such a way as to permit the rateable value of the appeal property to be reduced to nil from the date P&O vacated the building in 2014. Secondly the appellant argues that she should be entitled to compensation for the suggested breach of her convention rights. She quantifies this compensation at a little under £160,000 by applying an hourly rate of £125 to the time which she estimates she and her husband have devoted to dealing with the Valuation Office Agency and the local billing authority in connection with the rating of the Old Station from 2014 to 2018.

5. The appellant is legally trained and at the hearing of the appeal she represented herself, with the support of her husband, while the valuation officer was represented by Ms Jacqueline Lean of counsel. I am grateful to them both for their helpful written and oral submissions.

Relevant statutory provisions

6. By section 41(1) of the Local Government Finance Act 1988 the valuation officer is required to compile and maintain a rating list for each billing authority which includes each non-domestic hereditament meeting certain requirements. The list must state the rateable value of each hereditament together with other prescribed information. By section 43 of the 1988 Act the occupier of the hereditament is then liable to pay the non-domestic rate in respect of the hereditament.

7. The Secretary of State is empowered by section 55(4) of the 1988 Act to make regulations concerning proposals for the alteration of a list which, by section 55(6), may make provision for the day from which an alteration is to have effect, including provision for an alteration to have retrospective effect. The current regulations are the 2009 Regulations, as amended by the Non-Domestic Rating (Alteration of Lists and Appeals) (England) (Amendment) Regulations 2015.

8. As part of a comprehensive scheme for the assessment and collection of non-domestic rates, the 1988 Act also includes provisions for the relief of liability to pay rates in respect of unoccupied or partly occupied hereditaments (sections 44A and 45), for discretionary relief for charities, and for relief where a ratepayer would otherwise sustain hardship (section 49).

9. Provision as to the time from which an alteration in the 2005 and subsequent lists is to have effect is made by regulation 14 of the 2009 Regulations. So far as material, regulation 14(2) provides as follows:

> "14(2) Subject to paragraphs (2A) to (7), where an alteration is made to correct any inaccuracy in the list on or after the day it is compiled, the alteration shall have effect –
>
> (a) from the day on which the circumstances giving rise to the alteration first occurred, if the alteration is made –
>
> (i) before 1 April 2016 otherwise than to give effect to a proposal;
>
> (ii) in order to give effect to a proposal served on the VO before 1 April 2015; …
>
> (b) from 1 April 2015 if the circumstances giving rise to the alteration first occurred before that date and the alteration is made on or after 1 April 2016 otherwise than to give effect to a proposal;
>
> (c) From 1 April 2015 if the alteration is made in order to give effect to a proposal served on the VO on or after that date and the circumstances giving rise to the alteration first occurred before that date."

The relevant facts

10. After the appellant and her husband acquired the Old Harbour Station from P&O in May 2013 it remained in occupation of part of the building for about a year. At that time the building appeared in the 2010 rating list as a single hereditament with a rateable value of £32,000. In January 2014, before P&O had departed, a company owned by the appellant and her husband moved into "the Hut", a small attached building at one end of the Station building and forming part of the hereditament, which it used as an office in connection with its freight forwarding business. No notice appears to have been given to either the billing authority or the valuation officer that this change of occupation of part of the hereditament had occurred.

11. P&O left at the end of April 2014 and, apart from the Hut, the hereditament then remained vacant until part of the right hand side of the building was let for the storage of books with effect from 22 October 2014. The valuation officer eventually became aware of that letting in January 2016 and on 23 March 2016 served notice splitting the assessment into three parts with effect from the date it had occurred. The three parts were identified as the bookstore, the left-hand side, and the right-hand side of the building. The valuation officer's notice ascribed a value of £16,500 to the new left-hand side hereditament. The Hut was the only occupied part of the left-hand side, but it was not subject to any separate assessment. Until some time after 1 April 2015 the greater part of the roof of the left-hand side (other than The Hut) was missing, having been removed as part of the appellant's refurbishment works.

12. It appears from correspondence that the valuation officer was first informed of the appellant's occupation of the Station in April 2015 after a demand for rates for the whole building was forwarded to the appellant by P&O. On 20 April 2015 the appellant emailed the valuation officer explaining that works were being undertaken and requesting information about business rates exemption on the grounds that the building was listed and unoccupied.

13. A VOA staff member visited the property on 14 May 2015. She suggested that inquiries be made of the billing authority concerning empty rates relief on the unoccupied element. As a result of this suggestion an application was made and in December 2015 relief was granted for 3 months from 30 April 2014. The appellant subsequently requested that the Hut be entered as a separate hereditament from the rest of the building, but she was advised by the valuation officer in July 2015 that it would first be necessary to show that it was in separate occupation.

14. The assessment for the left-hand side of the building was further split with effect from 1 January 2016 by a notice served by the valuation officer on 27 April 2016. This was to reflect the arrival of a new occupier of part. A further notice was served on 11 May 2016 reducing the value of the two hereditaments into which the left-hand side had been split because they shared a common reception area. The rateable value of the larger part, which continued to be referred to as left-hand side, was reduced to £8,600.

15. Finally, by a notice served on 20 July 2016, the division of the left-hand side into two hereditaments was reversed and the hereditament was split once again (but in a different form) recognising the Hut as a separate hereditament for the first time, with a rateable value of £2,000, and leaving the remainder of the left hand-side with an assessment of £15,500.

16. The appellant made a succession of proposals against this bewildering series of notices and assessments. On 14 June 2016 she made seven separate proposals, on 29 June she made a further four, and on 4 July she made yet another. None of those proposals was accepted by the valuation officer yet none was pursued to a conclusion at an appeal. Only a proposal made on 26 July 2016 against the 20 July assessment of the left-hand side with a rateable value of £15,500 from 1 April 2015 got to a hearing at the VTE. Precisely what happened to the remaining proposals is not clear. It seems likely that most or all were withdrawn by the appellant at the suggestion of the customer services department at the VOA on the grounds that none could achieve the desired reduction in the rateable value of the left-hand side with effect from 1 May 2014 because of the effect of regulation 14(2)(c) of the 2009 Regulations. An alteration to give effect to a proposal served on or after 1 April 2015 can only take effect from that date even where the circumstances giving rise to the proposed alteration first occurred before that date.

17. Before concluding this review of the recent rating history it is necessary to record that between April 2015 and January 2018 the appellant and her husband were engaged in a battle with the local billing authority, Dover District Council, over their liability to pay rates of more than £40,000 for the whole of the building for the years 2014-2016. They had a number of meetings with the Council's staff, received four summonses to attend the Magistrates Court, attended three liability order hearings (none of which appear to have resulted in a definitive conclusion) and, by their account, devoted hundreds of hours of their time to contesting both their liability to pay and the various assessments. They now contend that they ought to be compensated for this time and trouble because in January 2018 it was agreed by the Council that all but a very small part of the remaining demands would be withdrawn and relief would be granted on the basis that with, the exception of the Hut, the left-hand side of the building had been undergoing redevelopment throughout the period of the appellant's ownership. With the exception of three months during which the property was vacant, I understand this relief to have been granted on a discretionary basis, to address hardship which would otherwise be caused, rather than in recognition of any error on the part of the VOA or the billing authority in their dealings with the property.

The appeal proposal

18. The electronic proposal which gave rise to the appeal to the VTE, and ultimately to this appeal, was made by the appellant on 26 July 2016. In Part A it identified the property concerned as "Left-hand side, Old Harbour Station", described as offices and premises which were said to be vacant and currently to have a rateable value of £15,500 from effect from 1 April 2015. In Part B an alteration was proposed with effect from 1 May 2014 on the basis that "this part of Old Harbour Station is partly demolished and being re-built. It is not fit for human habitation – no roofs, doors etc". The grounds for the proposal was stated to be that the rateable value shown in the list by reason of an alteration made by the valuation officer on 14 July 2016 was inaccurate. The appellant's detailed reasons for believing that the list was inaccurate were explained in Part C as follows:

> "I have appealed the previous rating list alteration notice dated March 23 2016. I have been informed by Mr White of the VOA Eastbourne that I must appeal again because I had not ticked the correct box and as a result I would be unable to get the list altered to the actual effective date (May 1 2014) because of a change in the law. Please note that I have never

come across such a complicated and user unfriendly legal process. It is clearly not fit for purpose. It is too rigid and does not deliver justice in a timely way."

19. As Miss Lean submitted on behalf of the VO, there can be no doubt that the proposal which is the subject of this appeal relates to an alteration to the list notified to the appellant on 14 July 2016, and was not concerned with any of the alterations notified on 23 March 2016. That is significant because an appeal in respect of the alterations notified on 23 March 2016 would, if successful, be capable of resulting in an alteration to the list having effect from the day on which the circumstances giving rise to the alteration first occurred by reason of regulation 14(2)(a). That is in contrast to an appeal against an alteration made on or after 1 April 2016 which, if successful, could only result in an alteration having effect from 1 April 2015 by reason of regulation 14(2)(b) or an alteration to give effect to a proposal served on the VO on or after 1 April 2015 which cannot take effect earlier than that date by reason of regulation 14(2)(c). It is clear that the proposal related to the alteration notified on 14 July 2016, and was therefore in the second category for three reasons. First, the rateable value of the existing hereditament stated in the proposal was £15,500; secondly, the effective date was said to be 1 April 2015; and thirdly, the grounds for the proposal was that the rateable value shown in the list by reason of the alteration made by the valuation officer on 14 July 2016 was inaccurate. In contrast, the alteration notified on 23 March 2016 resulted in a rateable value of £16,500 taking effect from 22 October 2014.

The appellant's case

20. The appellant did not seek to argue that, as a matter of construction of the 2009 Regulations and in particular Regulation 14(2), the VTE had been wrong to find that its jurisdiction on an appeal against the alteration made on 14 July 2016 did not permit it to direct an alteration with an effective date before 1 April 2015. She accepted that such was the natural meaning of the regulation. In my judgment the VTE was clearly right in its conclusion.

21. The appellant's contention, nevertheless, was that both the VTE and this Tribunal were required by section 6(1) of the Human Rights Act 1988 to allow an alteration of the list to show a rateable value of nil for the appeal property with effect from 1 May 2014. They were, in effect, obliged to treat regulation 14(2) as if it permitted an alteration to take effect from an earlier date in order to avoid acting incompatibly with the appellant's Convention rights.

22. Section 6 of the 1988 Act provides as follows:

"**6 – Acts of public authorities**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an Act if –

(a) As the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) In the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention Rights, the authority was acting so as to give effect to or enforce those provisions."

23. The short answer to the appellant's invitation to the Tribunal to disapply regulation 14(2), or to modify it so that is has a different effect, is provided by the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Carmichael* [2018] 1 WLR 3429. That case concerned the power of the Upper Tribunal to determine an application for housing benefit in a manner inconsistent with the relevant regulation following a decision of the Supreme Court in judicial review proceedings which had declared that regulation to be in breach of the claimant's Convention rights. The Upper Tribunal had purported to give effect to the claimant's entitlement not to be discriminated against under article 14 of the Convention by disapplying the offending portion of the relevant regulation. The Court of Appeal held, by a majority, that the Upper Tribunal had not been entitled to excise words from the housing benefit regulations in a manner which effectively rewrote them. The function of making or amending regulations was the preserve of Parliament while the role of the Court of Appeal and of the Upper Tribunal was limited to determining that the regulation was incompatible with the claimant's convention rights.

24. The reasoning of the majority in *Carmichael* was contained in the judgment of Flaux LJ who, at [45] accepted the submission on behalf of the Secretary of State that "the existing powers of courts and tribunals do not include the rewriting of primary or secondary legislation in order to render it compatible with Convention rights". At [106] Sir Brian Levenson PQBD agreed. Leggatt LJ gave a judgment dissenting from the view of the majority and would have held that in the case of provisions of subordinate legislation which are incompatible with Convention rights, and where such incompatibility is not inherent in the enabling primary legislation, it could properly be treated by the Upper Tribunal as being overridden by the duty imposed by section 6(1) of the Human Rights Act.

25. The appellant's primary case in this Tribunal in relation to the compatibility of regulation 14(2) of the 2009 Regulations was based on the decision of the House of Lords in *Chief Adjudication Officer v Foster* [1993] AC 754 in which it had been held that there was no obligation on a court or tribunal to give effect to a provision of secondary legislation which was *ultra vires* and, moreover, that it was within the jurisdiction of a social security appeal tribunal to determine that a decision giving effect to such a regulation was "erroneous in a point of law". *Foster* was considered by the Court of Appeal in *Carmichael* at [64] – [66] as it had been relied on by the claimant in support of the approach taken by the Upper Tribunal in relation to housing benefit. The Court explained that the House of Lords had found only that the Upper Tribunal had jurisdiction to determine any challenge to the *vires* of secondary legislation as being beyond the scope of the enabling power in primary legislation whenever it was necessary to do so in determining whether a decision under appeal was erroneous in point of law. The challenge in *Carmichael* was a different one, as Flaux LJ explained at [66], as follows:

> "This case does not concern the jurisdiction of the Upper Tribunal in that sense, nor is it a case where any issue arises as to the *vires* of the relevant regulation. Foster's case, [1993] 754, which precedes the enactment of the Human Rights Act by some years, seems to me to

have no bearing on whether the Upper Tribunal was entitled to make the order it did in the present case."

26. It follows that the decision of the House of Lords in *Foster's* case cannot support the argument of the appellant in relation to regulation 14. If this Tribunal was persuaded that the application of regulation 14 in this case was incompatible with the appellant's Convention rights under Article 1 of the First Protocol, it would be limited to making a declaration of incompatibility under section 8(1) of the 1998 Act. It could not disregard the provision or apply it in a manner inconsistent with any permissible interpretation of its meaning and effect.

27. It should of course be appreciated that the short answer to the appeal provided by *Carmichael* begs the question whether by altering the list with effect from 1 April 2015 rather than with effect from an earlier date (and in particular 1 May 2014 as requested by the appellant) the Tribunal would act inconsistently with the appellant's right under Article 1 of the First Protocol. Article 1 prohibits interference with a person's "peaceful enjoyment of his possessions". As the European Court of Human Rights explained in *NKM v Hungary* [2013] ECHR 546 the concept of "possessions" in Article 1 is not limited to the ownership of material goods but extends to other rights and interests constituting assets of an individual. These can either be "existing possessions" or assets or claims in respect of which an applicant can argue that he has at least a legitimate expectation of their being obtained or realised. The classification of assets as "possessions" for this purpose is independent of their recognition as such in domestic law. As the Court explained: "In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant entitled a substantive interest protected by Article 1 of Protocol no.1."

28. The appellant submitted that the refusal of the valuation officer and the VTE to backdate the nil assessment of the appeal property to 1 May 2014 amounted to interference with her and her husband's possessions as it prejudiced the value of their pension fund, for which the property was held, as well as giving rise to a substantial interference with their use of their own time which had been diverted to dealing with the consequences of the successive alterations in the assessment by the valuation officer.

29. The appellant's description of the procedure in which she and her husband have become unwillingly embroiled, and on which she based her complaint, was incomplete. It wholly overlooked the fact that in January 2018 she and her husband were relieved of liability for almost the entirety of the rates payable in respect of the period before 1 April 2015 with which the appeal is concerned. In judging whether there has been any interference in the appellant's Convention rights by her subjection to the assessment and appeal process, it is necessary to consider the rating regime and her experience of it as a whole, including the provisions to which I have already referred allowing relief in respect of empty property or, on a discretionary basis, in cases of hardship. The appellant has benefited from both of those aspects of the rating legislation and has not been required to meet a liability in respect of the period in dispute. That seems to me to be a complete answer to the suggestion that there has been any interference with her and her husband's possessions in the first sense she suggested (interference with the value of the couple's pensions by the imposition of an unwarranted expense in the form of business rates).

30. In my judgment it is equally impossible to describe the consequences of the appellant's engagement in the legal processes leading to relief being granted against the initial liability as a deprivation of possessions in the sense contemplated by Article 1 of the First Protocol. Those consequences were not attributable to the operation of regulation 14, but were due, as it appears to me from the information available, to the omission of those occupying the appeal property to inform either the billing authority or the valuation officer at the appropriate time there had been changes of occupation or changes in the condition of the property.

31. It was suggested by the appellant that, as the appeal property is a prominent one in Dover, such that its dilapidated condition, including its missing roof, would have been readily apparent to anyone observing it from the road, it was therefore incumbent on the valuation officer to investigate whether any alteration was required to the list to reflect that condition from time to time. I do not accept that submission. The valuation officer is under a duty to maintain an accurate list. But, as explained by Sullivan J in *R (Corus UK Ltd) v The Valuation Office Agency* [2001] EWHC Admin 1108 at [47]: "That duty has to be discharged in the real world, where there are finite resources, and only 24 hours in the valuation officer's day. He may have to give priority to certain known inaccuracies, and defer consideration of other matters which possibly require alteration." The valuation officer's duty to act fairly is therefore discharged "if he does his best to compile and thereafter maintain an accurate list, making such alterations as are necessary for that purpose" [52].

32. The position was made even clearer by the Court of Appeal in *National Car Parks Ltd v Baird (VO)* [2004] EWCA Civ 967 that: "It is not possible to graft onto the obligation to maintain an accurate list any temporal element or requirement as to when it must be altered." It follows that the valuation officer is not in breach of duty if, for reasons unknown to him or her connected with the occupation of a hereditament or its condition, the rating list is for the time being inaccurate.

33. Finally, I come to the suggestion in the appellant's statement of case that the Tribunal should award damages or compensation for the inconvenience and distress she and her husband experienced. This aspect of the appeal was not pursued with any conviction once the appellant's attention was drawn to section 8(2), Human Rights Act 1998. This provides that, in relation to any act of a public authority which the court (an expression which includes both the VTE and the Tribunal) finds to be unlawful, such relief or remedy within its power may be granted as it considers just and appropriate: "but damages may be awarded only be a court which has power to award damages, or to order the payment of compensation, in civil proceedings." Neither the VTE nor the Upper Tribunal has any power to award damages or order the payment of compensation "in civil proceedings".

34. In *Carmichael* the majority in the Court of Appeal held that, to the extent that the claimant had suffered any loss as a consequence of the incompatibility of the housing benefit regulation with his Convention rights, his remedy lay in bringing a claim for damages in the civil courts under section 8(2) of the 1998 Act. It was not suggested in *Carmichael* that a remedy in damages was available in the Upper Tribunal and I am satisfied that it was not in that case, and nor is it in this.

35. I therefore dismiss the appeal.

Martin Rodger
Deputy Chamber President

3 September 2018