

THE VALUATION TRIBUNAL FOR ENGLAND



Council Tax Valuation Appeal; flat above a public house; fire damaged and incapable of occupation; hereditament test; Wilson v Coll (LO) [2011] appeal allowed

Re: The Laurel Tree, 349 Stourbridge Road, Brierley Hill DY5 1JD

APPEAL NUMBER: M0826076

BETWEEN:	Sandeep Tewari	Appellant
	and	
	Dal Virk	Respondent
	(Listing Officer)	

BEFORE: Gary Garland (President)

APPEAL DECIDED WITHOUT A HEARING

Summary of decision

1. Appeal allowed as the appeal property ceased to be a hereditament on 20 January 2017.

Introduction

2. This appeal process began when the appellant served a proposal on the Listing Officer, which was received on 23 March 2018, seeking a retrospective deletion of the band entry for the appeal dwelling with effect from 20 January 2017. The appellant's grounds for the proposed deletion included the following statement;

I would like to begin by detailing some history and background regarding this property. On 20 January 2017, there was a serious fire incident at the property, whereby the whole flat was engulfed with flames and severely damaged.

As per the attached images, the fire damage was that extensive that it had burnt everything on the 1st floor right down to the brickwork in the

majority of rooms. The atmosphere on the 1st floor was smoke logged and even staying there for 5 minutes without the correct breathing apparatus was difficult.

The complete electrical, central heating and piping system was totally destroyed in the fire. In conjunction with the condition of the flat, the water, electric and gas supply was all disconnected due to health and safety reasons after the fire, therefore making the flat incapable of occupation.

3. After considering the merits of the proposal, the Listing Officer decided that it was not well founded and a decision notice to that effect was served on the appellant, who appealed to the tribunal against that decision on 28 August 2018.
4. The appeal was on its third listing, when the matter came before a lay panel sitting in Birmingham on 29 January 2020. The appellant appeared before the panel and the Listing Officer was represented by Mr Muqbil. The panel decided to adjourn the earlier hearing with a bespoke direction and the following reasons were given for the adjournment at the time;

Prior to the hearing, Mr Tewari had requested a postponement. The reasons for this was because:

- (i) He did not recall seeing the respondent's evidence bundle;
- (ii) there were doubts that the Listing Officer had included all of Mr Tewari's evidence (within the hearing bundle); and;
- (iii) Mr Tewari wanted to supply additional information.

The clerk refused to postpone the appeal because all the evidence should have been exchanged prior to the first time the appeal was listed. The clerk was also mindful that the appeal had been postponed twice on previous occasions.

Mr Tewari therefore attended the hearing to ask for an adjournment.

At the hearing, Mr Muqbil, who was representing the Listing Officer objected to the inclusion of the new evidence. But he stated he would not object to the new evidence if the appeal was adjourned, so that he had more time to consider it. The panel therefore issued a bespoke notice of directions.

5. In accordance with the bespoke directions, the appellant was required to send to the Listing Officer any new evidence that he wished to rely upon by 12 February 2020. Mr Tewari complied with this aspect of the direction on 4 February 2020.
6. The Listing Officer was given the opportunity to comment or rebut the new evidence provided by the appellant by 11 March 2020. The Listing Officer failed to comply with this requirement of the bespoke direction.

7. I instructed the Deputy Registrar to contact the parties on my behalf, before I determined the appeal. Whilst the Listing Officer had provided a consolidated hearing bundle to the tribunal, in readiness for the panel sitting on 29 January 2020 it had not been added to, having regard to the bespoke direction following the aborted hearing. The appellant duly forwarded on to the tribunal his additional evidence, which he had served on the Listing Officer on 4 February 2020. The Deputy Registrar invited the Listing Officer on 27 May 2020 to comment and provide his reasons for his failure to comply with the bespoke direction. The Listing Officer was invited to respond by 5pm on 4 June 2020 but did not respond until the following day. The Listing Officer also provided the tribunal with a belated response to the appellant's additional evidence. As the appellant was not prepared to give his consent to me admitting fresh submissions from the Listing Officer, I dealt with this matter as a preliminary issue.
8. Having considered the matter, I decided not to admit the additional evidence which the respondent provided to the tribunal on 5 June 2020.
9. The respondent cited administrative errors, within the VOA, and the ongoing crisis relating to Covid 19 as reasons for their failure to comply with the tribunal panel's bespoke direction.
10. The tribunal's records showed that prior to the Deputy Registrar's email to the respondent, Mr Gath, on behalf of the lay panel who made the bespoke direction, had emailed both parties on 13 March 2020 and 3 April 2020. The purpose of Mr Gath's emails was to check the parties' progress in relation to the bespoke direction. The emails for the respondent were sent to Mr Muqbil but he did not respond to either, on behalf of the VOA Listing Officer.
11. The Covid 19 lockdown began after 11 March 2020, the date when the VOA Listing Officer's response to the appellant's evidence should have been served on the appellant.
12. In considering a breach of the Tribunal's Directions, the tribunal must have regard to the three-stage Test set out in *Denton v TH White Ltd* [2014] 1 WLR 3926 before applying sanctions. Stage one requires the Tribunal to determine the significance and seriousness of the breach: if the breach is neither, then relief should usually be granted. At stage two, the Tribunal must consider the reasons why the failure and default occurred: if the defaulting party has good reasons why they failed to meet the requirements of the direction, relief should usually be granted. Finally, at the third stage, the Tribunal must have regard to all of the circumstances of the case, the need for litigation to be conducted efficiently and at proportionate costs, that the failure to grant relief may leave an inaccuracy in the list and the need to enforce compliance with the Rules, Directions and Orders of the Tribunal.
13. I considered the respondent's failure to comply a major breach and the reasons cited by him were not, in my opinion good reasons, for avoiding a sanction. The breach had caused prejudice to the appellant because he was

not in a position to respond at the appropriate time, in accordance with the direction. Therefore, having regard to the Denton test, I decided to exclude the respondent's late evidence.

14. I also bore in mind the fact that the respondent had already given their consent for this appeal to be heard on the papers, prior to responding with additional submissions to rebut the appellant's evidence. In giving his consent for the case to move forward in this manner, the respondent must have been satisfied that his arguments and submissions were complete. The respondent received the appellant's additional factual evidence over a month, before he gave his consent for the appeal was heard on the papers and had had ample opportunity to respond or rebut the reliability of the appellant's additional evidence before the Covid 19 lockdown. There was therefore no legitimate excuse for his failure to serve his rebuttal on the appellant at the appropriate time.
15. In view of the foregoing, I determined the appeal based on all of the evidence submitted except the additional submissions made by the Listing Officer on 5 June 2020.
16. Ordinarily, I would have considered and determined this appeal, following a public hearing. However, in view of the Covid 19 pandemic and to avoid justice being further delayed, as previously stated, the parties were contacted by the tribunal office by email, to ascertain if they were prepared to give their consent to this appeal being decided without a hearing. In the event, both parties were happy to give their consent and therefore arrangements were made for the appeal to be decided without a hearing, in accordance with Regulation 29 of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. Regulation 29 is as follows;
 - (1) Subject to the following paragraphs, the VTE must hold a hearing before making a decision which disposes of proceedings unless--
 - (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
 - (b) the VTE considers that it is able to decide the matter without a hearing.
 - (2) The VTE may in any event dispose of proceedings without a hearing under regulation 10 (striking out proceedings).
17. I was satisfied that I could consider the appeal without a hearing, on the basis of their respective written representations. I should add that I did seek the parties' clarification on one point and that was in relation to what happened to the rating assessment for public house after the fire. As the appeal property was a composite hereditament, I wanted to establish the facts.

18. In accordance with the tribunal's business arrangements, I have considered and determined this appeal alone.
19. The appeal dwelling was a three-bedroom first floor flat above a public house. It also had a kitchen and a bathroom. Its existing entry was Band A (composite).
20. The rating assessment for the public house was deleted from the Rating List with effect from 20 January 2017, by the Valuation Officer of his own volition, following discussions with the appellant. Following the completion of the repair works, a new hereditament in relation to the public house was entered into the 2017 Rating List at £6,175 Rateable Value with effect from 9 March 2018.
21. The relevant date for the purposes of this appeal was 20 January 2017, the proposed effective date for the deletion and the date when the fire damage occurred.
22. The effective date for the deletion of the council tax band entry, should the appeal be successful was 20 January 2017.
23. This is not a case where I could consider a deletion of the existing for a defined period to cover the duration of the works, by making an Order under Regulation 38 (7) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. This is because the issue for me to decide if the dwelling ceased to exist on 20 January 2017. The appellant's argument was that it did cease to exist and the following the completion of a programme of works, a different hereditament came into existence on 9 March 2018 because of the major repair/refurbishment that had been necessary to make good the premises.

Issue

24. At the relevant date, did the appeal property still constitute a dwelling for the purposes of section 3 of the Local Government Finance Act 1992?

Evidence and submissions

25. The appellant provided photographic evidence to show the damage caused by the fire.
26. He also provided the contractors' surveyor's report which itemised in detail the fire damage caused to the whole property, the report covered both the public house and the flat accommodation, and the estimated cost of the repair works which was in excess of £180,000. This figure covered the combined cost of restoring the whole building (public house and the flat) so that it was capable of occupation.
27. The Listing Officer accepted that the property was incapable of occupation, following the fire, but argued that the amount of repair works that were

required to render the property habitable were reasonable for the owner to undertake. The Listing Officer therefore invited me to dismiss the appeal, having regard primarily to the High Court's judgment in *Wilson v Coll (LO)* [2011] EWHC 2824 (Admin).

28. The Listing Officer also relied on 3 earlier lay tribunal panel decisions relating to previous appeals, where the appellant taxpayer in each case sought a deletion of the dwelling's entry, and each case was dismissed. The three dwellings that were subject to the previous appeals were;

- a) 37 Diglis Road, Worcester;
- b) 44 Oakley Street, Shrewsbury; and
- c) The Market Tavern, 40-41 High Street, Walsall

29. The third panel decision in relation to the Market Tavern was the most relevant given that the rating assessment for the public house was reduced to nil, on the basis that it was described as a building beyond economic repair in the rating list. The panel decided that the flat above the public house remained a hereditament despite accepting that significant repair works were required to render it capable of occupation.

30. None of the earlier tribunal panel decisions are binding on me, at best they can only be persuasive if the facts are similar, I am satisfied that on the facts of this case none of the cases cited are of any help.

Decision and reasons

31. The following paragraphs of the High Court's judgment in *Wilson v Coll (LO)* [2011] are particularly relevant to this appeal. In paragraphs 5 to 7 Mr Justice Singh set out the legal framework which, in cases like this, have to be followed;

5. The Listing Officer's primary statutory duty in the present context is imposed by section 22 of the Local Government Finance Act 1992, and is to compile and maintain a valuation list for each local billing authority area. By section 23 of the same Act that list must show, for each day for which it is in force, each dwelling which is situated in the billing authority's area and which of the valuation bands is applicable to that dwelling. A "dwelling" is defined for the purposes of Part 1 of the 1992 Act by section 3. It is any property which, by virtue of the definition of a hereditament in section 115(1) of the General Rate Act 1967, would have been a hereditament for the purposes of that Act if that Act remained in force. Secondly, it is not for the time being required to be shown in a non-domestic rating list. And thirdly, that it is not exempt from non-domestic rating.

6. It is unnecessary, for present purposes, to go to the underlying definition of hereditament in section 115 of the General Rate Act 1967.

It is important, however, to recall an authority which has provided a definition of what is hereditament. That is the decision of the Court of Appeal in *Post Office v Nottingham Council* [1976] 1 WLR 624.

7. In the principal judgment, which was given by Browne LJ, there appear the following helpful passages. At page 635B:

"the question is whether the building as a *building* is so far completed as to be capable of occupation or ready for occupation for the purposes for which it is intended - as a house, shop, office, factory or, in this case, a telephone exchange."

Later at page 635H to 636A Browne LJ returned to this theme and said as follows:

"I think the test is: as a matter of fact and degree, is, or will the building, as a building, be ready for occupation, or capable of occupation, for the purpose for which it is intended?"

32. In *Wilson* the respondent's counsel argued that once hereditaments were entered into the council tax valuation list, they were effectively locked in even if they were in disrepair and needed repairs before they were capable of occupation. Paragraphs 11 and 15 record the argument put forward by the Listing Officer on this point;

11. For the respondent Listing Officer it was submitted that the question of whether a property continues to be a hereditament, according to the relevant legal regime, does not depend on whether any repairs which may be needed can be economically carried out. It was submitted that a dwelling that is capable of repair remains a hereditament even if it would not necessarily be economic to carry out those repairs. In particular, it was drawn to my attention that there are two legislative provisions which would appear not to make sense, unless the existence of a hereditament is taken for granted.

12. The first of those legislative provisions is regulation 6(2)(e) of the Council Tax (Situation and Valuation of Dwellings) Regulations 1992, which I will abbreviate as "the Valuation Regulations". That provision requires that in conducting a valuation exercise for a relevant property certain assumptions are to be made, and by regulation 6(2)(e) one of those assumptions is "that the dwelling was in a state of reasonable repair."

13. For the respondent it was observed that this court has previously held that the presumptions in regulation 6 are irrebuttable: see *R v East Sussex Valuation Tribunal, ex parte Silverstone* [1996] RVR 203 at 205. That is a decision to which I will return.

14. The other legislative provision upon which the respondent relies, as providing a statutory indication that the legislator has proceeded on the assumption that a hereditament continues to exist, even if repairs to it are required which may not be economic to undertake, is Article 3 of the Council Tax (Exempt Dwellings) Order 1992. This sets out a number of classes which are exempt from liability to pay council tax for a limited period of time of 12 months. Class A, which is material to the present

case, provides as follows:

"(1) a dwelling which satisfies the requirement set out in paragraph (2) unless it has been such a dwelling for a continuous period of twelve months or more ending immediately before the day in question;
(2) The requirement referred to in paragraph (1) that the dwelling is vacant and -
(a) requires or is undergoing major repair work to render it habitable,
...
(3) for the purposes of paragraph (2) above 'major repair work' includes structural repair work;"

15. In essence, therefore, the submission on behalf of the respondent is that those legislative provisions would simply make no sense if the underlying assumption was not implicit in them, namely that a hereditament continues to exist, even though repair to it may not be economic to undertake.

33. Having regard to the present case, the Listing Officer has overlooked the fact that the council tax legislation was amended with effect from 1 April 2013. The Class A of the Exempt Dwellings Order 1992 which was referred to in paragraph 14 in *Wilson* was abolished. Now unoccupied dwellings that are in need of major repair works to render them capable of occupation are chargeable dwellings rather than exempt. Prior to 1 April 2013, for all intents and purposes, a number of former dwellings did cease to be hereditaments. The regulatory wording of what was Class A of the Council Tax (Exempt Dwellings) Order 1992 leaves no doubt that a dwelling requiring or undergoing major repair works to render it habitable was incapable of actual or beneficial occupation. However, no prejudice was suffered to the owner of such properties provided he carried out any repairs in a timely fashion, otherwise any exemption period afforded by Class A was lost.
34. The Listing Officer's current approach, for appeals of this nature, which appears to have been endorsed by earlier lay tribunal panel decisions is that if a property is in disrepair and even if the state of decay is such that it cannot be occupied as a dwelling, a hereditament still exists as long as it can be repaired, no matter what the cost of those works will be, because there is no economic test for council tax purposes. Such a robust approach without giving proper consideration to whether a property is capable of occupation at the relevant date or whether it is reasonable for the owner to undertake such works to render it habitable is flawed, and fails to appreciate the reality of the situation, with respect in my opinion that approach is wrong.
35. Whilst the Listing Officer acknowledges that the correct legal test is to establish if the property constitutes a dwelling and therefore a hereditament, before the statutory assumption of it being in reasonable repair is applied, as this case shows, this is not followed in practice. The Listing Officer's approach in this case was to apply the statutory assumption that the property was in a reasonable repair but have no regard to whether or not a hereditament existed at the relevant date. It may be that the Listing Officer's errant approach was influenced because he was aware that the property was

subjected to a programme of works and was eventually re-occupied as a dwelling just over a year after the fire ruined the property.

36. Regard has to be had to physical facts as they existed on the relevant date 20 January 2017 as opposed to what existed on 9 March 2018.

37. Mr Justice Singh outlined the correct approach to be followed in paragraphs 39 to 41 of the *Wilson* judgment.

39. In answering that question correctly the respondent submitted to me that what in fact should be asked is a question which is posed for Listing Officers to consider in a practice note to the Council Tax Manual, practice note number 4. The question is as follows:
"Having regard to the character of the property and a reasonable amount of repair works being undertaken could the premises be occupied as a dwelling?"

40. I accept the respondent's submission as a general matter in that respect. I accept that as a general matter of law the crucial distinction for the purposes of deciding whether there is, or continues to be, a hereditament should focus upon whether a property is capable of being rendered suitable for occupation (in the present context occupation as a dwelling) by undertaking a reasonable amount of repair works. The distinction, which is correctly drawn by the respondent, in my view, is between a truly derelict property, which is incapable of being repaired to make it suitable for its intended purpose, and repair which would render it capable again of being occupied for the purposes for which it is intended.

41. The crucial distinction in that regard is not between repairs which would be economic to undertake or uneconomic to undertake. As I have already indicated, that submission, and my conclusion in accepting it, draws force from the fact that the concept of the reasonable landlord considering something to be uneconomic is simply absent from the present legal regime, whereas it is present in the legal regime which governs non-domestic rating.

38. Following the fire, the appeal property was in effect a burnt-out shell that was incapable of beneficial occupation. The Listing Officer conceded that this was the case on page 9 of the evidence bundle. Mrs Claire Crosby, in her advocacy statement, on behalf of the Listing Officer stated;

Whilst I appreciate that the property could not have been occupied following the fire and during building works, for Council Tax purposes, it isn't the fact that property could not have been occupied at this time, but could the property be occupied again following a reasonable amount of repair works. In this instance the answer is yes and should remain in the Council Tax List.

39. Whilst Mrs Crosby does refer to the need to consider whether a property could be reinstated with a reasonable amount of repair works, she has adopted the wrong starting point. She accepts that the property was incapable of being occupied at the relevant date, which if so, means it ceased to be a hereditament at that point. However, she ignored the fact that it was no longer a hereditament because she was probably mindful that the property had undergone a programme of works, the result of which, resulted in a new hereditament coming into existence.
40. Factual evidence provided by the appellant, in the form of a surveyor's report, showed that the interior of the property had been damaged beyond repair. Floorboards, plasterboard on walls, vinyl wallpaper, wall mounted radiators, the lath and plaster ceilings, the UPVC windows, bathroom sanitary fittings, kitchen units and ceramic tiles all required removing and replacing. The roof was also in need of repair and the loft was damaged.
41. The appellant argued that the amount of repair works that were involved in reinstating the dwelling went far beyond the term "reasonable" when one looks at the expression used by Mr Justice Singh in paragraph 40 of his judgment. Having seen the physical state that the property was left in following the fire, I found the appellant's argument compelling.
42. In theory, if you had enough money to throw at a project, it could be argued that anything was repairable. However, I note that in paragraph 40 of his judgment, Mr Justice Singh states that, in deciding whether or not a property continues to exist as a dwelling, there is a need to focus on whether it can be rendered capable of occupation by undertaking a reasonable amount of repairs. This judicial view, correctly interpreted, suggests that the test is not, how the Listing Officer has applied it in this case, can it be repaired whatever the cost? Since it does not matter if it is not economic for the owner to effect repairs but whether it is reasonable to expect, given the amount of work involved, that the repairs would be undertaken in the first place?
43. The Listing Officer, wearing his other hat, as the Valuation Officer had accepted that the public house which formed part of the same building as the flat ceased to be a hereditament following the fire. However, when looking at the burnt out first floor, that used to be flat, he maintained that it was still a hereditament that was capable of repair. In justifying his approach, the Listing Officer argued that there was no economic test for council tax purposes, so he did not have to have regard to the fact that any repairs had to be considered economic for the landlord to undertake.
44. I have no doubt that the Listing Officer's approach was heavily influenced by the fact that the appellant did undertake the repairs. However, the appellant argued that the fire damage was so extensive, after the repair and reinstatement works had been carried out a dwelling of a different character had resulted. The layout was altered and the interior was completely different.

45. The correct approach in appeals of this nature is to consider whether or not a hereditament exists at the relevant date. If it does, then it must be valued on the statutory assumption that it is in reasonable repair, even if in reality it is in need of repair.
46. The concept of a hereditament is intertwined with the concept of capability of occupation. As the Court of Appeal's judgment in *Post Office v Nottingham Council* [1976] 1 WLR 624 had shown there was a subtle difference between capability of occupation and rateable occupation. A hereditament does not need to be occupied, before it can be said to exist, but it does have to be capable of occupation.
47. The Listing Officer accepted that the property was incapable of beneficial occupation, following the fire, but argued it could have been a later date once a reasonable amount of repair works had been carried out. Having regard to the surveyor's report and the photographs, I do not accept that the amount of repair works required were reasonable. The flat was totally destroyed by the fire as was the public house. The reinstatement works required were major as were the building costs involved and there is no doubt in my mind that the appeal dwelling ceased to exist once the fire took hold. The corollary of that is that the Listing Officer erred in his refusal to delete it. There was no longer a hereditament to begin with to which he could apply the statutory assumptions. To use an analogy, you cannot repair what is not there.
48. It is accepted that the whole property, the public house and the first floor living accommodation has been subject to an extensive programme of building and renovation works. This has resulted in the public house accommodation being entered into the rating list as a new hereditament. As I have allowed the appellant's appeal and will order the existing entry to be removed from list with effect from 20 January 2017, it is now open to the Listing Officer to alter the valuation list, of his own volition, and create a new entry for the first floor flat with effect from the date that it was capable of beneficial occupation. The valuation band that is applicable to the new dwelling will be a matter for the Listing Officer to decide, in the first instance. Although the appellant will, of course, have a right to challenge the valuation for the new entry by way of a proposal should he wish to do so.

Order

49. In accordance with Regulation 38 (2) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, the Listing Officer is ordered to delete the entry relating to the flat from the Valuation List with effect from 20 January 2017.
50. The Listing Officer is required by Regulation 38 (9) to comply with this Order within 2 weeks of the date shown below.



President

David Slater

Deputy Registrar

Date: 15th June 2020

Appeal number: M0826076