Case Name: *Appeal of Jo Moore* (VO) [2018] UKUT 0324 (LC) (19 December 2018)

Topic: Material change of circumstances (MCC) – risk of future flooding

Full case: click here

Summary: This case (decided on written representations) concerned an appeal from a VTE decision that the risk of future flooding did not constitute an MCC forming the basis of a valid proposal to amend the 2010 list. The Upper Tribunal allowed the unopposed appeal (made by the valuation officer) and found the proposal to be invalid.

Commentary: The appeal property was a car supermarket in the Hessle Dock area, comprising a 1950s warehouse. It had been extensively flooded in December 2013, resulting in the loss of some 800 cars at a loss to the ratepayer of around £2m. Property insurance was no longer available after the flood (the property having been placed with a flood risk Zone 3 area) and the landlord agreed a 25% rent reduction.

On 30 March 2015 a proposal was made to reduce the RV with effect from the day following the flood. The proposal was initially accepted by the VO but validity was subsequently challenged, on the ground that at the material day (the date of the proposal) there was no flood and no MCC, so the proposal was invalid. The VTE dealt with the question as a preliminary issue and determined that the high risk of flood still remained at the material day and this amounted to an MCC. If the parties were unable to agree the reduced RV, the VTE would determine the issue.

The VO's argument was that periodic flooding (not evident at the material day) should be reflected at the next revaluation, by reference to values at the AVD. Current flooding events (normally transient) are not considered to be a change in the physical state of the locality unless they result in a physical change such as a bridge being swept away by floodwater. Unless made during a flood event (subject to the transience test, which may of course make a prompt proposal invalid), a proposal must necessarily be invalid if based on heightened flood risk alone.

The Upper Tribunal referred to their recent decision in *Merlin* and re-iterated that the types of MCC referred to in para 2(7)(a) of Schedule 6 to the 1988 Act (internal to the hereditament) and para 2(7)(d) (external to the hereditament, affecting the locality) were mutually exclusive. One must therefore consider separately whether a purported MCC falls within either category, and if it does not a proposal based on those facts will fail.

The principal factors relied upon by the VTE in reaching their decision were (1) the rent reduction and the inability to insure the property against flooding (both internal factors, possibly falling under para 2(7)(a)) and (2) the allocation of the property and (it was assumed) the locality (an external factor, possibly within para 2(7)(d)).

The Upper Tribunal found that the requirement in para 2(7) for physical impact or physical manifestation of a relevant factor was determinative of the issue. Neither the rent reduction nor the inability to insure the property was physically manifest so the proposal was invalid under para 2(7)(a). Further, there was no evidence that the allocation in flood Zone 3 physically affected the state of the locality or was itself physically manifest at the material day, so para 2(7)(2)(d) was not engaged. In the words of the valuer member, "there must be some physical effect which has to be observable on the ground".

Accordingly, the Tribunal allowed the appeal and found the proposal invalid.

This matter was dealt with pursuant to written representations submitted by one party only and one can speculate as to whether the outcome would have been different had the ratepayer been represented in a contested hearing. There is no doubt that placing the property within a Zone 3 flood risk area is a matter to be taken into account on revaluation, but this may not necessarily make the property uninsurable as it will depend on the method of construction and any defensive measures which may exist. It will depend on the facts but (as in this case) one would expect a 1950s warehouse to be particularly vulnerable and the reduced rent given by the landlord would be reflected in the new RV applicable on revaluation.

There was apparently no evidence given of any defensive measures put in place following the 2013 flood. If there were, these would clearly be physically manifest and capable of forming the basis of a valid proposal. By way of example, coastal defences to protect an area from flooding are not uncommon in certain parts of the country and, depending on their nature and extent, would surely fall within what is contemplated by para 2(7)(d). Had the ratepayer been party to the appeal and provided evidence of such defensive measures, the decision could well have gone the other way.

The decision in this case is unlikely to be the last word on proposal invalidity in the context of a high flood risk where there is recent history of such flooding (particularly where flood defences are evident on the ground).

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