Case Name: *Merlin Entertainments Group Ltd v W Cox (VO)* [2018] UKUT 0406 (LC) (11 December 2018)

Topic: Material change of circumstances

Full case: click here

Summary: The reduction in attendance numbers at a theme park caused by an event within the site is not a "material change of circumstances" within the meaning of Schedule 6 to the 1988 Act, as it neither affects the physical state of the hereditament nor is physically manifest in the locality (and "locality" cannot include the hereditament itself). There is, therefore, no justification for a reduction in the rateable value.

Commentary: This Upper Tribunal case (before the President and a valuer member) determined whether a proposal referring to a material change of circumstances by reason of reduced attendance numbers at a leisure venue following a high-profile accident at the site fell within the terms of paragraph 2(7)(d) of schedule 6 to the Local Government Finance Act 1988 and, therefore, gave rise to a reduction in rateable value. The relevant paragraph covers "matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there".

The appellant had been unsuccessful in the VTE as the tribunal was not persuaded that the chain of causation was sufficiently established.

The premises in question were Alton Towers, the UK's largest theme park near Stoke-on-Trent and operated by Merlin. The RV in the 2010 list at the material day (24 March 2016) was £6,625,000.

On 2 June 2015 an accident occurred on one of the major rides, resulting in serious injury to 5 individuals. The ride did not re-open until 19 March 2016, shortly after which a proposal to reduce the RV was submitted by Merlin. This proposal was based on the reduction in annual visitor numbers following the accident (which fact was agreed with the VO). However, the VO later argued that on closer scrutiny the monthly and daily figures did not show the same reduction.

Merlin argued that by reason of the accident the attitude of members of the public to thrill rides in general (and to those at Alton Towers in particular) was a matter "physically manifest in the locality" at the material day (although not affecting the physical state of the hereditament) and, therefore, the RV should be reduced.

The appellant relied on the Lands Tribunal decision in *Kendrick* v *Valuation Officer* [2009] RA 145, in which the general downturn in the aviation industry following the terrorist attacks on 11 September 2001 was deemed sufficient to justify a reduction in RV for a ratepayer operating lounges at Heathrow Airport, as the reduced numbers were physically manifest in the locality. The key point in that case was that although the attacks occurred some years prior to the material day, their effects were still being felt.

The UT considered as a preliminary matter the question as to whether the attitude of members of the public to thrill rides, and to thrill rides at Alton Towers in particular, as a result of the crash, was a matter which was physically manifest in the locality of the hereditament at the material day, so as to fall within paragraph 2(7). Merlin provided evidence that traffic movements had substantially reduced following the crash, which impacted on the locality. The reduction in trading potential on a fair maintainable trade basis (being the appropriate valuation method for theme parks) at Alton Towers as a result of the crash was confirmed by Merlin's expert witness, based on financial information provided by the company.

The Tribunal noted that it is a well-established principle of rating law that the volume of trade or the level of profitability achieved by a particular operator is not a characteristic which is essential to the value of the right to occupy the property from which the business is conducted and does not, therefore, impact on rateable value. The rating hypothesis does, however, have regard to matters external to the hereditament which are "essential" to that property, e.g. its location. Focusing on paragraph 2(7)(d) of Schedule 6 (relevant wording set out above), the Tribunal referred in particular to matters which (i) do not affect the physical state of the locality but (ii) are physically manifest there. The matter *itself* must be physically manifest in the locality and it is not sufficient for the matter to affect the locality. Examples of matters falling within the second limb include noise, fumes or vibration and facilities such as public transport services. One of the issues arising in the appeal was whether a purely economic matter can fall within paragraph 2(7)(d) and, if so, to what extent.

Merlin relied on the second limb and on *Kendrick,* as referred to above. It argued that the fact that the change relied upon here resulted from an event which occurred *within* the hereditament as opposed to an event elsewhere, as in *Kendrick*, was not a relevant legal distinction. The VO disagreed, saying that the change in numbers was as a consequence of the manner in which Merlin had operated its business at Alton Towers. The VO also argued that the area covered by the locality of a hereditament must lie outside the hereditament itself, whereas the crash occurred within the hereditament and in the operation of an item of non-rateable plant and machinery.

The UT identified a number of issues for determination and dealt with each in turn. For the purposes of this summary, it is sufficient to refer to the Tribunal's conclusion on each point but its detailed reasoning is fully set out in the decision (see link above). Dealing in turn with each issue:

1. Is the proposal concerned with any intrinsic or essential characteristic of the hereditament or locality? The UT was clear that it is not, as the crash related to the way in which the attraction was being operated. Accordingly, the appeal must be dismissed.
2. Are paragraphs 2(7)(a) (which refers to matters affecting the physical state or physical enjoyment of the hereditament itself) and 2(7)(d) (set out above) mutually exclusive? The Tribunal dismissed this interpretation of the provisions. The appellant having accepted that paragraph 2(7)(a) does not apply, it cannot argue that "locality" in sub-paragraph (d) includes the hereditament. Sub-paragraph (e) clearly distinguishes

"locality" from the hereditament itself and Parliament cannot have intended that when used in sub-paragraph (d) the word should have a different meaning. The UT concluded that "locality" refers to an area external to the hereditament being valued for rating purposes.

3. If the answer to 2 is yes, was the substance of Merlin's original proposal to do with the hereditament rather than the locality? If so, does the appeal fail because the appellant cannot demonstrate a material change of circumstances in a matter falling within paragraph 2(7)(a)? The proposal did not refer to any change in the locality of the hereditament, although the appellant developed its argument in this way, and the Tribunal considered that the appeal must fail due to the terms of the proposal. However, this extension of argument had been shared by the VO and the Tribunal in its discretion agreed to consider the point (without creating a precedent). Having noted that no specific evidence had been produced as to the attitude of the public to thrill rides after the crash and that the reduction in numbers originated from within the theme park, the UT was critical of the appellant's attempt to circumvent the limitations as to what changes would trigger a reduction in RV by presenting an internal change of visitor numbers as a change in the volume of traffic travelling to the theme park.
4. Whether the appellant's case offends the uniformity of treatment principle (this being a point raised by the VO). The Tribunal did not see this as being critical to the outcome of the appeal and did not consider it further.
5. The proper construction of paragraph 2(7)(d). The Tribunal provided a thorough analysis of the terms of this provision and guidance as to its application and scope. It referred to the case of *Addis Ltd* v *Clement* (1986) 85 LGR 489, decided in the Court of Appeal, as clarifying that changes will only be taken into account to the extent that they relate to the physical state of the hereditament and its locality (with changes in economic factors being taken into account only on revaluations). This was confirmed in the Local Government Finance Act 1988. Merlin's attempt to take into account factors beyond the physical state of the locality was therefore rejected. Adopting the general principles of interpretation of statute, the Tribunal concluded that the terms of paragraph 2(7)(d) do not apply to an economic or intangible cause which has led to a physical change in the locality. A physical change is required, irrespective of the nature of the cause/s which led to that change.
6. If the appellant's construction of paragraph 2(7)(d) is correct, whether the evidence relied upon by the appellant demonstrates that a material change of circumstances occurred. The Tribunal did not accept that a change of public attitude to thrill rides could be physically manifest in those properties or their localities which may experience the effects of the demand for such rides. It does not form part of the subject to be valued. Instead, it forms part of the system of values to be applied in the valuation exercise and the change in public attitude is one factor affecting market demand and taken into account on a revaluation (by reference to the antecedent valuation date as prescribed under the 1988 Act). Even if the appellant's construction of paragraph 2(7)(d) had been correct, the Tribunal was unable to draw any conclusions from the limited evidence provided. There were a number of factors

which may have given rise to the fall in attendance during the period following the 2015 crash.

To summarise, the Upper Tribunal rejected Merlin's argument that any economic or intangible matter falls within paragraph 2(7)(d) merely if it results in some effect which is physically manifest in the locality of the hereditament. Instead, the matter relied upon must itself be something which is physically manifest in that area. If that test is satisfied, there is no legal requirement to identify a cause to which that matter can be attributed in order to satisfy paragraph 2(7)(d). The final paragraph of the decision contains some helpful guidance for surveyors and tribunals as to the interpretation of paragraph 2(7) in the future.

The Tribunal closed with a reminder that expert witness evidence (even if given as fact and not opinion) must not be remunerated on a success-fee related basis or, if it is, that fact should be disclosed to the Tribunal and other parties to the case at the earliest possible opportunity (see *Gardiner & Theobald LLP* v *Jackson (VO)* [2018] UKUT 253 (LC)) and the witness statement must contain the prescribed RICS declaration as expert witness. The Tribunal underlined this requirement by drawing the attention of the RICS President to this part of the decision.