THE VALUATION TRIBUNAL FOR ENGLAND

Non domestic rating; 2017 rating list; compiled list appeal; public house, restaurant and premises; the correct fair maintainable trade to be adopted in the valuation; reasonably efficient operator; over-trading; percentages to be applied to achieve the rateable value; appeal allowed in part.

Re: Beer Hall at Holmes Mill, Greenacre Street, Lancashire BB7 1EB

APPEAL NO: CHG100526706

BETWEEN:	Emporia Leisure Ltd T/a Bowland Beer Hall	Appellant
	and	
	Mr R Roberts (Valuation Officer)	Respondent

PANEL: Mrs X Holt (Senior Member) and Mr A Wheeler

CLERK: Mrs A Keohane

HEARING: Remote Hearing No. 1, 15 December 2021

APPEARANCES: Mr J Gray of Altus Group on behalf of the Appellant as advocate and expert witness
Mr J Wainwright representing the Valuation Officer as advocate and expert witness

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Summary of decision

1. Appeal allowed in part. The appeal property's assessment was reduced to £224,000 rateable value (RV) with effect from 1 April 2017.

Introduction

2. The subject is a 2017 rating list appeal brought in respect of Beer Hall at Holmes Mill, Greenacre Street, Lancashire BB7 1EB (the 'appeal property'). The property was entered into the 2017 rating list as a Public House, Restaurant and Premises at £250,000 RV with effect from 1 April 2017.

3. Altus Group, on behalf of the appellant, submitted a challenge proposal that was received by the Valuation Officer on 9 December 2020. The proposal sought a reduction in the assessment on the grounds that the fair maintainable trade (FMT)

used in the valuation was excessive and that no allowances had been made to reflect over-trading. Upon consideration of the proposal, the Valuation Officer decided that no amendment would be made to the rating list. As the assessment had not been altered in the way requested in the proposal, an appeal was made to the Valuation Tribunal on 18 March 2021 on the grounds that the valuation for the hereditament was not reasonable.

4. The appeal property is part of a former textile mill, a grade 2 listed building, converted by the appellant as a good quality mixed development. It is situated approximately 0.5 miles from the centre of Clitheroe. Adjacent to the property to the west is an area of older mainly terraced properties and a recreation ground that borders Clitheroe Castle. To the east there are mixed retail and commercial users. Other parts of the ex-mill and factory premises lying immediately adjacent to the appeal property and occupied by the appellant and/or connected companies have been developed as a food hall, bistro and hotel, micro-brewery, ice cream parlour/restaurant, offices, and a cinema.

5. The appeal property is on the ground floor only, set out in the nature of a bierkeller. The upper floors are converted to a function room and offices. Outside, there is limited parking. It is a 'free of tie' house held on a freehold basis; therefore, no rental evidence is available.

6. Mr Gray appeared on behalf of the appellant as both advocate and expert witness. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), Mr Gray confirmed that he was instructed under a contingency fee arrangement. He declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and he would comply with this as well as the requirements of his professional body, regardless of whether or not the evidence supported the client's case.

7. The expert witness evidence was accepted on the above basis as the appeal was not complex and to do otherwise was contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations and was allowable due to the Tribunal's rules on admissibility of evidence (regulation 17(2)(a) where the Tribunal can admit evidence whether or not it would be admissible in a civil trial). The 'expert' evidence was considered and weighted appropriately.

8. The President of the Valuation Tribunal for England (VTE) is required to make sure arrangements are in place and make such statements and Directions so as to ensure that business before the Tribunal is conducted in accordance with The Local Government Finance Act 1988, Schedule 11, Part 1, paragraph A17(1) and The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 and by virtue of Part 2 regulation (5) (arrangement for appeals) and regulation (6)(3)(g) (appeal management powers) the VTE may determine the form of any hearing.

9. Therefore, in pursuance of Regulation (6)(3)(g) the VTE has incorporated "remote hearings" as part of the definition and for the time being as the default option until it is safe to return to normal working. The Tribunal's Consolidated Practice Statement has been amended to reflect this.

10. In accordance with that Practice Statement, the VTE conducted the hearing of this appeal remotely via a Microsoft Teams conference call using an audio/video-link.

Preliminary Issue

11. Mr Gray wished to submit a revised valuation of £182,000 RV for the appeal property. This had been provided to Mr Wainwright the day prior to the hearing. The revision was due to an error in his calculation of the FMT, and this had affected the remainder of his valuation.

12. Mr Wainwright did not raise any specific objection to the revised valuation being admitted but expressed that a number of valuations had already been presented by Mr Gray in relation to the appeal property, (£203,000 RV, £190,000 RV) all of which appeared to be based on different figures.

13. The panel considered it appropriate to determine whether the revised valuation should be accepted. Attention was therefore paid to the Upper Tribunal's guidance in *Simpsons Malt & Others v Craig Jones (VO) & Others* [2017] UKUT 0460, namely the three-stage test as outlined in *Denton v TH White Ltd* [2014] WLR 3926, which should be undertaken before considering whether or not to impose a sanction.

    i. Stage 1 – If panels conclude that the breach is not serious or significant then relief from sanctions should usually be granted (para. 53).

    ii. Stage 2 – Then the panel need to consider why the failure or default occurred. The burden is on the defaulting party to persuade the tribunal to grant relief. They must explain what happened and why. Illness or accidents are good reasons but overlooking a deadline is not (para. 54).

    iii. Stage 3 - The panel must consider all the circumstances of the case including:

        i. The need for litigation to be conducted efficiently and at a proportionate cost;
        ii. A failure to grant a sanction may leave an inaccuracy being uncorrected;
        iii. The need to enforce compliance with rules, directions and orders (Para. 55). However, such matters are the handmaids and not the mistress of justice and must never be allowed to assume a greater importance than doing justice (para. 56).

14. In consideration of the above, the panel was not persuaded that the Valuation Officer had been unduly prejudiced by the revised valuation or that its late submission was a significant breach. It therefore did not need to go on to consider stages 2 and 3 outlined above. The revised valuation was added to the evidence bundle for this appeal.

15. A substantial amount of evidence was provided by the parties. This decision document is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the evidence presented was fully considered by the panel before reaching its decision. The absence of a reference to any statement or item of evidence placed before it by the parties should not be construed as it being overlooked by the panel.

Issues

16. The issues in dispute were as follows:

- The FMT to be adopted in the appeal property's assessment.
- An over-trading allowance.
- Whether the appeal property fell within the upper or lower level of Category 2.
- Whether band A was correct for the food element.
- The percentages to be applied to the FMT to achieve the RV.

Evidence and submissions

17. A bundle of evidence comprising the information exchanged between the parties during the challenge process was provided for consideration. This included a location plan and photographs of the appeal property and the complex in which it was situated; photographs and details of properties cited as comparable; advertising literature for the appeal property and other businesses within the ex-mill complex; information setting out the awards the appellant had achieved in the licensed trade; references to case law; and a copy of the Rating Lists 2017 Valuation of Public Houses Approved Guide (the guide). Whilst a number of higher authority decisions were referred to, specific reference was made to the following:

- *Wishart v Hulst (VO)* RA/70/2017
- *Price v Owain Wynn-Cowell* RA 25/2005
- *Wetherspoon (JD) plc v Day (VO)* [2008] RA 129
- *Lothian Assessor v BBW Ltd* RA/470/2008
- *Watney Mann Limited v Langley (VO)* [QB 1963]

18. Mr Gray gave some background to the subject property, its creation and locality. Trading had commenced at the property in 2016. In settling a 2010 rating list appeal, agreement had been reached to tone back the available trade to the 2008 Antecedent Valuation Date (AVD). Allowances of 17.5% had been applied to the wet FMT and 20% to the dry FMT to reflect that the appellant, as an exceptional operator, over-traded at the appeal property. No such allowances had been given in the 2017 rating list assessment.

19. In brief, Mr Gray placed emphasis on the following:

   i. The operator of the business, Emporia Leisure Limited, was an established, experienced and successful licensed and leisure operator who had a variety of hotels, restaurants and public houses within Lancashire. The appellant was an exceptional operator who over-traded in this location, over and above what a reasonably efficient operator (REO) could be expected to achieve. Allowances, as set out in the guide, had not been applied by the Valuation Officer to reflect this, although recognition had been made in the 2010 rating list assessment.
   ii. The FMT applied in Mr Gray's revised assessment reflected turnover figures for 11 months trade annualised for valuation purposes. The total FMT adopted was, in effect, based on the year end trade for 2017 toned back to the AVD using the ONS RPI inflation calculator. It had also been agreed that the FMT would be split 66:34 wet to dry trade. In applying this split, together with over-trading allowances to match those adopted in the 2010 rating

assessment, Mr Gray had reached the FMT adopted in his valuation, as set out below.

iii. To assist in establishing that the appeal property's current assessment was excessive, Mr Gray referred to public houses in and around the Clitheroe area, and several Wetherspoon pubs in small towns within the BB postcode area. The appeal property's assessment was the highest of all of these properties.

iv. In the absence of comparable properties in the immediate locality, the guide allowed for consideration to be given to parallel situations elsewhere. Comparisons had therefore been made with similar operations in the North West licensed and leisure market sector, namely Alberts Schloss and The Bierkeller in Manchester and 6 Thomas Steers Way in Liverpool. Two of these properties had assessments lower than the appeal property.

v. A substantial portion of the appeal property's trade was required to cover costs. Because of the higher operating costs reflective of the type and style of the house, Mr Gray argued that the appeal property should remain in Category 2 but be valued at the lower level.

vi. Mr Gray considered the food element should be at band B to reflect the food offering and the running costs associated with back of house i.e., kitchen staff and front of house staff.

vii. Mr Gray believed that the Valuation Officer had applied incorrect percentages from the scales within the guide to achieve the appeal property's RV.

viii. Mr Gray submitted that trade at the appeal property had been adversely affected by the opening of a new boutique hotel immediately adjacent that offered food and beverages. A new food emporium was also adjacent to the appeal property.

20. Having regard to his full submission, Mr Gray sought confirmation of the following:

Income Stream	FMT (£)	Percentage	RV (£)
Wet – Cat 2 lower	1,295,000 (£1,573,138 less 17.5%)	10.00	129,500
Dry – band B	648,000 (£810,405 less 20%)	8.25	53,460
			182,960

Say £182,000 RV

21. Mr Wainwright contended there was no evidence to support over-trading adjustments in the appeal property's FMT. Whilst re-iterating that each rating list was de-novo, he submitted that the allowances in the appeal property's 2010 rating assessment were not for over-trading. He believed they reflected 'pioneering', given that the Holmes Mill development had only been partially completed, and to reflect a 'honeymoon' period, as it was not unusual for a new venture to initially attract strong trade that was unsustainable. He did not consider such allowances were appropriate in the appeal property's 2017 assessment, as figures showed continued trade growth.

22. The appeal property's current assessment was based on the projected turnover provided by the appellant. Agreeing that it was appropriate to tone back to the AVD, Mr Wainwright had taken trade from 2017 and 2018 and toned back to 2015. The average of these two years had produced a higher wet and dry FMT than those applied in the appeal property's current assessment. He considered this toned back trade demonstrated that the FMT adopted in the appeal property's assessment was not excessive.

23. Turning to the issue of over-trading, Mr Wainwright held that when considering the REO, it was necessary to have regard to the nature of the hereditament they occupied. In the case of the appeal property, he believed the success of the outlet lay mainly in the unique concept of the building and less so in the abilities of the operator.

24. In the absence of any directly comparable properties to enable a comparison of receipts to be made, Mr Wainwright considered he had correctly adopted FMT for the appeal property tested by reference to two years' trade toned back to the AVD. He contended that no evidence had been presented to suggest that the appellant was an exceptional operator.

25. Mr Wainwright maintained that the appeal property had been correctly valued as a Category 2 – Destination House at the upper level and the choice of band A (upper) for the food trade was not unreasonable. Furthermore, he could see no error in the percentages he had applied from the scales within the guide to determine the rateable value.

26. Mr Wainwright sought confirmation of the current assessment, as follows:

Income Stream	FMT (£)	Percentage	RV (£)
Wet Cat 2 upper level	1,595,000	11.25	179,438
Dry - band A	805,000	8.90	71,645
			251,083

Say £250,000 RV

Decision and reasons

27. The appeal hereditament must be valued for the purposes of non-domestic rating on the basis of the rent at which it might reasonably be expected to let from year to year on a number of assumptions detailed in paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988. The date of the hypothetical rent was 1 April 2015, the AVD.

28. The material day (the date by which physical factors have to be taken into account) was provided by the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 (SI 1992 No. 556) as amended. In respect of the subject appeal, the material day was 1 April 2017.

29. Public houses were assessed for the 2017 rating list by reference to the Rating Lists 2017 Valuation of Public Houses Approved Guide, a document agreed between the Pubs Rating Forum and the Valuation Office Agency. The actual trade achieved at a property around the AVD was usually the starting point in its valuation. In this case, the appeal property had not been in existence at the AVD; however, both parties had provided valuations supported by trade toned back to this date.

30. In addressing the first issue in dispute, namely, the determination of a reasonable FMT as at the AVD, the panel had regard to the valuations provided by the parties. After discussing the merits of these, the panel considered that the FMT proposed by Mr Gray, using trade achieved closest to the AVD toned back to 1 April 2015, was the most reliable. It therefore accepted, prior to any adjustment, a wet FMT of £1,573,138 and a dry FMT of £810,405 for the appeal property.

31. When referring to the over-trading adjustment, Mr Gray strongly disputed the Valuation Officer's reasoning for the allowances in the appeal property's 2010 rating assessment. His own view of the settlement was that the allowances had been agreed to reflect that the appellant, as an exceptional operator, over-traded at the appeal property. The panel accepted that each rating list was separate and distinct, and any adjustments to the appeal property's 2017 rating assessment had to be fully justified by the available evidence.

32. In support of an over-trading adjustment, Mr Gray referred to a number of licensed properties in the Clitheroe area. He specifically referred to The Aspinall Arms Hotel, BB7 1EB, Calf's Head Hotel, BB7 1QA, The Three Fishes, BB7 9PQ and Assheton Arms, BB7 4BJ. In the panel's view these were more traditional licensed premises that appeared to be in more rural areas. He also referred to a number of Wetherspoon properties in the BB11, BB3, BB5 and BB8 postcode areas. Mr Gray submitted that all of the comparable properties, some of which were in the centre of towns with a larger customer base than Clitheroe, had rating assessments below that ascribed to the appeal property. In consideration of this evidence, and in the absence of any details of how these assessments were made up, the trade upon which they were based and whether any adjustments to the assessments had been made, the panel did not find these properties provided good evidence in this appeal.

33. The guide indicated that in the absence of adequate local comparable properties, which the panel accepted was the case in this appeal, consideration of parallel situations elsewhere could be of assistance. Mr Gray had provided three comparable properties within Manchester and Liverpool, that had a bierkeller type offer. Whilst accepting that two of the three assessments were lower than that of the appeal property, due to their distance from Clitheroe and, in the main, the lack of information on the basis of their assessments, the panel was not persuaded that this evidence confirmed that over-trading occurred at the appeal property. A number of reasons could exist for the lower assessments, for example, there could be a higher level of competition in these areas. The panel concluded that these properties did not assist in determining the level of trade a REO could achieve in a Category 2 public house around the AVD in the appeal property's locality, nor were they useful in establishing what extent, if any, the appellant over-traded at the appeal property. For these reasons, little weight was attached to this evidence.

34. Section 7.3.1 of the guide stated that '..any element of trade which is considered attaches to the operator (and thus would move with them) and which is not capable or expected to be replicated by the REO, should be disregarded in the FMT

calculation. Due regard needs to be given to the attributes of the property'. In resisting the application of an allowance for over-trading, the Valuation Officer had argued that the level of trade at the appeal property clearly relied on the unique attributes of the building and not the skills of the operator.

35. Section 7.3.4. referred to unique properties as follows, 'Throughout, it must be borne in mind that a property that is uniquely placed and/or enjoys a particularly attractive physical character, is likely inherently to achieve a much higher level of turnover than any other property in the vicinity. It is important to establish that, having regard to the size and nature of the customer base in the locality, no element of the performance is solely attributed to the particular offer of the current operator. In such circumstances where over-trading is not manifest, no adjustment of the actual turnover when determining FMT is necessary,'

36. Mr Gray had argued that in looking at section 7.3.4 reference to 'the size and nature of the customer base in the locality' implied that where the property was situated in an area with a high concentration of people, or benefitted from high footfall because of its location, then trade was likely to be much higher without any influence from the operator. He considered this would not apply to the appeal property; given it would be impossible for it to trade as it did, relying solely on the 14,000 population of Clitheroe. Whilst acknowledging this argument, the panel noted that there was a main train line to Clitheroe. Clitheroe was situated within the Ribble Valley, an area of natural beauty and in the article provided by Mr Gray from The Telegraph dated 9 January 2018, Clitheroe was described as the 'declared gastro-capital' and Holmes Mill was advertised as a place to visit. This suggested that the appeal property did not solely rely on the population within Clitheroe, but also benefitted from customers and trade from outside of the Clitheroe area.

37. On balance, after due consideration of the evidence, and having regard to the photographs provided, the panel found merit in the Valuation Officer's contention that the attractiveness of the appeal property lay in the quality, character, and inherent uniqueness of the hereditament and less so on the abilities of the operator. The building had won a pub design award and, in its conversion, many of the original mill features and industrial machinery had been retained, the longest continual bar in Britain had been created and glass panels allowed viewing into other areas, such as the micro-brewery and the spinning wheel room. The panel found no evidence to demonstrate that the appeal property's performance was solely attributed to the particular offer of the current operator, or that the operator's offer was different to that of any other potential occupier of the appeal property. As over-trading was not manifest, no adjustments were warranted in the appeal property's FMT.

38. In his evidence, Mr Gray had also indicated that the Valuation Officer had failed to acknowledge that the newly opened hotel with a food and beverage offering, together with the food emporium situated adjacent, would have an impact on the financial performance of the appeal property and should be considered when determining the FMT. The panel found insufficient evidence in relation to these enterprises to confirm whether they were in existence at the material day. The Valuation Officer had set out in his evidence when certain parts of the development opened, and it was submitted that the food hall (restaurant) had been entered into the rating list in January 2019 and the bistro and hotel in November 2017. However, if the enterprises referred to by Mr Gray had actually been in existence at the material day, it would be reasonable to expect some decline in the appeal

property's trade to reflect this. The panel noted that the trade figures within the evidence did not show any downward trend.

39. The appeal property had been valued as a Category 2 type house, upper level with the food element at band A. Mr Gray had argued that it should be valued as a Category 2 house at the lower level and the food element at band B. The panel had regard to the descriptions outlined in the guide and agreed that the appeal property was better valued as a Category 2 type at the lower level. This reflected that it was a listed building with a higher repair liability, and also the limited parking facilities. The panel also accepted Mr Gray's contention that the appeal property was better placed in band B for the food element, to reflect the employment of both kitchen and front of house staff and recognise the high running costs. Having decided this, the panel adopted the percentages shown in Mr Gray's valuation for the wet and dry income streams, which remained applicable in accordance with the scales within the approved guide.

40. As a consequence of the above, the panel confirmed the following valuation for the appeal property with effect from 1 April 2017.

Income Stream	FMT (£)	Percentage	RV (£)
Wet – Cat 2 lower	1,573,138	10.00	157,314
Dry – band B	810,405	8.25	66,858
			224,172

Say £224,000 RV

Order

41. Under the provisions of regulation 38(4) and 38(9) of The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, the Valuation Tribunal for England orders the Valuation Officer, within two weeks of the date of this order, to amend the entry in the rating list to show a revised assessment of £224,000 RV for the appeal property, with effect from 1 April 2017.

Refund of fees

42. The appellant is also entitled to a full refund of the fee paid in accordance with regulation 13E(1)(a) of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 (as amended).

Date: 14 January 2022

Appeal number: CHG100526706