

TRIBIWNLYS PRISIO CYMRU - VALUATION TRIBUNAL FOR WALES

Appellant: A Keating

Appeal property: The Flat, Mount Pleasant, Broadfield, Saundersfoot, SA69 9DG

Appeal number: 684536224640/285NV17/87

The Matter Appealed against: Non-Domestic Rating Appeal

Date of Hearing: 15th November 2023

Appearances: Mr Keating and Mrs R Morris and Mr B Davies both for Valuation Officer

Date of Decision: 15th February 2024

Decision of Tribunal: Allowed

Members of the Tribunal: Mr J K Lewis (Chairperson), Mrs H Lloyd & Mr D O Evans

Tribunal Clerk: Mr J Evans

Summary of the Case

1. This 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 tribunal before coming to its decision. Consequently, the absence of a reference to any statement, or evidence, should not be construed as being overlooked.
2. This appeal challenged the Valuation Officer's decision to delete the appeal property from the Rating List with effect from 1st April 2020. Mr Keating is the appellant in this appeal and, in his proposal, which the VO accepted had been validly made, he sought the restoration of the previous Rating List entry with effect from 1st April 2020.
3. In his proposal to alter the List, Mr Keating draws attention to his contention which was that it be altered as follows : -

"Other changes 'errors in days let' effective from 1st April 2020. A statement required to be made about the property is wrong or has been omitted"

4. Mr Keating supported the contentions he made in his proposal with the following statement –

"I met the required number of days for that year but underestimated them due to an addition error".

5. Mr Keating owns the appeal property. It is situated near to Saundersfoot Bay Leisure Park and approximately five minutes from Saundersfoot beach front and is used as a holiday let on a short period on a self-catering basis. Its accommodation provided three single bed spaces. The property had been included as an entry in the 2017 Rating List with effect from 1st April 2017. However, the VO subsequently considered that it failed to meet the statutory

provisions to enable its continued existence in the Rating List. As a corollary the VO removed the entry for the appeal property with effect from 1st April 2020.

6. Paragraph 2(1) of the Local Government Finance 1988, as amended, provided the statutory definition of Rateable Value under which a valuation for rating purposes is done. It states –

The rateable value of a non-domestic hereditament none of which consists of domestic property and none of which is exempt from local non domestic rating] shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions—.

(a)the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;

(b)the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;

(c)the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above.

7. The definition of “Domestic Property” is provided for by Section 66 of the Act. It stated –

(1) Subject to subsections (2), (2B), (2BB) and 2E below, property is domestic if—

(a)it is used wholly for the purposes of living accommodation,

(b)it is a yard, garden, outhouse or other appurtenance belonging to or enjoyed with property falling within paragraph (a) above,

(c)it is a private garage which either has a floor area of 25 square metres or less or is used wholly or mainly for the accommodation of a private motor vehicle, or

(d)it is private storage premises used wholly or mainly for the storage of articles of domestic use.

8. In order that it remain as an entry in the List, a hereditament such as the subject property must satisfy criteria set out by Section 66 (2BB) of the Act. This stated –

A building or self-contained part of a building is not domestic property if each of the following paragraphs apply in relation to it—

(a)the relevant person intends that, in the year beginning with the end of the day in relation to which the question is being considered, the whole of the building or self-contained part will be available for letting commercially, as self-catering accommodation, for short periods totalling 140 days or more;

(b)on that day the relevant person's interest in the building or part is such as to enable the person to let it for such periods;

(c)the whole of the building or self-contained part of the building was available for letting commercially, as self-catering accommodation, for short periods totalling 140 days or more in the year prior to the year beginning with end of the day in relation to which the question referred to in paragraph (a) is being considered;

(d)the short periods for which it was so let—

(i)amounted in total to at least 70 days; or

(ii)taken together with the short periods for which one or more other buildings or self-contained parts of a building so let, amounted to an average of at least 70 days for each building or self-contained part of a building included within the calculation; where each building or self-contained part of the building included in the calculation—

(aa)is not included in another calculation under this sub-paragraph for the year in relation to which the question is being considered,

(bb)is situated at the same location or in very close proximity to all of the other buildings or self-contained parts of a building included in the calculation, and

(cc)is so let as part of the same business or connected businesses.

9. Paragraph 5, S.67 of the Act states –

For the purpose of deciding the extent (if any) to which a hereditament consists of domestic property on a particular day, or is a Crown hereditament on a particular day, or is exempt from local non-domestic rating on a particular day, the state of affairs existing immediately before the day ends shall be treated as having existed throughout the day.

10. Regulation 34 (6) of the Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005

Orders

Where it appears that circumstances giving rise to an alteration ordered by a valuation tribunal have at the date of the decision ceased to exist, the order may require the alteration to be made in respect of such period as appears to the tribunal to be commensurate with the duration of those circumstances.

11. For the purposes of the 2017 Rating List, the Antecedent Valuation Date, which is fixed in law, is 1st April 2015. The Material Day is 1st April 2020.

12. The matters under contention arose following information Mr Keating disclosed to the VO following a request for information (Form of Return) in respect of the subject property for the year 2020. Mr Keating explained that he provided details of lets which amounted to 67 days. At the time, he believed that the error was of little consequence because the COVID pandemic had forced the closure of a number of properties because it was illegal in Wales for his customers to travel to the property under the terms of the letting agreement. Once Mr Keating had re-examined his records for the year 2020 and having realised a mistake had been disclosed in the FOR previously submitted, he informed the VO that there was a total of 74 letting days. For Mr Keating, the issue at hand was a simple one: was his property legally let for 74 days or not, and how does the law react to this?

13. In response to the proposal, and having re-examined the data, the VO now concedes that the property had been incorrectly deleted from the List with effect from 1st April 2020 and seeks a restoration to the List with effect from 1st April 2020. However, as the property failed to meet the qualifying criteria after 12th October 2020, Mr Davies relied on Regulation 34 (6) of the Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005 to insert the property at Rateable Value £3,000 with effect from 1st April 2020, but to then delete it with effect from 13th October 2020.
14. As a retired accountant, Mr Keating appreciated the importance of providing accurate information. He confirmed that the information he provided to the VO for the years 2019 and 2021 were correct and that the anomaly only existed in 2020. Mr Davies deduced that the information Mr Keating provided in the Form of Return (Additional Evidence), which was reproduced on page 39 of his bundle of evidence, that the period 23rd April 2020 to 29th October 2020 represented the period when the property accepted lettings. Mr Keating said that this was not necessarily the case, although the dates referred to by Davies may have been applicable to that particular year, he stressed that bookings were accepted throughout the year even during low periods of commercial activity. He considered the dates referred to in the FOR document may have covered the time in which he accepted lettings and, if these dates were taken for these purposes, then the period from when the property was available for lettings (i.e.140 days) had been exceeded.
15. In response to a question from Mr Davies, Mr Keating confirmed that the property was available from late October until the following late April. Mr Davies queried with Mr Keating that the information he had supplied in question 7 of the FOR document was not correct. Mr Keating confirmed the property was available during winter months.
16. Mr Keating maintained that the area of rating law the VO wished to test was the meaning of a “letting”. He drew the distinction between bookings, lettings and occupation within the context of this case. He said that bookings merely involved holding the property until final and full payment was made. The letting, on the other hand, was a legal obligation that he and his client had to fulfil. From the moment the payment in full was made, then the property was reserved for the holiday maker. Mr Keating maintained that “occupation” was the point at which the holiday maker took advantage of his rights under the letting agreement. Mr Keating contended that the law only required that the letting part of the process be observed for these purposes. In his view that occupation was of lesser importance because holiday makers may decide to leave the property for any number of reasons on the last day or earlier.
17. Mr Keating pointed out that in the years which preceded 2020, his business enterprise had comfortably exceeded 70 letting days. However, the VO eschewed averaging lettings taken over a three-year period despite having looked at three years of data in order to establish whether the criteria had been met for one year.
18. The VO’s view in regard to matters associated with the restricted use of property during the lockdown was that Mr Keating could have made it available for let for 140 days for the period 1st April 2020 to 31st March 2021. Mr Davies recognised that during the national lockdown, self-catering property could not be used unless there was a legal exception for them to do, such as being put to use by essential

or key workers. Nevertheless, the VO refused to alter its position and asked for more information. Mr Keating maintained that the correct number of letting days was 74. The VO contended that as some of the bookings were never completed due to the COVID restrictions then in force, then the point at which the conditions for appeal property's continued inclusion in the Rating List ended on 12th October 2020.

19. In correspondence with the VO, Mr Keating maintained that the Welsh Government had not amended the statutory rules which could have helped businesses such as his during the Covid Pandemic. He recognised that the fault was not of the VO's making but he considered that they could have exercised a degree of flexibility, particularly when it was merely an opinion which formed the basis of their decision.
20. With regard to the definition of the expression "so let", which appeared in S.66 (2B B) (1) (d), the Tribunal had sight of an email which Mr Keating had sent to the VO in respect of a booking which took place between 25th July 2020 and 8th August 2020. The information contained information about how the booking was secured by the client making a 25% deposit and understanding that the balance should be paid not less than 6 weeks before the holiday commenced. These pecuniary transactions between client and Mr Keating, were within the purview of the booking agency and not dealt with by Mr Keating personally.
21. Mr Davies drew attention to booking information contained on page 41 of his bundle of evidence. This was information which Mr Keating had provided in advance. He pointed out that one of these bookings took place between 18th May 2020 and 22nd May 2020. It was understood that the agency would have sought payment of the balance of this booking around 6th April 2020. Mr Davies reminded the Tribunal that by this time the country was already in a state of lockdown which came into force on 23rd March 2020. Mr Keating explained that the balance due date for any of the bookings referred to in the FOR evidence were effectively final bookings, and that failure to pay would have deprived the customer of rights made under the booking. Irrespective of this, Mr Keating considered that the date the let became legally completed was the day they agreed to the booking. He explained that no one knew what the impact of COVID would be during early 2020 and many of the bookings had been agreed to in the February of that year. Moreover, there was no explicit conversation with the agency about how payments might be pursued after all these were new and unchartered times. The booking agency also advised Mr Keating not to cancel any bookings he had accepted prior to the lockdown even though the Welsh Government had explicitly requested that the property be closed during the lockdown period(s).
22. Mr Keating said that he was not obliged to make refunds to customers who had booked during the time that was covered by the lockdown. However, where it was possible to do so and in the spirit of maintaining good relations, he was able to fit some customers into slots for the subsequent year. Mr Keating was not able to confirm whether he made any refund to one of the customers who stayed for four nights between 18th May and 22nd May. Mr Davies referred to another booking which took place between 30th May to 6th June. Mr Keating said that no refund was returned to this customer, even though they may have paid in full, and no future booking had been carried forward unlike in the earlier example referred to above.

23. Mr Davies explained that the VO considered letting criteria by looking at the circumstances immediately before midnight to establish whether it was let on a particular day. This aligns with Section 67 (5) [end of day provisions] of the Act and referred to above to support this point. He explained that the Form of Return documents that were sent to proprietors asked them to specify nights rather than days in order to remove the risk of double counting.
24. Using this method, the VO deduced that for the period 1st April 2020 to 31st March 2021, a total of 49 nights were let. Mr Davies pointed out that cancelled bookings or those which were not completed, could not be regarded as being a day on which the property was “so let” as the legislation stated. Consequently, such days were discounted from the number of day calculations the VO could make for these purposes.
25. In response to questions, Mr Keating acknowledged that he was in Spain in May and June of 2020 when Europe was in a state of lockdown, although he was confined to his Spanish residence until arrangements could be made for him to fly home. Mr Keating confirmed that he was in Spain in March 2020. He added that he spent approximately 12 weeks of the year in Spain. Whilst away, Mr Keating was charged £70 for management charges which included changing the bedding, undertaking laundry duties and answered queries from customers.
26. Mr Keating confirmed that he would have accepted payment in full for the lettings even though they could not be legally fulfilled due to COVID restrictions the Welsh Government had imposed. He recognised that these arrangements were not the fault of the client and appreciated they were unable to travel but, due to the foregoing, he was unable to admit them onto the premises at that time but drew attention to the prospect that they may have taken advantage of their holiday insurance in such circumstances. He added that he was required to make commercial decisions where appropriate but that did not preclude him working with the client to establish whether other bookings could be made. In one case, the Tribunal understood that Mr Keating had arranged a free holiday in 2021 for one of his clients who could not take their holiday when they initially required it.
27. Having analysed the information Mr Keating had provided him, Mr Davies had no doubt that Mr Keating intended to let the property for 140 days with effect from 1st April 2020. Although Mr Keating did not accept the VO ‘s methodology in applying the statutory test. Mr Davies explained that the legislation required a prospective look of the ensuing twelve months as well as a retrospective view of the preceding twelve months. He explained that the legislation did not allow the VO to take an average of lettings across different years as Mr Keating had mentioned in his evidence. Mr Davies recognised that the consequences of the national lockdown meant that the appeal property could not legally be put to use as self-catering property unless it could be used by key or essential workers. However, Mr Keating had not provided the VO with data in respect of this.
28. In a passage cited from an email he received from the VOA Mr Keating pointed out that none of his customers “cancelled” their bookings. Such an act required the agreement of both parties and reiterated points he made in his written submission that the contracts he entered into with his clientele were of a legal and binding disposition. However, he also stated that some of the bookings were never fulfilled due to the exigencies of the COVID pandemic despite these rentals being in place and paid for. This included the period 8th May to 13th June.

29. Mr Davies reminded the Tribunal that that Wales was in a state of lockdown or firebreaks from 23rd March 2020 to 11th July 2020, a firebreak of 17 days followed between 23rd October 2020 to 9th November and another lockdown between 20th December 2020 and 27th March 2021. As a corollary, only 150 letting days were available to Mr Keating for the period 1st April 2020 to 31st March 2021.
30. However, in his submission, Mr Davies now accepts that the appeal property had been incorrectly removed from the List with effect from 1st April 2020 and seeks the restoration of the property in the List at £3,000 Rateable Value from that date. However, he does not believe that the statutory conditions, which must be satisfied in order for the property to remain an entry in the List beyond 13th October 2020, were met. As a corollary, Mr Davies relied on Regulation 34 (6) for maintaining an entry in the List as set out in S.66 (2BB) were met beyond 13th October 2020 and asked the Tribunal to delete it from that date.
31. As corollary Mr Davies relied upon Regulation 34 (6) of the Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005 and asked the Tribunal to reinstate the property with effect from 1st April 2020 until 13th October 2020.
32. At the conclusion of the hearing, the Tribunal decided to reserve its decision.

Decision

33. Having considered the evidence placed before it the Tribunal decided to allow the appeal, but only to the extent conceded by Mr Davies in his submission.
34. The starting points for cases of this nature begins with S.66 (1) of the Act. In its essence, this S.66 (1) of the Act established that, subject to its subsections, *Domestic Property* is that which is used wholly for the purposes of living accommodation. Those properties which are defined as domestic property under the Act appear in the Council Tax Valuation List and are therefore subject to the Council Tax. However, S.66 also makes certain provisions for properties used on a commercial basis for short-term stays, which means they appear in the Rating List and are subject to Business Rates.
35. Since the parties accepted that the property should be shown in the List with effect from 1st April 2020, there was no requirement for the Tribunal to address the entry point at which it should have been amended.
36. The Tribunal considered there were two limbs to this appeal. Taken in no particular order, the first part of the appeal it considered related to the term “so let” within the context of S.66 (2BB) (1) (d) of the Act, and the other related to the way in which the VO counted days so as to be included within the amount of letting days, also referred to in this Act.
37. The Tribunal recognised that the lockdowns had a profound impact on an entrepreneur’s ability to trade during these periods. However, it was required to apply the law as it was laid down in statute and had no power to waive or ignore marginal differences that would otherwise be case significant. The Tribunal also accepts that Mr Keating did not cancel bookings which could not be completed due to the restrictions of movement brought about by the COVID pandemic.
38. Mr Keating’s remarks about three stages that comprised a self-catering contract were clearly explained and appeared entirely reasonably within his commercial

environment. The Tribunal understood that once a booking had been made, a deposit was then required followed by payment in full at times specified by the operator and/or any agent employed on their behalf. Despite the fact that Mr Keating had received bookings, the Tribunal did not consider that this aligned with the tests enshrined in S.66 (2BB). Whilst a booking may in the retail world in which Mr Keating operates constitute a let, the Tribunal considered that for rating purposes, a letting was commensurate with its occupation, or being actually let whereas a booking which did not manifest itself by way of occupation was merely a frustrated contract.

39. In order to determine the days' "so let", the VO asked for details of nights. This aligned with the requirements of S.67 (5) of the Act which requires that the circumstances immediately before midnight are scrutinised. This method also ensured that instances of double counting was avoided. The Tribunal did not accept that cancelled bookings, of which there were only a few but were nevertheless material to the outcome of this case, could be regarded as lettings within the meaning of S.66 (2BB).
40. In view of the foregoing, the Tribunal decided to allow the appeal but only to the extent conceded by Mr Davies in his evidence. The Tribunal orders that the subject property is entered in the Rating List at a Rateable Value of £3000 between 1 April 2020 and 13 October 2020.