THE VALUATION TRIBUNAL FOR ENGLAND

Proposal – validity – error in rent – whether invalid – when invalidity may be raised at hearing – when VO precluded from exercising discretion to treat proposal as invalid.

Appellant:

Mayday Optical Co Ltd in respect of:

508 London Road, Thornton Heath, Surrey CR7 7HQ: 524017577018/072N10

Respondent:

Ms Karen Kendrick (Valuation Officer)

Appearances:

The appellant's representative (The Coupers Partnership) was not present.
Mr David Forsdick of Counsel, instructed by The Solicitor, HMRC, for the respondent

Hearing: 29 February 2012 **At:** Black Lion House, London

Before: The President (Professor Graham Zellick QC)

A. Introduction

1. This decision must be read in the light of the Tribunal's decision in *Imperial Tobacco Group Ltd* v. *Alexander (VO)* [Appeal nos. 306018810109/511N05, 306018810330/511N05 and 306018810247/511N05] with which this appeal was heard and which is issued at the same time. I do not intend to reproduce here the detailed reasoning in *Imperial Tobacco*, but merely to apply the reasoning developed there and the conclusions reached. Counsel for the respondent appeared in both cases; the appellant is represented by the Coupers Partnership, who did not appear.

B. Background to the appeal

2. This appeal originally came before a panel of the Tribunal which on 19 May 2011 struck it out on the basis that the appellant's proposal was invalid. I subsequently reviewed and set aside that decision on the basis that neither the respondent nor the Tribunal had made it clear to the appellant that the respondent Valuation Officer intended to apply at the hearing for the appeal to be struck out on the ground that the proposal was invalid; that failure constituted a procedural irregularity within reg. 40 of the Procedure

Regulations.[1] Counsel for the respondent in his skeleton argument is highly critical of the decision to set aside. I reject those criticisms and must explain why.

3. Counsel insists there was no "procedural impropriety". The correct word is "irregularity", which has slightly different connotations from "impropriety", but this is not about semantics. He says that there was no irregularity because Coupers knew that invalidity would be raised at the hearing; they nevertheless failed to attend in order to defend the proposal; the VO was entitled to raise invalidity at the hearing; she could not have issued an invalidity notice as the appeal had been listed for hearing; and the VTE was required as a matter of law to determine the issue of invalidity at the hearing. I append to this decision my decision on the review, which explains clearly why the original strike out was set aside.

4. Coupers did indeed know that the VO thought the proposal was invalid, but it did not follow that the VO was proposing to rely on the invalidity and seek to have the appeal struck out. The regulations give the VO a discretion in at least some cases to acquiesce in the invalidity and proceed with the appeal on its merits. The VO should have stated explicitly that she regarded the proposal as invalid *and* that she intended to ask the Tribunal to strike out the appeal.

5. It is said that no invalidity notice could have been issued because, by the time the VO discovered the discrepancy in the rent which is claimed to be the basis of the invalidity, the appeal had already been listed for hearing, but this does not accord with the dates given by counsel in the skeleton.

6. In any case, the panel manifestly failed to apply its mind to any of these issues. They acted on the basis that a mistake in the rent automatically made the proposal invalid; that the VO could raise it at the hearing even though no invalidity notice had been issued; that there was indeed a mistake in the rent; and that the appellant had had adequate notice of the VO's intentions.

7. I remain satisfied that the original decision was seriously defective and amounted to a procedural irregularity which it was in the interests of justice to set aside. Valuation Officers need to take note of this because they will in future need to ensure that their intentions are made abundantly clear to appellants in advance of the hearing if an adjournment is to be avoided and the Tribunal must be invited to apply its mind specifically to the relevant issues of whether the VO has given explicit notice to the appellant, whether he is entitled to raise invalidity at the hearing, and whether on the facts invalidity is established. A decision which merely records that the VO stated that there was a mistake which invalidated the proposal and the appeal is thus struck out will be vulnerable to review and setting aside.

[1] The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 (SI 2009 No. 2269)

C. The issues

8. Three issues arise for consideration here:

   1. Is the VO entitled to raise the invalidity of the proposal at the hearing, not having previously issued an invalidity notice?

   2. Does the mistake in the rent render the proposal invalid?

   3. Is the VO acting lawfully in asserting invalidity?

   1. Is the VO entitled to raise the invalidity at the hearing?

9. Where an invalidity notice has not been issued in accordance with reg. 8(1), within four weeks of its receipt, the issue of invalidity may be raised subsequently (whether at the hearing or otherwise) only in very limited circumstances, as described in the *Imperial Tobacco* decision. They include where it was not legally possible to serve a notice, where the facts on which the invalidity is said to turn only emerged later, and where the defect is so fundamental that the Tribunal has no jurisdiction to entertain the appeal.

10. The respondent here maintains that the four-week deadline had already passed when she discovered the error and she could not serve an invalidity notice because the appeal had already been listed for hearing.

11. In fact, the appeal had not been listed for hearing when the VO discovered the discrepancy in the rent: the VO communicated her view as to validity to the appellant's representatives on 3 May 2011, which was well before 19 May 2011 when the case was listed for hearing. This, however, is irrelevant, because the four-week deadline runs from when the proposal is submitted, which was on 14 October 2010.

12. The basis for the VO's belief that an incorrect figure for the rent had been entered in the proposal was that it differed from the figure given by the appellant himself (not his representative) in the statutory Form of Return dated 17 May 2010.

13. Thus, the information containing what the VO took to be the correct rent was in her possession five months before the proposal was received. There is a case for saying that she should have compared the proposal with the Form of Return within four weeks of receiving the proposal so as to be able if necessary to issue a notice of invalidity within the four-week deadline. I hesitate, however, to impose that administrative burden on the respondent.

14. Given the number of proposals received, I do not think it would be right or reasonable to impose such an obligation on the Valuation Office Agency. It is for ratepayers to ensure that the rental information they are required to give is accurate and it is they who must take the risk of their proposal being pronounced invalid and their appeal struck out if the VO becomes aware of the error at a later date.
15. I accept, therefore, that the VO was not in this case able to serve a notice when she became aware of the discrepancy between the figure in the

proposal and that in the Form of Return and formed the view (as she was entitled to do in the absence of any evidence to the contrary) that the former was not the correct rental figure.

16. It follows, therefore, that in this case the VO is entitled to raise invalidity at the hearing.

17. But alleging invalidity is only the beginning: it is then for the VO to satisfy the Tribunal on the evidence before it that the proposal is indeed invalid, which brings us to the second issue.

2. Does the mistake in the rent render the proposal invalid?

(i) Was there an error in the rental figure?

18. The proposal gave a rent of £9,500 pa. The Form of Return gave a figure of £10,000 pa. The issues to determine are whether the figure in the proposal is correct, and, if it is not, whether the error is such as to render the proposal invalid.

19. The figure of £9,500 given by Coupers in the proposal is based on a figure given to them by the appellant himself, whereas the figure of £10,000 was given to the VOA by the appellant personally in the statutory Form of Return. At no point, so far as I can tell, did Coupers seek to confirm the correct figure with their clients, even when receiving an order from the Tribunal to produce documents, issued by me under reg. 18(1)(b) of the Procedure Regulations, requiring "the appellant to produce authenticated documentary evidence of the rent".

20. Coupers responded by sending a copy of the document in which the appellant authorised them to act on his behalf, in which he gave the figure of £9,500; and even after further correspondence in which the Registrar made it clear that the document supplied did not in my view comply with the order, Coupers failed to provide any further information and it would appear from the correspondence took no steps to clarify the matter with their client. I find this behaviour of a professional representative extraordinary and deplorable.

21. The order itself made clear that failure to comply "will be taken into account by the Tribunal at the hearing … and may damage the appellant's case".

22. On the evidence before me and in view of the foregoing, I find that the correct rent is £10,000 pa and that the figure given in the proposal was incorrect.

(ii) Was the error such as to make the proposal invalid?

23. The error is £500 pa or 5%. As I stated in the *Imperial Tobacco* case, not every error in a proposal, even as to the rent payable, gives rise to invalidity. Where does this error lie along the spectrum?

24. It is clearly outside the category of clerical, trivial or *de minimis* errors, which are to be ignored, as well as outside the category of errors so fundamental that the Tribunal lacks jurisdiction and cannot be disregarded. That leaves the second and third categories described in paras. 31 and 32 of *Imperial Tobacco*.

25. Is it an error of substance, not the result of a deliberate attempt to mislead and not impairing the VO's ability to consider the proposal on its merits and without an adverse impact on her ability to assess the correct rateable value? In other words, has there been substantial compliance and is without prejudice to the VO? Or is it an error that misrepresents the appellant's case and misleads the VO?

26. In distinguishing the error here from that in *Imperial Tobacco*, I observe that the rent there was in any event entirely immaterial so that the VO was in no way misled or prejudiced and that here there are none of the tenure and similar complexities that excused, or at any rate explained, the error.

27. The appellant's representative has had ample opportunities to convince me that this was not the kind of error that should be treated as giving rise to invalidity, but he has conspicuously failed to do so.

28. There might be cases where an error of this order of magnitude might nevertheless be held not to invalidate the proposal, but in the absence of any relevant argument or evidence on this point on behalf of the appellant, I would hold that the error here made the proposal potentially invalid. But that still leaves the question of whether the VO can raise the invalidity.

3. Is the VO acting lawfully in asserting invalidity?

29. The third and final question must be posed in all cases but will only rarely have an impact on the outcome.

30. As explained in *Imperial Tobacco*, the VO has a discretion under reg. 8. It is not a discretion as to whether to issue a notice or instead raise invalidity at the hearing, but whether to issue a notice or treat the proposal as valid. That discretion persists even where (as here) it was not possible to issue a notice. It is inconceivable that the VO would be given a discretion in the one context but not in the other. It is, as I understand it, no part of the respondent's case that a VO, not having issued a notice whether in the exercise of discretion or otherwise, is bound to raise invalidity at a later stage if of the view that there is a defect that makes the proposal invalid.

31. It is axiomatic that such a statutory discretion must be exercised lawfully, in particular reasonably. Can it be said that the VO in this case has exercised her discretion lawfully?

32. The ratepayer is likely to be bemused. The VO says the proposal is invalid because it contains a piece of information which she knows or suspects to be inaccurate because of information already in her possession provided by that same ratepayer which she believes to be accurate. It must look to the ratepayer like the use of a technicality to immunise her assessment of the rateable value from scrutiny.

33. Can the VO so exercise her discretion on these facts as to shield her assessment from review by the Tribunal? Can she take refuge in a numerical error which she knows to be an error because of information previously supplied by the ratepayer and where therefore she is in possession of the correct figure? Is that not an unattractive display of pedantry and formalism?

34. The question in law is whether it is unreasonable in the *Wednesbury* sense. Is it a decision to which no reasonable VO could come? I am unable to conclude that the VO's attempt to have the proposal ruled invalid falls within the range of rational decision-making. In my judgment, the attempt to claim invalidity is unreasonable and irrational and therefore unlawful. Public law principles will inhibit a VO from using invalidity on these facts in this way and they render the assertion of invalidity inadmissible.

35. The answer to this question means that the VO is precluded from claiming invalidity. Accordingly, I hold the proposal valid notwithstanding the error.

D. Conclusion

36. As the proposal must be treated as valid for the reasons given above, the substantive appeal must now be considered by the Tribunal.

E. Appeal to the Upper Tribunal

37. Finally, I draw attention to my observations in para. 48 of the *Imperial Tobacco* decision.

Professor Graham Zellick QC
President

Mr Jon Bestow
Registrar

24 April 2012

President's review of a decision under regulation 40 (2) of
The Valuation Tribunal for England
(Council Tax and Rating Appeals) (Procedure)
Regulations 2009 (SI 2009 No 2269)

No: 7
For office use only

Representative:
Coupers Partnership
King Edward House
1 Jordangate
Macclesfield
SK10 1EE

Appeal Property:
Mayday Optical Co Ltd.
508 London Road
Thornton Heath
Surrey CR7 7HQ

Appeal Number:
524017577018/072N10

Respondent:
Mr D Harvey
Valuation Office Agency
Unicorn House
28 Elmfield Road
Bromley
Kent
BR1 1LR

Hearing: 19 May 2011

Decision:

1. This appeal, brought to my attention by the chairman of the panel, was struck out on 19 May 2011.

2. On 14 July 2011, the Registrar, on my behalf, asked the parties for their comments on the failure of the panel to give the appellants an opportunity to make representations in relation to the respondent's assertion that the proposal was invalid.

3. The respondent submitted comments in writing within the 14 days allowed. Nothing was heard from the appellants' representative. The Registrar made enquiries and was informed that his letter of 14 July 2011 had not been received. It was therefore sent again but astonishingly the representative has made no representations even though this review was delayed in order to allow him to do so.

4. There are three issues relating to the alleged invalidity of the proposal:

    a. Was rental information given in the proposal incorrect?

    b. If it was, did it render the proposal invalid?

    c. Was the respondent entitled to assert invalidity at the hearing, not having served an invalidity notice within the statutory time limit?

5. As to 1, the respondent claims to have informed the appellants' representative by email on 3 May 2011 that the rental information was incorrect. The appellants' failure to respond does not, however, mean that he accepted that it was incorrect. There was thus a conflict in the information available about the rent. The appellants' representative chose not to respond. That may be because he was confident that the information he had included was correct; or that, even if incorrect, it did not matter. That failure to respond did not entitle the panel to conclude that the appellants accepted the error or any possible consequences following from that error if such it was; and it did not absolve the panel from affording the appellants an explicit opportunity to make representations.

6. As to 2, the discrepancy in the two rental figures was £500. The parties were asked whether such an error necessarily rendered the proposal invalid. The respondent merely cites the regulation that requires that a proposal must show the rent on the property, but that fails to address the point. At what point does an error render the proposal invalid? Suppose it is £10 out on a £10,000 rent? What is the determining factor? Is it the appellants' state of mind? Is it whether the difference or the error has a material impact on the respondent's evaluation of the proposal? The respondent says nothing beyond citing the regulation with which I am, of course, familiar.

7. As to 3, the respondent merely asserts that "If a proposal is invalid then the respondent is entitled to raise the matter with the Valuation Tribunal". On what authority? Why should this be possible when the regulations stipulate that an invalidity notice must be served within four weeks unless he has the written consent of the proposer (The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (SI 2009 No 2268), reg. 8(3)).

8. I am of the view that all these points should have been put to the appellants' representative before the appeal was struck out and that the failure to do so amounted to a procedural irregularity.

9. Is it in the interests of justice to set aside the strike-out decision? The respondent asserted the invalidity in his Statement of Case which should have put the representative on notice, but the respondent failed to state that he would on that basis seek a strike out. I am also unimpressed by the appellants' representative's failure to respond to the Registrar's letter, thus putting his client's interests at serious risk. Nevertheless, on balance, I conclude that the interests of justice demand that the panel's decision be set aside, the appeal be reinstated and a fresh hearing arranged.

10. I direct that, at the new hearing, the parties should be prepared to argue all three points *fully* with regard to the relevant factual evidence, statutory provisions and case law.

11. I further direct that, in view of the comments made above about the appellants' representative, a copy of this decision should be sent direct to the appellants.

Date 30.viii.11

Professor G. J. Zellick QC
President