UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 0389 (LC)
UTLC Case Number: RA/61/2018

RATING – VALUATION – alteration of rating list – football stadium – generally accepted valuation method – whether relegation a material change of circumstances – Para 2(1)(b) and (d), Sch 6, Local Government and Finance Act 1988 – appeal dismissed

IN THE MATTER OF AN APPEAL FROM THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN: WIGAN FOOTBALL COMPANY LIMITED Appellant

and

WAYNE COX (VALUATION OFFICER) Respondent

Re: DW Stadium, Loire Drive, Robin Park, Wigan, Lancashire, WN5 OUH

Upper Tribunal Judge Elizabeth Cooke and A J Trott FRICS

The Royal Courts of Justice, Strand, London WC2A 2LL
On
28-29 October 2019

Jenny Wigley, instructed by DMH Stallard, for the appellant
Hui Ling McCarthy QC and Sarah Sackman, instructed by HMRC Solicitor's Office, for the respondent

The following cases are referred to in this decision:

Alexander Wood v Aberdeenshire Assessor [1936] RA 101
Fir Mill Ltd v Royton UDC and Jones (VO) [1960] 7 RRC 171
Merlin Entertainments Group Limited v Wayne Cox (Valuation Officer) [2018] UKUT 406 (LC)
Tomlinson v Plymouth Argyle Football Co Ltd (1960) 6 RRC 173
Williams v Scottish & Newcastle Retail Ltd [2001] EWCA Civ 185; [2000] RA 119 (Lands Tribunal)

Introduction

1. The appellant, Wigan Football Company Limited, is the owner and occupier of the DW Stadium in Wigan, which is the home of the Wigan Athletic Football Club Limited ("the Club"). The Club is an associated company of the appellant. The Club was relegated in 2013 from the Premier League to the Championship and then in 2015 from the Championship to League One. The issue to be determined in this appeal from the Valuation Tribunal for England ("the VTE") is whether relegation amounts to a material change of circumstances so as to prompt an alteration of the local non-domestic rating list. The VTE found that it did not.

2. We heard the appeal at the Royal Courts of Justice on 28 October 2019. The appellant was represented by Ms Jenny Wigley of counsel, and the respondent by Ms Hui Ling McCarthy QC and Ms Sarah Sackman of counsel; we are grateful to them all for their helpful arguments. For the appellant we heard evidence from Mr Jonathan Jackson, the Chief Executive and Director of the Club, and expert evidence from Mr Blake Penfold FRICS, MCIArb. The respondent called no evidence.

3. In the paragraphs that follow we first summarise the factual background and the relevant law. We explain how football stadiums are valued for rating purposes, drawing on the unchallenged evidence of Mr Penfold. We then consider the arguments made in the appeal and explain why we agree with the VTE.

The facts

4. What we say under this heading is taken from the Statement of Agreed Facts and Issues ("the SOAF") that the parties have helpfully provided.

5. English professional football is organised in four leagues: the Premier League, the Championship, League One and League Two in descending order of status. Each season there are promotions and relegations between the leagues.

6. The Club was formed in 1932 and played non-league football until 1978. It began a run of promotions in 1997 and finally achieved promotion to the Premier League in 2005. It then suffered the two relegations referred to in paragraph 1.

7. The majority shareholding in both the appellant and the Club is held by Wigan Athletic Holdings Limited. Both parties accept that the financial fortunes of the appellant depend entirely upon the success or failure of the Club; for all practical purposes they are financially identical.

8. The DW Stadium was purpose built for the Club by the appellant, and the Club moved there in 1999. It is an all-seater stadium with a capacity of 25,138 seats. The main stand houses the Club's offices, changing rooms, and conference and entertainment facilities, and there are basic catering and bar facilities in the other stands.

9. The stadium is also used by the Wigan Warriors, a Rugby League club playing in the Super League; it pays a facility fee to the appellant in the form of a percentage of attendance receipts and the appellant also charges it for food supplied at the stadium for rugby matches.

10. The stadium was included in the 1995 rating list with effect from 1 August 1999, at an initial value of £30,000, which was increased to £225,000 with effect from 22 January 2000. At that time the Club was playing in what is now League One. In the 2000 rating list the stadium was given a rateable value of £305,000. In the 2005 list the stadium was given a rateable value of £400,000, reduced on appeal to £294,000; at the antecedent valuation date ("the AVD") for that list, 1 April 2003, the Club was playing in what is now League One, but by 2005 the Club was playing in what is now the Championship, finishing second in that division in the 2004-5 season and securing automatic promotion to the Premier League.

11. The stadium was entered in the compiled 2010 list at £1,500,000, which was reduced by agreement to £1,100,000 following an appeal. The appellant has made two proposals for the alteration of the list, and both were served in December 2015. The first proposal (relating to the first relegation) is agreed to be of no effect because of the service of the second proposal. So the Tribunal is to consider the second proposal only, which refers to the cumulative effect of two relegations, and the material day is 16 December 2015, but our conclusions would be the same whether we were dealing with one relegation or two.

12. We pause to observe that the rateable value of the stadium increased, at a rate that exceeds the rise in property values, over the years from 1999 when it was built to 1 April 2008 which was the AVD date for the 2010 Rating List. During that period the Club was on an upward trajectory. The period between 2008 and the material day in 2015 would, other things being equal, have included the AVD in 2013 for the 2015 list – but there was no 2015 rating list. The life of the 2010 list has been two years longer than expected, because the next list to be compiled was the 2017 rating list for which the AVD was 1 April 2015.

13. The Premier League auctions its worldwide and domestic broadcasting rights. The Premier League in turn pays distributions to its member clubs (who are also its shareholders). The Championship, League One and League Two receive less broadcasting income with the result that their member clubs in turn receive lower distributions. For convenience we refer to these amounts as "broadcasting revenue" in this decision.

14. Reverting to the SOAF, it is said that relegation had an effect on the Club's revenue and in particular on distributions received from the League to reflect the League's broadcasting revenue, and also had an effect upon attendance at matches.

15. The following table from the SOAF shows the change in the Club's fortunes over three years in which it played in different leagues. It will be seen that broadcasting revenue in particular varies dramatically, and the effect is cushioned by parachute payments made by the Premier League which are paid on relegation and for three years afterwards, in decreasing sums. One reason for parachute payments is the need to assist clubs who have signed up players before relegation and may have difficulty with contractual payments after relegation, but parachute payments are made without reference to the individual club's financial liabilities.

	Broadcasting revenue	Other football league revenues	Cup related revenues	Parachute receipts	Total revenues
2012/13 (Premier League)	£44,462,462	£9,059,284	£4,935,861	-	£58,457,607
2013/14 (Championship)	£1,867,000	£6,094,535	£5,829,446	£25,530,101	£39,321,082
2015/16 (League One)	£828,661	£5,361,601	£116,267	£11,711.576	£18,018,105

16. It will be seen that broadcasting revenue far exceeded ticket sales when the Club was in the Premier League; the opposite was true in the Championship and League One. The column headed "Other football league revenues" represents total attendance revenue from league ticket sales, season ticket sales and commercial revenue; we set out maximum and average attendance figures below when we discuss the valuation of football stadiums. Cup related revenues rose in 2013/14 because the Club had had two good years in the FA Cup and took part in the Europa League in that year.

17. It is agreed that the Club's league status dictates how many matches are played and against whom.

18. In 2013/14 the Club started to cover sections of seating in Championship matches because fewer spectators were expected; more were covered when the club moved to League One. One of the two ticket offices has now closed and remains vacant, but the SOAF does not say when it was closed.

19. The SOAF states that the Club's experience in the decline of revenues following relegation is in line with the effect of relegation on other football clubs, taken from the Deloitte Annual Review of Football Finance. In its 2012/13 review it showed an average total revenue for a club in the Premier League in that season of £126,230,000 and for one in the Championship of £18,137,000. Average attendances for clubs in the different leagues likewise show a steep decline.

The law

20. Paragraph 2(1) of Schedule 6 to the Local Government and Finance Act 1988 ("the 1988 Act") provides that the rateable value of a hereditament:

> "shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to be let from year to year."

21. That rent is calculated on the three well-known assumptions that the tenancy begins on the day by reference to which the determination is made, that the hereditament is in a state of reasonable repair, and that the tenant pays for rates, taxes, repairs and insurance. The "date by reference to which the determination is made" in this case was 1 April 2008, being the antecedent valuation date for the 2010 rating list, compiled on 1 April 2010; a new rating list was due to be compiled on 1 April 2015 but that was deferred until 1 April 2017, with the result that the 2010 list remained effective for seven years rather than the usual five.

22. The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 ("the 2009 Regulations") set out a number of grounds on which the list may be altered in regulation 4, including the following at 4(1)(b):

> "the rateable value shown in the list for a hereditament is inaccurate by reason of a material change of circumstances which occurred on or after the day on which the list was compiled."

23. A "material change of circumstances" is defined by regulation 3(1) of the 2009 Regulations as "a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the [1988] Act". Those matters are, insofar as relevant here:

> "(a) matters affecting the physical state or physical enjoyment of the hereditament,
>
> (b) the mode or category of occupation of the hereditament,
>
> (d) 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…"

24. It is argued for the appellant that relegation amounts to a change in the mode or category of occupation of the hereditament (sub-paragraph (b) above) or is a matter which is physically manifest in the locality of the hereditament (sub-paragraph (d)). The VTE held that it was neither.

25. The appellant also seeks to rely upon sub-paragraph (a) above. That sub-paragraph was not mentioned in the proposal; the proposal said that the grounds "included" sub-paragraphs (b) and (d), but that is not sufficient to bring in sub-paragraph (a). We therefore find that the appellant is not entitled to rely upon that sub-paragraph, although we refer to it briefly below (paragraph 69) because we think it is worth making clear that the appellant could not have succeeded on that ground.

26. The VTE's decision was made on 24 July 2018, and the appellant appealed to the Tribunal in August 2018. On 11 December 2018 the Tribunal (the President, Sir David Holgate, and Mr Peter McCrea FRICS) handed down its decision in *Merlin Entertainments Group Limited v Wayne Cox (Valuation Officer)* [2018] UKUT 406 (LC). The parties were given the opportunity to amend their pleadings in the Tribunal in the light of that decision and they did so. There will be more to say about the decision in *Merlin* later.

How football stadiums are valued for rating purposes

27. The parties have agreed that there is only one possible tenant for the DW Stadium. The Court of Appeal accepted this argument in its decision in *Tomlinson v Plymouth Argyle Football Co Ltd* (1960) 6 RRC 173, and it is accepted by the respondent that whilst other bodies do make use of football stadiums, there is no possible tenant other than the local professional football club. This is said to be borne out by a number of instances where a football club has ceased to exist; what happens is that a new club is formed and takes over the stadium (in *Plymouth Argyle* the Court of Appeal noted that this had happened to the Plymouth football club more than once). There are no other tenants waiting to offer to step in.

28. The VTE did not accept this agreement. It took the view that the Wigan Warriors rugby club was another potential tenant and that therefore this was not a case where there is no market at all.

29. We have been given more detail about Wigan Warriors and the terms of its occupation in the witness statement of Mr Jackson and in Mr Penfold's report. The rugby club operates on an entirely different financial basis than does the football club, and we are told that it is not a potential tenant because the stadium is too big for it (having a far greater capacity than most Super League rugby stadiums which have between 12,000 and 20,000 seats) and that it could not afford to meet the tenant's responsibilities for maintenance, repair and so on. Moreover it is at the top of the game in the UK and cannot rise to a higher level of income, so that situation is not going to change.

30. We are not obliged to accept this agreement as to the facts, and we are aware of the difficulties that can arise if a court accepts a counter-factual agreement. But we are satisfied on the basis of the information given to us, that the football club is the only potential tenant.

31. That being the case in Wigan and for football stadiums in general, they cannot be valued by reference to comparable properties. There are no other stadiums like this one in the vicinity and no other potential tenants, and therefore no market. Football stadiums, this one included, are therefore valued for rating purposes on the basis of ability to pay. A formula, specific to football stadiums, has been agreed between ratepayers and the VOA (although the result of the application of that formula is not always agreed). An alternative would be the contractor's basis of valuation which looks at the decapitalised cost of building an equivalent stadium; it is agreed that the football club as the unique tenant would not pay more than that cost, and therefore that the valuation will not exceed that which the contractor's basis would yield.

32. Mr Penfold explained that in earlier years ability to pay was calculated as a percentage of income or of home league gate receipts (to avoid the fluctuations often produced by including receipts from Cup matches). However, as other sources of income developed, in particular income from broadcasting, a more detailed approach was developed, and has been largely agreed between the VOA and a consortium of agents representing Premier League and other clubs.

33. The scheme involves four stages:

a. First, a basic rateable value ("RV") per seat is calculated by dividing the cost of building the stadium by the number of seats. Reliable information about building costs is available because the recommendations made following the Hillsborough Stadium disaster in 1989 prompted most clubs to refurbish or rebuild their stadiums. There are therefore agreed levels of RV/seat, depending on design, type of construction and capacity[1], which are adjusted by a location factor because of regional variations in building costs and land values. That cost is then multiplied by the licensed capacity of the stadium.

   Mr Penfold's valuation for the appeal property is an RV/seat of £68.50, adjusted by a location factor of 0.935, and multiplied by a capacity of 25,138 to give a base RV of £1,610,026.

   Mr Penfold observes that while the league status of a club is not relevant to this part of the calculation it may have an effect because clubs in League One and Two may have a standing area, which reduces the RV/seat, whereas all-seater stadiums are a requirement for Premier League and Championship clubs.

b. The base RV is then adjusted for superfluity by taking the maximum attendance[2] as a proportion of capacity. Some clubs consistently fill their stadium; most do not. A club with a capacity of 20,000, and a maximum attendance at the relevant date of 10,000 would have a superfluity adjustment of 0.5. Mr Penfold's valuation shows a superfluity factor of 0.922 (rounded), which is used to adjust the basic RV to £1,483,981. The VOA valuation adopts a different maximum attendance figure; we do not need to go into the difference; the point is that the method is agreed.

   Mr Penfold observes that the league in which the club pays will have a profound effect upon maximum attendance. He and Mr Jackson set out the maximum attendance figures for the Club, as follows:

2007/8	Premier League	23,170
2013/14	Championship	15,470
2015/16	League One	9,469

c. Thirdly, the valuation is adjusted for ability to pay, derived from an assessment of the Fair Maintainable Trade ("FMT") for the club as at the AVD, being the reasonably maintainable total income from all sources other than transfer fees. The fee paid by Wigan Warriors is included, as are fees from conferences and dining at the stadium and income from broadcasting. The FMT figure derived in this way is divided by average attendance and then further adjusted by the relativity of average gate to maximum gate (so as to allow for the fact that some clubs regularly get a full attendance while others might usually be half full). This relativity factor is then compared with other clubs in a peer group drawn from the same league and the FMT is adjusted again if the ratio of the average gate to the maximum gate is below the norm for that group, but not otherwise.

[1] Adjustments are also made, in the case of lower league clubs, for standing capacity and open terraces.
[2] Including cup matches and taken as the maximum over the last five years.

Mr Penfold calculates the ability to pay adjustment for the Club when it was in the Premier League as 25.74%. He deducts this percentage from the base value reflecting superfluity (£1,483,981) to give £1,102,004.

Mr Penfold observes that league status affects the calculation of the ability to pay adjustment several times. The FMT varies according to league, largely as a result of broadcasting revenue, and so does average attendance; the figures that he and Mr Jackson provide for the Club are as follows:

	FMT	Average gate
Premier League	£30,000,000	17,183
Championship	£10,800,000	12,256
League One	£7,000,000	8,093

d. Finally the figure is adjusted where there are other items forming part of the hereditament that were not reflected in building costs and need to be added in. There are no such items in this case. Mr Penfold then rounds his calculated rateable value of £1,102,004 to give an adopted rateable value of £1,100,000. This figure, but not all the component parts of the calculation, is accepted by the respondent.

34. Central to the argument for the appellant is that the valuation of the stadium is very closely linked to the appellant's league status, because both attendance and broadcasting revenue, which affect the superfluity adjustment and the ability to pay adjustment, are tied to league status.

The appeal

35. The appellant therefore argues that since its league status is crucial to the rateable value when the Rating List is compiled, the list becomes inaccurate when it is relegated. In fairness it accepts that promotion should have the converse effect and rateable value should go up.

36. The respondent challenges the premise of the argument by pointing out that the link between ability to pay and league status is not so direct as the appellant states. Attendance will vary considerably between clubs in the same league, as will broadcasting revenue. We were taken to figures for the number of domestic broadcasts of matches for teams in the Premier League showing that whereas Manchester United, Liverpool or Arsenal might have as many as 28 matches televised live in a season five other clubs were only televised live on the minimum of 10 occasions. Attendance is said to be a function in part of ticket pricing policy, and we were taken to reports of the great success of Bradford City in filling its stadium despite relegation by dint of attractive pricing.

37. We accept that there are variations in prosperity between members of the same league. But it is clear that league status in itself has an effect on both broadcasting revenue and attendance

figures. In other words, we find that when a club is relegated or promoted its attendance figures and its broadcasting revenue will change by virtue of the change in league status, even if all other factors remain the same. That is obviously true of broadcasting revenue because of the different level of broadcasting exposure that clubs get purely by virtue of league status. Generally the broadcasting revenue for a Premier League club will far exceed that of a Championship club, let alone that of a League One club. We find that the same is also true of attendance as well on the basis of the statistics we have been shown.

38. Accordingly, in the light of the way rateable value is calculated, with attendance and income feeding into both the superfluity adjustment and the calculation of FMT, we accept that the ability to pay of a Premier League club will far exceed that of a club in League One.

39. Moreover, the parties have agreed that if the appeal succeeds then the rateable value of the stadium pursuant to the first proposal (following one relegation) would be £454,000 and pursuant to the second proposal (following two relegations) would be £255,000. It follows that there can be no dispute that if the stadium were being valued at the material day by the method set out by Mr Penfold, according to the scheme agreed described above, in the light of the two relegations, the rateable value would be £255,000.

40. That does not mean that the list should be altered. The policy of having a new list only every few years is dictated by the need for stability and the impracticability of having the list adjusted whenever economic factors mean that rateable value goes out of date. Accordingly Ms McCarthy for the respondent says that the fact that the rateable value would be found to have changed if calculated at the material day is not relevant to the issue before the Tribunal, which is whether there has been a material change in circumstances within the meaning of paragraph 2(7) of Schedule 6 to the 1988 Act so that an alteration can be made to the list.

41. The respondent's approach is correct. Ms Wigley went to some length to explain that the valuation of stadiums for rating purposes is closely connected with the actual tenant's ability to pay, even though that jars with the usual rating approach based on a hypothetical tenant, because there is only one tenant for the stadium. We accept that. It does not follow that whenever ability to pay changes, the list has to be altered. It is not the case that when the list is inaccurate there is a material change of circumstances and therefore the list must be altered. Rather, the list can be altered only where the list is inaccurate *by reason of* a material change in circumstances, and it is that material change that must be identified in this case if there is to be an alteration in the list. Put another way, we accept that the fact that there is only one possible tenant is relevant at the AVD (as is clear from the *Plymouth Argyle* decision); that does not mean that it is also relevant to whether there is a material change of circumstances.

42. The rateable values of football stadiums reflect ability to pay and the respondent agrees that the appellant's ability to pay has declined between the AVD in 2008 and the material day in 2015, but says that there has been no material change in circumstances among those listed in paragraph 2(7). We therefore turn to the sub-paragraphs of paragraph 2(7), and it has been explained that the relevant ones are (b) and (d).

Sub-paragraph (b) and the mode or category of occupation

43. Has the "mode or category of occupation" of the stadium changed as a result of relegation?

44. It is accepted by both parties, and we agree, that there is no need for a change in mode or category to be accompanied by physical change in the hereditament or in the surrounding area.

45. The appellant argues that the mode has changed because the primary purpose of the occupation of the stadium was as a broadcasting studio when the Club was in the Premier League whereas the purpose now is for the entertainment of those attending matches; and that the category has changed because the different leagues amount to different categories of occupation.

46. As Ms Wigley acknowledged, there is no precedent in rating decisions for the use of the words "mode" and "category" in this context to mean two different things and we do not wish to suggest that that would be an appropriate use of the statutory language. The phrase "mode or category" has always been used as a hendiadys, that is, two words meaning one thing. Consistently with the practice of the courts and of this Tribunal we therefore look at "mode or category" as a single concept in examining the arguments put forward by for the appellant.

Is change in league status a change in mode or category?

47. Ms Wigley argued for the appellant that the change in league status is a demonstrable, and readily identifiable, change in the mode or category of occupation. She relied upon the fact that league status dictates the way the business of football is conducted. The number of home league fixtures a club plays, and the identity of its opponents, are dictated by the league in which it plays. So is the level of attendance at the stadium. The rules for each league are different, and we have been shown a comparison of the handbooks for the Premier League, the Championship, and Leagues One and Two which demonstrates that requirements for seating, broadcasting facilities, floodlighting provision, pitch size, crowd segregation and stewarding are different.

48. Ms Wigley suggested that the fact that rating surveyors adopt different methods of valuation for stadiums in different football leagues reflects the fact that those stadiums are in different categories of use. She cited paragraph 73 of the Court of Appeal's decision in *Williams v Scottish & Newcastle Retail Ltd* [2001] EWCA Civ 185:

> "Rating surveyors adopt different methods of valuation because the differences between business premises make that appropriate. In this case the different methods adopted for public houses and shops reflect the fact that they are in different categories of business use."

49. The quotation reveals the weakness in the argument. It is not the case that valuation methods differ between stadiums in different leagues in the way that they do between shops and public houses. The valuation method used for football stadiums is consistent, although the elements in the calculation will differ (for example in the proportion of income represented by broadcasting

revenues) between leagues. We are told by Mr Penfold that the VOA uses two different adjustments for ability to pay, one for Premier League and Championship clubs and the other for Leagues One and Two, and that the figure used for averaging across the leagues is different (see paragraph 33c above). But the method is fundamentally the same (and very different from that used to value shops or public houses).

50. The differences in the conduct of the business of professional football between leagues are matters of degree. The league makes a difference, but it does not change the fact that the stadium is occupied for the purpose of playing football commercially. The idea of a league as a category is of course seductive because it is easy to spot, and clearly labelled. Ms Wigley argued that because there is a limited number of relegations and promotions each season there is no danger of a floodgates effect; but the argument for regarding a league as a category would itself require groups of clubs within the league, or even single clubs, to be regarded as different categories because the earning power of, for example, Manchester United is likely to be greater than that of, for example, Bournemouth AFC. On that basis the number of modes or categories is not limited to the four leagues but is unpredictably wide, which goes against the principle that the rating system uses broad categories of use rather than the use of the individual occupier. In *Williams* the Lands Tribunal [2000] RA 119 said at paragraph 111:

> "… it is thus the principal characteristics of the actual use that are relevant – those features that reflect the general purpose of the use – rather than the particular operations of the individual occupier."

51. We have to agree with the VTE's pithy summary: football is football. A league is not a mode or category of occupation.

"Rent of a different order"

52. The same sort of difficulty arises when we consider another aspect of Ms Wigley's argument which focuses on the financial implications of league status.

53. In *Fir Mill Ltd v Royton UDC and Jones (VO)* [1960] 7 RRC 171 the Lands Tribunal said:

> "… the mode or category of occupation by the hypothetical tenant must be conceived as the same mode or category as that of the actual occupier. A dwelling house must be assessed as a dwelling house, a shop as a shop but not as any particular kind of shop; a factory as a factory but not as any particular kind of factory."

54. Ms Wigley points out that this is not a statutory text and should not be construed as such. She relies upon the Scottish authority of *Alexander Wood v Aberdeenshire Assessor* [1936] RA 101, where the court had to consider the ratepayer's argument that a herring curing yard should be treated as being in a different mode or category from other fish curing yards. The argument was rejected. Lord Patrick said

> "… valuation law and practice do not require that general categories of heritage should be minutely sub-divided. Shops are valued as shops, not as grocers' shops or as butchers' shops. … Exceptions are only carved out of general categories if it is shown that heritage of the alleged exceptional kind commands rents of a different order from heritage belonging to the general category."

55. Ms Wigley lays stress upon the fact that the court there contemplated the creation of exceptional sub-divisions where the rent that the hereditament commands is "of a different order" from the rest. In the present case, she says, a Premier League stadium commands rent "of a different order" from that of a Championship or, even more so, a League One stadium. It is right therefore to regard them as representing separate categories of occupation.

56. In response Ms McCarthy points out that this is a Scottish authority and not binding upon the Tribunal, and that the fact that the same use for a property might have become significantly more profitable is simply not a reason, in English rating law, to create a new category. It has nothing to do with any intrinsic quality of the stadium itself and has everything to do with the personal attributes and economic success of the owner. In fact, she argues, the words quoted above indicate that rather than departing from the *Fir Mill* test the Scottish court was reinforcing it.

57. We agree that there is no divergence here between English and Scottish law. Shops are valued as shops. The success of a particular business does not put it, individually or with other similar businesses, into a different category of occupation. Nor does the success of a group of businesses within a larger number. The logic of Ms Wigley's argument again leads to the result not that the league as a whole is a separate mode or category, but that different teams in the particular league can be said to be in a different mode or category of occupation because there is often a gulf between the profits of a club at the top of the Premier League and at the bottom. Ms Wigley's argument would also mean the top four Premiership clubs would constitute a different category of occupation because they would be entered into next season's Champions League (European) competition which generates additional broadcasting and attendance revenue that is not available to other Premiership clubs. The argument is unprincipled, and generates a floodgates result which cannot have been the intention in a rating system based upon relatively broad categories and not intended to be a tax on profits.

Broadcasting: a change in the purpose of occupation?

58. Ms Wigley argued that relegation from the Premier League to any other league amounts to a change in the way football entertainment is delivered and the way it is exploited economically. A Premier League club's matches are broadcast to a worldwide audience whereas clubs in other leagues are predominantly playing for the spectators in the stadium itself. The predominance of the broadcasting aspect of Premier League games dwarfs all other aspects of the stadium's use. The income figures we quoted above demonstrate the strength of the argument; there was a 96% reduction in broadcasting revenues for the Club between 2012/13, when it played in the Premier League and 2013/14 when it played in the Championship.

59. Ms Wigley points out that Premier League games are regularly screened on Sky Sports or BT Sports throughout the UK, always screened live to many countries throughout the world,

shown on Match of the Day in highlights form, screened all over the world in highlights form and regularly broadcast by local, national and worldwide radio channels. In 2017/18 approximately 44% of Premier League matches were broadcast live in the UK whereas about 2% of League One and League Two matches were broadcast live over the same period.

60. We accept, of course, that the broadcasting exposure of a Premier League club vastly exceeds that of a Championship club, and that that of a League One club is lesser still. But to say that the stadium is therefore occupied as a broadcasting studio is an abuse of language. The Club does no broadcasting itself. It does not even have a contractual arrangement with broadcasters, since that aspect of the business is all managed by the league. It provides facilities for broadcasting, and it receives broadcasting revenue in the manner described above. But what it does is to play football professionally. We are not persuaded by the analogy with a shop, by contrast with a warehouse providing goods for online shoppers, or with a theatre, by contrast with a television studio. It is not the case that, as Ms Wigley put it, a Premier League club and a League One club are regarded as being in the same mode or category of occupation "just because they both involve an element of the same activity, namely the playing of football matches". They are regarded as being in the same mode or category of occupation because playing professional football matches is the central activity and purpose of each.

Sub-paragraph (d): matters that are physically manifest in the locality

61. Paragraph 2(7) of Schedule 6 to the 1988 Act refers to:

> "(d) 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…"

62. Ms Wigley argued that relegation is physically manifest in the locality of the stadium in the form of greatly reduced traffic because of the drop in attendance numbers and general lower levels of activity. League status also affects the identity of opponents, and that identity is physically manifest in lower numbers of supporters travelling to the stadium and in the kit they wear and the chants they sing and shout. We have looked at maximum and average gate in paragraph 33 above; it is not in dispute that attendance drops with relegation, and we accept that traffic must decline and the drop in attendance must be observable in the locality of the stadium.

63. The respondent seeks to attribute attendance to other factors such as ticket pricing policy and the weather; those factors will certainly have an effect, but we accept that there is a clear link between attendance and league status. However, the argument for the appellant runs up against the principle reiterated in the decision in *Merlin* that a change in the economic fortunes of the ratepayer does not meet the requirements of sub-paragraph (d).

64. *Merlin* was an appeal brought by the owner of Alton Towers, one of the largest theme parks in the UK, whose takings declined considerably following the tragic accident on the "Smiler" ride in June 2015. The appellant argued that the attitude of the public to thrill rides was a matter which was physically manifest in the locality and so fell within paragraph 2(7)(d) of Schedule 6 to the 1988 Act. The Tribunal reiterated the long-established principle that the hypothetical letting which

is the basis for rating valuation is valued without reference to the personal attributes of the actual occupier:

> "43 … when mode or category of occupation is being determined, the fact that the actual occupier runs his business in a half-hearted or inefficient (or simply incompetent) manner or leaves half of his premises empty is irrelevant.
>
> 45 … For a given property, the rateable value is the same whether the actual occupier runs a flourishing business or trades at a loss. … Rates are not a tax on actual profits."

65. It was argued for the appellant in *Merlin* that the change in public attitudes to thrill rides was "physically manifest" in the locality in the form of a drop in visitor numbers and therefore a substantial decline in the volume of traffic in the area. The Tribunal rejected that argument following a detailed analysis of the authorities. It found that the cause of the depleted visitor numbers was the crash, which was – on the appellant's own admission in the criminal proceedings – caused by the appellant's failure to make the ride safe. This was a personal characteristic of the occupier, and not therefore a matter that could be the basis for a revaluation. At paragraphs 79 and 80 the Tribunal said:

> "79. It is plain from long-established principles summarised in paras. 43 to 45 above that the circumstances upon which the appellant seeks to rely were irrelevant because they were simply concerned with the way in which it operated its business on the hereditament and the reaction of potential customers thereto. They had nothing to do with any intrinsic or essential characteristic of the hereditament itself or the locality in which it was set. It should be recalled that those principles also protect a ratepayer against an attempt to increase the rateable value of his property, whether in the compilation of the list or its subsequent alteration, by virtue of his personal success in running his business. Such success (or failure) is no more than an attribute of the actual occupier and not a characteristic of the property being valued or of the locality in which it is set.
>
> 80. We recognise that different considerations *may* sometimes arise when a specialist type of property involves a "monopoly of supply" and/or the actual occupier is the only likely bidder for the hypothetical letting, and there is adequate evidence that such matters affect the intrinsic profit-earning potential or capacity of the hereditament. But no such case has been advanced in this appeal."

66. Ms Wigley relied heavily upon paragraph 80 and said that in circumstances where the occupier is the only possible tenant the principles set out in paragraphs 43 and 45 (and the surrounding text) are inapplicable. Paragraph 80 is said to make it clear that in these circumstances the fortunes of the actual occupier, including in this context league status are relevant matters and, where physically manifest in the locality, will prompt an alteration in the list.

67. This is to lay far too much weight on paragraph 80 in *Merlin*. The paragraph is obiter, it makes a suggestion only (by the word "may"), and it expressly refers to the intrinsic profit-earning potential or capacity of the hereditament. There is nothing intrinsic to the hereditament about the league status of the occupying club, and the physical changes in the locality that the appellant relies

on are caused by the league status of the Club in this case. As Ms McCarthy says, the argument here is on all fours with the argument rejected by the Tribunal in *Merlin*; and we do not accept that paragraph 80 in *Merlin* can justify a different approach in this case.

68. Accordingly we reject the argument based on paragraph 2(7)(d).

69. By way of postscript we can add that had the appellant been permitted to argue the requirements of sub-paragraph (a) were met, that argument too would have failed. Paragraph 2(7)(a) refers to "matters affecting the physical state or physical enjoyment of the hereditament", and the appellant wished to rely on the covering of areas of seating in the stands, and the closure of a ticket office. Again, these are caused by and directly related to the business performance of the Club. They do not affect the intrinsic characteristics of the hereditament and cannot be relied upon as a material change of circumstances.

Fairness

70. Finally Ms Wigley sought to persuade us that for the appeal to fail would be unfair, and that it is legitimate to construe the statute so as to achieve a fair result. Because the rating valuation of football stadiums is carried out on the basis of ability to pay it is said to be unfair that a dramatic change in ability to pay, such as is caused by relegation, should not be regarded as a material change of circumstances. The unfairness here is said to be exacerbated by the unusually long life of the 2010 list, so that the appellant is liable for the rateable value determined on the basis of its ability to pay as a Premier League club even when its parachute payments (see paragraph 15 above) have ceased.

71. Where there is doubt about the interpretation of the statute we are asked to choose the fair outcome; Ms Wigley cites *Bennion on Statutory Interpretation* (7th edn), where it is said at paragraph 26.3 that "The courts will seek to construe legislation so as to produce a result that is fair and just."

72. We agree that from the appellant's point of view there may well be an unfairness here, although it is dangerous to make sweeping statements about fairness without knowing all the consequences of departing from principle. But we are not able to stretch the statute, and the clear principles in the authorities, in the interests of a fair result. To do so would be to go behind the plain words of the statute and of the authorities.

Conclusion

73. The appeal fails because there has been no material change in circumstances.

74. It may be useful for us to observe that the valuation method used to value football stadiums is itself a compromise with the statutory scheme. The statute speaks of a hypothetical tenant and so assumes that there is a market for the purposes both of initial valuation and of alteration to the list. A material change in circumstances must relate to the intrinsic features of the hereditament or

to physical changes in the locality, or manifest in the locality, so as to retain an objective market-based list rather than a list that is altered to reflect matters that are personal to the occupier. However, inevitably where there is no market for a particular hereditament the VOA has to adopt another method of valuation, such as receipts and expenditure or the contractor's basis. In the case of football stadiums the generally accepted valuation method is a hybrid of the two. Such a method is bound to be something of a compromise, because it is tied so tightly to the performance of the team (of which league status is a measure); its distance from the statutory scheme is exposed by an application to alter the list because a change in the team's performance, however dramatic, cannot be shoe-horned into the statutory criteria for a material change of circumstances. The method does not seem to us to be fit for purpose any longer given the fundamental changes in the finances of professional football in England and Wales since the introduction of the current league structure and the importance of broadcasting rights in the calculation of FMT.

75. The problem is highlighted in this case by the coincidence of successive relegations with a rating list that remained in force for two years longer than usual; but the problem and the unfairness lie with the method of valuation used when the list was compiled. We understand that there have been changes in the assessment of ability to pay in the compilation of the 2017 list and it may be that the difficulties highlighted in this case will not occur in the future.

76. This decision is final on all matters other than the costs of the appeal. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

Dated 18 December 2019

Elizabeth Cooke, Upper Tribunal Judge

A J Trott FRICS