MISC/1976/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by Admiral Taverns Ltd ("the appellant") does not succeed**. In accordance with the provisions of the Tribunals, Courts and Enforcement Act 2007 I confirm the decision of the First-tier Tribunal made on 28th April 2017 under reference CR/2016/0022. This dismissed the appellant's appeal against the decision of Cheshire West and Chester Council ("the local authority") to list the relevant land as an asset of community value.

Hearing

2. I held an oral hearing of this appeal on 14th December 2017 at Field House (London). The appellant was represented by Jonathan Steinert of counsel, instructed by Freeths LLP, solicitors. The local authority was represented by Jeremy Phillips of counsel. I am grateful to them for their assistance. The second respondent, Farndon Parish Council, did not address any written or oral arguments to the Upper Tribunal.

The legal framework

3. The Localism Act 2011 requires each local authority to keep a list of land (including buildings) in its area which is of community value. The effect of listing (which usually lasts for five years) is that generally speaking an owner of listed land wishing to sell it must give notice to the local authority after which any community interest group has six weeks in which to ask to be treated as a potential bidder. If any such group does so the sale cannot take place for six months, during which the group may come up with an alternative proposal. At the end of the six months it is up to the owner whether to sell and to whom and on what terms. There are arrangements to compensate owners who lose out financially in consequence of the listing.

4. Listing under the 2011 Act does not in itself prevent land being developed but as a matter of planning policy any necessary permission is likely to be refused while land is listed. There might also be other restrictions, such as the effect of green belt policy.

5. So far as concerns the present appeal the relevant parts of sections 87 and 88 of the 2011 Act provide as follows:

> 87(1) A local authority must maintain a list of land in its area that is land of community value.
>
> (2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.

…

88(1) … a building or other land in a local authority's area is land of community value if in the opinion of the local authority –

> (a) an actual or current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
>
> (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

88(2) … a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority –

> (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or social interests of the local community, and
>
> (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

88(6) In this section …

> "social interest includes (in particular) each of the following –
>
> (a) cultural interests;
> (b) recreational interests;
> (c) sporting interests;

6. Schedule 1 to The Assets of Community Value (England) Regulations 2012 specifies land which is not of community value and therefore may not be listed. At the hearing before me Mr Steinert accepted that the relevant premises in the present case did not, at the relevant times, come within the provisions of Schedule 1.

7. Regulation 11 of those regulations provides that an owner of listed land may appeal to the First-tier Tribunal against the local authority's decision on a listing review in respect of the land. No grounds of appeal or restrictions on the right of appeal are specified and the parties did not dissent from my suggestion that on such an appeal the First-tier Tribunal stands in the shoes of the local authority and makes its own findings of fact and decision afresh, although it must of course consider all the relevant evidence and representations. Accordingly, the task of the Upper Tribunal on further appeal is to consider whether the decision of the First-tier Tribunal was made in error of law, rather than to review the decision of the local authority.

Background

8. This appeal concerns premises called the Farndon Arms Public House, of which the appellant was, at the relevant times, the freeholder. A 20 year lease was granted on 1st November 2007. The lease described the "Business" as meaning "the business of the sale on the Property of intoxicating and other drinks for consumption on and off the Property and the provision of food and other refreshments and recreation to the public with or without ancillary bed and breakfast accommodation".

9. In paragraph 6 the lease stated:

> **6. Tenant's Covenants (Conduct of Business)**
>
> The tenant covenants with the landlord
>
> **6.1 Conduct of Business**
>
> (a) Not without the Landlord's written consent (which need not be given or may be given on conditions) to use the Property except as a licensed public house with or for the purpose of carrying out the Business and not to apply for planning permission for any change of use
>
> To:
>
> (i) Keep the property open as a licensed public house and
> (ii) To supply food and non-alcoholic beverages from the Property

10. On 25th March 2011 Barron Mitchell Limited, which had been formed with an eye to purchasing the lease of those premises, did in fact purchase the lease. There were three shareholders (who were also Directors) – a married couple who ran the business, and the chef. The chef retired in December 2014. There was a replacement chef until November 2016 but he left because of health problems. There were three elements to the business: a restaurant, a hotel and a bar. The business started off reasonably well but later struggled to make a profit. By January 2016 it was clear that the business was no longer viable. The rest of the lease was put on the market but there was no interest in purchasing it. Terms were agreed for the surrender of the lease, which took place in November 2016. It was agreed that the wife of the married couple would continue to run the business on a day to day basis, while the husband assisted with the accounts. On 22nd February 2017 the wife made a written witness statement for the First-tier Tribunal explaining the above. She also stated that the restaurant was separate from the bar and guestroom area, and when it was running well had accounted for the largest proportion of the business's income (including drinks served with meals). However, by the time of the statement, it had not proved viable to employ a new chef and the restaurant had remained closed. She provided details of the income from the various different activities of the business but it is not necessary to repeat those details here.

11. That left the five guestrooms and the bar. Breakfast was served to the guests but the income from the guestrooms just about covered the rent paid to the appellant. The bar remained open daily, with some regulars and the occasional guest drinking in it, but no television. There was difficulty covering the running costs from this.

12. There was one function room, in which there had been one wedding reception since March 2011. There had been some use by local groups but they now preferred to use a local upgraded community centre. No sporting events had been held, although there were quizzes every two months, with 20 or 30 attending, but the man running them had just died and there were no plans to continue them.

13. There were also witness statements of 22nd February 2017 from one of the appellant's employees and from a legal assistant at Freeths (their solicitors) relating to their own visits to the premises..

Procedure

14. Meanwhile, on 20th April 2016 Farndon Parish Council (the second respondent) applied to the local authority (the first respondent) for The Farndon Arms to be listed as an asset of community value. After considering representations, on 8th August 2016 the local authority agreed to list the premises. In October 2016 it maintained that decision on review and on 28th November 2016 the appellant appealed to the First-tier Tribunal against that decision of the local authority. The First-tier Tribunal considered the matter (without an oral hearing) on 28th April 2017 and upheld the decision of the local authority. On 3rd June 2017 the same judge of the First-tier Tribunal refused permission to appeal to the Upper Tribunal and on 5th July 2017 the appellant renewed the application direct to the Upper Tribunal. It now appeals by my permission given on 24th July 2017. On 26th September 2017 I directed that there be an oral hearing of the appeal. This took place on 14th December 2017. The first respondent opposes the appeal and supports the decision of the First-tier Tribunal.

The First-tier Tribunal

15. Much of the document "Decision and Reasons" of the First-tier Tribunal reviewed the background, the evidence before it and the grounds of appeal to it. For my purposes the key passages appear to be the following (references are to paragraph numbers of that document):

> 8. … The actual question for the tribunal is, of course laid down by s88(1) and 88(2) whether an actual current use (or use in the recent past) of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the community. The view that pubs can encourage alcohol abuse is of course a proper and legitimate concern, although one more associated with the Temperance Movement than with the owners of pubs; however, there is no evidence in this case of any such deleterious social consequences or concerns about failure to uphold the conditions of the licence with respect to these premises. It is recognised (not least by [the government in its October 2012 advice note]) that pubs have a role to play in contributing to the development of vibrant and active communities. The appellant [Admiral Taverns Limited] recognises that the law must be applied on a case by case basis to the facts of

> each nomination [to be listed]. It is clear from the information before me that the premises have been used by local people as part of their social lives, meeting others in a convivial atmosphere for food and drink and furthermore holding some social events, notably quiz nights. I am satisfied that while in the most recent period the business has not thrived as it might it has been used for the social wellbeing of the community and there are reasonable grounds to consider that in the next years (especially with the housing development in the area identified by the Parish Council leading to an increase in demand for its services) it could support the social wellbeing and social interests of the local community.

16. In support of its conclusions the First-tier Tribunal referred (paragraph 9) to the contents of the Farndon Arms website which strongly pointed to it being a pub, the fact that the 2008 lease described the premises as "The Farndon Arms Public House", the fact that there was a trade tie for the sale of various alcoholic beverages (including beers and ciders), and the provisions of the lease to which I have referred above. It concluded that "the documentary evidence clearly points to the primary use of the property as being a public house" and that the lease defined the residential aspect of the business as being ancillary. It rejected as unconvincing the appellant's argument that it was up to it to choose whether or not enforce the covenants.

17. The First-tier Tribunal continued:

> 9. … The lease clearly is of a public house, the business of a public house is the sale of drinks and the provision of food and other refreshments, that is what the lease provides. The use as a pub and restaurant are, it goes without saying, of social benefit to members of the local community who will visit the Farndon Arms Public House for social purposes and enjoy a drink and food as part of that social intercourse. The use as a pub – whether for a drink or a meal is a non-ancillary use which confers a social benefit on the local community.

The First-tier Tribunal rejected an argument based on the Court of Appeal decision in Taylor v Courage Limited [1993] 2 EGLR 127 (see below) and concluded that "Parliament has (with limited exceptions) defined premises by their social consequences rather than their uses", with a final reference (paragraph 10) to the evidence from the wife of the married couple that "some local groups have used the Farndon as a meeting place at different points over the last six years" and a comment that the First-tier Tribunal did not consider this use to be *de minimis* (minimal).

The Grounds of Appeal – Taylor v Courage Limited

18. Mr Steinert identified four separate grounds of appeal to the Upper Tribunal against the decision of the First-tier Tribunal. The first related to the Court of Appeal decision in Taylor v Courage Limited. That case concerned an application under Part II of the Landlord and Tenant Act 1954 for a new tenancy. The appellant had held a five year term of a public house from the respondents. At the beginning it was a traditional public house. By the time of the application for renewal he had carried out substantial extensions, including a new kitchen. Customers could book tables in the dining room in advance and could order from a substantial menu. Food could also be ordered at the bar and meals could be taken in the bar area or in the dining room.

Under section 43(1)(d) of the 1954 Act the right to renew the tenancy did not apply "to a tenancy of premises licensed for the sale of intoxicating liquor for consumption on the premises". However, that was subject to an exception in the case of:

> 43(1)(d)(i) premises which are structurally adapted to be used, and are bona fide used, for a business which comprises one or both of the following, namely the reception of guests and travellers desiring to sleep on the premises and the carrying on of a restaurant, being a business a substantial proportion of which consists of transactions other than the sale of intoxicating liquor.

19. If the premises came within the exception in 43(1)(d)(i), there was a right renew under the 1954 Act. If they did not, and were within the description "premises licensed for the sale of intoxicating liquor for consumption on the premises", there was no right to renew. The Court of Appeal held that the premises did come within 43(1)(d)(i) and were protected by the Act. Although the public house as a whole could not be described as restaurant premises, this was not required, and the appellant was running a restaurant business within the meaning of the provisions. Mr Steinert cited several extracts from the judgments but perhaps the most relevant is from Lord Justice Evans (at page 130):

> "… it is difficult to avoid the conclusion that the business does include the carrying on of a restaurant. In favour of that conclusion, the principal factors seem to me to be these: a dining room is provided which has the appropriate furnishings for a dining room; the menu and the wine list are both of a high standard; a limited amount of service is available at table; and it is possible to book tables in advance. Against the conclusion are the facts that the service is limited, some of the facilities are shared with bar customers, and the same food and wine are available to all customers, including bar customers if tey so wish, subject only to availability and space".

20. Mr Steinert argued that the statutory language was similar to that in section 88 of the Localism Act 2011, that the Court of Appeal decision should have been used to analyse the various actual uses of The Farndon Arms, and that this and an analysis of the trade receipts from the various activities, together with the physical separation of the various activities, would have led to a conclusion that the actual bar use was only a minor and ancillary actual use and therefore not capable of satisfying section 88.

21. It was in this context that the First-tier Tribunal commented that rather than statutory definitions of types of premises for the purposes of the 1954 Act, the 2011 Act "has (with limited exceptions) defined premises by their social consequences rather than their uses". This formulation is misleading – what is relevant is the social consequences of particular uses. However, despite the infelicitous wording, I agree with the conclusion of the First-tier Tribunal. The purposes of the relevant provisions of the 1954 Act (protecting the commercial interests of tenants) and those of the 2011 Act (protecting the social interests of the community) are totally different; the statutory language is different and serves different purposes; the issue was not whether The Farndon Arms was a pub or a restaurant but whether the listing provisions of the 2011 Act were satisfied, and there is no suggestion that the Court of Appeal in Taylor v Courage Limited intended to do anything other than apply the precise statutory wording of the 1954 Act for a very specific purpose.

The Weight of the Evidence

22. Mr Steinert argued that the First-tier Tribunal failed to attach due weight to the evidence before it, especially in relation to whether any specific use was ancillary or not. This referred to the written witness statements mentioned above and to the financial breakdown of the business's various activities. Although he went into considerable detail about this the argument is totally unconvincing. I can only interfere with the decision of the First-tier Tribunal if it was made in error of law. I cannot substitute my own view of the facts in the absence of error of law, but in reality this is what I am being asked to do. When I suggested this, Mr Steinert was really forced to fall back on an argument that there was such an overwhelming weight of evidence against the findings made by the First-tier Tribunal that no reasonable tribunal could properly have made them. This was clearly not the case and it is also clear that the First-tier Tribunal considered all the relevant evidence – it just reached different conclusions from those that Mr Steinert was arguing it should have done.

Use as a Public House

23. In his written skeleton argument Mr Steinert put this point in the following way:

> "The [First-tier Tribunal] erred in proceeding on the assumption that the Property is of community value because it is used as a public house and restaurant in accordance with the user covenant and trading tie of a surrendered lease of the Property."

24. There were really three parts to this argument. First, every case for listing must be considered on its own particular facts – with which I totally agree and which was explicitly acknowledged by the First-tier Tribunal.

24. Second, the First-tier Tribunal was wrong in the assumptions that it seems to have made about pubs, in particular when it stated (my emphasis) "The use as a pub and restaurant are, <u>it goes without saying</u>, of social benefit to members of the local community …". I agree that as a matter of law the statement I have underlined was wrong and does not represent the law. It contradicts the notion that each case must be considered on its own facts. However, the First-tier Tribunal did not in fact rely on that statement but clearly considered the specific evidence and facts of this particular case in reaching its decision. This was another infelicitous statement which did not in fact affect the outcome.

25. Third is really the same point that was made at an earlier stage – that on the evidence the findings and conclusions of the First-tier Tribunal in relation to use as a pub were not open to it. I reject this argument, as I did above.

Use and/or Consequence

26. This point relates to the statement by the First-tier Tribunal that the 2011 Act "has (with limited exceptions) defined premises by their social consequences rather than their uses". Mr Steinert argued (paragraph 56 of his written skeleton argument) that by reason of this error the First-tier Tribunal:

> "was distracted from the logically primary and necessary task of considering use and identifying non-ancillary use of the Property … was led to fail to properly address the social consequences of that which must be identified as non-ancillary use, namely the restaurant and hotel/guestroom use".

27. As I have made clear above, I agree that the First-tier Tribunal made an inaccurate statement. As I make clear now, I simply do not accept that it had the consequences suggested by Mr Steinert. Further, the issue was not whether specific use as a restaurant/guestroom was a non-ancillary use, but whether a use that was not ancillary furthered the social wellbeing or social interests of the local community.

28. There was some suggestion from Mr Phillips that the Upper Tribunal should give guidance on what is meant by "ancillary" in this context, and reference was made to certain other First-tier Tribunal decisions. It seems to me that "ancillary" is an ordinary word to be understood in the context of the relevant legislation and in light of the facts of any particular case, and any further comment by the Upper Tribunal on its meaning would lead to more confusion rather than less.

Conclusions

29. As I have stated above, every case must be considered on its own facts. There is no presumption that a pub comes within the listing provisions of the 2011 Act, or that a business which includes a pub but also other activities does not come within those provisions. However, despite some clumsiness of expression, when it came down to it the First-tier Tribunal was entitled on the evidence to make the findings and decision that it made.

30. For the above reasons this appeal by Admiral Taverns Limited does not succeed.

H. Levenson
Judge of the Upper Tribunal
17th January 2018