FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Community Right to Bid

Appeal Reference: CR/2015/0015

Heard at Field House
On 9 March 2016

Before

JUDGE PETER LANE

Between

MENDOZA LIMITED

Appellant

and

LONDON BOROUGH OF CAMDEN

First Respondent

CARPENTERS ARMS SUPPORTERS

Second Respondent

DECISION AND REASONS

Introduction

1. The Localism Act 2011 requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. The effect of listing is that, generally speaking, an owner intending to sell the asset must give notice to the local authority. A community interest group then has six weeks in which to ask to be treated as a potential bidder. If it does so, the sale cannot take place for six months.

The theory is that this period, known as "the moratorium", will allow the community group to come up with an alternative proposal – although, at the end of the moratorium, it is entirely up to the owner whether a sale goes through, to whom and for how much. There are arrangements for the local authority to pay compensation to an owner who loses money in consequence of the asset being listed.

Legislation

2. Section 88(1) and (2) of the 2011 Act read as follows:-

> "88. Land of community value
> (1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority –
> (a) an actual 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.
> (2) For the purposes of this Chapter but subject to regulations under subsection (3), 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 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."

3. Section 89 explains the procedure for listing:-

> "89. Procedure for including land in list
> (1) Land in a local authority's area which is of community value may be included by a local authority in its list of assets of community value only –
> (a) in response to a community nomination, or
> (b) where permitted by regulations made by the appropriate authority.
> (2) For the purposes of this Chapter "community nomination," in relation to a local authority, means a nomination which –
> (a) nominates land in the local authority's area for inclusion in the local authority's list of assets of community value, and

(b) is made –

.....

(3) By a person that is a voluntary or community body with a local connection.

....

(4) The appropriate authority may by regulations make provision as to –

(a) the meaning in subsection (2)(b)(iii) of "voluntary or community body;"

(b) the conditions that have to be met for a person to have a local connection for the purposes of subsection (2)(b)(iii);

(c) the contents of community nomination;

..."

4. The regulations in question are the Assets of Community Value (England) Regulations 2012 (SI2012/2421). Regulation 5 provides as follows:-

"Voluntary or community bodies

5.-

(1) For the purposes of Section 89(2)(b)(iii) of the Act, but subject to paragraph 2, 'a voluntary or community body' means -

.....

(c) an unincorporated body –

(i) whose members include at least 21 individuals, and

(ii) which does not distribute any surplus it makes to its members;

...."

Regulation 6 sets out the required contents of community nominations. Amongst these is:

"(d) evidence that the nominator is eligible to make a community nomination."

The appeal

5. The appeal concerns a public house known as the Carpenters Arms, 105 King's Cross Road, London, WC1. The Carpenters Arms was acquired by the appellant in March 2014. In February 2015, the first respondent received what purported to be a community nomination from the Carpenters Arms Supporters ("the Supporters"). A nomination form listed 21 local people who appear on the electoral roll within the first respondent's area. The Supporters were said to have been established under the 2011 Act and "the 21 names listed have agreed that the following persons have been selected to represent the Association." There then followed the names of the chairman, vice-chairman and secretary. The nomination form set out the reasons why the Supporters

considered the Carpenters Arms met the requirements for listing set out in section 88 of the 2011 Act.

6. On 2 April 2015, the first respondent informed the appellant that the Carpenters Arms had been added to the list of assets of community value. A review hearing was requested by the appellant. This took place on 21 July 2015. The first respondent's decision of 3 August 2015 was to uphold the listing.

7. The appellant appealed to the Tribunal against that decision. A hearing took place on 31 March 2016. Mr J Wills, Counsel, instructed by A K Law Limited, appeared for the appellant. Mr M Lee, Counsel, instructed by the Solicitor, London Borough of Camden, appeared for the first respondent. Mrs E Bonds, Mrs J Godfrey, Mr M Clapson and Mr D Wheeler appeared on behalf of the Carpenters Arms Supporters and provided a written statement, which was read out at the hearing. The case for the appellant and the first respondent respectively was confined to submissions.

The issue

8. The appellant does not dispute the fact that the Carpenters Arms currently satisfies the requirements of section 88(1) of the 2011 Act. Its case is that the nomination by the Carpenters Arms Supporters was ineffective because the Supporters do not comprise "a person that is a voluntary or community body" for the purposes of section 89(2)(b)(iii) of the 2011 Act, read with regulation 5 of the 2012 Regulations.

Case law

9. In Conservative and Unionist Central Office v Burrell (Inspector of Taxes) [1982] 1WLR 522, the question was whether the Conservative and Unionist Central Office was liable for corporation tax as a "company," defined by section 526 of the Income and Corporation Taxes Act 1970 as follows:-

> "'company' means ... any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association ...."

10. Having quoted that definition, Lawton LJ, delivering a judgment in favour of the Central Office, held as follows:-

> "It is against this statutory background that a meaning has to be given to the words 'unincorporated association.' It is sufficiently like a 'company' for it to be put in the charging section within the ambit of that word. The interpretation section makes it clear that the word 'company' has a

> meaning extending beyond a body corporate but not as far as a partnership or a local authority. I infer that by 'unincorporated association' in this context Parliament meant two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual."

11. In Sarah Jane Williams v Devon County Council [2015] EWHC 568 (Admin), the High Court had to consider whether a group of individuals, local traders and residents called Sustainable Totnes Action Group (STAG) was able to bring an application for statutory review under the Road Traffic Regulation Act 1984. The respondent council contended that STAG was not "a body of persons … unincorporated" for the purposes of the definition of "person" in Schedule 1 to the Interpretation Act 1978. STAG had not long existed, had no formal membership and no list of members.

12. The Deputy Judge considered that the first issue was "whether, at the time of issue of proceedings the group known as or described as STAG was sufficiently certain as an entity to constitute an unincorporated association." The Deputy Judge held that it was. In so finding he placed considerable weight on the fact that STAG had an identifiable membership:-

> "47. The issue of whether or not a body constitutes an unincorporated association is necessarily high fact-specific. Mr Whale referred to Conservative and Unionist Central Office v Burrell [1982] 1WLR 522 as an example of a situation in which the court had found a group not to have the characteristics of an unincorporated association for the purposes of section 526(5) of the Income and Corporation Taxes Act 1970. Lawton LJ stated with elegant simplicity,
>
> > '*Since membership of an unincorporated association is based on agreement between members a starting point for examining the legal nature of the party is to consider how anyone can join it.*"
>
> 48. In that case the answer was that nobody could join the party directly. However in the present case there was a co-ordinator, an email address to send the request to join and a list of members. So STAG met what in my view is likely to be the legal and indeed practical condition precedent (of being an unincorporated association for the purposes of commencing an action such as the present or indeed a judicial review) in the vast majority if not all cases; an identifiable membership ..."

13. In Hawthorn Leisure Acquisitions v Northumberland County Council (CR/2014/0012), Judge Warren considered the validity of a nomination under the 2011 Act:

> "10. It is convenient to deal first with an earlier contention advanced on behalf of the then owners of the Inn concerning the meaning of 'an unincorporated body.' It was submitted that this phrase had been 'defined in case law' namely Conservative and Unionist Central Office v Burrell (Inspector of Taxes)
> .....
> It will be observed that the Court was there concerned with the meaning of 'unincorporated association' not 'unincorporated body.' The case is helpful, in my judgment, however, for the approach adopted by the Court. Lawton LJ referred to the Act of Parliament and stated that it was 'against this statutory background that a meaning has to be given to the words.'
>
> 11. In the very different statutory context of the Localism Act and the regulations, I agree with Northumberland's reviewing officer that a local action group, forming itself perhaps for the specific purpose of making a community nomination, is not expected to turn its mind immediately to the drawing up of a formal constitutional set of rules or even to give itself a name before making a nomination. The requirement for 21 local individuals is sufficient to indicate strength of feeling."

The Supporters' Constitution

14. It appears that the individuals who came together to form the Carpenters Arms Supporters made use of a *pro-forma* Constitution provided by the Campaign for Real Ale (CAMRA). This can be found at page 36 of the bundle, within the nomination form. The Supporters were said to be an association representing the views of the users of the Carpenters Arms. The aims of the Supporters were to preserve the use of the pub; represent the views of users to various bodies; and to be a voice for the pub's users in any other matters agreed by the Supporters. Provision was made for the election of various officers. Clause 9 provided that "all men and women who use the pub are welcomed into the supporters regardless of their race, ethnicity, religion, sexual orientation or disability." By Clause 10, all members were said to have an equal say in the running of the Supporters and all members over 18 present had a vote at meetings. Clause 11 is particularly relied on by the appellant:-

> "11. All [PUB] users are automatically members of the Supporters. No membership fee or subscription is charged."

15. Clause 12 provided that the Supporters:-

> "…is non-profit distributing i.e. any surplus is not distributed to members but is wholly applied to activities in support of the aims of the Association.

> The income and property of the Supporters shall be applied solely towards the aims of the Supporters."

Discussion

16. In reaching a decision in this case, I have had full regard to the submissions made by the parties. The fact that I do not refer to any particular aspect of a submission does not mean that I have not considered the same.

17. I do not consider that the Burrell case materially assists the appellant. Lawton LJ was at pains to make plain the context-specific nature of the task of statutory interpretation required in that case, which involved the potential liability of associated individuals for tax. I agree with Judge Warren that the different statutory context of the 2011 Act is highly relevant, when determining whether the requirements of that Act and its associated Regulations are met. I nevertheless fully agree with the appellant this does not mean that, having ascertained the statutory requirements, they should be ignored.

18. Regulation 5 requires there to be "an unincorporated body ... whose members include at least 21 individuals and ... which does not distribute any surplus it makes to its members." Regulation 4(1) requires the unincorporated body to be one which "has at least 21 local members," defined as being "a member who is registered, at an address in the local authority's area ... as a local government elector in the register of local government electors kept in accordance with the provisions of the Representation of the People Acts."

19. If the legislature had intended to confine a voluntary or community body to those bodies which are unincorporated associations, it would have done so. There is no sound reason for transporting into the 2012 Regulations the requirement for there to be an unincorporated association, of the kind described by Lawton LJ in the Burrell case. Although, of course, an unincorporated body *may* be an unincorporated association, in the sense that its members have mutual duties and obligations stemming from contract, there is no case for confining the expression "unincorporated body" in that way. The fact that the nominating body in the General Conference of the New Church v Bristol Council (CR/2014/0013) was an unincorporated residents' association is, thus, immaterial for present purposes.

20. The Concise Oxford Dictionary defines a "body" as "3. An organised group of people with a common function." That organisation and common function may arise from a contractual relationship. But, equally, they can, I consider, arise less formally, as a result of a number of individuals coming together to further a matter of common interest.

21. I do not find that the appellant can derive any assistance from the case of Williams. Again, context is significant. In that case, the issue was whether a group of people could bring High Court proceedings for the quashing of a road traffic regulation order. Being a party to proceedings in the High Court involves, of course, various actual and potential obligations and liabilities, amongst which is the payment of costs. The Deputy Judge in Williams appears to have used the expressions "unincorporated body" and "unincorporated association" interchangeably. Whilst that may have been appropriate in the context of that case, it is not, as I have explained, appropriate in the context of the legislation with which we are concerned. Furthermore, and in any event, the Deputy Judge said no more than that it was "likely" to be the case that "in the vast majority if not all cases" an identifiable membership was required. That leaves room for argument over whether, even in the case of an unincorporated association, such a membership is always required, regardless of context.

22. Much is made by the appellant of clause 11 of the CAMRA *pro-forma* "Constitution." At paragraph 34 of the appellant's statement of case, clause 11 is described as an absurdity, since:-

> "It may be that directors or representatives of the Owner itself may well have had a drink in the pub. Not only would such a person not be granted the right to object to falling within this class of people, but if the nomination is allowed to stand, he would be regarded as jointly personally responsible, in legal terms, for the nomination."

23. At page 36 of its statement of case, the appellant submits that "where the nomination is made by a body, the constituent members of the body must be to some extent ascertainable." The appellant's case is that clause 11 means that the Council can have no idea of the actual members of the supporters, with whom they are dealing.

24. Compared with the Burrell and Williams cases, however, where the nature of the obligations and liabilities concerned meant the membership of the body had to be capable of comprehensive identification, a nominator which is a voluntary or community body under the 2012 Regulations does not, by making the nomination, place itself under any actual or potential liability or obligation. There is no requirement for the nominator to play any part in the review process or in any subsequent appeal against listing. Section 87 of the 2011 Act places the obligation to maintain a list of land of community value solely upon the relevant local authority. A nominator which fails in its bid to have the land listed is not liable under the Act or the Regulations to any adverse consequences, whether the failure arises as a result of the listing being rejected by the local authority or by the Tribunal, on appeal. The obligations under regulation 14 to pay compensation are imposed on the local authority, not the nominator. So there is, I find, a significant difference between the 2011 Act and its Regulations, on the one hand, and the legislative schemes under which

Burrell and Williams were decided. This difference means that there is no rationale for inferring that the legislation with which we are concerned requires each and every individual comprising the nominating body to be capable of individual identification.

25. Mr Lee pointed to the following extract from the guidance issued by the Department for Communities and Local Government entitled "Community Right: Non-statutory advice note for local authorities" (October 2012):-

> "**Unincorporated groups.** Nominations can be accepted from any unincorporated group with membership of at least 21 local people who appear on the electoral roll within the local authority, or a neighbouring local authority. This will for instance enable nomination by a local group formed to try to save an asset, but which has not yet reached the stage of acquiring a formal charitable or corporate structure."

26. Mr Wills urged the Tribunal not to place weight on that guidance. In particular, he emphasised its non-statutory nature. The fact is, however, that the use of the word "group" in the guidance fits precisely with the dictionary definition of "body," to which I have made reference in paragraph 20 above. It is also perfectly compatible with the relevant case law, as I have explained. The guidance is useful, not as an aid to statutory construction, but as confirming the position I have reached by independent means.

27. There is something deeply unattractive about the proposition that whereas a group of ordinary individuals, coming together quickly in order to nominate an asset which they believe may be under immediate threat, does not need to have any formal Constitution (let alone one involving contractual rights and liabilities), if the group uses something like we find at page 36 of the bundle, then the nomination must, on that account alone, be ruled invalid. There is, in other words, no justification for importing into the 2011 Act and the Regulations a requirement as to membership of the group, which is not present on the face of those enactments.

28. I therefore conclude that Mr Lee was right to say that the membership of the Supporters is sufficiently ascertainable to meet the requirements of the legislation. The legislation does not require the group to be an unincorporated association, involving contractual obligations as between its members, or to be an unincorporated body whose membership must be capable of being comprehensively identified. The nomination in the present case was made by 21 identified individuals, who had organised themselves into a group with the common purpose of nominating the Carpenters Arms as an asset of community value. Those individuals met the legislative requirement to be "local" residents.

29. The final requirement of the legislation is that the group does not distribute any surplus it makes to its members. The Supporters' Constitution makes it plain that no such distribution is possible.

30. The nomination was, accordingly, valid. As I have indicated, it is common ground that the relevant requirements of section 88(1) of the 2011 Act were met.

31. At an earlier stage in the proceedings, the appellant objected to the Registrar's decision to join the Supporters as a respondent to the appeal. The objection was based on the contention that the Supporters were not a body that could validly make a community nomination. I have found that this contention is not made out. However, for completeness, it is worth pointing out that the Tribunal has wide powers to add persons as respondents, which do not depend on whether those persons have a formal role in the process leading to the decision under appeal. Rule 1 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 defines a respondent as:-

> "(c) a person added or substituted under rule 9";

and rule 9(3) provides that:-

> "Any person who is not a party may apply to be added as a party".

Decision

32. The appeal is dismissed.

Judge Peter Lane

Date: 27 April 2016