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Landlord and tenant

Administrative acts subject to judicial review

by Barry Lovegrove

ARISING from the previous article in this series (S.C.M. Post, March 21) several readers have asked how, in addition to reviewing by way of appeal a decision based on an individual objection to an assessment of rateable value, a court could possibly render invalid the entire valuation list compiled by the Commissioner of Rating and Valuation.

The courts have always zealously preserved their right, on the application of an affected party, to make administrative acts subject to judicial review in circumstances where it can be established that the administrative act is reproachable from the standpoint of certain well-established principles. This will be the case, for instance, where the administrative act is outside the scope of the authority vested in the Commissioner by relevant legislation.

An example may make this clearer. The Rating Ordinance requires the Commissioner, in making an assessment of rateable valuation, to have regard to *reasonable* rent which might be expected for particular premises if vacant and to let. Case law establishes that in ascertaining what is reasonable the Commissioner must have regard to the *hypothetical tenant*. In the earlier article referred to above, I argued that there may be a case for alleging that the Commissioner has, instead, in error had regard to an *ahypothetical* tenant, and has thereby exceeded the bounds of his authority.

In the 1964 English case of *R v Paddington Valuation Officer, Ex Parte Peachey Property Corporation Ltd*, Lord Denning said ". . . insofar as [the applicants] are attacking the valuation list itself and contend that the whole list is invalid . . ., then I do not think that they are confined to the statutory remedy: for the simple reason that the statutory remedy is in that case nowhere near so convenient, beneficial and effectual as *certiorari* and *mandamus* . . . The jurisdiction of the [court] is not to be taken away without express words; and this applies both to the remedies by *certiorari* and *mandamus*, . . . and also to the remedy by declaration."

In considering the grounds on which *certiorari* would lie (which would have the effect of quashing the new valuation list), Lord Denning went on to say: "The error must be one which affects the list as a whole, or a large part of it, . . . It seems to me that if the valuation officer prepared the list on entirely the wrong basis, contrary to the directions in the statute, it could be quashed . . . Suppose . . . he disregarded the statutory test of 'what a hypothetical tenant might reasonably be expected to pay' and substituted an arbitrary scale of values based on a pre-conceived formula . . . then again the list would be quashed."

Procedurally, Lord Denning has suggested that an applicant should proceed on the basis, first, of obtaining a writ of *mandamus* to compel the Commissioner to proceed with the compilation of a new valuation list on the correct footing followed, secondly, by a writ of *certiorari* to quash the existing list.

Applying for the prerogative writs of *mandamus* and *certiorari* would be time-consuming and costly. One hopes that the Government will take steps to obviate the possibility of such proceedings being initiated either by making a fuller disclosure of the precise criteria according to which assessments of rateable value were made (so as to provide, at one and the same time, a rational explanation and a legal justification for the staggering 80 per cent overall increase in rateable values), or by adopting the recommendation of the Joint Associations' Committee to Oppose the Unreasonable Assessment of Rateable Value (S.C.M. Post, March 18) – to wit, that a review committee be formed to establish a more equitable and reasonable principle and method of valuation.

A reader who signed himself "Ratepayer" (S.C.M. Post, March 25) has complained that the Yaumati District Office had run out of copies of Form R20A (required for the lodging of objections to the new assessments of rateable value) by March 19, no less than six days before the closing date for the lodging of objections. If true, this is an unhappy state of affairs possibly compounded by the further allegation that the officer-in-charge at that time stated that the period for lodging objections had expired. It is a pity when a citizen's recourse to his rights under the law are thwarted by easily avoidable administrative blundering.

Rent Control in Post-war Premises: In an earlier article in this series (S.C.M. Post, February 7), I explained how rent control worked in relation to pre-war premises. In the present article, a review of rent control in relation to post-war premises (or premises subject to Part II of the Landlord and Tenant [Consolidation] Ordinance) will be begun and, in the next article, concluded.

Unlike Part I, which statutorily obliges a landlord to demand or receive no more than a *permitted* rent calculated on the basis of standard rent plus statutory adjustments, Part II does not operate to establish a maximum rent which the landlord may recover from his tenant but leaves this exclusively to be negotiated or agreed by the parties at the commencement of the tenancy. Part II then operates to limit the extent to which a landlord can thereafter increase the rent beyond the rent earlier negotiated.

Before the provisions of Part II relating to rent control, or more properly, rent-increase control, will apply to particular tenancies, it will be necessary to establish that the tenancy is indeed subject to Part II. Generally, Part II applies to *domestic* tenancies in post-war buildings (buildings in respect of which an occupation permit was issued after August 16, 1945) although there are some significant exceptions generally as follows:

1 Pre-war premises.

2 A tenancy of land unbuilt on.

3 A tenancy of agricultural land.

4 A tenancy where the landlord is the employer of the tenant.

5 A tenancy held from the Crown, the Hongkong Housing Authority, the Hongkong Housing Society or the Hongkong Model Housing Society;

6 A tenancy protected, or having been protected, by Part IV of the Landlord and Tenant (Consolidation) Ordinance.

7 A tenancy for a particular purpose for a term not exceeding one year, where the agreement has been ratified by the Commissioner of Rating and Valuation.

8 A tenancy in respect of which an occupation permit was issued by the building authority under section 21 of the Buildings Ordinance after December 14, 1973.

9 A tenancy created after December 31, 1975 for a fixed term of three years or more, or for a fixed term capable of being extended to not less than three years, with no provision for earlier determination other than for breach of covenant.

10 A tenancy where the tenant is a public body, corporation, foreign or Commonwealth Government, partnership or firm.

Exception number 8 is particularly important. Its effect is to exclude from Part II all tenancies in new buildings occupied after December 14, 1973. Thus, modern premises let out for domestic purposes are not subject to Part II and, instead, are governed exclusively by the terms of the agreement between the landlord and tenant.

In the next article, our review of rent control in relation to Part II tenancies will be concluded by examining the means by which a landlord may increase the rent beyond the originally negotiated rent.