Appeal number: CR/2021/0001

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
COMMUNITY RIGHT TO BID

Decided at a CVP hearing on 1 June 2021

Between

DONFORD LIMITED

Appellant

-and-

BRACKNELL FOREST BOROUGH COUNCIL

First Respondent

-and-

MOIRA GAW
(for Nominating Organisation Residents of Winkfield and Cranbourne)

Second Respondent

Before:
Judge J Findlay

Appearances:

For the Appellant
Mr T Jefferies, Counsel for the Appellant
Mr C Keliris, Instructing Solicitor for the Appellant

For the First Respondent
Mr C Cant, Counsel for the First Respondent
Ms H Brewster, Instructing Solicitor for the Respondent
Mr S Prashar Solicitor for the First Respondent

For the Second Respondent
Ms M Gaw on behalf of the unincorporated community group of the residents of Winkfield and Cranbourne.

Mode of Hearing

1. This has been a remote hearing on the Cloud Video Platform ("CVP") which has been consented to by the parties. The form of remote hearing was V: by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a CVP hearing. I have considered an agreed bundle of 284 pages, two authorities bundles, an agreed chronology, agreement as to witness evidence, and skeleton arguments from the Appellant and First Respondent.

The Background

2. The Localism Act 2011 ("the Act") requires local authorities to keep a list of assets (meaning buildings or other land) which are of community value. Once an Asset of Community Value ("ACV") is placed on the list it will usually remain there for five years. 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.
3. The Estate known as Ascot Place ("the Estate") was acquired by Samuel Asher by a conveyance dated 6 December 1910. On 17 February 1932 the Royal British Legion Hall, known as the Cranbourne and Winkfield Royal British Legion Hall, Hatchet Lane, Cranbourne, Berkshire SL4 2EE ("the Property") was demised by Lillie Asher to The British Legion for a term of 99 years from 25 December 1931 at a rent of £1.00 per annum. The lease includes tenant covenants not to assign or sub-let for more than 24 hours and not to use save for the purposes of The British Legion but to allow use for the benefit of inhabitants of the district.

4. In 1955 Lillie Asher gave some adjoining land behind the Property to the Parish Council with a right of way over the access road. That land is now used as a car park and allotments.

5. The Appellant acquired the freehold of the Estate on 22 May 1969 and has since been the proprietor of the freehold land registered under title BK85175, the Estate includes Ascot Place ("the House"), a Grade II listed residence, and the Property. The Estate and the Property are owned by one person.

6. On 1 November 2018 the Royal British Legion surrendered the lease to the Appellant and ceased using the Property although fitness groups have been taken place in the car park at the back of the property.

7. A nomination of the Property was made on 29 June 2020 by the Second Respondent. On 7 August 2020 the Appellant lodged an objection to the nomination. On 24 August 2020 the Property was listed and notice was given that it had been entered on the First Respondent's list of ACVs. On 19 October 2020 the Appellant requested a review. On 10 December 2020 the decision was made that the listing was correctly made. On 6 January 2021 the Appellant lodged an appeal.

Relevant Legislation

8. The Localism Act 2011 ("the Act")

Section 87 List of assets of community value

(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.

(3)Where land is included in a local authority's list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry (unless the entry has been removed with effect from some earlier time in accordance with provision in regulations under subsection (5)).

(4)The appropriate authority may by order amend subsection (3) for the purpose of substituting, for the period specified in that subsection for the time being, some other period.

Section 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.

…

(6) In this section-

…

"social interests" includes (in particular) each of the following-

(a) cultural interests;

(b) recreational interests;

(c) sporting interests;

9. Assets of Community Value (England) Regulations 2012 ("the Regulations")

Regulation 3 Land which may not be listed

3. A building or other land within a description specified in Schedule 1 is not land of community value (and therefore may not be listed).

Appeal against listing review decision

11.—(1) 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.

(2) The owner referred to in paragraph (1) may be either the owner who requested the review, or a subsequent owner of part or the whole of the land.

Schedule 1 Land which is not of community value (and therefore may not be listed)

1.—(1) Subject to sub-paragraph (5) and paragraph 2, a residence together with land connected with that residence.

(2) In this paragraph, subject to sub-paragraphs (3) and (4), land is connected with a residence if-

(a) the land, and the residence, are owned by a single owner; and

(b) every part of the land can be reached from the residence without having to cross land which is not owned by that single owner.

(3) Sub-paragraph (2)(b) is satisfied where a part of the land cannot be reached from the residence by reason only of intervening land in other ownership on which there is a road, railway, river or canal, provided that the additional requirement in subparagraph (4) is met.

(4) The additional requirement referred to in sub-paragraph (3) is that it is reasonable to think that sub-paragraph (2)(b) would be satisfied if the intervening land were to be removed leaving no gap.

(5) Land which falls within sub-paragraph (1) may be listed if-

(a) the residence is a building that is only partly used as a residence; and

(b) but for that residential use of the building, the land would be eligible for listing.

Grounds of Appeal

10. The Appellant appeals on the ground that the Property is exempt from listing by regulation 3 of the Regulations because it falls within paragraph 1 of Schedule 1 of the Regulations.

11. The Appellant is and has since 1969 been the registered proprietor of the freehold land of the Estate and the Property.

12. It is not the case that the Property is wholly surrounded by land owned by Winkfield Parish Council or that it has no physical or practical relationship with the Appellant as owners of the Estate.

13. The House and the Property are owned by a single owner, the Appellant.

14. Every part of the Property can be reached from the House without having to cross land which is not owned by the Appellant.

15. Accordingly, the Property falls within paragraph 1 of Schedule 1 and may not be listed.

16. The Respondent was wrong to decide that paragraph 1 does not apply to other buildings save for those ancillary to the residence. The word "land" in paragraph 1 includes a building or part of a building, as in other provisions in the Act and Regulations including ss 87, 88 and 95 of the Act, and paragraph 1(5) of Schedule 1 to the Regulations. It is implicit in the definition of "land" in s108 (1) as including part of a building that it includes the whole of a building.

17. The only requirement for the exemption in paragraph 1(1) is that the Property is "connected with" the House. There is no basis for substituting a different requirement that it is ancillary to the House.

18. The Respondent was also wrong to decide that the Property does not fall within paragraph 1 of Schedule 1 because "it is not linked to the residential user and therefore does not satisfy the two-fold test of a physical and functioning relationship with the residence aspect of the Estate."

19. The Regulations specifically provide in Regulation 1(2) which land (including buildings) is connected with a residence for the purpose of Regulation 1(1). There is no justification for implying an additional requirement of a physical and functional relationship.

20. Regulation 1 should be construed consistently with the exemption for part listed disposals in section 95(5) of the Act, defined by paragraph 11 of Schedule 3 to the Regulations in the same way as "connected land" in paragraph 1 of Schedule 1. In both cases the requirements were intended to provide, and should be construed as providing, a clear and simple test. It is wrong in law to qualify that test by imposing any additional test of physical and functional relationship.

21. The land now comprising the Property was acquired with the House as part of the Estate by a conveyance dated 6 December 1910.

22. The Property was demised to the Royal British Legion by a lease dated 17 February 1932 and described as "forming part of the Ascot Place Estate."

23. The Property was constructed in about 1912 and demised to the Royal British Legion as an act of philanthropy to provide facilities on the Estate for ex-military personnel and the local community.

24. The freehold of the Property has remained part of the Estate and been conveyed as part of it with the House ever since 1910.

25. The word "curtilage" has different meanings in different contexts but is not used in or relevant to Paragraph 1 of the Schedule.

26. Any test of physical separation has no relevance to Paragraph 1 of the Schedule.

27. The House is listed but the Property is not. Large parts of the Estate are not within the listing. Whether the Property is listed or not is not relevant to Paragraph 1 of the Schedule.

28. The Property is not separated from the Estate by a wall or hedge and every part of the Property can be reached from the House without the Appellant crossing the land belonging to another person.

29. The Second Respondent seeks to rely on an aerial photograph claiming to show the relationship of the Property to Cranbourne Village to establish that the Property is separate from the Estate which is not the case. The yellow lines on the photograph are not an accurate depiction of any legal or physical boundaries or ownership of the Estate.

30. The appeal should be allowed and the Property removed from the list of ACVs.

Grounds of Opposition

31. The property should be viewed as an entirely separate site and nothing to do with the House and the rest of the Estate

32. The Property is not shown within the curtilage of the House and has no synergy with the Estate itself, even though it is within the same ownership. The Property is entirely self-contained having a separate vehicular access and parking and has no reliance on the House or other parts of the estate. The Property does not share any ancillary activities to the main residential use of the House and there is a functional separation from the main Estate. As such the Property is not ancillary to the House nor does it form part of a composite use of that Estate and as such it is considered to form a separate planning unit in its own right.

33. The Property does not comprise part of the residential element of the Estate. The Property:

    (i) is not used as a residence or for a purpose which is ancillary to the use of a separate residence;

    (ii) is not within the curtilage of the House;

    (iii) is physically separated from the remainder of the Estate;

    (iv) has a current lawful use for the purposes of planning law that does not fall within use class C whereas the House has a current lawful use within use class C3;

    (v) is part of a different planning unit from that of the House.

    (vi) is registered on the register of National Parks and Gardens of Special Historic Interest in England maintained by Historic England but the remainder of the Estate is not so registered.

34. The land on which the Property is located is separated from the remainder of the Estate by a wall or hedge. The Property does not satisfy the condition in paragraph 1(2)(b) of Schedule1.

35. The purpose of paragraphs 1 and 2 of Schedule 1 is to exclude from listing under the ACV regime any building or land used wholly or partly for residential purposes subject to the

exception in paragraph 1(5) of Schedule 1 but not to exclude land in the same ownership which is not so used.

36. In paragraph 1(1) and paragraph 1(2) of Schedule 1 the word " land" means land which is not built on and the word " residence" means any building which is used wholly or partly for a residential purpose subject to the application of paragraph 1(5) of Schedule 1. Any statutory definition to the contrary is explicitly or implicitly subject to a contrary intention.

37. Further or in the alternative the words " for residential purposes" are implied in paragraph 1(2)(a) after the words " by a single owner" and there is implied into paragraph l(5)(a) of Schedule 1 the words "and any land connected with it" after the words " the residence" or alternatively there is implied at the end of paragraph l(5)(a) of Schedule 1 the words " or has land connected to it which is not wholly used for residential purposes" and in para. l(5)(b) there is implied the words " or land connected with it" after the words " the building."

38. Further or in the alternative in order for a building which is not a dwelling to be excluded by paragraph 1(1) of Schedule 1 the use of that building must be ancillary to the use of a dwelling and/or there is implied at the end of that paragraph 1(1} the words " excluding any building or land which is not wholly or partly used for residential purposes."

39. The retention of the Property on the Respondent's ACV list was a proper and appropriate decision on the review of the ACV listing of the Property as the Property is not excluded by paragraph 1 of Schedule 1.

40. The appeal should be dismissed.

The Second Respondent's Case

41. Ms Gaw submitted a number of photographs with her witness statement. One shows the picket fence erected by Winkfield Parish Council. Ms Gaw submits that the access point is overgrown and difficult to access and bearing in mind the additional factor of no lighting it would be a risky and unestablished route to choose. Winkfield Parish Council are the only holders of the key to the picket fence. In addition to navigating the dense overgrowth from the eastern aspect, it is also necessary to " step" over the fence to continue the route to the hall.

42. One photograph shows the entrance gate to the House demonstrating the security for the Estate. This security does not apply to the Property. There are regular fitness groups taking place at the back of the Property in the car park which are not subject to any security measure. Ms Gaw is not aware that there have ever been any visible security measures on the Property site. The police have attended this site during the last five years, at local resident's requests to deal with suspicious behaviour from cars gathering in the early evening to late at night.

43. There are two access points via road from the House. The Pigeonhouse lane route is 1.23k via Lovel Road. The other access from Forest Road is 1.44k. Both routes are only partially lit and this demonstrates how separated the Property is from the Estate.

44. The additional photographs show that although in technical terms there may be a route via the east, in practical terms this is difficult to contemplate.

45. Ms Gaw submits that the Property is considered separate from the Estate. The Property lies at a significant distance from the House, has its own entrance and car park and has never

been used in conjunction with the Estate itself, but has until recently enjoyed community use.

46. The Second Respondent seeks the dismissal of the appeal.

Discussion

47. Mr Jefferies sought to rely in support of his arguments on Lord Simon's statement in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 and the " Lord Wensleydale's golden rule " of statutory construction—namely, that statutory words and phrases should be applied according to their natural and ordinary meaning without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case the natural and ordinary meaning can be modified so as to obviate such injustice but nothing more.

48. Mr Jefferies sought to rely on the direction in *Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586* that considerable caution should be exercised before adding or omitting or substituting words when interpreting statute and before doing so a court must be abundantly sure of the intended purpose of the statute or provision in question, that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question and the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. And if the above conditions are not met any attempt to determine the meaning of a statute would cross the boundary between construction and legislation.

49. Mr Jefferies sought to rely on *GR Property Management Ltd v Safdar* [2021] 1 WLR 908 as support for his argument that the only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences and that choice of the adjectives 'absurd' and 'perverse' sets the bar high.

50. Mr Cant sought to highlight the purpose of the ACV regime which was clearly set out in the Ministerial foreword of The Rt Hon Don Foster MP. Mr Cant submitted that I should take into account in making my decision that the underlaying purpose of the regime to identify community assets and preserve them for community use was a strong factor.

51. Mr Cant submits that in allowing the appeal the consequence would be that large estates would be placed in a preferential position.

52. Mr Cant submitted that Policy is a strong indicator when looking at the construction of legislation and the task before me is to give effect to the Policy and not allow the Policy to be defeated.

53. Mr Cant has referred me to *Blackbushe Airport Limited [2021EWCA Civ 398* when it was considered what falls "within the curtilage of a building." In that case the extensive area of an operational airfield was found to not be properly described as falling within the curtilage of the relatively small terminal building.

54. Mr Cant submitted that if it was the intention of Parliament to exclude large estates from the legislation that intention would have been made clear.

55. Mr Cant submitted that the expression "other land" in regulations 3: Land which may not be listed "A building or other land within a description specified in Schedule 1 is not land of

community value (and therefore may not be listed)" should be interpreted in context taking into account the task set out above.

56. Mr Cant submitted that a building when constructed becomes part of the land but this is not the case when applying the general law.

57. Mr Cant invited consideration of the Comment in Section 18.8 Bennion Bailey and Norbury on Statutory Interpretation (7th ed.) that "Acts sometimes provide expressly that a definition applies 'unless the context otherwise requires' or 'unless the contrary intention appears'. This wording is unnecessary as the same result is achieved whether or not it is included" and "A statutory definition does not apply if the contrary intention appears, regardless of whether the definition includes express provision to that effect." He points out that that a contrary intention may apply to a part only of a definition and this has been judicially approved.

58. Mr Cant submitted that to find that it is enough that the Hall and the land of the Estate is in the same ownership and there are no other factors would result in a number of anomalies. For example, a public house containing accommodation would qualify because there is partial use as a residence but the same would not apply if the situation concerned a cottage beside the public house or a groundsman's house on a sports field would be precluded but not the occupation of a flat within the pavilion.

59. Mr Cant submitted that the interpretation of the legislation as suggested by the Appellant would mean that if an asset which qualifies as an ACV is acquired by a person who owns an adjoining residence it would be precluded from being added to the ACV list or where the owner of a house purchases the adjoining public house. Similarly a listed public house could be removed from the listing if the owner obtained planning permission for the construction of a dwelling on the surrounding land. This is in contrast to the situation where planning permission to convert the upstairs part of a listed public house to a flat would not preclude the continuation of the listing of the public house.

60. Mr Cant submitted that if the Appellant's interpretation is correct in planning applications the consequences of granting planning permission for residential use of part of land owned on which there is a listed ACV will need to be taken into account which is not presently the situation. Case law suggests that ACV listing has little bearing on proposed development and should be given negligible weight.

61. Mr Cant submitted that if the Appellant's contention is correct then if either the Property had been attached to the House and comprised part of the building or part of the Property has been used for residential purposes, the Property would not be precluded from being listed as an ACV but because it is detached and has not been used for residential purposes the Property is precluded from listing even though it cannot lawfully be used as a residence.

62. The Appellant's interpretation is contrary to the overriding purpose of the ACV regime.

63. Mr Cant sought to rely on the Non-statutory advice note for Local Authorities issued by the Department for Communities and Local Government on 4 October 2012 where it is stated in the Ministerial Foreword:

> "From local pubs and shops to village halls and community centres, the past decade has seen many communities lose local amenities and buildings that are of great importance to them. As a result they find themselves bereft of the assets that can help to contribute to the development of vibrant and active communities. However on a more positive note,

the past decade has also seen a significant rise in communities becoming more active and joining together to save and take over assets which are significant for them.

Part 5 Chapter 3 of the Localism Act, and the Assets of Community Value (England) Regulations, which together deliver the Community Right to Bid, aim to encourage more of this type of community-focused, locally-led action by providing an important tool to help communities looking to take over and run local assets. The scheme will give communities the opportunity to identify assets of community value and have them listed and, when they are put up for sale, more time to raise finance and prepare to bid for them.

This scheme requires an excellent understanding of the needs of the local community. As such local authorities will have a pivotal role in implementing the Community Right to Bid, working with local communities to decide on asset listing, ensuring asset owners understand the consequences of listing, enforcing the Moratorium period and in taking decisions as part of any appeals process.

This advice note, which has non-statutory status, is aimed at helping local authorities to implement the scheme so that they can work with their communities to protect the buildings and amenities which are of great local significance to the places where people live and work."

64. Mr Cant submitted that the objective is to interpret legislation in so far as is possible in a way which best gives effect to the purpose and does justice to the logic of the statutory regime as a whole. The definition provisions are subject to a contrary intention and definition provisions are not intended to substantively change the purpose of the legislation.

65. Mr Cant submitted that the exclusion in paragraph 1 is focussed on buildings which are used wholly or partly for residential purpose as defined by paragraph 2 but it is not aimed at other types of building. Incorporating the definition of residence in paragraph 2 into paragraph 1(1) the exclusion would read as applying to "a building used or partly used as a residence and land connected with a building used or partly used as a residence." This serves to emphasise that the scope of the exclusion is limited as regards buildings to those which are used or partly used as a residence. There is no room or need for any other type of building to be considered when applying that exclusion and in consequence the reference to land connected with such a building or buildings must be limited to land. Paragraph 1(5) is needed in order to cope with buildings which are only partly used as a residence. There is no need to deal with buildings which have no residential use as they are not within the scope of paragraph 1(1). Paragraph 1(5) emphasises the deliberate limitation of the exclusion to residential buildings and land connected with such buildings.

66. The phrase "building or other land" is used in the ACV legislation and means land and does not include buildings. Both section 88(3) and reg. 3 are particularly material because each provides that a building or other land falling within a description specified in Schedule 1 is not land of community value and so cannot be listed. The scope of this regulation covers not all buildings but only particular types of building including residences. Section 88(3)(a) authorises reg. 3 to provide "that a building or other land is not land of community value if the building or other land is specified in the regulations or is of a description specified in the regulations". The use of the words "other land" in that sub-section and regulation 3 very clearly does not extend to buildings in general. The focus is on buildings within a particular description which does not allow for other buildings to be included. The wording in paragraph 1(1) is governed by the limitation in regulation 3 and also by the provision's task

which is limited to particular buildings which are used or partly used as a residence and does not cover all buildings. That limitation is deliberate.

67. Mr Cant submitted that his proposed construction accords with the guidance issued by the DCLG in the Community Right to Bid: Non-statutory advice for local authorities issued on 4 October 2012 which reads:

68. "There are some categories of assets that are excluded from listing. The principal one is residential property. This includes gardens, outbuildings and other associated land, including land that it is reasonable to consider as part of the land with the residence where it is separated from it only by a road, railway line, river or canal where they are in the same ownership as the associated residence. Details of this are set out in paragraphs 1 and 2 of Schedule 1 to the Regulations. "The same ownership" includes ownership by different trusts of land settled by the same settlor, as well as literally the same individual owner.

    There is an exception to this general exclusion of residential property from listing. This is where an asset which could otherwise be listed contains integral residential quarters, such as accommodation as part of a pub or a caretaker's flat."

69. This is non-statutory advice but does not support the contention that a building which is not used for residential purposes is to be covered by the exclusion.

70. The application of paragraph 1(5) has been considered in earlier appeals in the context of a public house with living accommodation over for staff and the provision applies to ensure that properties such as public houses which incorporate living accommodation continue to be listed as ACVs. This is achieved by the application of the twofold test concerning both the physical and functional relationship of the building and the residential part ("the twofold test"). It allows the ACV regime to be applied by reference to the actual divisions of buildings and land.

71. It is material that the objective of this provision is to determine whether or not the residential part of the building is included in the listing of the property. The residential use is not permitted to prevent the listing of a building which has been used in a manner which qualifies it as an ACV. If the residential part of the building is self-contained then it is excluded from the ACV listing but that does not prevent the listing of the part of the building which qualifies as an ACV. In such circumstances the ACV regime is applied by treating each part of the building as a separate unit. Again the part qualifying as an ACV is not precluded from being listed as an ACV because another part of the building is a residence. In both sets of circumstances the overall objective is to ensure that the part of the building qualifying as an ACV can be listed.

72. Mr Cant submitted that to give effect to the intention of the ACV regime this should be the outcome when a building is in the same ownership as a residence but has not been used wholly or in part for residential purposes and is, or has in the recent past been, used for an ACV qualifying purpose. Mr Cant submitted that this could be done by introducing one or more of the following implications:

    (i) the words "for residential purposes" could be implied at the end of paragraph 1(2)(a).
    (ii) the words "and any land connected with it" are to be implied after the words "the residence" in paragraph 1(5)(a);

(iii) at the end of paragraph 1(5)(a) of Schedule 1 the words "or has land connected to it which is not wholly used for residential purposes" are to be implied and in paragraph 1(5)(b) there is implied the words "or land connected with it" after the words "the building".

73. Mr Cant submitted that it is appropriate to give effect to the intention of Parliament by taking account of reasonable and proper implications as well as the express wording (Bennion Bailey and Norbury (7th Ed.) section 11.5).

74. Mr Cant sought to rely on *Crendain Developments Limited v Ealing LBC CR/2017/0009* which concerned whether an allotment acquired by an adjoining householder could be listed as an ACV or was prevented by paragraph 1. There was a common boundary of six to seven metres between the allotment and the rear garden of the house which had a wall running along it but they were at different levels. A hole had been knocked in the wall to provide access but without the necessary consent in a conservation area. The Tribunal Judge rejected the claim for "the residential property exemption" on the ground that there was insufficient nexus. In particular the Tribunal Judge:

(i) disregarded the unlawful knocking of the hole in the wall so that the wall was regarded as continuing to separate the allotment from the rear garden;
(ii) took account of the absence of planning permission authorising the use of the allotment as a garden;
(iii) did not consider that there had been a use of the house or the allotment as a single unit;
(iv) account was taken of the allotment constituting a separate planning unit with a separate designation;
(v) accepted Ealing Council's argument that the correct analysis was based on the reasoning in the Wellington Pub Company case requiring a physical and functional relation between the two properties.

75. The Tribunal Judge concluded "there is insufficient nexus between the two parcels of land to justify considering them as a single unit."

76. Mr Cant submitted that this approach has been applied to other issues in the ACV regime. In particular, Judge Lane in the Wellington Pub case held that the twofold test should be applied to determine whether or not the accommodation area was excluded from the ACV listing. Judge Lane applied the two-fold test in the Kicking Horse Ltd Faucet Inn case because otherwise the intention of Parliament would be subverted.

77. Mr Cant submitted that in determining whether the use of a nominated asset is ancillary it may be necessary to determine that question by reference to a larger area if the nominated asset is part of a larger land unit such as a café in a garden centre as suggested by Judge Lane in *Trouth v Shropshire Council CR/2015/0002*. Such an exercise to ascertain the area of the land unit for determining this point will involve an investigation of the facts relating to the physical and functional relationship of the nominated property to the larger area.

78. Mr Cant submitted that the case law supports the proposition that the provisions of the ACV regime are applied in a manner consistent with the overall purpose of the regime and literal constructions of those provisions will not be applied in a manner which was not intended. To achieve this objective the two-fold test is utilised.

79. Mr Cant submitted that when considering whether the Property can be reached from the House without crossing land owned by another it is necessary to ascertain the range or extent or ambit of the residence. The phrase "reached from the residence" requires that the route is not interrupted by a barrier but is land which is within the range or influence of the residence.

80. Mr Cant submitted that the Property cannot be said to be reached from the House because the boundary of the residence is the fencing which includes the padlocked metal gate, the security for the residence ends at the opposite side of the padlocked gate to the Property, the Appellant's strip of land running east from the padlocked gate is not made up and is left at times untended, the Appellant has allowed the erection of the picket fence across the strip with a gate which is locked and allowed a key to be held by the Parish Council until very recently, there are four posts across the strip where the roadway to the car park turns and the wall and fencing with the locked metal gates enclose the Property on three sides.

81. Mr Cant submitted that the scope of paragraph 11 of Schedule 3 of the Regulations covers all types of buildings and land whereas paragraph 1(1) and (2) of Schedule 1 applies only to residential buildings and land connected to such buildings and paragraph 1(2) is concerned with the reach of the residence.

82. To allow the appeal would be to render the entire statutory framework meaningless.

83. The First Respondent seeks the dismissal of the appeal on the basis that the Property is not excluded from being listed as an ACV and should be retained on the list of ACVs.

Conclusions

84. The task before me is to make a fresh decision standing in the shoes of the First Respondent. I am able to take into account events occurring between the date of listing and the date of the appeal and accept additional material.

85. In reaching a decision in this case, I have had regard to the submissions and evidence, both oral and written. The fact that I do not refer to a particular submission or evidential matter is not to be taken as indicating that I have not had regard to the same.

86. The Appellant appeals the decision of the Respondent dated 10 December 2020 on a listing review in respect of the Property. The sole ground of appeal is whether the Property is excluded from listing as land which may not be listed as an ACV.

87. I find that Ms Gaw properly represents the nominating organisation being the unincorporated community group of the residents of Winkfield and Cranbourne.

88. I find the agreed chronology of events is correctly set out.

89. By a lease dated 17 February 1932 the Appellant's predecessor in title leased the Property to The British Legion for a term of 99 years commencing on 25 December 1931 at a yearly rent of £1.00. The lease was surrendered by The Royal British Legion to the Appellant on the 1 November 2018 and the Property has remained vacant since that date. The Property has not been used for any purpose since the lease was surrendered. No part of the Property has ever been used for residential purposes. The Property comprises a main hall area, bar

area, toilet and kitchen. Immediately to the south of the building is a single storey outbuilding used for storage.

90. Immediately at the rear of the Property are some allotments and car park. The allotments were gifted out of the Estate by the Appellant's predecessor in title to The Winkfield Parish Council by a Deed of Gift dated 22 August 1955.

91. The Property is a single storey building dating back to 1912. There are two vehicular access points which are secured with metal gates and which cannot be accessed. There is onsite parking for about 20 cars at the rear of the Property. The site surrounding the Property is enclosed by board fencing to the rear, picket fencing along the side boundaries and the front open area is partially hard surfaced and partially soft landscaped.

92. The back of the site is the boundary with the Winkfield Parish car park for the allotments. The Appellant owns the land along the right hand side of the site and the road provides access to the allotments and the Winkfield Parish recreation ground. The roadway is fenced off from the Estate by a picket fence which runs from the locked metal gates to the boarded fence at the rear.

93. There is a second locked gate to the Estate and the grass area which has a stream on either side runs between the allotments and the recreation ground.

94. The Property is sited on land which forms part of the Estate as shown on the title plan. The Property is referred to on the title plan as the "Club."

95. The Property was used by the community until 2018 for various activities and the community wishes to preserve that community use for the future. The question before me is whether the legislation permits this or whether because of its ownership and position within the Estate it is excluded as land which specifically may not be listed as an ACV.

96. There are several types of buildings or other land which are excluded from being listed as ACVs. Regulation 3 states clearly that a building or other land within a description specified in Schedule 1 to the Regulations is not land of community value and therefore may not be listed. Schedule 1 sets out three main categories of land which are not of community value. I am concerned in this appeal with the category relating to residences.

97. A straightforward reading of the legislation results in the Property being excluded from listing. The test in essence is whether the land is owned by one person is not physically interrupted by land owned by another person.

98. The starting point for the interpretation of the word ‘land’ must be the definition of ‘land’ set out in Schedule 1 of the Interpretation Act 1978 – ‘land’ includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.

99. S. 88 refers to “a building or other land” which appears to follow the general principle of English land law that once constructed, a building becomes part and parcel of the land itself.

100. S.108 (1) of the Act provides that “land” includes—

(a) part of a building,
(b) part of any other structure, and
(c) mines and minerals, whether or not held with the surface.

101. If the land on which the building stands is within the exemption, so too is the building which stands on it. The provisions of the Act and Regulations are consistent with this principle.

102. I find it is incumbent on me to follow the basic proposition of English law that the owner of the surface of land is also entitled to the airspace above it, and the subterranean strata below it. A building becomes part of the land and in that sense is land.

103. I find that on a straightforward interpretation of the paragraph 1(1) of Schedule 1 the expression “land connected with a residence” must include the buildings on that land, i.e. the Property. Had Parliament intended this not to be the case it would have made this clear in the Regulations.

104. Mr Cant submitted that in paragraph 1(1) and paragraph 1(2) of Schedule 1 the word " land" means land which is not built on and the word " residence" means any building which is used wholly or partly for a residential purpose subject to the application of paragraph 1(5) of Schedule 1. He urged me to consider that any statutory definition to the contrary is explicitly or implicitly subject to a contrary intention. I reject this argument for the reasons set out below.

105. I reject Mr Cant’s argument that the exclusion in paragraph 1 is focussed on buildings which are used wholly or partly for residential purpose as defined by paragraph 2 but it is not aimed at other types of building. He has suggested that consideration should be given to incorporating the definition of residence in paragraph 2 into paragraph 1(1) so that the exclusion would read as applying to “a building used or partly used as a residence and land connected with a building used or partly used as a residence.” He argues that this serves to emphasise that the scope of the exclusion is limited as regards buildings to those which are used or partly used as a residence. And when applying the exclusion the reference to land connected with such a building or buildings must be limited to land.

106. In my view Mr Cant’s proposal is a redraft of paragraph 1(1) of Schedule 1 which goes beyond interpretation.

107. In reaching this view I have taken account the words of Lord Nicholls of Birkenhead (*Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592) who said:

> “It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words … This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any

> attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

108. I have borne in mind, also, the words of Lord Simon of Glaisdale (*Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 237) when explaining the limits of a purposive approach to construction:

> "a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

109. I follow the established approach that a court is not entitled to disregard plain and unambiguous terms of legislation unless it is necessary to avoid absurd or perverse consequences (*GR Property Management Ltd v Safdar* [2021] 1 WLR 908 at [47] to [48]).

110. Mr Cant argued that in interpreting 'land connected with that residence' I should consider that there be an additional test of a physical and functional relationship.

111. It is my view it would be wrong and unnecessary to introduce an additional test. Schedule 1 sets out clearly what the test is for deciding if 'land is connected with a residence.' The terms of paragraph 1(2) are plain and unambiguous and the application of those terms do not result in absurd or perverse consequences. The consequences are disappointing for the Second Respondent and the community but they could not be said to be absurd or perverse. There is no ambiguity, anomaly or obvious drafting error. Parliament has chosen to define clearly and precisely what land counts as connected to the residence.

112. I find that the Estate, the House and the Property are owned by a single person as defined by the Interpretation to the Regulations that states: 1(4) For the purposes of these Regulations, land is owned by a single owner if— (a) the land is owned by the same person.

113. I find that paragraph 1(2)(a) of Schedule 1 is satisfied. I find that every part of the land can be reached from the House without having to cross land which is not owned by the owner and paragraph 1(2)(b) of Schedule 1 is satisfied.

114. I accept that there are obstacles including locked gates and a picket fence but the gates and the picket fence are on land belonging to the Appellant and do not prevent the Appellant from reaching the Property from the House without having to cross land not owned by the Appellant

115. The picket fence was erected in or about October 2016 at the request of the Parish Council with the permission of the Appellant in order to prevent children or any users of the Asher Recreation Ground and allotment car park accidentally falling into the ditches. The picket fence has a gate in the centre which secured by a padlock and chain. The fence and gate was not intended to and does not prevent the Appellant from reaching the Property. It could be easily removed as is a temporary structure.

116. On the other side of the picket fence, there is a narrow section of the access strip which is a metalled pavement which provides access from the allotment car park to the Asher

Recreation Ground. The Parish Council, under a Deed of Gift, was granted the right to pass and repass at all times and for all purposes over the land including the narrow metalled pavement. This right does not alter the ownership or access of the Appellant.

117. The wooden posts on the grass strip were erected by the residents of the adjoining cottages due to parents using it to park their cars when collecting their children from the school which adjoins the Asher Recreation Ground. The posts are temporary, can be removed at any time do not prevent access.

118. I have considered whether paragraph 1(5) of Schedule 1 is satisfied, namely the 'exception to the exception.' As an exception to the residence exclusion land can still be listed as an ACV if an otherwise eligible building is only partly used as a residence and but for that residential use of the building the land would be eligible for listing. This does not apply in this case without the addition of words not in the legislation or by stretching the meaning of the words to an unacceptable degree.

119. The policy objective behind the 'exception to the exception' was to deal with situation where a pub or community centre may have integral accommodation tied to the site's main function. The intention was that such assets could be listed provided that the main purpose of the building or land meets the definition of an ACV. This is not such a case. The property is not part of the residence but part of the connected land. The residence which is excluded is not a 'building that is only partly used as a residence' because it is only used as a residence so the provisions of 1(5)(a) and (b) do not apply.

120. I reject the First Respondent's submission that the purpose of paragraphs 1 and 2 of Schedule 1 is to exclude from listing under the ACV regime any building or land used wholly or partly for residential purposes subject to the exception in paragraph 1(5) of Schedule 1 but not to exclude land in the same ownership which is not so used. Had that been the intention of Parliament then the legislation would have said so.

121. In reaching my decision on the interpretation of Schedule 1, I must consider carefully the purpose of the community to bid regime which is crucial. The purpose of the community right to bid regime is to provide a tool and means for communities to be given the opportunity to identify assets of community value, have them listed and when they are put up for sale have time to raise finance and be prepared to bid for them. It was recognised that throughout the country there were buildings and amenities that were integral to the communities that use them. The closure or sale of such buildings and amenities can create lasting damage to communities and threaten the provision of services. The intention of the regime was to provide greater opportunities for communities to keep such buildings in public use to ensure they remained a social hub for those communities. However, it is clear that there was an intention for there to be limits to the assets that could be listed as ACVs. It was intended that there would be exceptions to the general rule that any asset could be listed as an ACV if the requirements of s.88 were satisfied. The intention was by including a provision for land which is not of community value and Parliament set out the definition of such land and the tests to be applied.

122. Parliament could have used different language or further defined the phrase 'land connected with a residence' to enable all buildings which satisfied the tests in s.88 of the Act to be listed. However, parliament chose to exclude non-residential buildings on land where the land, buildings and residence were owned by a single owner. In my view it is likely that Schedule 1 was drafted specifically to include such buildings and it is not a situation where due to inadvertence the draftsman and Parliament failed to give effect to the purpose of the

community right to bid regime. In this regard I consider the wording of paragraph 1(3) of Schedule 1 to be significant because it is a large estate that is most likely to have intervening roads, railways, rivers and canals on intervening land.

123. I accept that the Property is not used as a residence or for a purpose which is ancillary to the use of a separate residence, is not within the curtilage of the House, is physically separated from the remainder of the Estate, has a current lawful use for the purposes of planning law that does not fall within use class C whereas the House has a current lawful use within use class C3, is part of a different planning unit from that of the House and the remainder of the Estate but not the Property is registered on the register of National Parks and Gardens of Special Historic Interest in England maintained by Historic England. However, this does not assist the First Respondent in view of my decision regarding the purpose of the exception to the community right to bid regime and the place of Schedule 1 within that purpose.

124. I reject Mr Cant's submission that the Property is not ancillary to the main residence nor does it form part of a composite use of that Estate and as such it is considered to form a separate planning unit in its own right because such factors are not relevant to the issues before me and the test. It has been established that the concept of a 'planning unit' is not determinative in relation to ACVs and can be relevant but only if there is some practical application in considering the test before me. The Property may be a separate planning unit but this makes no difference to the fact that it is part of the land connected to the residence and as such a plain reading of the legislation means it comes within the definition of land which may not be listed as an ACV.

125. I reject the assertion that the straightforward interpretation of Schedule 1 without additions or refinements and without implying additional words or meaning results in absurd and unintended results. I find there is no justification for additional words which are unnecessary and unjustified or the imposition of implied meanings. To do so would be to limit the scope of the exemptions and pervert the intention of Parliament.

126. I find there was no unintended or drafting error and the test as set out by Parliament was to balance the interests of the community against the interests of landowners. I find there is no basis for substituting different or additional requirements. Taking this into account I do not consider that the straightforward interpretation thwarts the purposes of the overall legislation.

Decision

127. The appeal is allowed. The Property, the former Royal British Legion Hall, known as the Cranbourne and Winkfield Royal British Legion Hall, Hatchet Lane, Cranbourne, Berkshire SL4 2EE is statutorily excluded from being listed as an ACV. The Property satisfies the description of land which may not be listed as an ACV as specified in Schedule 1 of the Assets of Community Value (England) Regulations 2012 . The Property should be removed from the list of ACVs.

Tribunal Judge J Findlay **DATE: 1 June 2021**

Signed as corrected: 22 October 2021