

## Public houses and the ACV regime again

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A fresh batch of ACV appeal decisions has been released on the BAILII website and inevitably most concern public houses. The judgments address a number of interesting points for those concerned with either the operation of the ACV regime or seeking to challenge a community nomination particularly when made by a CAMRA branch.

1. CAMRA branch ticking box that nomination by company limited by guarantee – the hybrid approach set out by Judge Warren in *St Gabriel Properties Limited v Lewisham LBC* (CR/2014/0011) has been relied on heavily by CAMRA. This treats the requirements in reg. 5 20102 Regulations as satisfied by the holding company (limited by guarantee and bar on distribution to members) whilst the requirements in reg. 4 (local connection) are to be satisfied by the particular branch. In a number of cases this has been challenged on behalf of the owner.

One such challenge has been considered in *Hamna Wakaf Limited v Lambeth LBC* (CR/2015/0026). The CAMRA South West London branch nominated the Grosvenor public house in Stockwell. On the nomination form the branch ticked that it is a company limited by guarantee and did not tick the box relating to an unincorporated body. The owner argued that the branch did not qualify as a company limited by guarantee because there was no evidence that the company had authorised the branch to make the nomination on its behalf. The Council accepted this so it was left to the Branch to argue the point. Judge Lane accepted that as there was no authority the Branch did not qualify as nominator on the basis that the nomination was made by a company limited by guarantee. He accepted that the law of agency and company law must prevail and to the extent that the *St Gabriel* decision conflicts it must be regarded as wrong (para. 87).

In order for a Branch to take this route it must have authority from the company. Such authority can be express, implied or presumed but must exist. It has now become the practice of the CAMRA company to provide letters authorising nominations made by its branches so that this particular objection should not arise in the future.

2. “Hybrid approach” upset? - What Judge Warren described as the “hybrid approach” in the *St Gabriel* case has not been said to be wrong in the *Hamna Wakaf* decision. What it holds is that for a CAMRA branch to make a nomination on behalf of the CAMRA company it must be authorised. If such authority exists then it would seem that the *St Gabriel* decision still holds good as the *Hamna Wakaf* decision did not have to consider any challenge to that aspect of it. The local connection requirements in regulation 4(1) regarding the nominator’s activities and the application of its surplus do not require that all such activities and application must relate only to the particular area or neighbouring area.

It is enough that they so relate in part. Why can that not be achieved by the Branch on behalf of the Company? If the branch is not a separate legal entity then its acts should be attributable to the company. This would suggest that with the appropriate authority a Branch can still adopt this route.

3. Switching to unincorporated body - one of the main issues in the Hamna Wakaf case was whether reliance could be placed on the CAMRA branch being a qualifying unincorporated body even though the correct box had not been ticked on the nomination form. The owner's argument was that once the nomination had been made it was not possible to switch. This was not accepted by Judge Lane. Provided that factually the nominator was a qualifying unincorporated body at the date of the nomination then it was open to the Council to regard the nomination as valid even if the relevant box had not been ticked.

4. Adoption of nomination by another – however, this ability to switch did not allow an independent third party to come along and adopt the nomination. Judge Lane gave as an example a nomination by a company limited by shares cannot be adopted by a qualifying company limited by guarantee in order to save it (para. 84).

5. Ratification – there is no suggestion in the Hamna Wakaf case that the CAMRA company sought to ratify the particular nomination. An effective ratification is retrospective. Could a ratification have been effective in the circumstances of that case? It has operated with writs issued without authority (for example, in *Alexander Wood & Co Limited v Samyang Navigation Co.* [1975] 1 WLR 673). There are limits so it will not be effective if it unfairly prejudices a third party. If it can be effective there will then be the issue whether this will be subject to a time limit so, for instance, it is only effective if occurring prior to the listing decision?

6. Can a CAMRA branch be an unincorporated body? – it was argued on behalf of the owner in the Hamna Wakaf case that because the branch has no separate legal identity from the CAMRA company and is part of a single organisation it cannot be an unincorporated body and so there was no valid community nomination. This argument was in part based on section 89(2)(b)(iii) of the 2011 Act which requires the nomination to be by “a person that is a voluntary or community body” and so the argument ran to qualify as a nominator for these purposes the nominator had to be a person. This runs counter to the spirit of the decision in *Mendoza Limited v Camden LBC* (CR/2015/0015) that an unincorporated body need not be an unincorporated association. The argument was rejected. It was reaffirmed that it is enough that there is a group of individuals with a common function. This accords with many listing decisions and appeals such as the recent one in *Fernwick Limited v Mid Suffolk DC* (CR/2015/0024) in which it was accepted that the CAMRA branch was a qualifying nominator without discussion.

7. Proof of 21 local members – in order for an incorporated body to qualify as a nominator the membership must include 21 local members. These are members on the electoral register with an address in the area or in a neighbouring area (reg. 4(3)). The usual practice is that a list of names and addresses of such members accompanies the nomination

which is checked against the electoral register and once verified a copy of this list with the addresses redacted to comply with the Data Protection Act is provided to the owner. This was described as “best practice” by Judge Lane in *Hibbert v Wycombe DC* (CR/2015/0014)(para.13).

However, in both the *Hibbert* case and the *Hamna Wakaf* case there was no such list of local members. In neither case did this stop the CAMRA branch nominator qualifying. The judgments make the following points:-

(i) there is no statutory requirement that a list be provided with the nomination. It is possible to prove in other ways that the membership includes 21 local members.

(ii) a large local membership can lead to the inference that the requirement is satisfied. In the *Hama Wakaf* case it was stated in the nomination form that the branch had 1,522 members with 358 living in the Lambeth area. This was sufficient to establish an inference that the local membership requirement was satisfied.

(iii) satisfaction by a CAMRA branch of the local member requirement with regard to a community nomination was accepted in the *Hibbert* case because the Council has satisfied itself on this point with regard to a different nomination of a different property. It appears that these nominations were around the same time which may be material.

8. “Once and for all basis” for validity of nomination – the judgment in the *Hamna Wakaf* case is wider in scope than just dealing with the issue of switching status as a nominator. A principal argument on behalf of the owner (as in many cases concerning public house nominations) was that the requirement of regulations 4, 5 and 6 had to be satisfied “once and for all” when the nomination was made and that there is no scope for subsequently remedying a failure to do so. Importantly Judge Lane rejected this argument taking into account that the procedure was intended to be operated by individuals who would not have expertise in compiling formal legal documentation. Further the inclusion of a review procedure in the ACV regime was taken to indicate an ability to correct mistakes.

It followed from this that

(a) an authority has a discretion to waive a requirement in regulation 6 (contents of community nomination) “where the authority concludes that no substantial prejudice would be caused.” (para. 81) However, this will not allow the authority to waive the requirements in regulations 4 and 5.

(b) an authority may permit a nominator to make good a failure under regulation 6 after receipt of the nomination. This is important as this should mean that authorities are entitled to seek clarification of points raised by a nomination.

This will exclude many of those challenges to nominations which are focused on a failure at the time the nomination is made.

9. Realistic to think future community use – the dicta in the Upper Tribunal in *Banner Homes v St Albans City and District Council* that there is no empty space between fanciful and realistic was followed in the *Hamna Wakaf* case (para. 93). It reaffirmed that such

future use “is not to be equated with what is more likely than anything else to occur” (para. 98).

10. Planning permission for a use which is not a community use – the grant of planning permission for a non-community use such as residential development around the time of the nomination may mean that it is not realistic to think there can be a future community use of the property (as in *STO Capital v Haringey LBC* (CR/2015/0010)). However, such a conclusion does not follow automatically from the grant. In *Singh v Leeds City Council* (CR/2015/0023) there was no evidence from the owner as to the timescale he had in mind for the implementation of a planning permission for residential development. This provided an opportunity for there to be a community use until implementation started. Separately from the question of if and when the planning permission will be implemented is the question as to whether the authorised use will last. In *Hawthorn Leisure v Bracknell Forest BC* (CR/2015/0020) the owner claimed the right to use the pub for retail use under a change of use said to have occurred under the Permitted Development rights regime before the introduction in April 2015 of the need to obtain a grant of planning permission if the pub has been nominated or listed. Judge Lane carefully scrutinised the accounts and found that the total sales were far less than the wages bill. In consequence he considered it unrealistic to expect a retail use to continue for any significant time and so in turn it was realistic to think there could be a future community use.

11. Terminal decline – it has been successfully argued that the business of the nominated pub was in terminal decline and so it is not realistic to think it will continue in the future (*Fernwick v Mid Suffolk DC* supra). The location of the pub which was not really accessible on foot and outside a village was a material factor. However, such claims will be closely scrutinised and not readily accepted (see, for example, *Curtis Sloane v Bassetlaw DC* (CR/2015/0021)).

12. Unlawful residential use – listing cannot be avoided by taking up unlawful occupation of the whole of a public house as a residence (*King v Chiltern DC* (CR/2015/0025)(as discussed more fully in an earlier article).

13. Informal community use – to establish a community use in the recent past reliance can be placed on use allowed by licence. In *Singh v Leeds CC* supra use of a garden had been allowed to a lessee of adjoining premises as an act of kindness but it still justified the inclusion of the garden in the listing.

14. Land comprised in single title – the inclusion of land in a registered title does not mean it must be listed along with the remaining land in the title which qualifies for listing. In *New River Trustee 7 Limited and Another v Wylie Forest DC* (CR/2015/0013) the listing covered not just the Swan pub with car park and garden (including children’s play area) but also a section of abutting woodland comprised in the same registered title. On appeal this woodland was removed. The woodland was not linked to the pub physically or functionally and enjoyment of the view of the woodland did not further the social wellbeing or social interest of the local community. Interestingly there was no discussion as to whether there was power to list only a part of the nominated property rather than the whole.

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