

Compensation under the Asset of Community Value regime

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Regulation 14 of the Assets of Community Value (England) Regulations has since its coming into force in September 2012 had the potential to pose a serious problem for listing authorities. It provides that an owner of an ACV listed property is entitled to compensation in the circumstances specified in reg. 14(2). This compensation is payable by the listing authority. The Impact Assessment carried out with regard to the ACV regime did not anticipate that there would be significant claims due to listing and estimated that the amount of such compensation claims would average around £2000.

Initially a safety net for listing authorities was provided by central government which underwrote for each listing authority any amounts exceeding in aggregate £20,000 in a year. However, the safety net was withdrawn in 2015 and now each listing authority must meet in full any successful compensation claim against it.

Much mention of the possibility of compensation claims has been made in attempts to prevent an ACV listing in the hope that it would act as a deterrent even though listing authorities cannot take account of a potential compensation claim. There have been some actual claims but it would seem not that many and to the extent successful only small amounts. However, that is changing and more substantial claims are now being pursued against listing authorities.

The circumstances in which compensation is payable are specified in regulation 14(2). It reads:

“(2) The circumstances mentioned in paragraph (1) are that the person making the claim has, at a time when the person was the owner of the land and the land was listed, incurred loss or expense in relation to the land which would be likely not to have been incurred if the land had not been listed.”

The elements necessary for a claim are

(i) The claimant owns or owned an ACV listed property. A claim cannot be pursued by a third party who has suffered loss but not owned the property whilst ACV listed. For example, no claim can be made by an aggrieved prospective purchaser who has incurred expenditure on investigating a property and then not proceeded because it has been listed as an ACV.

(ii) loss or expenditure has been incurred in relation to the property;

(iii) this must have been incurred whilst the land was ACV listed and owned by the claimant;

(iv) the loss or expenditure is likely not to have been incurred if the land had not been listed.

The precise scope of this general statement in reg. 14(2) is then obscured by reg. 14(3) which unusually is introduced by the words “For the avoidance of doubt, and without prejudice to other types of claim which may be made”. It then goes on to specify two types of specific compensation claim. The first is a claim for loss or expenditure arising from any period of delay in entering into a binding agreement to sell the land wholly caused by the operation of the moratorium provisions. The second is the reasonable costs of a successful ACV appellant.

The relationship of reg. 14(2) and reg. 14(3) has raised the issue whether a compensation claim can be made if loss or expenditure has been caused merely by the entry of the asset on the ACV list unrelated to the operation of the moratorium provisions. There have been many assertions made that by listing a property as an ACV the value of the property has been reduced particularly with regard to public houses.

In *Chadwick v Rossendale BC* (CR/2015/0006) Judge Lane stated at para. 19 that “Secondly, despite the opening words of regulation 14(3), it appears that the legislature did not intend an owner of a listed property to recover compensation in respect of the diminution of the value of that property, by reason of its listed status. I agree with Mr Wyatt that, had the intention been otherwise, one would have expected to see express reference being made in regulation 14 to this type of claim.”

This dictum was obiter as there was no compensation claim for loss of value in that case. It has been argued against the dicta that the wording of regulation 14(2) is wide and clear and that the introductory words of regulation 14(3) ensure that it does not have any limiting effect on the generality of reg. 14(2) and so does not preclude a compensation claim arising from the act of listing property as an ACV.

This issue has been raised for decision in the recent ACV appeal in *St John's Ambulance v Teignbridge DC* [2018] UKFTT 2018/CR/0003. In that case St John's Ambulance owned a hall in Ashburton which it had acquired in 1939 but which it no longer needed and it decided to sell. This decision caused considerable upset locally. The hall was marketed as having potential to develop. There were two bidders and the Appellant proceeded with the bid for £135,000. Shortly after the marketing started a community nomination to list the hall was made. This was later replaced by a second nomination made by a group of individuals called the Unincorporated Friends of Ashburton Ambulance Hall. The nomination was disclosed to the bidder quite late on. The hall was listed as an ACV as expected by the Appellant. The sale to the bidder did not proceed. The hall was sold in the following year for £80,000 at auction. Amongst a number of heads of claim the Appellant claimed for the difference between the bid and the sale price amounting to £55,000.

Two important issues were considered by Judge Simon Bird QC when deciding this head. The first is whether loss caused by an ACV listing alone can be the subject of a compensation claim. The second is the manner of assessing such compensation. The Appellant's case was that it could claim under reg. 14(2) and the amount of compensation should be the full amount of the difference between the bid price and the sale price at auction. The Respondent's position was that the scope of the entitlement to compensation was limited to losses arising from the operation of the ACV regime and excluded losses caused by listing. In any event even if the Appellant was correct that the loss could be recovered in principle the measure of damages could not be assessed on the basis that the property does not qualify as an ACV.

On these issues the learned judge held that

(i) despite an initial attraction to the argument that an entitlement to compensation was restricted to loss and expense incurred after and not as a result of listing he held that

reg. 14(2) was wide enough to include loss or expense arising from an ACV listing. The learned judge stated at paragraph 101 that “I accept that those who devised the statutory regime did not anticipate that its light touch nature would lead to mere inclusion on the LACV impacting on value to any material extent, as is clear from the wording of the Impact Assessment. However, the anticipated limited effect of a new regime cannot operate to restrict the scope of the wording used in Regulation 14(2).” He then noted that this broader scope was consistent with both the Explanatory Memorandum and the Non-Statutory Guidance albeit that neither was treated by him as an aid to construction.

(ii) on the issue of the assessment of the likely loss the judge rejected that argument that it should be undertaken on a no scheme basis which disregarded the statutory ACV listing regime. At paragraph 120 he stated that the “proper baseline for the purposes of assessment is to assume that the ACV listing regime exists but that it has not been applied to the particular building. Assessed on that basis, the difference between the two values, should fairly reflect the act of listing.” This led the judge to reject the Appellant’s claimed difference between the bid and the sale price. At paragraph 129 he stated that “In reality, the Appellant’s principal head of claim requires me to accept that the difference between two values which both claim to evidence the market value of the unlisted SJAH at the valuation date, is the loss which they incurred. That is to compare apples and pears and provides no proper basis for concluding that a loss in value was incurred.” He then continued by saying that there “is simply no sound evidential basis before me on which I can ascertain the loss, if any, which the change in status of the SJAH might have given rise to on 4 June 2015.” The onus was on the Appellant to prove the loss and it had failed to do so.

It will be a matter of concern to listing authorities that the scope of the compensation entitlement has been held to be wider including loss or expenditure incurred arising from the acquisition of the ACV status as well as compliance with the procedural requirements of the ACV regime. However, to be set against this is the approach adopted by the judge to the assessment of the loss which seeks to achieve a realistic assessment of the loss rather than an amount based on a wholly artificial assessment as if the asset was not and had not been a community facility. The existence of the ACV regime and the qualification of the asset as an ACV has to be taken into account when determining the

asset's value rather than wholly disregarding the existence of the ACV regime and the asset being or having been a community facility.

Compensation claims under the ACV regime cannot easily be budgeted for by listing authorities. The amounts now being claimed are substantial. In this case the claim made was well in excess of £100,000 because interest was sought at 8% or alternatively the loss of investment profits put at RPI plus 3.5%. That aspect failed and the Appellant succeeded in an award of just over £5,000. This leaves costs as an issue. Greater sums will be claimed from listing authorities. This has the potential to have serious consequences for local authorities. The need to engage in such disputes expends resources. The operation of reg. 14 is not straightforward. A review of the compensation provisions in reg. 14 is required not just as to the scope of the compensation entitlement but also how such payments are to be funded. If the government underwriting of annual payments exceeding in aggregate £20,000 was withdrawn because in the first few years the actual claims for compensation were few and small then this was premature and needs to be reinstated.