[2020] UKUT 288 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. MISC/1400/2019 (V)**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)
Reference: CR/2018/00006
Decision date: 29 April 2019

Before: Upper Tribunal Judge Poynter

Between:

Mr David Fielder

Appellant

-v-

Harrogate Borough Council

Respondent

DECISION OF THE UPPER TRIBUNAL

By Skype for Business
Hearing date: 6 May 2020
Decision date: 15 October 2020

Representation

Appellant:	Jonathan Wills of counsel instructed by Freeths LLP
Respondent	Ruth A. Stockley of counsel instructed by Harrogate Borough Council Legal Services

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Respondent Ruth A. Stockley of counsel
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DECISION

The appeal does not succeed.

The decision of the First-tier Tribunal given on 29 April 2019 under reference CR/2010/0006 did not involve the making of any material error on a point of law.

Therefore that decision continues to have effect and the appellant is not entitled to compensation under regulation 14 of the Assets of Community Value (England) Regulations 2012 in respect of the decision to include the former Henry Jenkins public house, Main Street, Kirkby Malzeard, HG4 3RY in the list of assets of community value maintained by the respondent under section 87 of the Localism Act 2011.

The respondent's application for costs is refused.

REASONS

Introduction

1. This is an appeal against the above decision of the First-tier Tribunal, which upheld the decision of the respondent council that the appellant is not entitled to compensation for the loss he claims to have incurred as a result of the former Henry Jenkins public house in Kirkby Malzeard being listed as an asset of community value. I am told that it is the first time that the compensation provisions of the Assets of Community Value (England) Regulations 2012 have been considered by the Upper Tribunal.

2. The appeal was decided after a remote oral hearing conducted through Skype for Business, with the representatives for both parties attending the hearing via Skype. I am grateful for the flexibility with which counsel approached the hearing. It made it easier to overcome the minor technical problems that were experienced. I would also like to record my gratitude to the clerk at the hearing, without whom those problems would have been significantly less minor.

3. The hearing and the form in which it was to take place had been notified in the daily courts list along with information telling any member of the public or press how they could observe the hearing at the time it took place through Skype for Business. No member of the public or press sought to attend the hearing.

4. A recording of the hearing was made using the Skype for Business recording facility and will be preserved for a reasonable time in case members of the public or the press would wish to view it.

5. I heard oral submissions at the hearing just as I would have done had we all been sitting in the tribunal room.

6. I am therefore satisfied that the hearing constituted a public hearing (with members of the public and press able to attend and observe the hearing), that no party had been prejudiced, and that the open justice principle had been secured.

Relevant Law

Localism Act 2011

7. Chapter 3 of Part 5 of the Localism Act 2011 (the Act) deals with assets of community value (ACV). Section 87 requires each local authority to maintain a list of

land in its area that is land of community value. Subsequent sections define when land is of community value; establish the procedure under which the authority is to decide whether land should be included on the list and under which that decision may be reviewed; provide for the list to be available for public inspection; and impose restrictions on the ability of the owner of land that is an ACV to sell it.

8. Section 99 of the Act then provides as follows:

> "**Compensation**
>
> **99.**—(1) The appropriate authority may by regulations make provision for the payment of compensation in connection with the operation of this Chapter.
>
> (2) Regulations under subsection (1) may (in particular)—
>
> (a) provide for any entitlement conferred by the regulations to apply only in cases specified in the regulations;
>
> (b) provide for any entitlement conferred by the regulations to be subject to conditions, including conditions as to time limits;
>
> (c) make provision about—
>
> (i) who is to pay compensation payable under the regulations;
>
> (ii) who is to be entitled to compensation under the regulations;
>
> (iii) what compensation under the regulations is to be paid in respect of;
>
> (iv) the amount, or calculation, of compensation under the regulations;
>
> (v) the procedure to be followed in connection with claiming compensation under the regulations;
>
> (vi) the review of decisions made under the regulations;
>
> (vii) appeals against decisions made under the regulations."

Assets of Community Value (England) Regulations 2012

9. The powers conferred by section 99 were exercised to make regulations 14-17 of the Assets of Community Value (England) Regulations 2012 (the Regulations) which are in the following terms:

> "**Compensation**
>
> **14.**—(1) An owner or former owner of listed land or of previously listed land, other than an owner or former owner specified in regulation 15, is entitled to compensation from the responsible authority of such amount as the authority may determine where the circumstances in paragraph (2) apply.
>
> (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.
>
> (3) For the avoidance of doubt, and without prejudice to other types of claim which may be made, the following types of claim may be made—
>
> (a) a claim arising from any period of delay in entering into a binding agreement to sell the land which is wholly caused—
>
> (i) by relevant disposals of the land being prohibited by section 95(1) of the Act during any part of the relevant six weeks that is on or after the date on which the responsible authority receives notification under section 95(2) of the Act in relation to the land, or
>
> (ii) in a case where the prohibition continues during the six months beginning with that date, by relevant disposals of the land being prohibited during any part of the relevant six months that is on or after that date; and
>
> (b) a claim for reasonable legal expenses incurred in a successful appeal to the First-Tier Tribunal against the responsible authority's decision—
>
> (i) to list the land,
>
> (ii) to refuse to pay compensation, or

(iii) with regard to the amount of compensation offered or paid.

(4) In paragraph (3)(a) "the relevant six weeks" means the six weeks, and "the relevant six months" means the six months, beginning with—

(a) the date on which the responsible authority receives notification under section 95(2) of the Act in relation to the land, or

(b) if earlier, the earliest date on which it would have been reasonable for that notification to have been given by the owner who gave it.

(5) A claim for compensation must—

(a) be made in writing to the responsible authority;

(b) be made before the end of thirteen weeks after the loss or expense was incurred or (as the case may be) finished being incurred;

(c) state the amount of compensation sought for each part of the claim; and

(d) be accompanied by supporting evidence for each part of the claim.

(6) The responsible authority must give the claimant written reasons for its decisions with respect to a request for compensation.

15. …

Review by local authority of compensation decision

16.—(1) A person who has under regulation 14 made a claim for compensation may ask the responsible authority concerned to review either or both of its decisions, made in response to that claim, as to—

(a) whether compensation should be paid to that person, and

(b) if compensation is to be paid, the amount of that compensation.

> (2) If a request for a compensation review is made in accordance with the provisions of paragraph 2 of Schedule 2, the authority must in accordance with the procedure in Schedule 2 review the decision or decisions of which review is requested.
>
> (3) Where an authority carries out a compensation review, the authority must give written notification to the person who asked for the review of—
>
> (a) the decision on the review, and
>
> (b) the reasons for the decision.
>
> **Appeal against compensation review decision**
>
> **17.** Where a local authority has carried out a compensation review, the person who requested the review may appeal to the First-Tier Tribunal against any decision of the authority on the review."

10. By paragraph 2 of Schedule 2 to the Regulations:

> "**2.** A request for a compensation review must be made in writing before the end of a period of eight weeks beginning with the date on which the responsible authority provides the owner with written notification of its reasons in accordance with regulation 14(6), or such longer period as the authority may in writing allow."

and by paragraph 9 of that Schedule:

> "**9.** The authority must complete the review by the end of the period of eight weeks beginning with the date the authority receives the written request for the review, or such longer period as is agreed with the owner in writing."

Planning legislation

11. The events that gave rise to these proceedings took place against the background of a change to the applicable planning legislation.

12. Subject to exceptions that do not apply in this case, article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the 2015 Order) states that:

> "planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."

and article 3(2) provides that:

> "Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2."

13. Until 23 May 2017, Part 3 of Schedule 2 to the 2015 Order was in the following terms:

> "*Class A – restaurants, cafes, takeaways or pubs to retail*
>
> **Permitted development**
>
> ***A. Development consisting of a change of use of a building from a use falling within Class A3 (restaurants and cafes), A4 (drinking establishments) or A5 (hot food takeaways) of the Schedule to the Use Classes Order, to a use falling within Class A1 (shops) or Class A2 (financial and professional services) of that Schedule.***
>
> **Development not permitted**
>
> A.1 Development is not permitted by Class A during the specified period if the building is a specified building.
>
> **Conditions**
>
> A.2—(1) In the case of a building which is not a community asset, which is used for a purpose falling within Class A4 (drinking establishments) of the Schedule to the Use Classes Order(a), development is permitted by Class A subject to the following conditions.
>
> (2) Before beginning the development the developer must send a written request to the local planning authority as to whether the building has been nominated, which must include—
>
> (a) the address of the building;
>
> (b) the developer's contact address; and
>
> (c) the developer's email address if the developer is content to receive communications electronically.
>
> (3) If the building is nominated, whether at the date of request under paragraph A.2(2) or on a later date, the local planning authority must notify the developer as soon as is reasonably practicable after it is

aware of the nomination, and on notification development is not permitted for the specified period.

(4) The development must not begin before the expiry of a period of 56 days following the date of request under paragraph A.2(2) and must be completed within a period of 1 year of the date of that request.

Interpretation of Class A

A.3 For the purposes of Class A—

"community asset" means a building which has been entered onto a list of assets of community value, including any building which has been subsequently excluded from that list under regulation 2(b) of the Assets of Community Value (England) Regulations 2012(b);

"list of assets of community value" means a list of land of community value maintained by a local authority under section 87(1) of the Localism Act 2011(c);

"nomination" means a nomination made under section 89(2) of the Localism Act 2011 for a building to be included in a list of assets of community value and "nominated" is to be interpreted accordingly;

"specified building" means a building used for a purpose falling within Class A4 (drinking establishments) of the Schedule to the Use Classes Order—

(a) which is a community asset; or

(b) in relation to which the local planning authority has notified the developer of a nomination under paragraph A.2(3); and

"specified period" means—

(a) in relation to a building which is subject to a nomination of which the local planning authority have notified the developer under paragraph A.2(3), the period from the date of that notification to the date on which the building is entered onto—

(i) a list of assets of community value; or

(ii) a list of land nominated by unsuccessful community nominations under section 93 of the Localism Act 2011;

(b) in relation to a building which is a community asset—

(i) 5 years beginning with the date on which the building was entered onto the list of assets of community value; or

(ii) where the building was removed from that list—

(aa) under regulation 2(c) of the Assets of Community Value (England) Regulations 2012 following a successful appeal against listing or because the local authority no longer consider the land to be land of community value; or

(bb) under section 92(4)(a) of the Localism Act 2011 following the local authority's decision on a review that the land concerned should not have been included in the local authority's list of assets of community value,

the period from the date on which the building was entered onto the list of assets of community value to the date on which it was removed from that list."

14. To summarise, until 23 May 2017, the 2015 Order gave automatic planning permission to change the use of land from a pub to a shop or to the provision of financial or professional services as long as:

(a) the developer made the request required by article A2(2);

(b) the development took place within the period specified in article A2(4); and

(c) the land had neither been listed nor nominated as an ACV.

15. With effect from 23 May 2017, that state of affairs changed by virtue of the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2017 (the 2017 Order). Article 3(1)(a) of the 2017 order revoked:

(a) the words "or pubs" from the heading to Class A;

(b) the words ", A4 (drinking establishments)" from the description of permitted development in paragraph A; and

(c) paragraphs A1 to A3.

Article 3(1)(b) then inserted a new Class AA as follows:

> "*Class AA-drinking establishments with expanded food provision*
>
> **Permitted Development**
>
> ***AA. Development consisting of a change of use of a building and any land within its curtilage—***
>
> ***(a) from a use falling within Class A4 of the Schedule to the Use Classes Order to a use falling within Class A4 (drinking establishments) with a use falling within Class A3 (restaurants and cafes) ("drinking establishments with expanded food provision"); and***
>
> ***(b) from a use as a drinking establishment with expanded food provision to a use falling within Class A4 (drinking establishments).***"

16. The effect of the change was to end the automatic grant of planning permission for a change of use from a pub to a shop or an office providing financial services. From 23 May 2017, an application for planning permission is required for any change of use from a pub to a use that does not fall within Class AA.

17. Finally, that change was subject to the transitional provisions in Article 5(1) of the 2017 Order, which (so far as relevant) were in the following terms:

> "**Transitional and saving provisions**
>
> **5.**—(1) Where, in relation to specified development, the period of 56 days referred to in—
>
> (a) paragraph A.2(4) of Part 3 of Schedule 2 to the General Permitted Development Order; or
>
> (b) …
>
> expired before 23rd May 2017 then the planning permission granted under Class A … of Part 3 … of Schedule 2 to the General Permitted

> Development Order continues to have effect as if the amendments made by this Order had not been made."

Factual background

18. The former Henry Jenkins public house (the Henry Jenkins) is in Kirkby Malzeard, which is in the area administered by the respondent council.

19. The appellant acquired the freehold interest in the Henry Jenkins in December 2012, by which time it had ceased to trade as a public house.

20. The appellant applied to the respondent for planning permission to demolish the Henry Jenkins and erect four dwellings. The respondent refused permission on 1 March 2017.

21. The appellant appealed against that decision,[1] but also decided to exercise his permitted development rights to change the use of the Henry Jenkins. The goal was to ensure that any future application for planning permission for change to residential use would not involve the loss of a village pub and would therefore be more likely to succeed.

22. On 11 March 2017, the appellant's planning consultant wrote to the respondent, notifying it of the appellant's intention to exercise permitted development rights under the 2015 Order to change the use of the Henry Jenkins to Class A2 (Financial and Professional Services).

23. On 16 March 2017, the respondent confirmed receipt of the letter dated 11 March 2017 and stated that the exercise of permitted development rights must not begin before 8 May 2017 and must be completed by 12 March 2018 (i.e., in accordance with paragraph A.2(4) of Part 3 of Schedule 2 to the 2015 Order as it was in force at the time: see paragraph 8 above).

24. On 5 May 2017—three days before the exercise of the permitted development rights could otherwise have begun—the Henry Jenkins was nominated for listing as an ACV by a group called "Save the Henry Jenkins". When the respondent notified the appellant of that nomination, the Henry Jenkins became a "specified building" and the change of use that had previously been permitted by virtue of article 3 of, and paragraph A of Part 3 of Schedule 2 to the 2015 order ceased to be permitted by virtue of paragraph A.1 of that Schedule and the concluding words of paragraph A.2(3).

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1 The appeal was refused by an Inspector on 22 February 2018.

25. On 23 May 2017, the law changed as set out at paragraphs 10 and 11 above and, subject to the transitional protection set out in paragraph 12 above, the permitted development rights on which the appellant relied ceased to exist.

26. On 29 June 2017, the respondent listed the Henry Jenkins as an ACV and on 26 September 2017, that decision was upheld on review under section 92 of the Act. The review decision was notified to the Appellant by a letter dated 5 October 2017.

27. On 19 January 2018, the appellant made the claim for £711,000 in compensation that gives rise to this appeal.

28. On 3 April 2018, the respondent refused the claim for compensation and, on 23 July 2018, that decision was upheld on review under regulation 16 of the Regulations: see paragraph 4 above.

29. On 17 August 2018, the appellant appealed to the First-tier Tribunal against the respondent's review decision under regulation 17 of the Regulations.

30. On 2 October 2018, the Chamber Registrar of the General Regulatory Chamber (GRC) directed that the issue:

> "whether compensation can/should be paid (i.e. liability) and, if so, under what heads"

should be determined as a preliminary issue.

31. On 30 April 2019, Judge Alison McKenna, the Chamber President of the GRC decided that preliminary issue against the appellant.

32. The appellant now appeals to the Upper Tribunal with Judge McKenna's permission, given on 3 June 2019. Permission was given on the basis that the grounds of appeal set out below all have reasonable prospects of success. However, Judge McKenna also observed, as she had done in her substantive decision, that there was no authority on the issues raised in this case and that it would be helpful to the First-tier Tribunal to obtain the Upper Tribunal's ruling.

The First-tier Tribunal's decision

33. The learned judge set out the background to the appeal and the relevant law in much the same terms as I have done above. She then continued:

"17. I have considered the witness statement filed by the Appellant dated 10 January 2019. He describes himself as an experienced property developer with a career spanning some 40 years in relation to more than 500 properties. He states that he originally planned to convert the Property into an estate agents' office for his own use and that he intended to exercise permitted development rights to achieve this. He took permissible preparatory steps to this end and incurred costs in so doing. He says he regarded the change of use to an office as a means of "de- risking" the subsequent proposed application for conversion of the Property to residential use.

18. The Respondent has filed no witness evidence.

19. …

20. The Appellant's claim dated 19 January 2018 is set out as follows:

> "It is the owner's claim that it has suffered loss as a consequence of the listing of the property as an Asset of Community Value. That loss has taken the form of a loss of profits that would otherwise have been made had the owner been able to develop the property.
>
> In support of the owner's claim we enclose a valuation report… These figures are derived from a loss in property value to the owner attributable to the ACV listing, and a loss of profits to the owner attributable to the ACV listing.
>
> The owner relies on the contents of the enclosed valuation report in its entirety, but in particular we draw the following aspects of the report to your attention:
>
> 1. the valuation report is supported by a detailed planning report, which evidences the owner's intention to exercise permitted development rights to change use of the property to an [A2] use in order to de-risk a planning application for later residential conversion, by removing the council's policy objections to development on the grounds of the feared loss of a community facility.
>
> 2. Had the property not been listed as an Asset of Community Value then it is clear that consent for a later planning application may have been obtained and the future path of the property would have followed a different route, attracting a far greater value as well as profits from its development.

> Accordingly, the owner claims the sum of £711,000 from the council as a consequence of the ACV listing and the consequent diminution in value and loss of profits…."

21. In submissions made by letter dated 4 July 2018, the Appellant's claim was further particularised to refer to losses which had not *finished being incurred* as a result of the Property's continuing status as an ACV. It was denied that the Appellant's claim was time-barred for this reason. It is also submitted that the diminution in value and loss of opportunity to develop are compensatable types of loss under the Regulations."

34. The learned judge then set out the terms of the decision under appeal to her and discussed the parties' submissions before concluding as follows:

"*Conclusion*

26. I have adopted a plain reading of the Regulations and have not sought to interpret them with reference to the various extraneous materials supplied to me. I conclude that this is the correct approach in the absence of a *Pepper v Hart* application.

27. I remind myself that the preliminary issue for determination is whether the Council is in principle liable to pay compensation in the circumstances of this case.

28. My reading of the Regulations as applied to this case is as follows:

(i) The Appellant is the owner of listed land for the purposes of regulation 14(1);

(ii) The Appellant is therefore "entitled" to compensation from the Council if the "circumstances" in regulation 14(2) apply. The Council must determine the amount of compensation if the "circumstances" apply;

(iii) The "circumstances" in regulation 14(2) are that an owner has incurred "loss or expense" which would be likely not to have been incurred if the land had not been listed;

(iii)[*sic*] Regulation 14(3) sets out a non-exhaustive list of possible types of claim but this is expressly without prejudice to other types of claims which may be made. The Appellant's claim is therefore "another type of claim" as it is not of a type in the list;

(iv) Regulation 14(5) provides that a claim for compensation "must" be made in conformity with sub-paragraphs (a) to (d), and at (b) provides that a compensation claim "must" be made before the end of 13 weeks after the loss or expense was incurred or (as the case may be) finished being incurred.

29. There are some puzzling aspects to these provisions. I note that the owner of listed land is not merely "entitled to make a claim" but is "entitled compensation" if she or he makes a claim in particular "circumstances". I note that regulations 14(1) and (2) do not cross-refer to regulation 14(5), and that there is no specified consequence of a failure to make a compensation claim in accordance with regulation 14(5). On a plain reading of the Regulations, I conclude that the use of the word "must" in regulation 14(5) means that the "circumstances" entitling an owner of listed land compensation under either regulation 14(2) or 14(3) must be understood to include the "circumstance" that there claim for compensation is made in conformity with the provisions of the sub- paragraphs (a) to (d) of regulation 14(5). These provisions include the *sine que non* of any compensation claim, such as the amount claimed and the evidence in support of the claimed losses, but also create a thirteen-week window for making a valid claim.

30. This leads me to decide that a claim which did not comply with all aspects of regulation 14(5) could not give rise to an "entitlement" to compensation. With reference in particular to regulation 14(5)(b), I doubt that my interpretation above strictly creates what the parties have referred to as a "limitation period" or a "time-bar", but the effect is the same, namely that in order to give rise to an *entitlement* to compensation [,] a claim *must be made before the end of thirteen weeks after the loss or expense was incurred or finished being incurred.*

31. I go on to consider whether the Appellant's claim for compensation made on 19 January 2018 complied with regulation 14(5)(b). The claimant they are made clearly refers to him having *suffered loss as a consequence of the listing of the property as an Asset of Community Value.* My clear understanding of the claim which was actually made is therefore that it was for losses flowing from the decision to list the property as an ACV. That decision had an effective date, which I consider further below.

32. The terms of the Appellant's claim have been refined in later correspondence, the grounds of appeal and the written submissions. In the Appellant's most recent submissions (dated 28 February 2019), his claim is described as a claim for losses attributable to the effect of the ACV listing in removing the Appellant's permitted development rights, which would have been exercised for were it not for the listing of the Property as an ACV. As I understand it, that description supports my view that the claimed losses flow from a particular event of a particular date.

33. The date of the listing was 29 June 2017. I note that there was a right to review of that decision and that the Council's decision to confirm the listing was sent to the Appellant under cover of a letter dated 5 October 2017. It is usual, where there is a statutory right of review, to take the review decision is the decision from which consequential time limits (such as the right of appeal to the Tribunal) start to run. It also seems reasonable to take the review decision as to ACV listing as the starting point for the requirements of regulation 14(5), as that is the date on which I understand the Council to have become *functus officio* under the Regulations.

34. The letter of 19 January 2018 was sent more than 13 weeks after 5 October 2017. If, as I read it, the Appellant' is claim was for losses incurred from the date of listing, in the claim made did not in my view give rise to an entitlement compensation because it did not comply with regulation 14(5)(b). If, as appears in later articulations of his case, the Appellant claimed compensation for losses which are continuing so long as the Property remains listed as an ACV, then the claim he made failed to comply with regulation 14(5)(b) for another reason, which is that the losses had not finished being incurred at the date of the claim.

35. For all these reasons, my ruling is that the Appellant did not make a valid claim for compensation under the Regulations on 19 January 2018. I therefore decide the preliminary issue on the basis that the Respondent is not liable to pay compensation to the Appellant in this case. Determining the preliminary issue in this way means that this appeal may not proceed to a final determination of the remaining issues.

36. In the circumstances, I have not found it necessary to decide whether the Appellant's claims are a type which fans an entitlement compensation under the Regulations or how to approach the question of compensation where the losses may be said to arise from multiple contributing factors. I have also not decided the matters raised by the parties in final submissions, which strayed a long way from their pleaded cases. It might be helpful if I explain here that this statutory Tribunal has no supervisory jurisdiction and may not determine an appeal with reference to public law concepts such as legitimate expectation. See *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)."

Grounds of Appeal

35. The grounds of appeal on which Judge McKenna gave the appellant permission to appeal were as follows:

(a) There is no requirement that continuing losses have "finished being incurred" in order for a valid claim to be made. On the premise that the Appellant's alleged loss was a continuing loss, the claim was therefore not premature.

(b) On the premise that the alleged loss was a once-and-for-all loss, the date of the review decision is not the starting point of the reg. 14(5)(b) thirteen-week period. The proper date would be the end of the time for appealing (at the earliest).

(c) The Tribunal does have jurisdiction to consider whether a legitimate expectation can have the effect of extending time for bringing a claim.

36. I will discuss each of those grounds in greater detail below but, in summary, I have decided:

(a) The Appellant's loss was not a continuing loss. I therefore do not need to decide whether continuing losses must have finished being incurred before a valid claim for compensation can be made in respect of them and I decline to do so.

(b) I agree that the date of the listing review decision is not the starting point of the thirteen week period, but neither is the proper date the expiry of the period within which the Appellant could have appealed against the listing review decision under regulation 11 of the Regulations. Rather, the thirteen-week period begins on the date on which the loss was incurred which, in this case, was the date of listing.

(c) I agree that the First-tier Tribunal has power to consider arguments based on the doctrine of legitimate expectation. However, that doctrine does not assist the appellant in this case because a relevant authority has no power or discretion to pay compensation on a claim that is made after that thirteen-week period has expired.

Discussion

Is a consequential diminution in value of a listed property a valid head of compensation?

37. This is an issue that Judge McKenna did not feel that she needed to deal with, given her conclusions on regulation 14(5)(b). However, I view it as being logically prior to what I need to decide. If the Appellant cannot as a matter of law be entitled to compensation for any diminution in the value of the Henry Jenkins as a result of the listing, then discussion of whether a claim for such compensation was made within thirteen weeks of the loss being incurred becomes academic.

38. My decision to decide the issue is also influenced by the fact that there is conflicting case law on the point in the First-tier Tribunal which—even though none of the decisions creates a precedent—potentially causes uncertainty for local authorities and landowners. I bear in mind that the Chamber President of the GRC has asked for guidance from the Upper Tribunal on the issues that arise in this area (albeit not this issue specifically) and that one of the functions of the Upper Tribunal is to give guidance to the First-tier Tribunal.

39. In those circumstances, it is only necessary for me to say that, as was accepted by counsel for both parties, such a diminution in value is in principle a valid head of compensation. There may be difficult issues as to quantum, and possibly also as to causation, but the law permits an owner or former owner of listed land to seek to establish that the requirements of regulation 14 are met in relation to any such diminution: it does not require a claim for diminution in value to be rejected at the threshold as being outside the scope of the regulation.

40. As to why that is so, I respectfully agree with the reasoning of Tribunal Judge Simon Bird QC at paragraphs 87-102 of his decision in the First-tier Tribunal in *St John Ambulance v Teignbridge District Council* [2018] UKFTT CR-2018-0003 (GRC), [2019] CLY 1764 and do not wish to add to what was said there.

Was the appellant's loss continuing or once-and-for-all?

41. It was a once-and-for-all loss.

42. It is common ground that listing a property as an ACV is capable of giving rise to losses of both types: the issue between the parties is which type of loss has been incurred in this particular case.

43. I am therefore only concerned with that particular loss, namely a diminution in the value of the Henry Jenkins and loss of profits as a result of being unable to exercise permitted development rights. I respectfully agree with Judge McKenna that the appellant lost the benefit of those rights on 29 June 2017 when the Henry Jenkins was listed and that the loss for which compensation was subsequently claimed was incurred on that day.

44. For the appellant, Mr Wills makes three arguments on this point.

45. First he argues, with the support of paragraph 5.136 of *Assets of Community Value: Law and Practice*, by Simon Adamyk (2017, Wildy Simmonds and Hill), that where the loss is caused by the actual listing of the land as an ACV the time period continues to run during the whole time that the land remains listed "because the cause

of the alleged loss is not the initial act of listing but rather the continued status of the land as an ACV as a result of its listing". Mr Wills adds that it does not follow from the fact that the appellant's losses arose as a consequence of the listing that they were incurred when the listing occurred. An ACV listing, he says, is an ongoing and potentially precarious status that deprives a landowner of the ability to implement a planning permission for an ongoing but temporary period. The initial listing was causative of the loss but the loss did not finish being incurred until the listing finished, or at the very earliest, the date on which the appellant's planning permission would have lapsed if there had been no listing (which, on the facts of this case, would have been on 12 March 2018). He reminds me that in *Whitehead v Tunbridge Wells BC* CR/2017/0002, Judge Peter Lane (as he then was) held that as long as one loss or expense has not finished being incurred, then a claimant is not time-barred by reason only of the fact that a particular head of loss or expense was incurred earlier.

46. Second, Mr Wills draws my attention to the considerable inconvenience of holding that a claim for compensation for such losses must be made within 13 weeks of the listing decision and that such a limit would be uniquely short. It would mean that the period for claiming compensation expires before the time limit for the local authority to carry out a listing review.

47. Third, Mr Wills submits that as a matter of statutory interpretation, restrictions in statutes which deprive landowners of property rights should be construed narrowly.

48. The answer to the second and third submissions is that regulation 14(5)(b) says what it says, namely that the claim for compensation must be made "before the end of thirteen weeks after the loss or expense was incurred or (as the case may be) finished being incurred".

49. As to the second submission, even if that thirteen-week limit is uniquely short and causes inconvenience, it is the limit the legislator has chosen to impose. The examples of longer time limits in Mr Wills skeleton argument emphasise this. The legislator had no shortage of longer time-limits to choose from and the imposition of one that was uniquely short must be taken to have been deliberate.

50. As to the third submission, the words used are clear and, in my judgment, there is no ambiguity to be resolved by principles of statutory interpretation.

51. Unfortunately my reasons for rejecting the first submission cannot be explained quite so briefly.

52. I begin by accepting that it does not follow from the fact that the appellant's losses arose as a consequence of the listing, that they were incurred when the listing occurred.

53. However, the question is not whether it is possible for losses arising from the listing to be incurred after the listing: the losses specified in regulation 14(5)(3)(b) demonstrate that it is. Rather the question is when the particular losses that are claimed in this case were incurred.

54. Those claimed losses are set out in the valuation report referred to by Judge McKenna at paragraph 20 of her decision (see paragraph 33 above). The report is dated 14 December 2017. The calculation of the figure of £711,000 claimed by the appellant is as follows (page 9 of the report):

Higher range[2]	
Value of property for residential conversion	£490,000
Value subject to ACV	£100,000
Loss in property value due to ACV	£390,000
Loss to owner of developers profit	£320,709
Total loss to owner attributable to ACV	£710,709
Say	**£711,000**

55. The reasoning underlying those heads of loss is set out in paragraphs 12.1–12.13 of the report. In particular, having explained why "market value" was the most appropriate basis for valuation, and set out the nationally and internationally accepted definition of that phrase, Section 12 of the report continues:

> "7. One practical effect of Listing is that the owner's right to dispose of the property is restricted.
>
> 8. Briefly this [*i.e.*, Listing] requires the owner to notify the local authority of an intended sale, with vacant protection, which constitutes a "relevant disposal" i.e. a sale of the freehold with vacant possession. Local interest groups then have 6 weeks to register their interest. If they do so there is a moratorium period of 6 months. After 6 months the owner is free to sell to whoever he wants. The price is not restricted. No further moratorium period can be imposed within 18 months, i.e. the "protected period".
>
> 9. Another practical effect, in this case, is that permitted development rights for the property were lost upon listing. …

[2] The report also contains a figure of £577,000 calculated on a similar basis but on a lower range of values. Perhaps unsurprisingly, the appellant decided to claim the higher figure.

> 10. The following two [*sic*] provisions have particular relevance to the issue of valuation and a claim for compensation.
>
> i. The provisions do not restrict in any way who the owner of a listed asset can sell their property to, or at what price. CRTB advice 2.19.
>
> ii. "… the fact that the site is listed may affect planning decisions – it is open to the Local Planning Authority to decide whether listing is a material consideration if an application for change of use is submitted". CRTB advice 2. 20.
>
> iii. The removal of permitted development rights, under the GDO, which the owner would otherwise have exercised, in order to de-risk a subsequent planning application to change the use to residential.
>
> 11. The elements of these regulations which give rise to a claim for compensation are;
>
> a. The Local Planning Authority can decide the Listing is a material consideration when considering a change in use.
>
> b. The potential effect on a sale resulting from either a 6 week or a 6 month delay.
>
> c. The removal of permitted development rights.
>
> 12. The implication of a and c is that the LPA can prevent a property from being converted to it's [*sic*] optimum commercial use.
>
> 13. The loss to the owner is therefore the difference in value of the property without an ACV Listing and the value of with the Listing plus any loss of profit."

Section 13 of the report, which follows, explains how values have been assigned to each of those two heads of loss.

56. In my judgment, if the first head of loss is "the difference in value of the property without an ACV Listing and the value with the Listing", then the loss must have been incurred when the listing took place. I cannot see that the contrary is even arguable. I accept that some types of loss that are caused by a listing may not be incurred until after it has taken place, but this loss is not one of them.

57. The second head of loss is not quite so straightforward. The loss of profit claimed here is not the type of ongoing loss which continues to accrue on each day on which (for example) a claimant is prevented from trading, or is forced to trade under disadvantageous circumstances. Rather what is claimed is compensation for the speculative loss of a future profit which (it is said) would have been realised had the appellant been successful in redeveloping the Henry Jenkins for residential use. That loss is speculative because—even if the appellant had been successful in de-risking the necessary planning application—that planning application might still have been unsuccessful, or may not have succeeded to the extent assumed in the report. What is really being claimed is therefore compensation for the loss of a chance. Such a claim is necessarily for a one-off capital sum. I agree with Judge McKenna that the second head of loss was also incurred when the Henry Jenkins was listed.

58. Those conclusions can be tested by a simple thought experiment. Suppose the contrary were true and that the appellant's losses were not incurred when the Henry Jenkins was listed. If that were the case, it would necessarily follow that—had it been practicable for the appellant to make a claim for compensation on the day of listing—such claim would have been premature. That conclusion is obviously incorrect and the premise must therefore be false.

59. That, however, is not the end of the matter. Even though the two heads of loss claimed by the appellant were *first* incurred when the Henry Jenkins was listed, did they *continue* to be incurred after that date so that they "finished being incurred" on a later date for the purposes of regulation 14(5)(b)?

60. In my judgment, they did not. I accept Ms Stockley's submission that for a loss to be continuing—so that in the future it can sensibly be said to have "finished being incurred"—it must continue to accrue over time. Examples would be loss of trading profits, or earnings, or rent, or continuing expenses. Such a loss will usually be capable of being expressed as continuing at a daily rate, or some other rate referable to a continuing period. Where, as here, the losses do not continue to *accrue* in that sense, they are not continuing losses merely because they continue to *exist*.

61. I am strengthened in that conclusion by the wording of regulation 14(5)(b) itself which expressly contemplates two categories of losses and expenses. The first category contains those that are incurred on a single occasion and the second those that are continuing but will eventually "finish being incurred".

62. If a loss or expense is to be regarded as falling into the second category merely because it continues to exist on the day after it was first incurred, then it is difficult to imagine any loss or expense that will fall into the first category. It will be rare for a loss or expense to cease to exist on the very day it was incurred.

63. Further, if a loss is to be regarded as continuing to be incurred merely because it continues to exist, then there is the possibility that it may never finish being incurred. The circumstances of the present case provide an example. The losses claimed by the appellant were incurred as a result of the loss of his permitted development rights on the listing of the Henry Jenkins and will continue to exist until those rights are restored. Absent a change in legislation, that will never happen. Again, I accept Ms Stockley's submission on this point. It would accordingly follow that the thirteen-week period in regulation 14(5)(b) would never expire. And if—on which I express no view: see paragraph 36(a) above—Judge McKenna was correct to hold that no claim for compensation could be made until a continuing loss had finished being incurred, it would also follow that any claim made in respect of such a loss would always be premature.

64. In my judgment that analysis is not affected by the possibility that the Henry Jenkins might have been removed from the List before the deadline for the exercise of the appellant's permitted rights expired on 12 March 2018. A loss is sometimes recouped or reduced, but that does not mean it was never incurred in the first place. On the contrary, a loss that has not been incurred does not exist and cannot be recouped. If the Henry Jenkins had been removed from the list early enough to revive the appellant's permitted development rights, that would have gone to the quantum of compensation. It would not have meant that the appellant's loss continued to be incurred until the moment of removal.

65. For those reasons, I respectfully disagree with the views expressed in *Assets of Community Value: Law and Practice*: see paragraph 45 above. In particular, the distinction between the status of the land as an ACV and the initial act of listing is not in my judgment as clear cut as the learned author suggests. I can readily accept that it is the status of the land as an ACV that is the cause of the loss. But that status comes into existence as a result of the initial act of listing and the loss is fully incurred at the point of listing. The fact that the loss continues to exist thereafter does not mean that it finishes being incurred at some later date.

When did the thirteen-week period begin to run?

66. The learned judge decided that the time limit began to run from 5 October 2017, the date of the listing review decision. As noted in paragraph 34 above, she took the view that it is usual, where there is a statutory right of review, to take the review decision is the decision from which consequential time limits start to run and that—as the respondent became *functus officio* under the Regulations at the date of the listing review decision—it seemed reasonable to take that date as the starting point for the requirements of regulation 14(5).

67. Both parties submit that that is incorrect.

68. Ms Stockley submits that it is not consistent with the wording of the Regulations. Regulation 14(5)(b) says that in the case of a one-off loss, any claim for compensation must be made before the end of thirteen weeks after it was incurred and, for the reasons given above, the loss in this case was incurred when the Henry Jenkins was listed.

69. Mr Wills submits that if (as the appellant does not accept, but as I have held) the loss is a one-off loss, then Judge McKenna did not go far enough.

70. Given the wording of regulation 14(5)(b), the outcome that time begins to run from the listing review decision can only be correct on the basis that the loss is "incurred" on that date. That, in turn, can only be the case if the loss is regarded as being inchoate until a final decision is made on whether to list. As Mr Wills puts it "the loss has not yet crystallised because there is still the possibility of it being overturned".

71. Whether or not a listing decision is final does not depend on when the relevant authority becomes *functus officio* because regulation 11 provides a right of appeal to the First-tier Tribunal. On that analysis, it is submitted:

(a) the decision to list only ceased to be inchoate—or the loss only crystallised—when the appellant's time limit for appealing the listing decision expired on 2 November 2017, 28 days after the letter dated 5 October 2017 notifying him of the listing review decision,[3] and therefore

(b) the application for compensation on 19 January 2018 was made within the thirteen-week limit.

72. In his skeleton argument, Mr Wills submits that this is consistent with the approach adopted elsewhere in statutes relating to land. Specifically, he says:

> "65. This approach is consistent with the approach taken in another statutory context relating to land, namely s.64 of the Landlord and Tenant Act 1954. S. 64(1) provides that where a notice is served to terminate a business tenancy, and an application is made to Court for a new tenancy, the effect of the notice is to terminate the tenancy at the expiration of
>
> > "the period of three months beginning with the date on which the application is finally disposed of".
>
> 66. By s. 64(2) the application is only "finally disposed of" at:

[3] The 28-day time limit for appealing is established by rule 22(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

> "the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired"
>
> 67. So too in this statutory context it should be considered that the Appellant's challenge to the listing decision had not been finally disposed of until the time for appealing had lapsed."

73. I admire the ingenuity of the submission but I cannot accept it.

74. It assumes that Judge McKenna was correct to decide (implicitly) that the loss did not crystallise at the time of the original listing, and that she then fell into error by failing to follow the logic of that decision to its proper conclusion.

75. However, I respectfully consider that the learned judge was mistaken to conclude that the time limit ran from the date of the listing review decision. Rather, I accept Ms Stockley's submission that—at least in this case—the clear wording of regulation 14(5) provides for the thirteen-week limit to run from the original decision to list the Henry Jenkins. It may be that it would be more convenient if the ACV compensation scheme operated in the way that Judge McKenna decided—or in the way that Mr Wills submits—but in my judgment neither outcome can be reconciled with what regulation 14(5)(b) actually says.

76. Further, Mr Wills' reliance on the Landlord and Tenant Act 1954 proves too much. What section 64 of that Act demonstrates is that where a legislator wishes to achieve the outcome for which Mr Wills contends, express words are used.

77. It would have been straightforward for the legislator in this case to have provided that the time limit for applying for compensation was to run from the date on which the decision to list became final (or, if later, the date on which a continuing loss or expense finished being incurred) and then define the circumstances in which finality is achieved. The legislator did not choose to do that.

Legitimate expectation

78. It will be remembered that Judge McKenna declined to consider the appellant's arguments on legitimate expectation because:

> "this statutory Tribunal has no supervisory jurisdiction and may not determine an appeal with reference to public law concepts such as legitimate expectation"

It is common ground between the parties, and I agree, that the learned judge misdirected herself on this point. As Mr Wills put it, the First-tier Tribunal does not have jurisdiction to hear claims for judicial review, or to quash public law decisions but it does have power to determine questions of public law when it is necessary to do so in order to decide an appeal in respect of which the FTT does have jurisdiction. If authority is needed for that proposition, it can be found in *Chief Adjudication Officer v Foster* [1993] AC 754 (also reported as R(IS) 22/93).

79. I have therefore considered the issue, which arises because, during correspondence between the appellant and the respondent's Scrutiny, Governance and Risk Manager, the latter sent the former an email that included a statement that a claim for compensation could be made until 4 April 2018.

80. Mr Wills submits that that representation gave rise to a legitimate expectation, on the part of the appellant, that any compensation claim submitted by him "could be made until 4 April 2018" and would not be rejected on the basis of time if made before then.

81. The respondent submits that putting the matter as I have just done is to take the statement out of context; that the statement must be read as qualified by reference to the questions that the appellant had asked and the other statements made in the same email; and that, so read, no legitimate expectation can have arisen.

82. I do not need to resolve that issue because I am prepared to assume in the appellant's favour—but without deciding—that a legitimate expectation did arise that a claim for compensation made on or before 4 April 2018 would be in time.

83. Even making that assumption, the doctrine of legitimate expectation does not assist the appellant because—as is common ground between the parties—a legitimate expectation cannot prevail if legislation prevents the authority that raised the expectation from satisfying it: see *R (Albert Court Residents' Association) v Westminster City Council* [2011] EWCA Civ 430 at [34] and *R v Staffordshire Moorlands District Council, ex p Bartlam* (1999) 77 P & CR 210.

84. In this case, on the law as I have held it to be, the time limit for applying for compensation expired on 21 September 2017. As a matter of substantive law, as opposed to mere procedure, a claim for compensation made after that date could not succeed in any circumstances because it was no longer possible to satisfy the conditions of entitlement to compensation. The respondent had no legal power to pay compensation under such a claim and—the assumed legitimate expectation notwithstanding—it cannot have been an abuse of power for it to refuse to do so.

85. I have reached that conclusion for the following reasons.

86. To begin with a short and distinct point, paragraph 2 of Schedule 2 to the Regulations (see paragraph 10 above) demonstrates that where the Legislator intends to confer power on a relevant authority to extend a time limit in the Regulations, the Regulations say so in as many words. There is no express power to extend the thirteen-week period in regulation 14(5)(b).

87. The time limit in paragraph 2 of Schedule 2 is purely procedural. The time limit in regulation 14(5)(b) is not like that: it is not merely a procedural requirement that can be waived or extended.

88. The latter regulation is made under the power conferred by section 99(2)(b) of the Act, which empowers the appropriate authority to provide for any entitlement conferred by the regulations to be "subject to conditions, including conditions as to time limits". There is no other power to impose time limits in respect of compensation claims.

89. It follows that thirteen-week time limit in regulation 14(5)(b) must take effect as a "condition" to which "any entitlement conferred by the regulations" is "subject". I accept Ms Stockley's submission to that effect.

90. In short, compliance with the thirteen-week time limit is a substantive condition of entitlement. A claimant who does not comply with it fails to satisfy the conditions of entitlement to compensation in the same way as a person who is not an "owner or former owner of listed land or of previously listed land" within regulation 14(1) or who has not "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" within regulation 14(2).

91. Viewed in that light, the absence of an express power for the responsible authority to extend the time limit is unsurprising. It would not be usual for a local authority administering a statutory entitlement to be permitted to change the conditions that had to be satisfied for that entitlement to arise.

92. Mr Wills referred me to a significant amount of authority on this issue but, in my judgment, the only case to which I need to refer in detail is *R v Soneji and another* [2005] UKHL 49.

93. The facts and legislative background in *Soneji* were very different from those in the present case. In summary, section 71 of the Criminal Justice Act 1988 required a criminal court that convicted an offender of certain specified offences to determine whether the offender had benefited from any relevant criminal conduct and, if so, to determine the amount to be recovered and make a confiscation order, "before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct". Under section 72A, a court that considered it needed more

information had power to postpone making those determinations. However, in the absence of exceptional circumstances, section 72A(3) provided that the court "shall not specify a [postponement] period … which …exceeds six months beginning with the date of conviction."

94. The defendants in *Soneji*, pleaded guilty in April 2000 and were sentenced in August 2000 but no confiscation order was made until January 2002. The question therefore arose whether the court retained jurisdiction to make those orders, given that more than six months had elapsed since the date of conviction. The Court of Appeal (Criminal Division) held that it did not and quashed the orders.

95. On appeal to the House of Lords, Lord Steyn (with whom Lord Carswell and Lord Brown of Eaton-under-Heywood expressly agreed) noted (at [14]) that "[a] recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply". His Lordship then noted (at [15]) that earlier case law which had solved that problem by categorising the requirement imposed by Parliament as either "mandatory" or "directory", (the former leading to total invalidity), had been replaced by:

> "… the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament *ex hypothesi* did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament" (my emphasis).

Lord Steyn concluded (at [24]–[25]) that an objective appraisal of the intent which had to be imputed to Parliament pointed against total invalidity of the confiscation orders.

96. I have emphasised the words in the quotation immediately above because, in my judgment, they explain why this is not a *Soneji* case. Although Judge McKenna was technically correct to say that, in the Regulations, "there is no specified consequence of a failure to make a compensation claim in accordance with regulation 14(5)", that consequence is necessarily implicit in the words used by Parliament in section 99(2)(b) of the Act.

97. Section 99(2)(b) provides that any time limits for claiming compensation in regulations made under subsection (1) are to take effect as "conditions" to which "any entitlement conferred by the regulations" is to be subject.

98. The only possible consequence of a failure to comply with a condition to which entitlement is subject is that no entitlement arises.

99. This, therefore, is not a case in which Parliament can be said not to have considered the outcome that would ensue from non-compliance with the time limit, or in which it is necessary to impute an intention to Parliament that it did not in fact form.

100. It follows that the respondent had no power to pay compensation under a claim made outside the thirteen-week time limit. On the authority of the decisions noted at paragraph 83 above, no legitimate expectation that may have arisen on the part of the appellant can require the respondent to do something it has no legal power to do.

101. To the extent that the appellant's submissions are based on estoppel as opposed to legitimate expectation, I reject them for the same reason.

Conclusion

102. Therefore, although I do not agree with every step in the learned judge's reasoning, I respectfully agree with her conclusions:

(a) that the appellant's loss was a one-off loss;

(b) that it was incurred when the Henry Jenkins was listed as an ACV on 29 June 2017 and did not "finish being incurred" on any later date; so that

(c) the claim for compensation that was made on 19 January 2018 was not made within the thirteen-week period specified in regulation 14(5)(b) of the regulations; and that therefore

(d) the conditions of entitlement to compensation in regulation 14(5) are not satisfied and the appellant is not entitled to compensation.

In those circumstances, the First-tier Tribunal's decision contains no material error of law and I have refused this appeal.

Costs

103. In the event of it successfully responding to the appeal, the respondent seeks an order for its costs. However, under rule 10(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 he Upper Tribunal only has power to make an order in respect of

costs to the extent and in the circumstances that the First-tier Tribunal had such a power.

104. By rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the First-tier Tribunal only had power to make an order for costs in this case if it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.

105. I do not so consider and the respondent's application for costs is refused accordingly.

Signed (on the original)
on 15 October 2020

Richard Poynter
Judge of the Upper Tribunal