LANDMARK CHAMBERS

Mode and category of occupation

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Refresh 1: Statutory Scheme

Sch 6 para 2(1) LGFA 1988 – sets out legal framework for NDR valuation - the statutory or rating hypothesis to arrive at the "hypothetical rent" – ***Poplar v. Roberts*** [1922] 2 AC 93 @ p104.

In the case of an alteration to a compiled list, the matters in sch 6 para 2(7) which "to be taken to be as they are assumed to be on the material day" include the "mode or category of occupation of hereditament" – the MCO

Refresh 2: Essential legal principles

1. The RV is the *hypothetical* rent arrived at under the statutory hypothesis: ***Hewitt v. Telereal Trillium*** [2019] UKSC 23 @ [32] per Lord Carnwath

2. In establishing that hypothetical rent, the principle of *reality* applies

3. For present purposes that means that: (a) the hereditament is to be valued as it in fact existed at the material day: ***Monk v Newbigin*** [2017] UKSC 14 [2017] 1 WLR 851; and (b) on the basis that it could be occupied only for a purpose within the same MCO as that for which it was in fact occupied on the MD: ***Willliams (VO) v Scottish & Newcastle*** *[2001] EWCA Civ 185*

4. Further "human realities" such as the demolition order in ***Ash Bros*** [1969] 2 AC 366 are taken into account in so far as they are *essential to the hereditament* itself but not otherwise. Contractual obligations which are not essential to the hereditament are ignored - because of 1. above

Refresh 3: Scottish & Newcastle – "the key authority"

RV of two units in shopping centre; one a pub the other a pub and licensed café

RV based on shop MCO would have been much higher than if valued as pubs.

Confirmed that the reality principle concerned not just the physical state but also the use

Had to decide between two previous authorities: *Fir Mill* and *Midland Bank*. The latter had held that MCO covered "all alternative uses to which the hereditament in its existing [physical] state could be put in the real world and which would be in the mind of competing bidders are to be taken as in the same MCO".

That approach was rejected in favour of the approach in *Fir Mill*: "the MCO [is the same as] that of the actual occupier….a shop as a shop but not as any particular kind of shop; a factory as a factory, but not as an particular kind of factory" – NB **general categories of use but the actual use not a possible alternative use.**

MCO - Summary of Legal Principles

From S&N (and other cases):

(1) in determining to what MCO a particular use belongs it is the principal characteristics of the actual existing use to which regard must be had

(2) focus is on the hereditament and not the business model of the occupier (e.g. only uses half/is inefficient – that is function of the business and not of the hereditament)

(3) broad categories are generally appropriate – shops, offices, factories, museum as a museum (***Hughes(VO) v Exeter CC*** [2020] UKUT 0007 (LC) or football club as a football club not a premier club ***(Wigan FC v Cox (VO)*** [2019] UKUT 0389 (LC) –*"football is football – the league is not a MCO"*– case law generally deprecates sub-divisions of the categories.

(4) some uses may not fall into those broad categories and may be regarded as sui generis. A central issue is when this applies.

Scope for dispute?

So far, so straightforward.

But classification of MCO can be highly value significant and is the subject of fairly regular litigation.

Fundamental issues are: (1) whether and when to sub-divide broad categories; and (2) how and on what principled basis to treat a hereditament as falling outside the broad categories and being sui generis.

Two recent cases shine a spotlight on these issues and in a nutshell show that a broad approach to MCO is required and that the focus on the precise use at the MD only gets RP so far. There has to be something intrinsic to the hereditament which takes it out of its former MCO – as we shall see mothballing or temporary occupation by Guardians is not enough.

SSE V MOORE (VO): Keadby Power Station (1)

PS in Keadby, Scunthorpe – one of first generation CCGT PS; relatively inefficient and therefore first to be switched off when economic conditions worsened.

Mar – Sept 13 Works carried out to mothball it or (put another way) "to preserve the power station for electricity generation pending the resumption of this activity"

Late 2014 process of bringing it back into use commenced. Major exercise.

Question was what was the MCO from the date the mothballing was effective.

Experts had explained the process of mothballing to preserve future generation potential by preventing or reducing deterioration when out of service [19] – two means of mothball long (12months +) and short term (3 – 12 months) with differing requirements.

Here common ground that mothballed because of adverse market conditions [31].

Keadby PS: The Argument

Issue was what was the MCO of a PS which was not used, and because of mothballing works physically incapable of being used, as a PS for electricity generation

RP contended that MCC to a mothballed PS (for preservation). The reality principle required a separate focus on the use limb from the physical limb - just because it looked like a PS did not mean it was whilst MB. The MCO was as at the MD (namely MB PS) even if (per S&N) an incoming tenant would instantly change the use to a more lucrative use (ie bring it into use/"unmothball" it) and the repairing assumption could not be used to vary the MCO – the MCO came first.

VO contended that no change in the purpose for which the PS was used - namely generation of electricity from time to time depending on economic conditions. MB fully reversible and were reversed depending on market conditions. No sub-category of PS – namely mothballed PS

Keadby PS: LC Reasoning (1)

Legal propositions of RP largely accepted but argument rejected essentially on the "broad category" point from *Fir Mill* endorsed in *S&N*.

- factory as factory – why not PS as PS?

- mothballing did not occur because awaiting demolition or conversion but for economic reasons; PS remained available throughout.

- with long term MB, the PS did not, on the facts, cease to occupied for the purposes of power generation and instead become occupied for the purpose of long term preservation.

- any sub-division of broad category must be based on real difference in use [94]

- it was not justified to create a new sub-category – the focus was the "broad purpose to which the relevant property may be put consistent with its actual occupation and without requiring more than minor works":[91]

Keadby PS: Reasoning (2)

All that had occurred was an economic decision to shut down the PS until market conditions improved.

If it had been closed down for the summer no new MCO. If short term MB, no new MCO. MB is part of the way in which older generation PSs operate

The same MCO or purpose persisted throughout – the generation of electricity from time to time as and when market conditions allowed

Thus this was just a feature of the operation of the PS – not its MCO. Just reflects the way the generating business operates. Goes to the way the particular business is run. S&N [71]

It would have been different if works were for decommissioning PS [95] – "doomed to demolition" – ***Dawkins v Ash; Monk*** [13] and ***UK Atomic Energy v. Highlands and Western Isles - nuclear decommissioning***

Keadby PS – Take Away Points

Questions of MCO are ultimately questions of fact not (really) law

Re-emphasis on the broad categories for MCO

Sub-categories deprecated - has to be a difference in kind [114]

Affirmation of the fundamental distinction between the way a particular business operates and the MCO of the hereditament

Economic decisions (as the warehouse closure in ***R v. Melladew*** [1907]) do not impact MCO

We can then see how those issues play out in the second case - Ludgate

Ludgate House II: Essential Facts

Vacant office block awaiting demolition (so one might think falls into the separate category referred to in SSE).

Significant number of Guardians granted licences to occupy as their homes their own “rooms" within the block with communal use of common parts.

Only had short term *licences* (not tenancies) terminable on 30 days notice but use continued for a prolonged (22 month)period pending demolition.

License required occupation as home most days and to be used as main residence in London.

There were only very minor works – it remained physically as an office block with only moveable showers added to cloakrooms.

The use being rolled out at MD was however clearly a G scheme.

Ludgate: The Litigation and the remaining issue

This was the second LC case on the same facts – following CA judgment on the question as to who was in RO and, thus, what was the hereditament. *The whole was single hereditament* in the *RO* of the landowner not the Guardians.

Wide ranging issues remained in case but ultimately, for our purposes, came down to one issue - what was the MCO?

Was it residential for the Guardians (RP Argument) or an office block with temporary Guardian use (the VO)?

Came before LC shortly before Keadby PS and a lot of the same reasoning is applied

Temporary uses and MCO

Given that:

(1) the MCO is to be taken as at the MD;

(2) the physical nature of the hereditament and the use of it are two separate limbs of the reality principle;

(3) there is an opportunity to undertake a MCC whenever there is a further change of use

it might be thought that the focus must be only on the *actual* use at the MD. Not the physical nature of the building or what the premises could be used for *(S&N* rejection of Midland Bank.

That was our argument in Ludgate and it was rejected

Ludgate reasoning (1):

The LC accepted that the establishment of the MCO cannot be affected by what a hypothetical tenant might do or what other uses might generate a higher RV [121]. Use was separate from physical state.

However, the accepted legal framework hit “the reality of the present case". Even though the use at the MD was as a scheme of property guardianship looking at it just in such terms “involves disregarding a significant chunk of the reality on the MD" [124]– picking and choosing the reality to be taken into account.

At MD, the premises comprised an office building with a temporary G scheme being rolled out. There was no material change in physical state of building (Limb 1), The units occupied by Gs were not “residential" even though their **use** was residential [127].

Ludgate Reasoning (2)

RP's argument imposed an unjustified limitation on sch 6 para 2(7)(b)

Given that the G use was "**strictly temporary" that was a part of the reality of use** which cannot be ignored [128]

Reasoning turned on:

> (1)it was very difficult to separate out the concept of office use from use of an office building for a temporary G scheme [130].
>
> (2) The use was a particular business choice of the owner [131] - "there is a distinction to be drawn between the category of business for which a building is occupied (MCO) and the way a business is run from the building.

Can be seen that widens the approach from just the actual use at the MD – recap sch 6 para 2(7)(b)

The G scheme was just a choice (like the MB in SSE and the warehouse approach in Melladrew)

The temporary nature of the licences could be taken into account as simply part of the reality.

The result was that the MCO was an office building in temporary (28-day notice) G use.

The Overall Result

1. MCO is a fundamental starting point to valuation and must be established before valuation and before considering repairing obligations
2. Broad categories are to be adopted
3. Economic reasons for change in way business uses premises do not change MCO
4. The key question is always what is the purpose of the occupation
5. Preservation of PS or office building to protect its potential is not a separate category
6. Temporary uses may not constitute a new MCO.
7. The latter point seems most controversial – what this space…

Thank you

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