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Welcome to Landmark Chambers'

Annual Rating Conference 2023

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Introductory remarks

Jenny Wigley KC

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Morning sessions Chaired by Jenny Wigley KC

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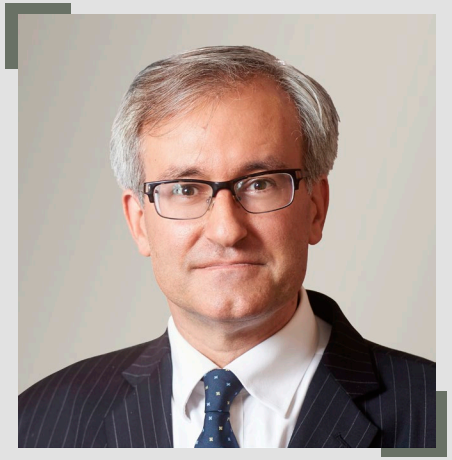
What recent Supreme Court decisions tell us about interpreting rating legislation



Dan Kolinsky KC

The Supreme Court cases

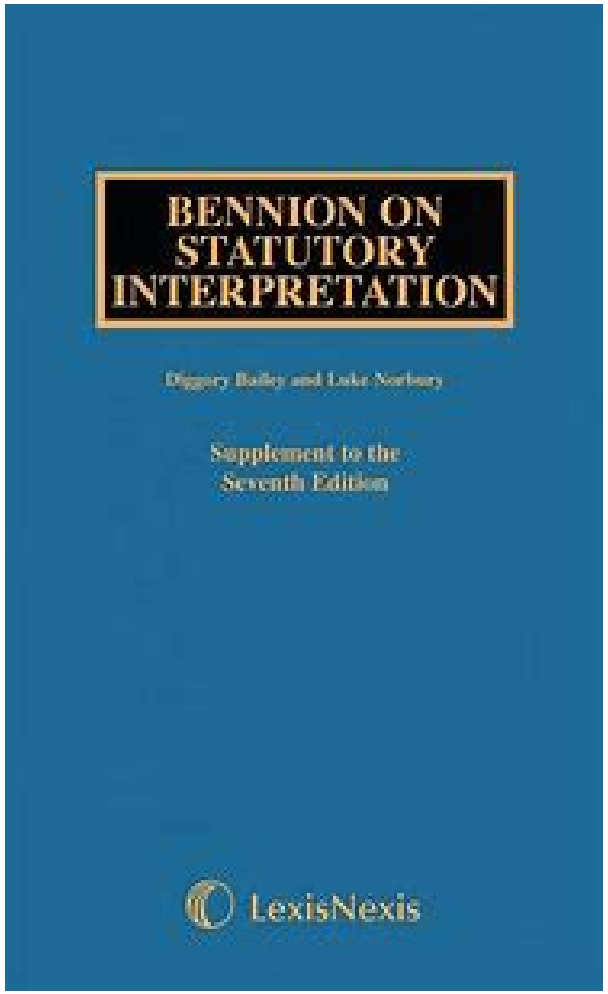
- *Hurstwood Properties v Rossendale BC* [2021] UKSC 16 (14.5.21)

  Lord Reed, Lord Hodge, Lord Briggs, Lord Kitchin, Lord Leggatt

  Judgment written by Lord Briggs and Lord Leggatt

- *London Borough of Merton v Nuffield Health* [2023] UKSC 18 (7.6.23)
- Lord Briggs, Lord Kitchin, Lord Sales, Lord Hamblen and Lord Leggatt
- Judgment written by Lord Briggs and Lord Sales

Interpreting legislation



Interpretation of legislation – a crash course in 2 slides

- The key task in statutory construction is to understand the words used in context.
- An important part of that context is to understand what mischief the statute is designed to address and how it does so.
- The “mischief rule “derives from *Heydon*’s case (1584) 76 ER 637.

"First, what was the common law before the making of the Act. Second, what was the mischief and defect for which the common law did not provide. Third, what remedy hath the Parliament resolved and appointed to cure the disease of the commonwealth. Fourth, what I s the true reason of the remedy."

Then, said the Barons of Exchequer, having considered all these points, the judges would do all in their power to give effect to the will of Parliament with regard to the cases that, thereafter, came before them for hearing.

Interpretation of legislation (2)

The mischief rule finds modern expression in Lord Bingham's speech in *R (Quintavelle) v Secretary of State for Health* [2003] 2 AC 687 at para 8 (which is cited by the Supreme Court in Rossendale at para 10).

"Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

Hurstwood Properties v Rossendale BC [2021] UKSC 16

- Rates avoidance scheme involving the grant of a short lease to a special purpose vehicle (SPV)
- SPV dissolved/put into liquidation
- reg 4(k) of NDR (Unocc Prop) (Eng) Regs 2008 excludes from unoccupied rates property "whose owner is a company subject to a winding up order made under the Insolvency Act 1986 or which is being wound up under that Act"
- Scheme relies on/benefits from "administrative inertia" - anticipated long process until lease disclaimed by crown

BA challenge to scheme

BA challenge that SPV is owner under 1988 Act because :-

- that the lease to the SPV was ineffective to make the SPV the “owner” of the unoccupied property within the meaning of the applicable legislation (applying the Ramsay principle);

BA claim struck out in HC and strike out upheld in CA.

- But – Supreme Court allows appeal and decides that claim should not be struck out.

Ramsay principle

- *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300

- Transactions or elements of transactions which have no business purpose, and which have as their sole aim the avoidance of tax, should be ignored.

- [established approach in various tax contexts; but pre SC had made little impression in NDR. In NDR (thus far) the focus was on legal effect not business purpose]

Supreme Court reasoning

Context

1. Common ground that SPVs not shams and entitled to possession under property law (see [36]).

2. Dissolution and liquidation of SPV did not have any business or other real world purpose – just rates avoidance.

3. Scheme relied on local authorities not finding out about dissolution until long after it occurred. SC considered it abuse of process, unlawful conduct by directors and as found by CA in PAG abuse of insolvency legislation.

Supreme Court reasoning

Ramsay doctrine is principle of statutory interpretation ("based on the modern purposive approach to interpretation of legislation of all kinds" [9]).

Imperative for the court is to read the legislation in its historic context. So [15]:-

- (a) understand the class of facts intended to be caught by the exemption by interpreting the relevant part of the statute in the whole of the statutory scheme and its context.
- (b) Decide whether relevant facts looked at realistically and in the round fall within the class
- Court must avoid tunnel vision [16]

Supreme Court reasoning – approach to s.65(1)

- So SPV did not have entitlement to possession for the purpose of the 1988 Act
- The entitlement to possession instead remained with the landlord as they had the practical ability to decide whether to leave the property unoccupied and had not passed that real entitlement to the SPVs by the leases
- Properly construed s.65(1) of the 1988 Act is concerned with a real and practical entitlement which includes the ability either to occupy the property or to put someone else in occupation. This achieves coherence between the language of the statute and its purpose in identifying the owner for rating purposes

Supreme Court - conclusions

- SC therefore concludes claim should not have been struck out. There is a triable issue as to whether the respondent landlords remained liable for business rates

Reflections and potential implications

- SC reasoning is informed by a deep dive into the historic background of unoccupied rates (paras 20-27)
- Purposive (Ramsay) approach deployed to find that person entitled to possession in law is not person entitled to possession in practice
- That is a big change of emphasis (from legal status to practical ability) in approach to liability for unoccupied rates
- But SC say [61]

> We would, however, reject the criticism that the test is insufficiently certain. In any ordinary case the test will easily be satisfied by identifying the person who is entitled to possession as matter of the law of real property. The fact that the law of real property may not prove a reliable guide in an unusual case of the present kind is not in our view an objection to our preferred interpretation. The value of legal certainty does not extend to construing legislation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose.

Critique

- Supreme Court identify the underlying purpose of unoccupied rates
- adopt an approach to interpretation which gives effect to that underlying purpose
- the way the case was decided did not bear much resemblance to the way that it was argued
- legal certainty is (explicitly) demoted in preference to practical utility
- No consideration given to the implications of this approach for the rest of NRD and the fact that it runs against the established approach to occupied rates (in Makro etc)

What about this line of cases?

Gage v Wren (1902) 67 JP 32 at 33: "I think that a great deal too much is said about people evading such liabilities. If persons are not within the charging Act, then they do not evade the liabilities; they are simply not liable for them".

Marko – para 56

"Ms Wigley submitted that such an outcome means that a scheme to avoid paying rates for six months has succeeded. It appears that such a consideration may have had some influence on the district judge. She further submitted that such an outcome could not have been foreseen when the 2008 reforms were made. Insofar as that may be relevant I cannot accept that latter submission. It has been recognised for a considerable amount of time that ratepayers or potential ratepayers can and do organise their affairs as to avoid paying rates. In Gage, Alverstone CJ dealt with this question and stated that if the ratepayer thought that she would not be within the charging act by going out of possession, she was quite entitled to do so. In my judgment the same applies to going in and then out of occupation. It has often been emphasised that the court is not a court of morals, but of law. If the outcome of this case is seen as unacceptable then it is for the legislature to determine whether further reform is needed".

What about this line of cases? (2)

[Not mentioned!]

Merton v Nuffield Health [2023] UKSC 18

- Important case on mandatory charity relief and how the charitable public benefit requirement applies for rating relief
- Nuffield health are a registered health charity who operate a gym at Merton Abbey alongside other health and fitness related sites
- Merton refuse mandatory charitable relief
- HC find that Nuffield entitled to mandatory charitable relief
- CA split 2:1 on entitlement to relief; majority find that entitled to relief but all say that Nuffield Health would not have met public benefit test if applicable to the hereditament only (due to level of fees charged at Merton Abbey)

Nuffield Health (2)

- Merton contend that the requirement that the hereditament be used for charitable purposes means that the use of the hereditament in question, considered as a separate use from any other hereditament by the charity, must qualify on its own as a use for charitable purposes [45]
- Merton's argument in SC relied on *Rossendale* and invited the SC to give effect to the purpose of ensuring that uses of hereditaments that are for public benefit to get mandatory charitable relief

Nuffield Health (3)

- Nuffield Health say requirement that the hereditament be used for charitable purposes means that it must be a place (and, in the case of a multi-site charity, therefore, one of the places) where the charitable purpose or purposes of that charity are fulfilled [or where the activity of the charity is sufficiently connected with the fulfilment of those charitable purposes that it qualified under the tests established in Glasgow and Oxfam cases] [46]

Nuffield Health (4)

- Supreme Court undertakes careful review of charity law and the historical background to the rating provisions
- Explores the purpose of mandatory charitable relief by reference to the Pritchard Report (1959) - which lead to s.11 of the Rating and Valuation Act 1961 - which emphasised the need for simplicity, certainty and economy of administration and alignment of rating relief with charity law [19]
- Clear as a matter of charity law – if public benefit requirement is met then all of the activities are for public benefit [26-29] – see ISC at 195:
- "in the case of a school which is a charity and is operating in accordance with the public interest, the provision of education to all of its students, including those who pay full fees is carried out as part of the public benefit requirement"

Nuffield Health (5)

- Clear as a matter of charity law that public benefit is judgment by reference to “the manner in which the body fulfils the relevant purpose or purposes overall, rather than whether it does so in any particular place where its activities are carried on” [30-31]
- SC look at purpose of mandatory charitable relief as introduced for occupied rates and do not consider that unoccupied rates provisions are useful as introduced later and serve different purposes [33-34]
- SC reject argument that mandatory relief is exception to be construed narrowly rather it is a “carefully calibrated relief provision…to fulfil a distinct policy objective as identified in the Pritchard Report” [38]

Nuffield Health (6)

- Activities at Merton Abbey gym were directly for the fulfilment of Nuffield's charitable purpose of promoting health through exercise, within the core sense of the term, without needing to rely on the extended sense laid down in Glasgow and Oxfam [44]
- S.43(6) should be tested by 2 stage enquiry.
- First whether ratepayer is charity or not
- If registered "that is the end of the first stage enquiry"; if unregistered – examine constitution and/or activities and purposes they served, looked at overall. Including an assessment whether the public benefit requirement is satisfied [49]

Nuffield Health (7)

- Second stage is whether the hereditament is being used for the (necessarily charitable) purposes of the charity, or used for other activities lawfully carried on by the charity which do not directly serve those purposes, in which case the close connection test applied in Glasgow and Oxfam may then need to be applied
- Second stage is factual and not a question of charity law – serves the statutory objective of providing a generally simple, predictable and consistent answer to the question whether a charity ratepayer should have relief from rates. "*It will not require the rating authority to don the cloak of the Charity Commission or the role of the Chancery judge to decide whether those purposes are charitable*"" [55]

Nuffield Health (7)

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Nuffield Health (8)

- Rejection of Merton's approach which would require the rating authority to conduct a "second (sort of) charity analysis, not on the actual facts, but on the counter-factual and usually unreal assumption that the hereditament was the only site upon which the charity was seeking to fulfil its purposes" [57]

- Parliament did not intend that counter-factual analysis. It intended the relevant analysis should proceed by reference to the general law of charity. That law assesses whether a body's purposes are charitable by looking at its purposes and activities overall, not on a site-by-site basis.

Nuffield Health (9)

- Nuffield gets relief because
- It is a registered charity
- Its essential purposes include the advancement, promotion and maintenance of health
- It fulfils those purposes in its gyms (amongst other places)
- Those purposes are irrebuttably presumed to be charitable, in all the places where they are carried on and, viewed overall, to satisfy the public benefit requirement
- It plainly uses the gym in direct fulfilment of its activities
- Even if poor are excluded from gym – (due to overall sufficient public benefit), all of its activities are charitable and for public benefit [63-4]

Nuffield Health (10) – implications

- Clear and welcome guidance on an approach which aligns approach to s.43(6) with
- charity law,
- the previous leading cases of *Glasgow* and *Oxfam*,
- the purpose of the relief as introduced

Gives clarity on public benefit and multi-site charities and makes relief easy to administer

- Leaves open approach to charitable relief in unoccupied cases [33-34]
- Leaves open assessment of public benefit (by reference to purposes and activities as a whole) in case of unregistered charities as part of stage 1 analysis [49]

Nuffield Health (11)– approach to interpretation

- Use of statutory history to explain problem that was being addressed and how it was being addressed
- Focus only on the position in occupied rates (due to history of provisions)

[extract from Nuffield's written case]

Unoccupied rates date back to 1966 and the provision contained in s.45A of the 1988 Act was added by the Rating (Empty Property) Act 2007. Thus the 1961 Act was introduced in a world before empty rates existed and the 1988 Act was originally enacted without s.45A. Unoccupied rates have a discrete policy context (as analysed in *Rossendale*).

- SC had rejected intervention attempts of City of London to put in issue the next in use provisions (in s.45A)

Rossendale and Nuffield – reflections

- Appreciation of historic context of legislation (and mischief which is being addressed) is critical in both cases (see also the role of history in *Iceland v Berry* (VO) [2018] UKSC 15 [11]-[25] – Shortt Committee; (1925),1925 Act, and 1927 Order, Wood Report)
- Different approach to certainty (yields to purposive approach in Rossendale; certainty was part of rationale for legislation in Nuffield)
- Separate discussion of occupied and unoccupied rates
- Focus in Rossendale on unoccupied rating regime (blind spot to implications for occupied rates?);
- Nuffield (conscious focus on occupied due to legislative history)

Key takeaways

- Purposive (contextual) approach to interpretation applies
- History matters in rating cases (identify the mischief and how statute addresses)
- Occupied and unoccupied rates may be analysed differently
- Facts are critical to framing the legal points in cases (as Rossendale shows)
- Purposive approach may trump legal certainty in hard/unattractive cases (ditto)
- Interpretation is always grounded in the specific context of the case at issue – the analysis from case A cannot necessarily be lifted and applied to case B

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Collecting and enforcing rates in an economic downturn

Jacqueline Lean

Evie Barden

What will we cover?

(1) Potential constraints on a billing authority's ability to collect or enforce liability for business rates in various insolvency scenarios

(2) Some particular issues which may arise with CVAs, & practical considerations for tenants and landlords

Context

- Registered company insolvencies for Q3 was 6,208 and 10% higher than Q3 2022:
- **735 compulsory liquidations;**
- **466 administrations;**
- **41 CVAs;**
- **4,965 CVLs. This figure represents the biggest increase from the start of the first lockdown: in Q3 2020 there were c.2,000 CVLs. Highest number of CVLs since 1960.**

Individual insolvency data for Q3 2023 shows a drop, by 6% from Q2 2023 and by 15% from Q3 2022 but:

- One in 441 entered into insolvency between 1 October 2022 and 30 September 2023.
- Highest number of Debt Relief Orders (DROs) in Q3 2023 since introduction in 2009 (8,438).
- 23,809 Breathing Space registrations in Q3 2023, which is 26% higher than Q3 2022.


Bank Rate
6
5
4
3
2
1
0
2005
2010
2015
2020
Bank Rate

Usual collection / enforcement methods

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- Applications for liability orders
- Civil claim for rates
- Taking control of goods
- Statutory demand / winding up petition
- Statutory demand / bankruptcy

Insolvency moratoria: companies

Some regimes have “automatic” moratoria: e.g. compulsory liquidation / administration.

Certain regimes have mechanisms built in for the Court to stay action.

Additionally: the moratoria in Part A1 of the Insolvency Act 1986.

Administration

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Pre-appointment but post application / notice of intention to appoint:

No legal process may be instituted or continued against the company or company property and no step taken to enforce security UNLESS the Court gives permission.

Also no winding up order.

Appointment made:

No legal process may be instituted or continued against the company or company property and no step to enforce security UNLESS the Court gives permission or administrator consents.

Also no winding up order.

Expenses of administration

Exeter City Council v Bairstow [2007] Bus LR 813 at [84]:

"Just as rates are payable in a liquidation as a necessary disbursement, so in my judgment they are payable in an administration."

Not at the top of the list priority as expenses incurred by the administrators, but payable as a necessary disbursement under rule 3.51(2)(g) of the Insolvency (England and Wales) Rules 2016.

Compulsory liquidation

At any time after the petition and before the order is made, the Court may stay pending proceedings or restrain further proceedings.

After winding up order made, "*no action or proceeding shall be proceeded with or commenced against the company or its property except by leave of the court and subject to such terms as the court may impose*".

Anti-avoidance provisions

- Section 127(1) of the Insolvency Act 1986: "In a winding up by the court, any disposition of the company's property […] made after the commencement of the winding up is, unless the court otherwise orders, void."
- "Whether the transaction would or would not be retrospectively validated by the court is irrelevant, if no application is ever made by the recipient for such validation. In the absence of such an application, the court must proceed on the basis that the disposition of the Company's property is void, as the statute says it is": *Officeserve Technologies Ltd (In Liquidation) v Annabel's (Berkeley Square) Ltd* [2019] Ch. 103 per HHJ Paul Matthews at [17].
- In considering whether to validate, the Court is considering whether there are special circumstances which exist to make the particular transaction in the interests of the creditors as a whole so as to override the *pari passu* principle: *Changtel Solutions UK Ltd (In Liquidation) v G4S Secure Solutions (UK) Ltd* [2023] BCC 143 at [64].

CVL / MVL

- There is no equivalent provision to sections 126(1) or 130(2) of the IA in voluntary liquidation.
- The liquidator or a contributory or creditor can apply to the court to determine a question in the winding up or for the court to exercise “all or any of the powers which the court might exercise if the company were being wound up by the court”: section 112(1) of the Insolvency Act 1986.
- The court can accede wholly or partly to such an application on such terms and conditions as it thinks fit if the exercise of the power will be “just and beneficial” or make such other order as it thinks just: section 112(2) of the IA.

Part A1 Moratorium

(1) Who is eligible? Schedule ZA1. Operates so that all companies are eligible unless excepted. Main exceptions: (a) already a moratorium in place or there was one in the last 12 months; (b) in CVA, administration, liquidation etc or that has been the case in the last 12 months; (c) certain entities like RSLs or banks.

(2) How long does it last? If no winding up petition is outstanding, starts when the documents are filed. If a winding up petition is outstanding, starts when an order is made by the Court. Initially lasts 20 business days: section A9(1) and (2).

(3) What is its impact on collection / enforcement? No insolvency proceedings: section A20(1). No enforcement or legal proceedings: section A21.

(4) What about payments? No payments that exceed £5,000 or 1% of the value of debts without consent from the monitor, pursuant to a Court order or payment to discharge security.

Bankruptcy

- Stay on proceedings, once the bankruptcy order is made: section 285 of the Insolvency Act 1986.

- Similar anti-avoidance provisions to those in section 127: section 284 of the Insolvency Act 1986.

DROs

- Small-scale insolvency with debts less than £30,000.
- If an order is made, a creditor with a “qualifying debt” has no remedy and cannot commence any action or bring a petition, except with Court permission.
- QDs = liquidated sums immediately payable which are not excluded. Excluded debts = prescribed debts. Rates are not excluded debts.
- Lasts for one year unless terminated early or extended.
- At the end of the period, discharged from all qualifying debts.

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CVAs

- Companies Act 2006 Part 26.
- Scheme of arrangement whereby limited company can pay creditors over a fixed period
- Requires 75% of creditors (by value) to agree the proposed compromise / arrangement
- + Court sanction.

CVAs

- 4 things for a Court to consider:

"First, the court must consider whether the provisions of the Companies Act 2006 have been complied with, including questions of class composition, whether an adequate explanatory statement was distributed to creditors and whether the statutory majorities were obtained. Secondly, the court must consider whether each class was fairly represented at the relevant meeting and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent. Thirdly, the court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Fourthly, the court must consider whether there is any "blot" or defect in the scheme which, for example, would make it unlawful or in any other way inoperable.

In the matter of Instant Cash Loans Limited [2019] EWHC 2795 (Ch) per Zacaroli J at para 2 citing Snowdon J in *Re Noble Group Limited* [2019] BCC 349 at para 17

CVAs

- Business rates are proveable in a CVA in respect of all rates due for that financial year – even if otherwise payable by instalments and ratepayer not in default: *Kaye v South Oxfordshire District Council* [2013] EWHC 4165 (Ch) (full year's business rates are a contingent liability for the purpose of rule 13.12 of the Insolvency Rules 1986)
- Business rates for that year can therefore be compromised within a CVA.
- Billing authority is a creditor, entitled to vote at the creditors' meeting, and can in principle challenge the CVA: see, e.g. *Richmondshire District Council v Dealmaster Ltd* [2021] EWHC 2892

CVAs & future years' rates

- But what about future years?
- Rates for financial years post-dating the creditors' meeting are not proveable in the CVA as not a liability (or contingent liability) at that time
- Rates therefore due in full for financial years thereafter.
- Therefore necessary to consider:

(i) Any reliefs that might be available / could be applied for to mitigate rates liability;

(ii) Implications of business rates liability for the feasibility of the proposals/ability of the company to make payments in accordance with the payment plan

CVAs & future years' rates

- What if the proposal involves 'giving up' a property / properties?
- CVA cannot, in and of itself, bring a lease to an end: *In the matter of Instant Cash Loans Limited* [2019] EWHC 2795 (Ch)
- What does this mean for business rates liability?

The *Instant Cash Loans* case

- Court asked to sanction arrangement which provided that from the effective date, and in exchange for the landlord's right to submit a scheme claim for the amounts specified, each of the leases would terminate and/or:

"(a) All of the Company's rights, obligations and liabilities (whether past, present or future) pursuant to the Leases shall end and any sums payable under or in relation to any Lease (including any liability for non-domestic rates), other than under the terms of this Scheme, shall be reduced to nil.

(b) The Company's estate, interests and rights in each of the premises shall be surrendered to, and accepted by, the relevant Landlord and shall merge and be extinguished into the reversion immediately expectant on the termination of each Lease.

The *Instant Cash Loans* case

(c) The Company shall immediately cease to enjoy any rights to occupy or in any way benefit from any of the premises.

(d) The Company agrees to relinquish any right of occupation and shall execute any document required to effect a surrender or termination of each Lease.

(e) The Company shall no longer be deemed or otherwise considered to be or treated by any of the Landlords for any purpose as being, in occupation of any of the premises.

(f) The Company shall as soon as reasonably practicable deliver to the Landlords all keys and (where relevant) security and alarm codes for each of the Premises".

The *Instant Cash Loans* case

- The CVA was not challenged by any creditor, but Zacaroli J had raised a concern, of his own volition, as to whether such a proposal could be effected under a CVA and whether surrender of leases fell within the jurisdiction of Part 26 of the Companies Act 2006.
- His conclusion was that it was not.
- The starting point, was that a CVA was "A scheme of arrangement between a company and its creditors must mean an arrangement which deals with their rights *inter se* as debtor and creditor." (at para 6, citing the CA in *Re Lehman Brothers International Europe* [2010] BCLC 496)
- That did not mean that a CVA was not capable of affecting proprietary rights, but that the extent to which it could do so was "significantly circumscribed" (para 7).

The *Instant Cash Loans* case

"*[10]… It seems to me, however, that the objection is best formulated along the following lines. While a lease of land is a creature of contract and creates contractual rights and obligations, it also constitutes a proprietary interest, a legal estate in the land. For so long as the lease subsists, the landlord's right is limited to a right in the reversion immediately expectant upon the lease. Importantly, during the subsistence of the lease it is the tenant, not the landlord, that has possession of the property. This may have important consequences so far as obligations towards third parties are concerned. For example, as is accepted by the company in this case, while a lease subsists over the properties, it is the tenant company and not the relevant landlord who incurs a liability in respect of unoccupied business rates, but that is reversed when the lease comes to an end, subject to a grace period of some three months. Occupiers' liabilities and environmental liabilities may be other examples that fall on the tenant while the lease subsists, but on the landlord upon the resumption of possession by it when the lease terminates*" (underlining my emphasis)

The *Instant Cash Loans* case

"[11] Perhaps as a consequence of this, a lease may not be terminated at the will of the tenant. It cannot be unilaterally surrendered. Surrender is a consensual process. It is true, as I will come on later to explain, that surrender may be the consequence of some other arrangement; for example an agreement between the landlord and tenant that the tenant shall no longer have exclusive possession, but that still requires the landlord's consent to something which, as a matter of law, has the effect of bringing the tenancy to an end. Clause 2.4.1 of this scheme, while not purporting directly to modify any proprietary right of the landlord, does in fact affect the proprietary interest. It effects a change in the nature of that interest. It ceases to be a reversionary interest encumbered by a lease and becomes one that is not so encumbered. To put it another way, the tenant ceases to be in possession of the premises and possession reverts to the landlord."

The *Instant Cash Loans* case

"[12] It might well be said, "So what? This can only be to the landlord's benefit, because it is increasing the nature of its proprietary interest by removing an encumbrance that was carved out from it". For reasons I have already mentioned, however, that is not necessarily so. Depending on the circumstances, a landlord may positively wish to avoid resuming possession of a premises, either at all until the expiry of the lease or on the basis of the timing forced upon it by the scheme. I do not mean, by referring to these possibilities to identify a potential unfairness in such a scheme. That is irrelevant to the question of jurisdiction. I refer to these in order to highlight the fact that the termination of the tenant's lease effects a substantive change in the nature of the landlord's interest in the property." (underlining my emphasis)

The *Instant Cash Loans* case

- The crux of the Judge's reasoning is at para 24:

"The proper analysis, therefore, of a deal which is embodied in, and thus imposed on landlords by, the scheme is that in return for the tenant agreeing to pay disclaimer damages, the landlord is required to do two things: (1) forego its debt claim and (2) agree to the tenant going out of possession with the consequence that the lease is terminated. The giving up of possession is not properly seen, therefore, as the quid pro quo of the landlord's agreement to forego its debt. Instead, it is properly analysed as an additional something being imposed upon the landlord by the scheme. It is within the scope of the scheme jurisdiction to impose such a term on a creditor only if it is ancillary to the compromise of the pecuniary liability or necessary to ensure the effectiveness of the compromise effected by the scheme. For the reasons I have already given, I do not see that it is. There is no need for the tenant to give up exclusive possession in order to be relieved of liability for future rent. Nor is it a consequence of the compromise of the future rent liability that exclusive possession is given up. In fact, the reverse is true: giving up possession in circumstances that it is treated by the law as a surrender of the lease has the consequence that the obligation to pay future rent is extinguished."

The *Instant Cash Loans* case: ramifications?

- Position would seem to be that CVA cannot in and of itself effect a termination of the Lease – even if it provides (or purports to provide) that that is what is intended.
- It would therefore seem to be open to a landlord to refuse to accept the giving up of possession / proposed surrender of a lease by its tenant
- If the Lease remains extant, then it would seem that tenant may remain liable for business rates (for financial years post-dating those compromised in the CVA) either on the basis of being in occupation of the premises (under s.43 LGFA 1988) or as "the owner" of an unoccupied hereditament for the purposes of s.45 LGFA 1988

The *Instant Cash Loans* case: ramifications?

Landlords:

- Do you need to / want to accept surrender?

Tenants

- Have you considered potential rates liability when assessing CVA proposals?
- Have you considered potential reliefs that might be available and steps that need to be taken to make best use of the same?

Local authorities:

- Do you know who to pursue for rates?
- What is the best strategy to pursue to collect rates due for future years?

Three further thoughts, for landlords and/or tenants

Empty property relief:

- Does the lease that if landlord is unable to obtain a relief because it has already been enjoyed by the tenant, the tenant will pay the equivalent of that lost relief to the landlord?

Forfeiture

- CVAs do not affect ability of landlord to forfeit a lease for non-compliance with tenant's obligations (save where those modifications are modified by a CVA, they only apply to non-compliance with the obligation as modified): *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch)

Unoccupied hereditaments – certain insolvency events

- See reg 4(i) – (m) of the Non-Domestic Rating (Unoccupied Properties) (England) Regulations 2008

Concluding thoughts?

- Don’t delay in enforcing for arrears!
- For billing authority: cons of pushing for a winding up order / bankruptcy order?
- Check the potential exemptions that might apply for (current) rates in certain insolvency events
- CVAs: does it do what you think it does? What are the potential implications if it doesn’t? Is the compromise better than the alternative situation?
- What other reliefs might be available? And are they worth it?

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The ‘fit out’ case and what it tells us

Jenny Wigley KC

Bunyan (VO) v. Acenden Limited [2023] UKUT 17 (LC)

- What was the case all about?
- What happened?
- Why is it interesting?

What was the case all about?

- Large modern high quality office building on a Maidenhead business park;
- Let in ‘Cat A’ state, with tenant’s ‘Cat B’ works (at cost of £3.4M) undertaken subsequently;
- Issue: how do those Cat B works affect rateable value?
- Not just a niche point – A test case

Typical Cat A / Cat B

Cat A: Raised floors, suspended ceilings, basic M & E services, lighting, aircon, fire detection and basic internal finishes.

Cat B: Installation of kitchens, tea points, partitioning, rerouting of air con, power points and addition of IT infrastructure.

Positions of the Parties

- VTE: £875,000 (£180/m2)
- Appellant VO: £1,100,000 (£230/m2)
- Respondent Ratepayer: £810,000 (£166/m2)
- UT: ???

Appellant VO:

"Where a tenant undertakes fit out works which turn premises into a hereditament suitable for occupation as offices, the value effect of those works must be assessed and will materially increase the rental value of the property over one incapable of such use. That increase in rental value of the property should properly be reflected in the rateable value of the hereditament"

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Respondent Ratepayer:

The fit out works carried out at Ascot House (at a cost of £3.4M, in addition to the landlord's refurbishment) make zero difference to value. The rent paid when it is in unfitted 'Cat A' state is representative of the rateable value of the property when it has been fitted out by the tenant at a very significant cost.

What did the UT decide?

- Firmly rejected the proposition that a building in Cat B condition is worth no more than a building in Cat A condition;
- Valued at £1,000,000 - £212/m2;
- Awarded full costs to VO

Why is it interesting?

- Raises some fundamental questions;
- Really useful reminder of basic principles;
- Makes new law;
- Provides key guidance on evidential matters.

What is to be valued?

- Need a hereditament - *Porter (VO) v. Gladman Sipps*;
- Reality principle – but….
- Assume vacant and to let with no tenant's (unratable) fixtures;
- Can allow for the possibility of minor alterations – *Williams (VO) v. Scottish & Newcastle*

Too bespoke? A fundamental point

- Concept of ‘general appeal’ necessary?
- But actual tenant is in the market
- And must assume hereditament meets the needs of the hypothetical successful bidder who is willing to take it at market rent without requiring inducement [84]
- Effect of higgling of the market [25]

Evidential Issues (1)

- Analysis of rents (to deal with rent free periods)
- Paucity of Cat B lettings
- Relevance of lease renewals and rent reviews
- Danger of relying too much on forms of return

Evidential Issues (2)

- Caution re expert witnesses trying too hard to support their client's case, being seen to be partisan can backfire! [42]
- Smaller basket of higher quality evidence better than wider, lower quality trawl (one high quality comparable can swing the case) [109]
- Back up info from FOR by info from parties to transaction, use disclosure orders or witness summons if needed [45]

Amortisation of Fit Out Costs

- Ratepayer argued for use of statutory de-cap rate (4%) in perpetuity, rather than 7% over lease term or to break
- Was this required by the Non-Domestic Rating (Misc Provisions) (No.2) Regs 1989 (as amended)?
- Is the rateable value of the hereditament (or part of it) “being ascertained using the contractor’s basis of valuation”?

Amortisation of Fit Out Costs (2)

- Mandatory use of stat de-cap rate depends on valuation of all or part of hereditament by using the contractor's basis 'in full'
- That was not the case here – e.g stage 3 omitted, actual rather than proxy cost
- Also, 'part' has to be capable of being a hereditament in its own right
- UT declined to follow Dorothy Perkins

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The valuation of composite hereditaments

Luke Wilcox

What is a composite hereditament?

LGFA 1988, s. 64(9):

“A hereditament is composite if part only of it consists of domestic property”

“Domestic property”: LGFA 1988 s. 66(1):

“it is used wholly for the purposes of living accommodation”

What is a composite hereditament?

Two key points to note from the definition:

- must be a single hereditament

- *Mazars* tests must be met
- Common occupation
- "wholly different purpose"?

- a discrete part must be domestic

- If the whole is used for mixed domestic and non-domestic purposes, then it is not a composite

What is a composite hereditament?

Note – a composite hereditament is a “non-domestic” hereditament for rating purposes: LGFA 1988 s. 64(8)(b)

It is also a dwelling for CT purposes: LGFA 1992 s. 3(3)

- the whole composite is the dwelling … not just the domestic part!

The valuation hypothesis for composites – the rating list

LGFA 1988 Sch 6 para 2(1A):

"The rateable value of a composite hereditament none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent which, assuming such a letting of the hereditament as is required to be assumed for the purposes of sub-paragraph (1) above, would reasonably be attributable to the non-domestic use of property."

The valuation hypothesis for composites – the CT valuation list

The Council Tax (Situation and Valuation of Dwellings) Regulations 1992, reg 7:

"In the case of a dwelling which is a composite hereditament or is part of a single property which is a composite hereditament, the value of the dwelling, for the purposes of valuations under section 21 of the Act, shall be taken to be that portion of the relevant amount which can reasonably be attributed to domestic use of the dwelling."

The valuation hypothesis for composites – the CT valuation list

The “relevant amount”:

“the amount which the composite hereditament might reasonably have been expected to realise on the assumptions mentioned in regulation 6, … if for the references to the dwelling throughout … that regulation, there were substituted references to the composite hereditament.”

The valuation hypothesis for composites – the CT valuation list

CT valuation assumptions apply even where a part of a composite hereditament falls to be valued as a dwelling in its own right, by virtue of physical self-containment:

Valuation of Dwellings Regs 1992, reg 7(1)

- valuation oddity!

The relevant amount

Atkinson v Lord [1997] RA 413

CT banding appeal

The issue: whether the “relevant amount” needs to be determined in carrying out a CT valuation

The valuer must have regard to the relevant amount … but need not calculate what it actually is!

The relevant amount

Atkinson v Lord [1997] RA 413

Schiemann LJ on the "relevant amount":

"an understandable legislative technique to bring composite hereditaments into line with purely domestic hereditaments and to bring the impact of the Council Tax on the person living in part of a composite hereditament into line with its impact on a person living in comparable accommodation which was not part of a composite hereditament."

Purpose of the "relevant amount" is to avoid "lotting" of value

The relevant amount

Atkinson v Lord [1997] RA 413

Note the tension between the legislative purpose and the legislative technique …

The relevant amount

Atkinson v Lord [1997] RA 413

Held:

The valuer must have regard to the relevant amount … but does not always need to calculate what it actually is!

e.g. valuer knows a non-comp would be worth 10% more than a comp for a given type, within a given value range.

The relevant amount

Does the *Atkinson v Lord* logic apply to the "relevant amount" to be determined for rating purposes as well as for CT purposes?

My view: in principle yes … but likely to be rarer

- valuation vs banding

- the rating valuer usually will need to determine the relevant amount

The *Monmouth* case

Daniels (LO) v Monmouth School [2009] EWHC 2720 (Admin)

Reg 7 confined to the identified hereditament

Where a single business comprises multiple hereditaments on classical principles, relevant amount is not the value of the whole business!

Composite valuation in CT – a recent illustration

Stowe School v Bunyan (LO) 23 June 2023

- concerned three housemaster's flats within the school

- appellant sought to determine value of whole school using CB, and identified amount of CB valuation attributable to the dwellings

- LO valued the flats in isolation by reference to comparables from composite and non-composite properties

Composite valuation in CT – a recent illustration

Stowe School v Bunyan (LO) 23 June 2023

Tribunal rejected both approaches:

- appellant's approach unsuitable as cost did not equate to value (school was Grade I Listed)

- LO's approach rejected because (it seems) of use of non-composite comparables

Tribunal valued using comparables drawn from within the same school where CT bands had been settled

Composite valuation in rating – reasonable attribution

Ludgate House Ltd v Ricketts (VO) [2023] RA 149

UT remittal to consider valuation of LH as a single composite hereditament

VO's primary case – the property should be valued as though it was non-domestic

VO also contended the residential areas of the property could be "consolidated" into the location most advantageous to the HT

Composite valuation in rating – reasonable attribution

Ludgate House Ltd v Ricketts (VO) [2023] RA 149

Held:

- property had to be valued as a composite: concurrent security purpose of the owner did not vitiate the only use made of the bedrooms as a purely domestic use

- BUT the property fell to be valued as an office subject to a temporary guardianship scheme … significantly impacted on the extent of the non-domestic attribution of value

Composite valuation in rating – reasonable attribution

Ludgate House Ltd v Ricketts (VO) [2023] RA 149

Held:

- HT was entitled to, and could, exercise contractual rights to re-arrange the domestic and non-domestic parts of the property so as to maximise the efficient use of the space (para 141)

- problematic – is this really the attribution of value to the domestic use of property? Or attribution of value to some alternative hypothetical domestic use? Does the hypothesis allow the latter?

Composite valuation in rating – reasonable attribution

"We remind ourselves at this point that the task in hand, for a composite hereditament, is to ascertain the rent which would reasonably be attributable to the non-domestic elements of the Building." (para 146)

… but went on to value on consolidated basis

I.e. valued on the basis that the non-domestic elements were located elsewhere to reality

Composite valuation in rating – reasonable attribution

Ludgate House the most recent word on “reasonable attribution” … but I suspect it won’t be the final word!

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Afternoon sessions Chaired by Galina Ward KC

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Mode and category of occupation

David Forsdick KC

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…

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Religious exemption update

Julia Smyth

Para. 11 of Sched. 5 to the Local Government Finance Act 1988

(1) A hereditament is exempt to the extent that it consists of any of the following—

(a) a place of public religious worship which belongs to the Church of England or the Church in Wales (within the meaning of the Welsh Church Act 1914) or is for the time being certified as required by law as a place of religious worship;

(b) a church hall, chapel hall or similar building used in connection with a place falling within paragraph (a) above *for the purposes of the organisation responsible for the conduct of public religious worship in that place.*

(2) A hereditament is exempt to the extent that it is occupied by an organisation responsible for the conduct of public religious worship in a place falling within sub-paragraph (1)(a) above and—

(a) is used for carrying out administrative or other activities relating to the organisation of the conduct of public religious worship in such a place; or

(b) is used as an office or for office purposes, or for purposes ancillary to its use as an office or for office purposes.

(3) In this paragraph 'office purposes' include administration, clerical work and handling money; and 'clerical work' includes writing, book-keeping, sorting papers or information, filing, typing, duplicating, calculating (by whatever means), drawing and the editorial preparation of matter for publications.

Setting the scene …

- *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852 (HL) – (a) place of worship had to be open to the public; (b) no ECHR discrimination; and (c) "in connection with" in para. 11(1)(b) implied use ancillary to use of place of public worship. Result - not exempt.

- *R (Hodkin & anr) v Registrar General of Births, Deaths and Marriages* [2014] AC 610 (SC) – Scientology chapel is a "place of meeting for religious worship" for purposes of s.2 of the Places of Worship Registration Act 1855 – overruling *R (Segerdal) v Registrar General* [1970] 2 QB 697 (CA)

Church of Scientology v Ricketts (VO)
[2023] UKUT 00001 (LC) – 5 Jan 23, Deputy President and Mr Higgin

- Exemption of buildings used by Church of Scientology under para 11 as place of public religious worship and related church premises

- Two buildings in Central London – London Church and Information Centre

- Proposal to delete assessments rejected by VO and appeal to VTE dismissed.

UT decides (1):

Chapel at London Church *is* place of public religious worship under para 11(1)(a) – see [80]-[96], especially [95]:

"Taking the evidence as a whole, we are entirely satisfied that at the material time in 2013 the chapel at the London Church was a place of public religious worship, and that it has continued to be so. The building itself indicates by its permanent signage and branding that it is a place where strangers are welcome, including to attend services. The Church actively invites non-Scientologists who have had no previous significant contact with the religion to participate in its services as a way of introducing them to its message and encouraging them to discover more. It uses conventional advertising on its premises, which are open to visitors every day, as well as word of mouth, email invitations, and its website. Its ambition is not limited to drawing its existing members closer, or attracting their immediate friends and family, and plainly extends to all comers. We unhesitatingly reject the submission made in closing by Ms McCarthy KC that, at as a matter of practical reality, the Chapel at the London Church is no more public than the Mormon Temple in Gallagher because though the public at large are not excluded by technical rules, their participation is prevented by an absence of information and active invitation. Newcomers come to the London Church in modest numbers, and no doubt if the building was in a more residential neighbourhood, or in a location with a higher pedestrian footfall, it would attract more to its congregational services. But it is not the public's response to an invitation extended by a church which marks a religious service out as public worship, it is the invitation itself and the openness of the church to admit any well-disposed persons who may choose to accept it …"

UT decides (2):

- Offices were exempt for purpose of para 11(2)(b) – see [97]-[122]
- Key issue: did office need to be used for a purpose ancillary to the public religious worship conducted elsewhere? Answer NO, difference in wording between (2)(a) and (b) deliberate
- UT at [121]:
- *" … Use as an office or for office purposes, provided it is used by an organisation responsible for the conduct of public religious worship in a place certified by law, is sufficient to gain exemption for so much of the hereditament as is so used. There is no further requirement of a connection or relationship between the office use and the place of religious worship."*

UT decides (3):

- Para. 11(1)(b) - church hall or similar building
- Functional question, rather than one dependent on appearance; “focus is on what the space is primarily used for” [125]. Appropriate to consider usage of space in “fairly general terms” and ask whether activity for which used is sort of activity would expect to find in a church hall etc. Range of activities likely to be “pretty wide” [126]. VO should not inquire too closely into spiritual significance or religious motivation for a particular activity [127]-[128]
- Did not include areas used for training of auditors [130] or office which was “akin to a shrine” [131]
- No condition of public access and payment for participation not a bar [139]
- Availability of exemption does not depend on relative size of spaces used for different purposes [141]
- Information Centre not exempt, save for self-contained offices and storage spaces [143]

Takeaways

- Decision on public religious worship follows inextricably from *Hodkin* and *Gallagher*

- Welcome clarity on scope of exemption for offices under para 11(2)(b) – which is wide-reaching

- Useful discussion on essence of para 11(1)(b) – church hall or similar building - albeit that application is always going to be fact sensitive.

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Routes of challenging rating decisions

Tim Morshead KC

Who takes rating decisions?

Parliament	• Legislation

Government	• Secondary legislation / statutory instruments
	  • Multiplier
	  • Regulations within other delegated fields
	• Policy

Valuation officers	• Compiling list showing
	  • Hereditaments
	  • Values
	• Maintaining accuracy of the list
	  • Updating in light of 'material' changes in circumstance
	  • Correcting errors in compiled list
	  • Penalising supply of false information

Billing Authorities	• Completion notices
	• Calculating / collecting rates including
	  • Applying *ad hominem* exemptions/ discounts
	  • Demanding and collecting rates including
	  • Enforcement

Challenging primary legislation

Challenging secondary legislation: 1

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Local Government Finance Act 1988

Multiplier: Schedule 7

Detailed regulation about large variety of matters (Secretary of State is mentioned 519 times in the 1988 Act):

For example:

Death: s63
Alterations to the list(s): s55
Information about the hereditament to be shown in the list: s42(5)
Displacing 'normal' rules about how to identify hereditaments (split/merge): s64(3)
Rural settlement areas: s42A(3)
Classes of hereditament capable of attracting unoccupied rates: s45(1)(d)
Guidance to billing authorities about discretionary relief for charities: s47(5C)
Joint ownership: s50
Disclosure of confidential information for 'prescribed' purposes: s63A
Treating equipment used to measure services as a hereditament: s64(2A)
Treatment of moorings: s64(3A)
Redefine 'domestic' property: s66(9) [… number 68 out of 519 refs to Secretary of State]

Challenging secondary legislation: 2

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General rule:

Unlawfulness of administrative action, including *vires* of regulations passed with statutory authority, can be raised as a potential defence: *Boddington v. British Transport Police* [1999] 2 AC 143, esp Lord Slynn at 272C-H:

"Since O'Reilly v. Mackman decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision. Nor does it apply where a defendant in a civil case simply seeks to defend himself by questioning the validity of a public law decision."

Exception that swallows the rule:

1988 Act, section 138: judicial review only remedy re: multiplier and various other matters.

AND in any event: Invalidity is a high hurdle …

Judicial review (see 2022 Rating Conference)

Forum:

High Court (inherent jurisdiction → s31 Senior Courts Act 1981

Lands Chamber of Upper Tribunal in limited circumstances: First-tier and Upper Tribunal (Chambers) Order 2010/2655, esp Arts 10, 12, 14, 18: jr of VTE.

High hurdle: invalidity ⇔ *ultra vires*: outside the powers of the Act, or vitiated by legal error, over-influenced by irrelevant considerations or under-influenced by relevant ones, *Wednesbury* unreasonableness, improper purpose, inconsistency with Human Rights Act 1988).

Procedural hurdles: permission; 3-month time limit; limited grounds to extend time.

Last resort: use alternative remedies (e.g., statutory or other route of appeal) where these are available.

"Causation": S31(2A), SCA 1981: relief can be withheld if it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

Valuation Officer decisions: 1

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Compiling the list

Local Government Finance Act 1988, s41.

- Draft list: 1988 Act, s41(5): provide a draft list to the relevant billing authority by 31 December of the year before the compilation date; s41(4): VO to take reasonably practicable steps to ensure that the new list is ready to be compiled on 1/4/[23] and then triennially
- No right of appeal in this process
- Judicial review the only remedy

Valuation Officer decisions: 2

Maintaining the list: ‘proposals’

The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009/2268 as copiously amended, notably by 2017/155.

- “Check, challenge, appeal” process: right to make a proposal is now conditional on timely completion of “check” and “challenge”
- No separate right of appeal within the process (eg, calculation of dates for deadlines): ??
- But process culminates in a right of appeal (on back of a “proposal”) to the Valuation Tribunal for England: initiated by the proposer, without VO (or anyone else) as gatekeeper: r13A
- So presumably VTE can determine many/ most/ (all??) such topics, on basis that doing so is necessary in order to decide if it has jurisdiction
- In practice, r13A appeal to VTE likely to be the appropriate route for challenge in most circumstances

Valuation Officer decisions: 3

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Maintaining the list: 'Part 2 penalties'

The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009/2268 as copiously amended, notably by 2017/155: rr9A–9D.

- "Check, challenge, appeal" process: in part an indirect method of obliging ratepayer to furnish relevant information (still no self-standing duty of 'candor') and penalising the ratepayer for providing false information
- VO's new power to issue penalties for provision of false information: rr9A–9D.
- Comprehensive right of appeal against imposition of penalty and amount: r9C appear to VTE

Valuation Officer decisions: 4

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Residual matters: judicial review ??

- Alleged delay and discrimination did not involve unfairness amounting to an abuse of power or otherwise vitiate the VO's decision to make a downwards alteration of RV, late in the life of the list, which under the transitional relief provisions had the effect of increasing the overall rates payable by the ratepayer: *R ota Corus UK Ltd v. VOA* [2001] EWHC Admin 1108; [2002] RA 1.

- A failure to identify in the Non Domestic Rating List which parts of a building said to be a composite hereditament were alleged to be non domestic property, did not invalidate the relevant entries in the list: *R ota Curzon Berkeley Ltd v Bliss (Valuation Officer)* [2001] EWHC Admin 1130; [2002] R.A. 45. On alternative remedy, the judge (Mr Goudie QC sitting as a deputy High Court judge) said: "72. I regard the Administrative Court, rather than the Valuation Tribunal, as having been the appropriate forum for determination of the legal and constitutional issue as to whether or not words should be implied into a taxing statute."

- Exactly what can a VTE order, on an appeal against a completion notice? *Reeves (VO) v. VTE* [2015] EWHC 973

- JR a remedy of last resort; use the statutory proposals / appeal procedure: *R ota Tameside MBC v. Grace (VO)* [2013] EWHC 450 (Admin); [2013] RVR 95 esp paras 20–24.

Billing authority: 1

Completion notices

1988 Act, Schedule 4A

- Billing authority can be prevented from serving a completion notice by a "direction" from the VO: paras 1(1) and 1(2)
- No right of appeal against a direction by the VO (or against non-exercise of power to make a direction)

  ➔ Judicial review.

- Otherwise, against substance of a completion notice, the person on whom it is served has a right of appeal to the VTE: para 4 appeal to VTE.

Billing authority: 2

Discretionary matters

- Notably:
  - "Top-up" exemption for charities
  - Hardship relief
- No right of appeal

➔ Judicial review.

Billing authority: 3

Ordinary collection / enforcement matters

The Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 SI 1989/1058 (as amended).

- Demand notice: no right of appeal so judicial review is in theory available - but demand notice has no final legal consequences of its own as it does not determine or purport to determine any legal rights. So: will (almost) always be an alternative remedy.
- Liability order: r12: needs an order from the magistrates court.
- Therefore magistrates court can be the forum for litigating arguments about whether Billing Authority has identified the ratepayer correctly and/or calculated the liability correctly: notably, this includes many of the rates "mitigation" schemes.
- Alternative to liability order: r20: sue for debt in any court of competent jurisdiction: i.e., County Court or High Court.
- In this setting, arguments about such matters are available as part of the defence to the debt claim: either as to liability, or as to amount, or both.

Onward appeals

Magistrates Court

High Court on Case Stated: "final" (Senior Courts Act 1981, s28A(4))

Or: High Court on judicial review

(permission unlikely because of alternative remedy but potentially preserves onward appeal routes to Court of Appeal / Supreme Court)

No onward appeal:

SCA 1981, s18(1)(c) excludes right of appeal to Court of Appeal; Administration of Justice Act 1969, s15 excludes grant of 'leapfrog' certificate to Supreme Court

VTE

Lands Chamber of the Upper Tribunal (with permission)

Court of Appeal (with permission)

Supreme Court (with permission)

High Court (judicial review or debt action); and County Court (debt action)

Court of Appeal (with permission)

Supreme Court (with permission)

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Panel discussion – legal issues arising from the Non-Domestic Rating Act

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Thank you

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