Welcome to Landmark Chambers' Annual Rating Conference 2021

Thursday 11 November 2021

Thank you for joining us today. We will begin shortly.

Landmark Chambers

Admas Habteslasie

The Supreme Court's decision in *Rossendale BC v Hurstwood Properties*

The legal framework

- National non-domestic rates (NNDR) liability for unoccupied property arises on basis of s.45 of the Local Government and Finance Act 1988 (**"the 1988 Act"**) and attaches to *"the owner of the whole of the hereditament"*

- The owner is defined as *"the person entitled to possession"* of the land: s.65(1), 1988 Act

***Rossendale*: background**

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- Owners of properties located in the areas of Rossendale Borough Council and Wigan Council sought to transfer liability for unoccupied rates to SPVs by grant of leases

- The schemes took two forms:
  - **V1**: SPV immediately put into members' voluntary liquidation
  - Exemption from liability where owner is a company subject to a winding up order or being wound up voluntarily

  - **V2**: SPV is dissolved and lease + associated liability for NNDR passes to the Crown

***Rossendale*: the appeals**

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- Legal basis for the schemes is that:
  - One of the essential ingredients for a lease = grant of a right to exclusive possession of the land subject to the lease
  - Therefore, on grant of a lease and passing of entitlement to exclusive possession, SPVs were *"owners"* for purposes of s.45

  - SPV scheme operated on basis of prolonging liquidation and keeping SPV as lessee while in process of liquidation for as long as possible
  - Dissolution scheme operated on basis of billing authority's delay in finding out that SPV had been dissolved

***Rossendale*: the appeals**

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- Billing authorities argued (actual) owners liable on two bases:
  - (1) ‘owner’ under s.65(1) meant someone with a “real” entitlement to possession, i.e. the defendants
  - (2) court should pierce the corporate veil of SPVs so defendants treated as true owners

- Defendants sought to strike out the councils’ arguments

- Test cases representative of 55 similar cases

The schemes

- The Supreme Court noted certain features of the schemes:
  - Dissolution scheme:
    - Reserved a rent that was not intended to be demanded or paid;
    - Lease contained business user and break clause provisions which also were not intended to be implemented
    - Relied on billing authority not becoming aware of dissolution and asking Crown to disclaim lease
    - Appeared to require unlawful conduct by directors and possibly commission of criminal offences
  - Insolvency scheme required nominal liquidators who dragged their feet to artificially prolong period in which SPV was lessee, and involved misuse of insolvency process

The schemes

- Further, and more relevantly to the question of statutory interpretation:
  - The leases were not “shams” and created genuine legal rights and obligations
  - They were entered into solely to avoid NNDR liability
  - The leases were not granted with the intention of allowing SPV to make use of the property, or to allow SPV any role in bringing property back into use – SPVs had no monetary or human resources to do anything with their rights under the lease
  - Practical ability to leave property unoccupied remained with the landlord, who could terminate the lease and really had control of letting the property
  - Not intended that SPV would actually pay any NNDR

The main question

- The main question was: who was the person entitled to possession?
  - Was it the SPVs, as intended under the schemes?
  - Or was it the landlord?
- The Supreme Court concluded, contrary to the first instance judge and the Court of Appeal, that it was **the landlord**
- Why?

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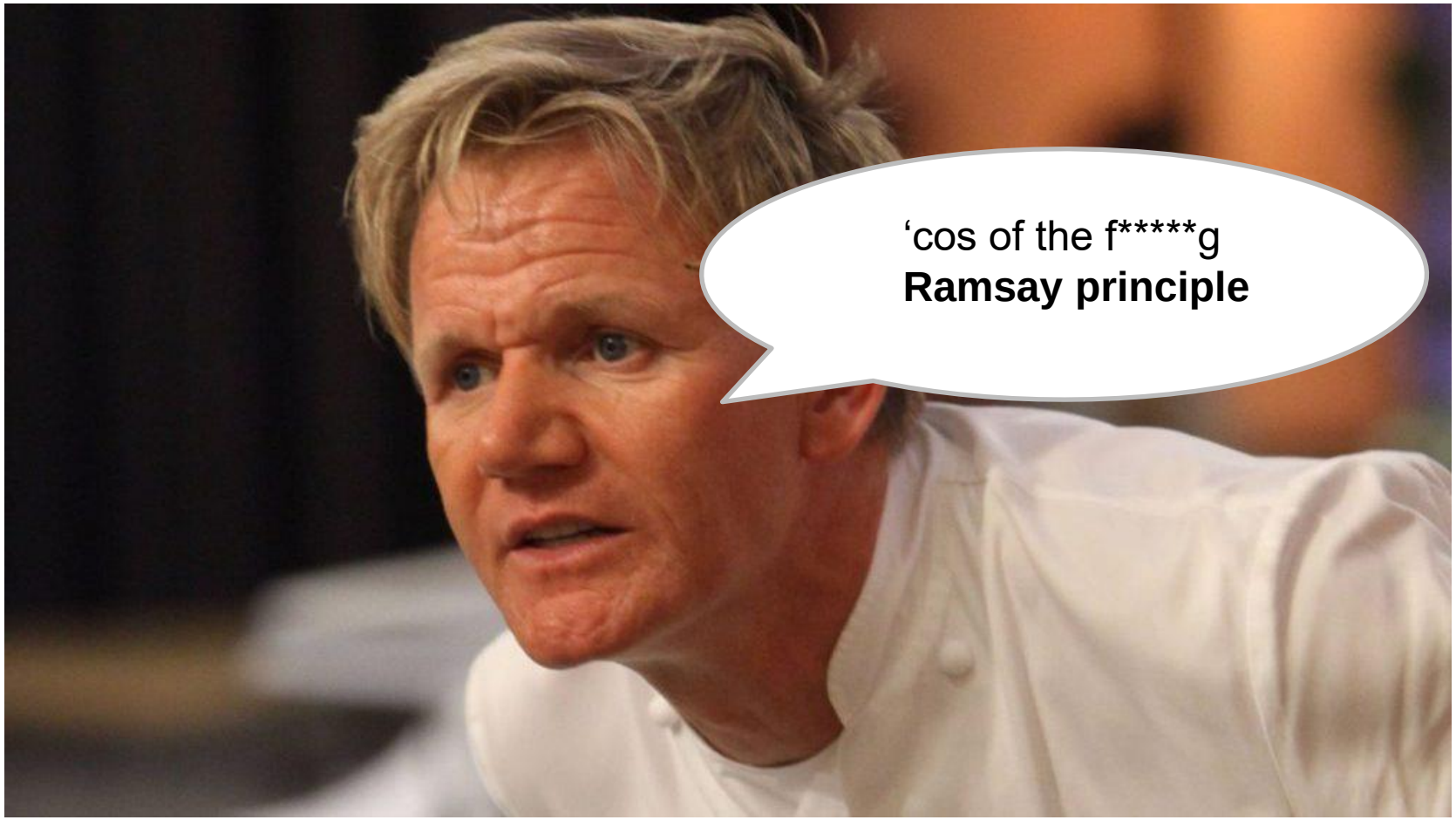


The *Ramsay* principle

- Relevant to the Supreme Court's analysis and central to the billing authorities' submissions was decision of House of Lords in ***WT Ramsay Ltd v Inland Revenue Comrs*** [1982] AC 300

- In ***Ramsay***, the House of Lords concluded that, on the basis of a purposive approach to capital gains tax legislation, losses produced by artificial tax avoidance schemes had not produced any losses for the taxpayers and were properly to be disregarded for the purposes of applying the legislation

- Until ***Rossendale***, Ramsay principle had made limited inroads into questions of NNDR liability; generally considered a complicated and difficult principle: *"what has been called the Ramsay principle… which I will not attempt, at my peril, to paraphrase" (*Kerr J in ***Principle Offsite Logistics v Trafford****)*

The *Ramsay* principle

- Supreme Court made it clear that Ramsay principle *"is an application of general principles of statutory interpretation"* (see [10] to [17]):
  1) In construing legislation, the court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose
  2) Transactions/elements with no business purposes are disregarded because not expected that Parliament intends to exempt from tax a transaction solely concerned with avoiding tax
  3) Where a scheme aimed at avoiding tax involves a series of steps planned in advance, scheme as a whole to be considered; facts to be looked at in the round, and a *"formalistic insistence on examining steps separately"* to be avoided

Statutory purpose

- In order to interpret the 1988 Act, the Supreme Court sought to identify the purpose of the statutory scheme; noting it had had little assistance from the parties on that issue ([52]):

- In relation to equivalent provision in predecessor General Rate Act 1967, Court noted earlier judgment in which mischief identified as follows: *"Parliament wanted to stop the owners of premises … leaving them unoccupied to suit their own convenience and to their own financial advantage".*

Statutory purpose

- In relation to 1988 Act, Minister responsible for Bill that became the 1988 Act said: *"historically, the purpose of empty property rating has been partly to reflect the fact that empty properties do benefit from some local authority services - police, fire and so forth - and partly to encourage owners to bring empty property back into use."*

- As to question of why liability falls on owner, Court at [30]:

  "…in relation to the central purpose of providing an incentive to bring unoccupied property back into use, the intention is clear. It focuses the burden of the rate precisely on the person who has the ability, in the real world, to achieve that objective."

The Supreme Court's conclusions

- "Owner" under s.65(1) *"is to be interpreted as denoting in a normal case the person who as a matter of the law of real property has the immediate legal right to actual physical possession of the relevant property":* [47]

BUT

"In the unusual circumstances of this case, however, identifying "the person entitled to possession" in section 65(1) of the 1988 Act as the person with the immediate legal right to possession of the property would defeat the purpose of the legislation." [48]

Main principle

- Key extract is at [59]:

“…we consider that the words "entitled to possession" in section 65(1) of the 1988 Act as the badge of ownership triggering liability for business rates are properly construed as being concerned with a real and practical entitlement which carries with it in particular the ability either to occupy the property in question, or to confer a right to its occupation on someone else, and thereby to decide whether or not to bring it back into occupation.”

Caveat?

- Note potential caveat at [61]:

“It may be that other factual situations may demonstrate that this test needs some further adjustment. For example the letting of unoccupied business property by a parent company to a wholly owned and controlled subsidiary would not of itself cause the subsidiary to fail to satisfy the ownership test merely because the management of the affairs of the subsidiary (including whether to bring the premises back into occupation) rested with the parent's board.”

Summary

1) Who is, as a matter of property law, entitled to possession?

2) Does that person have a real and practical entitlement which carries with it:
   - the ability to occupy the property in question; or
   - to confer a right to its occupation on someone else;
   - Put another way, who has the ability to decide whether or not to bring it back into occupation?

- In many cases, first and second question will lead to same answer; but where they do not, answer to second question will have primacy

The Supreme Court and empty rates mitigation:

some possible implications of recent developments for Makro occupations and other empty rates mitigation schemes

Tim Morshead, QC

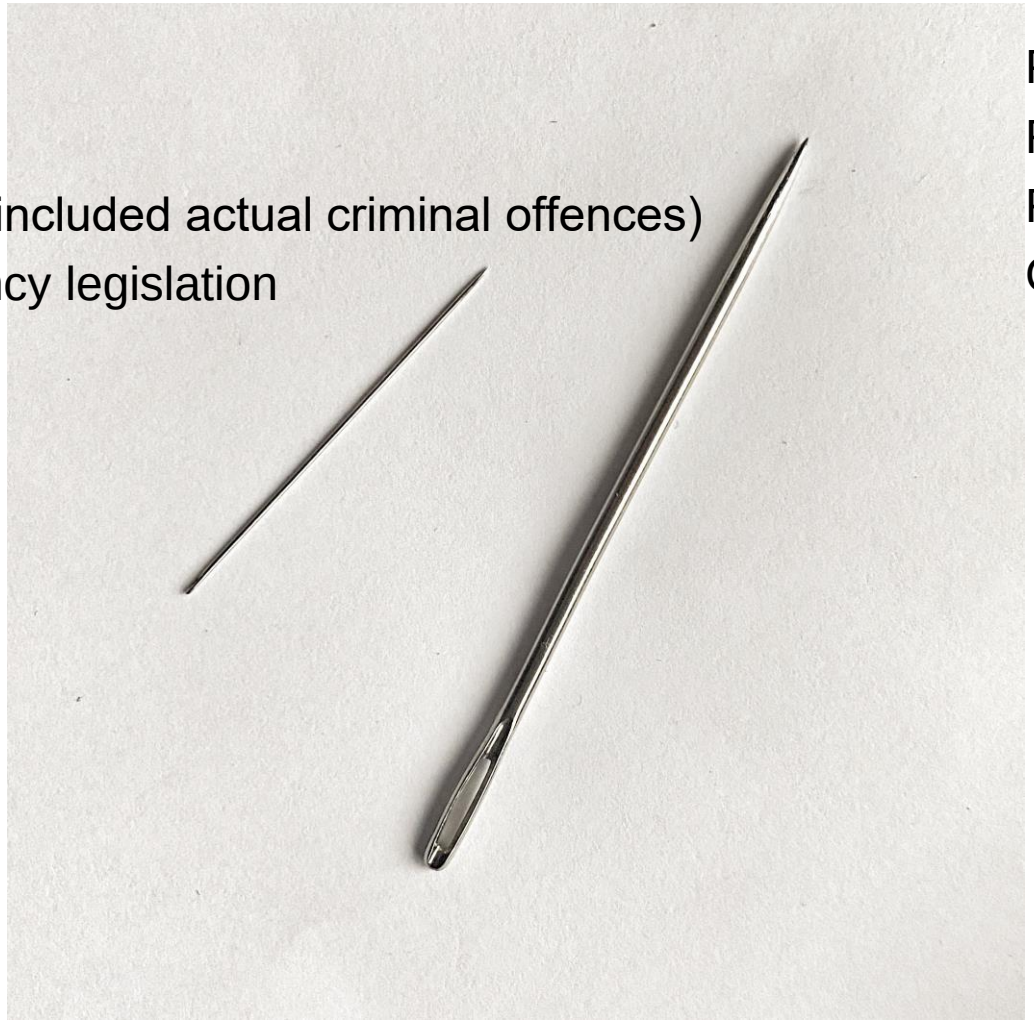
Rossendale: narrow or broad?

Statutory interpretation

“Possession” in s65(1)

Extreme facts (Scheme “A” included actual criminal offences)

Abuse of company/ insolvency legislation



Purposive approach

Rating is just a tax like others

Facts merely exemplify the problem

Chain of inquiry about substance

Rossendale as a judicial catalyst

Interpretation of s65(1) “possession” <<>> How to think about rating/ exemptions

The other judicial ingredient

- S Franses Ltd v. Cavendish Hotel (London) Ltd [2019] AC 249

“Intention” v “conditional intention”

The Makro-type scheme

- Makro Properties Ltd v. Nuneaton and Bedworth BC [2012] EWHC 2250

6 weeks occupation sufficient to reset the clock for attracting the 3 month/ 6 month exemption.

Motive not relevant but intention to occupy might be relevant as an ingredient of rateable occupation:

"43. The proper approach to be drawn from the authorities in my judgment is to consider both use and intention. If there is clear evidence or inference of an intention to occupy, such an intention taken together with the user, albeit slight, may be sufficient to amount to occupation as determined in Melladew. Slight user without such evidence of intention may not be sufficient. In my judgment Wirral is an example of the latter."

The problem in a nutshell

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1) If having an “intention to occupy” is relevant to whether or not a person is in rateable occupation, then is it sufficient to have a “conditional intention to occupy”: apart from the exemption, would the person intend to occupy?

2) AND: If having an “intention to occupy” is not relevant (and perhaps even if it is) then does the empty rates regime expose a previously unasked aspect of the Laing criteria: “apart from the exemption, would there be occupation?”

In other words, possibly the power (risk or advantage depending on which side of the fence you sit) of Frances combined with the purposive approach in Rossendale, is that it can be generalised:

Perhaps this formulation is arguable: occupation counts for rates if you satisfy the Laing criteria despite rates, but not if you only satisfy them because of a rating exemption. On this basis: if the correct inference from the facts is that, apart from the exemption, there would be no occupation – then there is no rateable occupation even if the Laing criteria are otherwise satisfied.

Endorsements of Makro in the High Court

- R ota Principled Logistics v. Trafford Council [2018] EWHC 1687 (6th July 2018)

[Frances in the Supreme Court: 5th December 2018]

… not cited in:

R ota SHSC v. Harlow DC [2021] 4 WLR 65 (16th April 2021)

[Rossendale in the Supreme Court: 14th May 2021]

And variants?

Examples of other schemes where the language and concepts evolved in the conventional sphere of rating (“occupation”/ “beneficial occupation”) has made it hard to question the effectiveness of avoidance schemes (a) in the sphere of unoccupied rating and (b) even in the conventional sphere:

- The charities variant
- The “Bluetooth” variant
- “Snail farms”
- Multiple small company occupiers to attract small business rate relief

What is at stake?

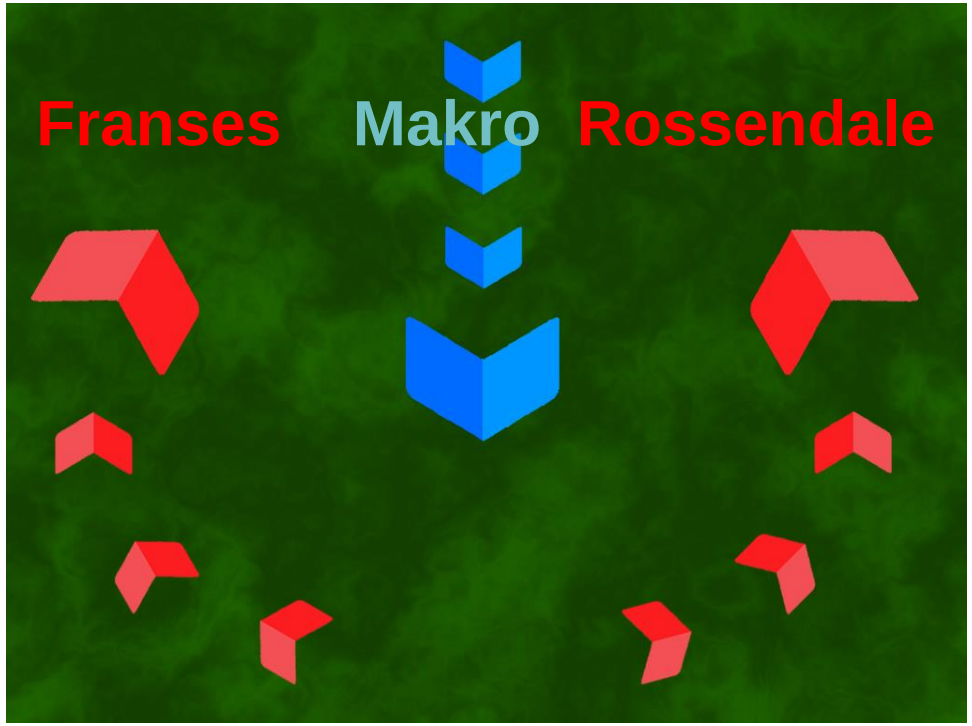
- Local Government Association survey, results published in July 2019:

"Business rates avoidance survey of local authorities"

- Estimated "cost" of avoidance schemes: £250m, or 1% of total payable
- Rossendale-type schemes: 26% of respondents
- Cases where occupation may be the critical factor: eg

❖ Makro-type schemes (periods of short occupation to attract 3 month exemption): 37% of respondents
❖ Charity schemes: 36% of respondents
❖ "Bluetooth" minimal occupation schemes: 30% of respondents
❖ "Snail farms": 17% of respondents

A judicial Pinzer?



A walk in the park?

- Concepts evolved in Franses and Rossendale are not self-deploying
- Cannot assume that “purposive” interpretation gives *carte blanche* to ignoring mitigation measures
- Cannot assume that concept of “conditional” intention/ “conditional” occupation defeats (eg) use of the 6 week “reset button” to attract successive periods of 3/6 months exemption

… for example, the “reset button” and other controls intrinsic to the rating regime (including empty rates) have their own purposes, which the Courts must be astute not to jeopardise.

So …

- One size might not fit all
- Case-by-case approach likely to be needed for foreseeable future
- Supreme Court recognised this in Rossendale:

The test:

"61… section 65(1) is speaking of an entitlement to possession which vests in the person concerned a real and practical ability either to occupy the property or to put someone else into occupation of it, is a purposive interpretation which achieves some coherence between the language of the statute and its purpose in identifying the owner of an unoccupied non-domestic property as the person who is liable for business rates.

"… It may be that other factual situations may demonstrate that this test needs some further adjustment."

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Questions?

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Refreshment Break

We will begin again at 11.20

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COVID-19 and rating – nothing to see?

Galina Ward

11 November 2021

Covid-19 and rating

Impact of legal restrictions and behavioural changes on property values

Economic shock and impact on revenues

Reliefs and other support for business

- Discretionary relief under section 47 of the Local Government Finance Act 1988
- Sector specific schemes – e.g. 100% relief for retail, hospitality and leisure, now extended at 50% into 2022/23
- Other support schemes tied to business rates, eg AGOSS capped for each airport at extent of business rate liability

Empty rates “relief”

- Local Government Finance Act 1988, s45: liable to rates for unoccupied hereditament if conditions satisfied, including that the hereditament “*falls within a class prescribed by the Secretary of State by regulations*”

- Non- Domestic Rating (Unoccupied Property) (England) Regulations 2008, r3: prescribes “*all relevant non-domestic hereditaments other than those described in regulation 4*”

- Reg 4(a): describes any hereditament that “*has been unoccupied for a continuous period not exceeding three months*”

Material change of circumstances

(a) matters affecting the physical state or physical enjoyment of the hereditament

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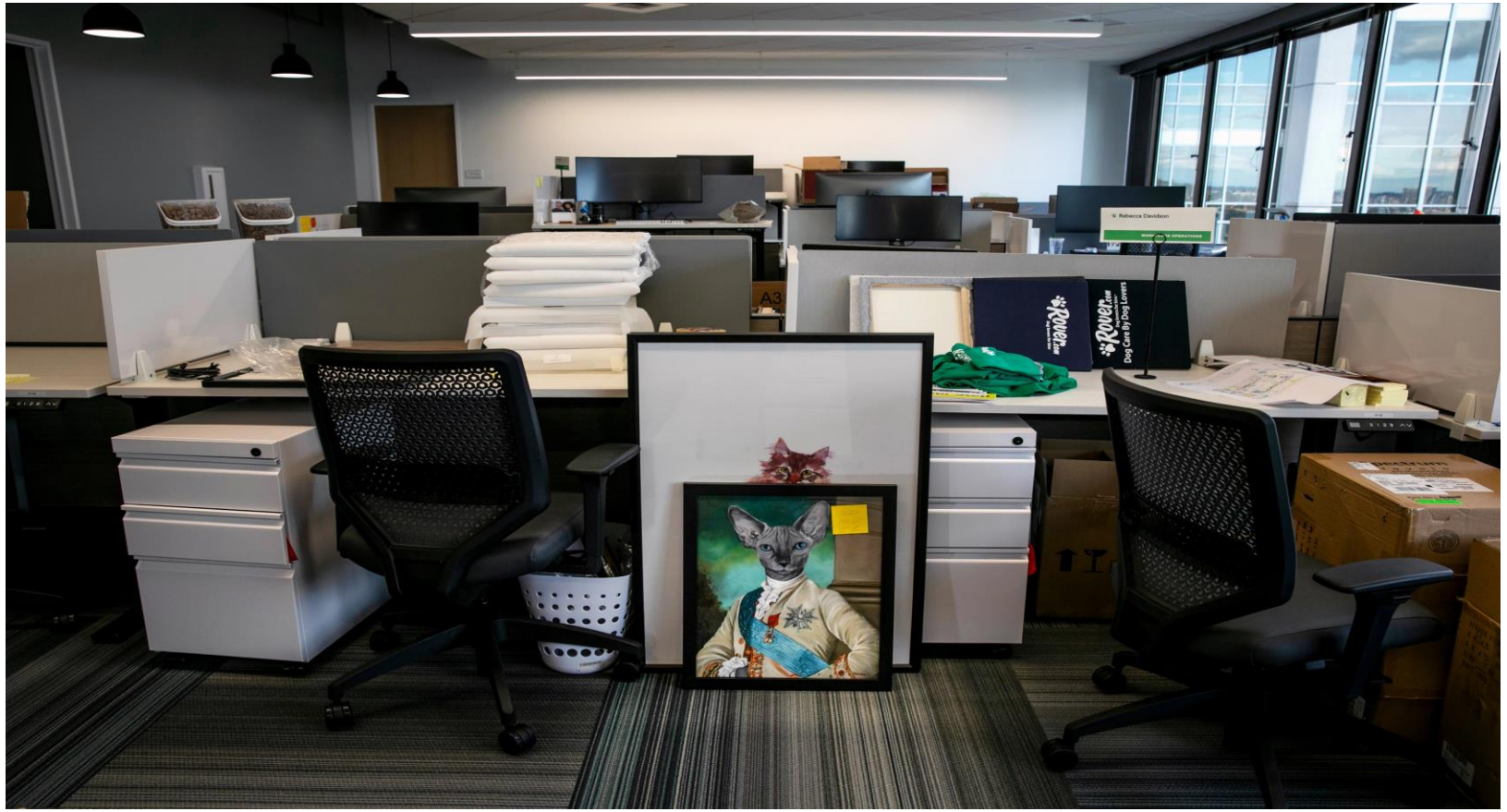
(b) mode and category of occupation



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(d) matters affecting the physical state of the locality … or … physically manifest there

(e) the use or occupation of other premises situated in the locality of the hereditament

Valuation for Rating (Coronavirus) Regulations 2021

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Regulation 2:

(1) This regulation applies to a hereditament **where, but for these Regulations, the rateable value shown in a 2017 list for that hereditament would be affected as a result of—**

(a) the UK Government's coronavirus response;

(b) any requirements of, or advice or guidance from–

(i) a public authority in the United Kingdom;

(ii) the Scottish Government, the Northern Ireland Executive or the Welsh Government;

(iii) the government of a country or territory outside the United Kingdom;

in response to the serious and imminent threat to public health posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2); or

(c) measures taken by any person to ensure compliance with health and safety legislation.

(2) **For the purpose of determining the rateable value of a hereditament to which this regulation applies for any day on or after 25th March 2021, in applying the provisions of sub-paragraphs (1) to (7) of paragraph 2 of Schedule 6 to the Local Government Finance Act 1988 it shall be assumed that—**

(a) on that day the response, requirement, advice or guidance referred to in regulation 2(1)(a) and (b) had not occurred; and

(b) the measures necessary to ensure compliance with health and safety legislation are the measures that were necessary on 1st April 2015 to comply with such legislation.

Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill

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(1) This section applies to the making of a relevant determination in relation to an English list.

…

(4) In making a relevant determination, no account is to be taken of any matter (whether arising before or after the passing of this Act) that is directly or indirectly attributable to coronavirus.

…

(7) This section applies to a determination made by reference to a day, or a matter as it is assumed to be on a day, which falls before, as well as on or after, the day on which this Act is passed.

Justification

Government announcement 25 March 2021:

- The government is making clear today that market-wide economic changes to property values, such as from COVID-19, can only be properly considered at general rates revaluations, and will therefore be legislating to rule out COVID-19 related MCC appeals.
- Instead the government will provide a £1.5 billion pot across the country that will be distributed according to which sectors have suffered most economically, rather than on the basis of falls in property values, ensuring the support is provided to businesses in England in the fastest and fairest way possible.

https://www.gov.uk/government/news/business-rates-relief-boosted-with-new-15-billion-pot

Illustrative case studies

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Consultancy firm operating from an office in Central London

- prior to the pandemic, operated with staff all office based on a full-time basis.
- since the pandemic, business has been unaffected.
- large office with staff continuing to work on a full-time basis but with 50% working from home at any one time.
- rateable Value - £12.5 million
- size – 36,000m2
- under the MCC regime, the businesses could have could have argued that it had suffered an MCC due to reduced occupancy as a result of social distancing guidance and due to the indirect effect on the value of the property due to the mandated closures of surrounding bars and restaurants.
- for illustrative purposes, a 25% reduction in rateable value would save the business £1.6 million
- under our proposed approach, the business would unlikely fall within scope, given it had not suffered an economic impact.

Food wholesaler operating from a warehouse outside of London

- prior to the pandemic sold exclusive to restaurants within a region
- since the pandemic, turnover reduced nearly to nil
- large warehouse where social distancing can be observed without an impact on operations.
- rateable Value - £95,000
- size – 5,200m2
- under the MCC regime, the businesses would unlikely have been deemed to have suffered an MCC and so would have received no reduction
- under our proposed approach the business would likely fall within scope given the economic impact on their business
- for illustrative purposes, a 15% relief would save the business £7,300

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The Tribunal's powers under regulation 38 of the Valuation Tribunal for England Regulations 2009

Joel Semakula

Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009

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- Regulation 35: enables the VTE to make an order in the terms agreed by the parties
- Regulations 36 and 37: provide for the giving of notice of, and reasons for, appeal decisions
- Regulation 37A: matters which must not be taken into account in NDR appeals
- Regulation 38: deals with the making of orders other than those made with the parties' consent.

Regulation 38: The Framework

- (1) - (3): appeals in relation to Council Tax
- (4): NDR appeals
- (5) – (6): sets out powers where VTE determines that a disputed rateable value should be an amount greater than both the amount shown in the list at the date of the proposal and the amount proposed by the appellant
- (7): sets out the powers where it appears that circumstances giving rise to an alteration ordered by the VTE have ceased to exist

Regulation 38: The Framework

- (7A) – (8C): powers in respect of penalties
- (9): time-limit for compliance
- (10): ancillary matters

The Proposal

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The Proposal

- The circumstances in which a proposal to alter a valuation list may be made are prescribed by Reg 4 of the NDR Regs. The same regulation also sets down who may make a proposal, and in what circumstances.

- Regs 9-12 deal with the procedure to be followed where the VO is in receipt of a valid proposal.

- This includes procedures for the VO's acceptance of the proposal (Reg 10), for the withdrawal of the proposal (Reg 11), and for agreed alterations outside of the terms of the proposal (Reg 12).

Regulation 38(4) / Regulation 13A

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- On dealing with an NDR appeal, the VTE has the power to "require a VO to alter a list in accordance with any provision made by or under the 1988 Act."

- Pursuant to Regulation 13A of the NDR Regs, a proposer may appeal to the VTE in circumstances where the Valuation Officer has:
  - decided under regulation 13 of the NDR Regs not to alter the list or to alter it otherwise than in accordance with the proposal; or
  - the VO has not made a decision under regulation 10 or 13 and—
    - the proposal is not withdrawn under regulation 11;
    - there is no agreement under regulation 12; and
    - 18 months has elapsed.

Regulation 38(7): Building Works

Avison Young Ltd v Jackson (Valuation Officer) Moore v Great Bear Distribution Ltd **[2021] EWCA Civ 969**

Avison Young

- Works: Carried out between 1 September 2014 and 23 January 2015
- VTE: Ordered VO to amend rating list to enter a rateable value of nil for the period of works.
- Effect: Hereditament remained in the list with its original rateable value of £1,830 from 23 January 2015 to 31 March 2015.

Great Bear Distribution Ltd

- Alterations: Carried out between 23 June and 3 October 2014.
- VTE: Ordered that the entry be deleted from 23 June. Declined to restore the entry in the list from 3 October.
- Reason: Effect of doing so would be to return the hereditament to the list at its previous rateable value whereas it had now reduced.

Avison Young Ltd / Great Bear Distribution Ltd (Cont'd)

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- For the purposes of these appeals, there was no difference between a valuation officer reducing the rateable value of a property to a nominal value and removing the property from the list: at [28].

- The purpose of reg.38(7) was to enable the VTE to ensure that its order for alteration of the list had effect only for the duration of the circumstances which justified the alteration, but also to give the VTE a discretion not to do so: at [67].

- The VTE exercise of its discretion is subject to control by the Court which will not hesitate to intervene where it is exercised in a flawed manner: at 81.

Regulation 38(7): Mistakes

Andrew Ricketts (Valuation Officer) v Cyxtera Technology UK Ltd **[2021] UKUT 0265 (LC)**

- VOA argued that the circumstances giving rise to an alteration by the VTE in relation to 13 March 2013, namely the fact that 631 was incomplete, have ceased to exist, which meant the had power under reg 38(7) to determine that 631 became part of the hereditament on a later date, and to order that the rating list should be altered at that date.

- Cyxtera argued that the Tribunal does not have jurisdiction to do this because the circumstance giving rise to an alteration on 13 March 2013 is that the VOA made a mistake and entered the wrong value, and that circumstance has not changed.

- UT declined to exercise its jurisdiction.

Saved by the Regulation 38(10)?

- Regulation 38(10): “An order under this regulation may require **any matter ancillary** to its subject matter to be attended to.”

- Where premises were entered in the 2005 and 2010 rating lists in reliance on completion notices which were found to be invalid after the 2005 rating list was closed to the owner and proposals for deletion from the 2010 list were upheld by the Valuation Tribunal for England, reg.38(10) did not give the Valuation Tribunal power to alter the 2005 rating list: *Metis Apartments Ltd v Grace (VO) and Sheffield CC* [2014] R.A. 222.

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Questions?

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Lunch

We will begin again at 13.10

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Recent Developments in Charitable Relief

Jenny Wigley QC

A reminder of the statutory framework

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Test for mandatory 80% relief from occupied rates:

> "*the ratepayer is a charity or trustees for a charity and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities*)" (s.43(6)(a), LGFA 1988)
>
> (also remember possibility of further discretionary relief under s.47)

Test for zero rating when unoccupied:

> "*the ratepayer is a charity or trustees for a charity and it appears that when next in use the hereditament will be wholly or mainly used for charitable purposes (whether of that charity or of that and other charities).*" (s.45A, LGFA 1988)

Recent Cases

- Nuffield Heath v. London Borough of Merton [2021] EWCA Civ 826

- R (oao Preservation and Promotion of the Arts Ltd [2020] EWHC 2435 (Admin)

- Derby Teaching Hospitals NHS Foundation Trust v. Derby City Council [2019] EWHC 3436 (Ch)

Nuffield Health (1)

- Fitness and wellbeing centre (including a gym, spin class area, swimming pool, reception area and creche);
- Charitable purposes of Nuffield: ‘advancing, maintaining and promoting health and preventing ill health’;
- There was an issue as to whether or not the activities and use of the hereditament delivered a ‘public benefit’;
- And issue as to the relevance or otherwise of ‘public benefit’ to whether or not Nuffield was entitled to 80% mandatory occupied rates relief for its fitness and wellbeing centre.

Nuffield Health (2)

- CA decided use of the hereditament not for the public benefit – because of its high-end membership fees it could not be demonstrated that the activities met the minimum threshold of providing benefit to those of modest means;

- But how did this affect whether or not Nuffield could demonstrate that the premises were being ‘used wholly or mainly for charitable purposes’?

Nuffield Health (3)

- The public benefit requirement applies only to the purposes of the charity, not to the activities carried on at the individual hereditament;
- That requirement that is shown to be met by the charity's registration under the Charities Act 2011 (see ss 37(1), 1, 2 and 3);
- In the case of a registered charity, s.37(1) provides that an institution is conclusively presumed to be a charity as defined under s.1;
- Under s.1, "an institution established for charitable purposes only…"
- Under s.2, a charitable purpose is a purpose falling within s.3(1) and "that is for the public benefit" (as interpreted under s.4 of the Act).

Nuffield Health (4)

- Accordingly in determining whether mandatory charitable relief applies to premises occupied by a registered charity, what does a rating authority (and, by extension a court determining rates relief) need to consider?

  - no need to consider the issue of public benefit;

  - only need to ascertain what the charity's objects are (by reference to its constitution)

  - and then determine whether the hereditament is being used directly for those purposes (*Nuffield*, para 149)

Nuffield Health (5)

- So, Nuffield Health was entitled to charitable relief from rating on the hereditament under consideration notwithstanding that the activities at the premises were unanimously considered by the CA not to deliver a public benefit (c.f Sales J in *Public Safety Charitable Trust v. Milton Keynes Council* [2013] EWHC 1237 (Admin))

- The Charities Commission, as regulator of charities, is better placed and more experienced at making assessments of this kind.

- Local authorities "*have many varied functions to fulfil, but regulating charities is not one of them*…"

Nuffield Health (6)

- BUT warning from Lord Justice Peter Jackson:

"I would only add this. Nuffield Health may have succeeded under the rating legislation, but its failure, on our unanimous view, on Ground 3 may not be without consequences in the context of charity law. Its trustees are obliged to satisfy themselves in good faith that its provision is for the public benefit. If the situation at the Premises is replicated across its several hundred fitness centres and gyms, the organisation may face scrutiny through the Charity Commission and ultimately through the courts, as occurred in the ISC case."

Preservation and Promotion of the Arts Ltd (1)

- High Court upheld a Magistrates' Court decision determining that mandatory charitable relief was not applicable in circumstances where charity had not persuaded court of the public benefit of the use of the hereditament;
- Court considered that the use must be 'extensive and for the public benefit';
- It had not been demonstrated that the events held were of sufficient artistic quality to be for the public benefit, so held legitimate to withhold charitable rates relief;
- Does not sit easily with the Court of Appeal decision in Nuffield Health

Preservation and Promotion of the Arts Ltd (2)

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BUT:

- Did not concern a registered charity so not regulated in the same way;

- So less scope for arguing that the issue of public benefit was an issue for scrutiny by others such as the Charity Commission rather than being appropriate for consideration by rating authorities;

- *Nuffield Health* not cited (albeit at only HC stage at that time);

- On the issue of public benefit, High Court decision in *PoPA* likely to be superseded by Court of Appeal decision in *Nuffield Health.*

Derby Teaching Hospitals NHS Foundation Trust

- Concerned whether an NHS Foundation Trust was entitled to rates relief under s.43(6) LGFA 1988;
- NHS Foundation Trusts are not registered charities, but arguably fall within the statutory definition of a charity in the 2011 Act and LGFA 1988;
- Held that foundations trusts not ‘established for charitable purposes’ only under s.67(1) LGFA 1988;
- An institution which was established for other purposes besides charitable ones was not a charity even if, in practice, it pursued only its charitable purposes.

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Res judicata and issue estoppel in rating cases

Peter Sibley

What is res judicata?

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Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2013] UKSC 46, at paragraphs 17 to 26

- A portmanteau term
- Cause of action estoppel
- Issue estoppel
- The overlapping principle of abuse of process

Res judicata in the rating context

- Thorntons Plc v Clarion Solicitors Limited [2018] UKUT 109 (LC)
- Co-operative Group v Virk (Valuation Officer) [2020] UKUT 286 (LC)

Proposals to alter the list

- The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (“ALA Regulations”)
- The Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005
- Regulations 2, 4(1), 4(3) and 12
- Regulation 4(3)(c) “No proposal may be made— on the ground set out in paragraph (1)(d), to the extent that the alteration [was made as a result of a previous proposal relating to that hereditament or] gives effect to the decision of a valuation tribunal, the VTE, the Lands Tribunal, the Upper Tribunal or a court determining an appeal or an application for a review in relation to the hereditament concerned

Thorntons

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- Initial proposals to alter – regulation 4(1)(a)
- Referred as appeals
- Agreements on proposals – regulation 12
- Further proposals to alter – regulation 4(1)(d)
- Referred as appeals
- VTE – dismissed appeals – regulation 4(3)(b)(i) and general reference to abuse of process
- Appeal to UT

Thorntons – UT Decision

- Disagreed with VTE - neither of the later proposals could be said to be invalid on the basis of regulation 4(3)(b)(i)

- [36] "…The ground of a proposal is required to be stated so it will or ought to be clear from the document itself and cannot be second-guessed by the VO or the VTE and be deemed or treated as being a proposal on a different ground"

Thorntons – UT Decision

- [38] “…The VTE considered that the second proposals had only been made "to secure a second bite of the cherry which amounted to an abuse of process”…”
- [40] to [46]
  - Neither the VTE nor the UT have specific power to strike out for abuse of process
  - Abuse means using the process for a purpose or in a way significantly different from its ordinary and proper use
  - One category of abuse is where a party seeks to raise in a second action issues or facts which could and should have been, but were not, raised in a first action which was determined or resolved by agreement

Thorntons – UT Decision

Continued

- The burden of establishing an abuse of process is on the party who seeks the dismissal
- The determination of whether there has been an abuse of process requires the adoption of a broad, merits-based judgment, taking account of all the public and private interests involved and all the facts of the case
- When considering whether there has been an abuse of process there is no distinction in law between previous litigation where the case was settled and previous litigation where the case proceeded to judgment

Thorntons – UT Decision

- Conclusion – appeals allowed and proceedings remitted to the VTE

Cooperative Group

- Three joined appeals
- First and second relating to shop premises in Wales
- A1 – former occupier, A2 – current occupier
- June 2010 and April 2011 – A1 made proposals to alter the list
- A1 agreed to settle
- November 2012 – A1 vacated premises
- July 2013 – the last of the agreements to settle entered into by A1
- 2015 – A1 made a further proposal to alter the list – regulation 4(1)(d)
- Later in 2015 – A2 took sub-lease of premises
- 2017 – A2 made a proposal on same basis as 2015 proposal

Cooperative Group – UT Decision

- Res judicata not relevant where no previous decision
- [20] “For reasons that we shall explain, the doctrine of res judicata is not relevant to the present appeals…”
- [21] “Res judicata is the principle that once a court or tribunal has made a decision, the parties cannot come back for another bite of the cherry (save by the proper appeal route)…”
- [26] “…as the name of the doctrine indicates: something (res) has been decided (judicata)”

Cooperative Group – UT Decision

Landmark Chambers

- Abuse of process – Thornton
- Power to strike out for abuse of process:

> [43] "… rule 8(3)(c) is a broad power, applicable to all the Tribunal's jurisdictions, and abuse of process takes many forms. It would be incongruous if the Tribunal did not have power to strike out abusive proceedings and was required to let them continue to a final hearing even though they were doomed to failure. Where the Tribunal finds that proceedings are abusive and must fail on that basis, rule 8(3)(c) enables the Tribunal to strike them out"

Cooperative Group – UT Decision

- A1’s appeal – struck out [58]
- A2’s appeal – not struck out [59]
- Appeal relating to premises in England – struck out

To conclude

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- Res judicata is appliable in the rating context
- Res judicata is a broad concept comprising a number of different principles
- In order for res judicata to be engaged there must be a previous determination
- If there is no such determination, the overlapping principle of abuse of process may be engaged
- The determination of whether there has been an abuse of process involves a broad, merits-based judgment, taking account of all the interests involved and all the facts of the case
- It will be relevant to consider whether new evidence is available that was not available to the parties previously

To conclude (continued)

- The UT and VTE can strike out for abuse of process
- Specifically when making a proposal to alter the list, first consider – 4(3) of the ALA Regulations

  (i) Consider whether there been a previous proposal to alter the same list in relation to the same hereditament on the same ground and arising from the same event?

  (ii) If relying on regulation 4(1)(d), consider whether the alteration was made as a result of a previous proposal relating to that hereditament [in England] or whether it gives effect to a decision of a tribunal or court in relation to the hereditament concerned [in England and Wales]?

Practical Suggestions for Preparing Challenges

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Golden Rules

Landmark Chambers

- Know the rules
- Think about all of your potential audiences
- Identify your key propositions
- Assemble the evidence to prove key facts and support your valuation
- Think ahead (especially about expert evidence)

CCA PROCESS

Appeal Regulations 2009 (as amended) SI 2009/2268

APPENDIX 1

0 **Confirmation of check** (Reg 4C)

Completion Check (Reg 4F (3))

max 12 months

check

Submission of complete proposal (Reg 6(1))

4 months from completion of check*

proposal

Decision Notice

18 months from submission max

(Reg 13B)

Submit Appeal

max 4 months

appeal

Incomplete proposals (Reg 8)

Penalties (Reg 9)

MCCs

MCC Regs
Reg 3(7)(b)
SI 1992/556

Material day for MCC proposals

Submission of MCC proposals (Reg 6A)

external MCCs only (Sch2 (7) d & e LFFA 88 - MD is the later of

-4 months from completion or

-16 months from date of confirmation of check

Check stage

- Regulation 4A of SI 2009/ 2268 (as amended) defines a check by reference to the steps which must be completed before a proposal may be made.
- Regulations 4B to 4E set out the steps.
  - Regulation 4C requires a proposer to confirm to the VO the accuracy of information it holds about the hereditament.
  - Regulation 4F requires the VO to serve a notice when a check has been completed and provides that a check is taken to be completed if the notice is not served within 12 months of the person confirming the accuracy of information under regulation 4C.

  - Use of Group Pre-Challenge Review (GPCR)

Know the rules (golden rule 1)

- The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (SI 2009/ 2268) ('Appeal Regulations') as amended by (SI 2017 /155)
  - Reg 4 statutory grounds for making proposal
  - Must have same material and effective date (reg 4(3)(a) and note also reg 6A(4) for MCC proposals)
  - One bite of the cherry (per person) (reg 4(3)(b)(i))
  - Time limits (4 months from check unless reg 6A(2) exception applies ["external" MCC under schedule 6 para 7(d) or (e)]
  - Reg 6 – sets out requirements for content of proposals (see next slide)

Proposal must include (reg 6(4))

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(a) the name, address and contact details of the proposer;

(b) the grounds of the proposal including the particulars on which each of the grounds is based ("particulars of the grounds of the proposal");

(c) details of the proposed alteration of the list;

(d) the date from which the proposer asserts the proposed alteration should have effect;

(e) the date on which the proposal is served on the VO;

(f) evidence to support the grounds of the proposal; and

(g) a statement as to how the evidence supports the grounds of the proposal.

Think about audience(s) (golden rule 2)

- VO
- VOA hierarchy/strategic decision makers
- Your client
- VTE
- Upper Tribunal (Lands Chamber)

Identify your key propositions (golden rule 3)

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- Why is the list wrong and what should it say
  - Link to statutory grounds
  - Where appropriate demonstrate cause of inaccuracy (eg MCC)
  - What entries/valuation(s) result?
  - How are they substantiated?

NB - MCC

– critical to formulate the propositions and the causation with great care

- differential time limits

- consider legal advice at formative stage (MCC/causation/valuation considerations)

Assemble the evidence to prove key facts and support your valuation (golden rule 4)

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- Facts – what evidence do I need to establish the challenge? Expert vs factual
- Valuation – comparables (best evidence not kitchen sink)
- Beware without prejudice material
- Think practically and strategically - Can facts be agreed at this stage or assembled in a way that is designed to be agreed at a later stage?
- How in practice is the evidence put forward? (use of witness statements; who has first hand knowledge?; what documents substantiate key assertions?)

Think ahead (especially about expert evidence) (golden rule 5)

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- What is factual evidence and what is expert evidence?
- Expert giving factual evidence
- Company witnesses (expertise but not experts)
- **Gardiner &Theobald v Jackson (VO)** issues (see also **Senova v Sykes** (VO) – application to expert giving factual evidence and **Merlin** (paras 162-170) and UTLC PD (2020)
  - Declare conditional fees in VTE; barred in UTLC (PD UTLC (10/20) at 18.27
  - Approach to connected cases
  - Professional obligations (RCIS –Surveyors Acting as Expert Witnesses 4th ed)
  - VTE approach
  - But, what would then happens in the UTLC? Vital to think ahead!

What could possibly go wrong?

- Reg 8 – incomplete proposals (note approach to 4 months time limit and disregards in reg 8(3) and (4)) ; no appeal right

- Reg 9A – penalty for false information

- Latent problems (see next slide)

Appeals

- Appeals (reg 13A) (following reg 13 decision notice)
  - Valuation not reasonable or list not accurate
  - VTE strict approach to new evidence not included in notice of appeal (regulation 17A of 2009/2269) if not agreed

- UTLC – more liberal approach in theory (see next slide) but beware
  - Proposals can be carefully construed (see **York Museums**)
  - Inaccuracies may invalidate proposals (**Mayday Optical v Kendrick** and see now **Alam v Stoyles** at para 24)
  - Pleading points can affect cases (**Cyxtera**)

UT(LC) Procedural cases 2017 rating list

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- 2017 list – 1st appeal to UTLC

Stock Auto Breakers Limited v Sykes (VO)

- Para 73 – approach to new evidence in UTLC

"The Tribunal is not bound by Regulation 17A. The 2009 procedure regulations only apply to the VTE and not to this Tribunal, which is governed by its own procedure rules and in particular Rule 16 (evidence and submissions). **There is no equivalent rule** to regulation 17A although rule 16(2)(b)(iii) provides that the Tribunal may exclude evidence that would otherwise be admissible where it would otherwise be unfair to admit it. That is not the case here."

Concluding reflections:

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- Lots of traps for the unwary
- Understand what is needed in terms of analysis and evidence (if in doubt get advice early – eg MCC formulation).
- Factual vs expert is critical
- Think ahead tactically as challenge is the platform for the case going forward

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Questions?

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Refreshment Break

We will begin again at 14.50

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What is in the Rating List? Occupation, possession, domesticity and self-containment

Luke Wilcox

Topics to be covered

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- The statutory tests
- Paramountcy and the hereditament – where have we got to?
- The role of possession in identifying the occupier and the hereditament
- Domestic hereditaments and the Council Tax

The statute

- What goes in a rating list?

- S. 42(1) LGFA 1988:

  - In the local area
  - Relevant non-domestic hereditament
  - At least some of it is neither domestic nor exempt
  - Not a central list hereditament

The statute

- A relevant hereditament (s. 64(4):
  - Lands
  - (some) Mines
  - (some) Rights

- Non-domestic (s. 64(8)):
  - Wholly non-domestic; or
  - Composite (i.e. a part of the hereditament is wholly domestic: s. 64(9))

Occupation and the hereditament

- Primary tests for identifying a hereditament: geographical and functional
- But occupation/ownership relevant too:
- *Mazars* per Lord Neuberger PSC at para 49:

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“the occupation of premises can in some circumstances serve to control their status as one or more hereditaments. An office building let to and occupied by a single occupier would be a single hereditament, but if the freeholder let each floor of the building to a different occupying tenant, retaining the common parts for their common use, then each floor would be a separate hereditament.”

Paramountcy – where are we now

- Case law where occupation controls the hereditament is focused on paramountcy
- Multiple occupiers = multiple hereditaments
- Two recent high authorities on the point

Cardtronics

- UKSC decision (Lord Carnwath JSC)
- Restoration of *Holywell v Halkyn* approach
  - Host must have parted with occupation, exclusively, for guest to be rateable
- Mutuality of purpose
- Effect – host more likely to be occupier than previously thought

Ludgate House

- Court of Appeal (Lewison LJ)
- Affirmation and application of the lodger principle (*Halkyn*)
- Primacy of contractual terms and exercisable (rather than exercised) rights

Possession after *Ludgate House*

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- *Ludgate House* introduces confusion over role of “possession” in rating law
- What does “possession” mean?
- Two candidates:
  - “actual” possession, i.e. physical presence on the land – actual occupation
  - “legal” possession, i.e. right to exclude the whole world - tenancy

- *Ludgate House* suggests “exclusive possession”, i.e. legal possession, is a necessary ingredient of rateability: para 73:

“If, as Blackburn J held, the test is whether a guardian would be entitled to maintain an action for trespass, it seems to me to be clear that the terms of the licence did not give them exclusive possession, which is the necessary foundation for an action in trespass.”

- But …

(1) No need for exclusive possession to bring a claim in trespass: *Manchester Airport v Dutton* [2000] QB 133 – "*the rattle of medieval chains*" …

(2) Licensees do not have exclusive possession by definition, yet many cases where a licensee is in rateable occupation (e.g. *Brook v Greggs, Re Heilbuth, Southern Railway*)

Council Tax – what's in the valuation list?

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Why does this matter to rating practitioners???

Council Tax – what's in the valuation list?

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- LGFA 1992, s. 23(1):
  - "dwellings" in the area
- What is a "dwelling"? S. 3:
  - A hereditament
  - Not exempt from NNDR
  - And not required to be shown in a NNDR rating list

Council Tax – what's in the valuation list?

- i.e a dwelling is a purely domestic hereditament

- But, s. 3(5) LGFA 1992:

(5) The Secretary of State may by order provide that in such cases as may be prescribed by or determined under the order—

> *(a) anything which would (apart from the order) be one dwelling shall be treated as two or more dwellings; and*
>
> *(b) anything which would (apart from the order) be two or more dwellings shall be treated as one dwelling.*

The Chargeable Dwellings Order 1992

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- Introduces key concepts – art 2:

"multiple property" means property which would, apart from this Order, be two or more dwellings within the meaning of section 3 of the Act;

"single property" means property which would, apart from this Order, be one dwelling within the meaning of section 3 of the Act;

"self-contained unit" means a building or a part of a building which has been constructed or adapted for use as separate living accommodation.

Disaggregation

- Art 3 CDO 1992
- If a single property contains multiple SCUs, each SCU must be treated as a dwelling
- i.e. can never have a hereditament for CT purposes that contains more than one SCU

Self-contained units

- What is a SCU?
- Very extensive body of case law
- Key summary – Popplewell J in *Clement v Bryant*, para 5
- Six principles

The *Corkish* principles (1)

The question is whether the effect of the construction or adaptation is such as to make the relevant building or part of a building reasonably suitable for use as separate living accommodation.

- i.e. higher test than mere “capability”
- What matters is how it is constructed/adapted, not how it could be – *Coll v Mooney*
- Relevance of contemporary standards of living

The *Corkish* principles (2)

The question is to be answered by reference to the physical characteristics of the building. This is sometimes referred to as a "bricks and mortar test", but the epithet does not accurately capture the wide range of physical characteristics which may be of relevance including services and fixtures.

- Includes, e.g., electrics and plumbing to enable installation of a washing machine: *Mooney*
- But doesn't extend to furnishings or other indicia of occupation: *Salisbury v Bunyan*
- Analogous to NNDR treatment of rateable vs non-rateable plant

The *Corkish* principles (3)

This is an objective test. The test is not concerned with when, how or why those characteristics were achieved. The purpose of the construction or adaptation is irrelevant. The test is addressed to the result of the building work, not the circumstances in which it was carried out. Intention is irrelevant.

- Largely driven by practical considerations:
  - Difficulty of investigating builder's intentions long after the event.
  - Plus avoiding encouragement to taxpayers to make challenges based on subjective intentions

An aside – planning status

- Planning status of a property is irrelevant to SCU – *Batty v Burfoot*
- Not clear why this is so – can it be said something was constructed or adapted for a certain use, if the permission for the construction renders that use unlawful???
- The premises of irrelevance of intentions are inapplicable here – planning controls objectively ascertainable and run with the land
- Wrong turn in the law?

The *Corkish* principles (4)

Whether the test is met is a matter of fact and degree for the tribunal.

- Courts take a very light-touch approach to supervision of VTE decisions in this area

- Need to show a patent error of law before Court will consider intervening: *Rahmdun v VTE*

The *Corkish* principles (5)

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actual use may in some cases be of some relevance. If, for example, the part of the property has in fact been used, or is being used, for occupation by persons who do not form part of a single household with those who occupy the remainder of the property, that may be a factor which supports a conclusion that its physical characteristics make it suitable for such occupation. However actual use is not the test, and even in cases where it may be of some relevance it will not usually be a factor of significant weight. At most it may reinforce a decision reached by reference to the physical characteristics of the building.

- Actual use can be, but is not necessarily, a material consideration – materiality for the VTE, and VTE doesn't need to give any reasoning for rejecting relevance (*Salisbury*)

The *Corkish* principles (6)

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If what is being considered is part of a building, the physical characteristics to be considered include those of the remainder of the building as well as the part being considered. Access is one aspect of such characteristics. Separate public access may be a pointer to the part being separate living accommodation; whereas if access is through the remainder of the building this may tell against the part being separate living accommodation. In the latter case different weight may be attached where access is through the living areas of the remainder of the building from the weight to be attached where it is through a hallway. But access is not a factor which can be determinative without considering the other physical aspects of the building. The weight to be attached to it is a matter for the tribunal.

The *Corkish* principles (6)

- Access not only characteristic of wider property to be relevant
- Communal facilities can be relevant:
  - *Mooney*, utility room
  - *England Kerr v Thomas* (VTE): security system for the house
- But <u>fact</u> of communal living irrelevant

What does a space require to be a SCU?

- Essentials of living:
  - Eating
  - Sleeping
  - Toileting/washing
  - Privacy
- But absence of some essential facilities need not prevent SCU status: see e.g. *Clement v Bryant* where SCUs identified despite having no baths or showers

Aggregation

- Art 4 of the CDO 1992
- If a SCU contains multiple dwellings, LO has a discretion to merge them into a single dwelling
- Policy rationale – enable efficient collection of CT in contexts where class of taxpayers is highly mobile

Aggregation

- Considerations relevant to aggregation: *James v Williams* [1973] RA 305
  - Extent of shared/communal facilities
  - Degree of adaptation of the individual dwellings
  - Capability of accurate identification of the boundaries of the dwellings
  - Degree of transience of occupation

Aggregation – the role of the VTE

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- Art 4 gives LO a discretion

- No definitive ruling, but seems that the VTE doesn't get to exercise the discretion on appeal – limited to reviewing LO's exercise of the discretion on public law grounds.

Panel discussion

Landmark Chambers

hot topics in valuation

Tim Morshead QC
Dan Kolinsky QC
Jenny Wigley QC
Galina Ward
Luke Wilcox

Thank you for listening

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