Neutral Citation Number: [2023] EWHC 3275 (Admin)

Case No: AC-2023-LON-001598
CO/1884/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2023

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

MICHAEL STANUSZEK **Appellant**

- and –

DAWN BUNYAN (LISTING OFFICER) **Respondent**

- -
- -

Andrew Carter (instructed by **Streathers Solicitors LLP**) for the **Appellant**
Luke Wilcox (instructed by **HM Revenue and Customs Solicitor's Office**) for the **Respondent**

Hearing date: 14 November 2023
Draft Judgment circulated to the parties: 12 December 2023

Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. This appeal concerns the number of 'dwellings' that make up a property in Twyford Abbey Road, Park Royal, London NW10 7HG ("***the Property***"), for the purposes of section 3 of the Local Government Finance Act 1992 ("***the 1992 Act***"): in effect, for council tax purposes.

2. The Appellant contends that the whole of the Property should be assessed as a single dwelling. The Listing Officer's view is that, when the law is properly understood and applied, the Property comprises six dwellings: one for each of the six rooms ("***the Rooms***") contained within the Property. In a decision dated 14 April 2023 ("***the Decision***"), the Valuation Tribunal for England ("***the VTE***") agreed with the Listing Officer, and dismissed the Appellant's appeal. This is the Appellant's appeal against that decision.

(B) FACTS

3. The Appellant is the freehold owner of the Property. The Property was listed from 1 April 1993 as a single dwelling until, based on information received from the local authority, the Listing Officer proposed to assess the Rooms as individual dwellings. The Appellant opposed that, proposing that the Property remain assessed as a single dwelling, one result of which would be that he, rather than his tenants, would be liable for council tax. The Listing Officer did not accept that proposal, and the case was appealed to the VTE.

4. The VTE recorded the Appellant's factual case as follows:

> "The appellant stated that 6 Twyford Abbey Road, London NW10 7HG was licensed as a house in multiple occupancy (HMO) and contained six rooms which had been separately entered into the valuation list. Each room contained a bathroom. Any occupier of the rooms had exclusive possession of their own room and shared use of the communal areas. Access to each

> room was through those communal areas. None of the rooms contained cooking facilities or sufficient space for hanging laundry. Each room contained a lockable door and was let pursuant to an assured shorthold tenancy agreement. The landlord granted each tenant quiet enjoyment of both the room and communal areas." (§ 13)

5. The Appellant adds that the only bathrooms/toilets in the Property are those in the Rooms, a point that was made to the VTE at the hearing and which is not understood to be disputed.

6. The bundle included a sample tenancy agreement, which provides *inter alia* that:

> "1. The Landlord lets to the Tenants the Designated Room, with the right to share the use of the Shared Parts with such other persons as the Landlord grants or has granted the right to use those Shared Parts, for the Term …
>
> …
>
> The Landlord agrees:
>
> Quiet Enjoyment
>
> 11.1 To allow the Tenant to quietly hold and enjoy the Designated Room and Shared Parts during the tenancy without any unlawful interruption by the Landlord or any person rightfully claiming on behalf of the Landlord."

The "Shared Parts" are defined as:

> "The communal areas of the Premises which are not currently or intended to be the private Designated Rooms of other occupants. The Shared Partys typically include garden(s), kitchen(s), bathroom(s), reception room(s) and any hallways and corridors linking them."

The Appellant presented the case to the VTE on the basis that the tenancy agreements gave exclusive possession of the Rooms and a licence to access the rest of the premises.

(C) THE VTE'S REASONING

7. The VTE identified the issue as being *"whether or not the property which comprised six separate council tax assessments fell to be assessed as a single entry"*.

8. Under the heading *"Relevant law"*, the VTE identified the main statutory provisions (considered in part (E) below) and said:

> "11. Thus, under the statutory scheme, in appeals of this nature, the first step was to determine whether separate hereditaments existed. The essential elements of rateable occupation which have to be met in order for a hereditament to exist have been

considered by the courts in a number of different statutory contexts.

12. In *John Laing & Son Limited*, Tucker LJ said at 350:

> "Mr. Rowe has said that there are four necessary ingredients in rateable occupation, and I do not think there is any controversy with regard to those ingredients. First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period…."

9. The core of the VTE's reasoning was as follows:

> "24. The panel was not satisfied that the appellant's contentions regarding the geographical and functional tests with regards to hereditaments as stated in *Mazars* were of assistance when considering the facts of the subject appeal. The *Mazars* case concerned whether distinct spaces under common occupation, in that case being different floors in an office block, formed a single hereditament. Factually, the rooms in the subject appeal were individually distinct spaces within the property as demonstrated by the provided floor plans. Each room was accessible through a common part of the building and there was sufficient evidence that each room had been let separately. The panel therefore found that it was not correct to apply the tests in *Mazars* as the respondent was clearly contending that the rooms in the subject appeal were not in a common rateable occupation but in fact in separate rateable occupation by their residents.
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> …
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> 26. … the panel ascertained whether the rooms constituted separate hereditaments under section 3 of the Act. The panel considered the four ingredients to constitute rateable occupation in *John Laing & Son Limited* and upheld the respondent's determination that each room constituted a hereditament and was therefore a dwelling in its own right.
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> 27. The panel found that all four ingredients were satisfied for each of the six rooms. The rooms were capable of actual and beneficial occupation, as evidenced by the rooms being occupied by tenants who used them as places to live, sleep, reside and rent was being charged for the use of the rooms. The appellant stated that occupation of the rooms was exclusive, and locks were present on each of them. The tenancies stipulated that the term of occupation was for one year. The panel was aware that there was no fixed definition of transience in law, however, it

> considered that a period of one year was sufficient to satisfy that occupation of the rooms was not too transient.
>
> 28. The panel noted that the rooms did not have cooking facilities or provision to hang laundry. Those were undertaken in the communal areas. However, it did not consider that to be a determinative factor as to whether the rooms constituted hereditaments. In forming that view, the panel referred to the Lands Tribunal decision of *James v Williams* in which a number of flats were held to be separate hereditaments even though they shared some facilities.
>
> 29. Reference had been given to various case law by the appellant regarding self-contained units. However, as the panel had determined the rooms to be dwellings in accordance with section 3 of the Act, consideration of the rooms as self-contained units in accordance with the Order was not required.
>
> 30. The panel understood that the respondent had discretion to aggregate multiple hereditaments into a single dwelling in accordance with Article 4 of the Order. The panel was aware that the respondent had chosen not to do so in this instance and following the Vice-President of the VTE's decision in *Burtfield Estates*, it did not have jurisdiction over the respondent's exercise of that discretion under the Order.
>
> 31. In view of the foregoing, the panel was satisfied that the appeal properties were individual hereditaments and the council tax valuation list correctly showed six dwellings in respect of each one."

(D) GROUNDS OF APPEAL

10. The Appellant appeals on the grounds that:

    i) the VTE erred in treating the test for rateable occupation as determinative of the number of dwellings contained in the Property; and

    ii) the VTE failed to apply the geographical and functional tests to the Property as set out in *Mazars*.

(E) LAW

11. The law relating to council tax is set out in the 1992 Act and secondary legislation made under it. Council tax was introduced on 1 April 1993 to replace the community charge (commonly known as the 'poll tax'), and the community charge had itself replaced domestic rates as the primary local government tax on residential property. Some of the key concepts used in the 1992 Act are derived from rating law.

12. The unit of property in respect of which council tax is payable is the "*dwelling*", which is defined by section 3 of the 1992 Act:

> "(1) This section has effect for determining what is a dwelling for the purposes of this Part.
>
> (2) Subject to the following provisions of this section, a dwelling is any property which—
>
> (a) by virtue of the definition of hereditament in section 115(1) of the General Rate Act 1967, would have been a hereditament for the purposes of that Act if that Act remained in force; and
>
> (b) is not for the time being shown or required to be shown in a local or a central non-domestic rating list in force at that time; and
>
> (c) is not for the time being exempt from local non-domestic rating for the purposes of Part III of the Local Government Finance Act 1988 ("the 1988 Act");
>
> and in applying paragraphs (b) and (c) above no account shall be taken of any rules as to Crown exemption."

13. Accordingly a "*dwelling*" is a hereditament, as that term is understood in rating law, that is not required to be assessed for National Non-Domestic Rates ("***NNDR***"). Hereditaments are not required to be assessed for NNDR if they are "*domestic*" (a term defined as relating to property that is wholly used for the purposes of living accommodation). Thus a "*dwelling*" is a hereditament wholly used for the purposes of living accommodation.

14. "*Hereditament*" is defined in the 1992 Act by reference to the definition contained in section 115 of the former General Rate Act 1967, namely:

> "property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list"

Lord Sumption JSC noted in *Mazars* that the meaning of the term was left to be elucidated by the courts in accordance with the principles underlying the rating Acts (§ 4).

15. The 1967 Act and its predecessors based liability to pay rates on occupation of the relevant hereditament. Occupation for these purposes was generally referred to as 'rateable occupation'. Case law developed on what ratable occupation meant.

16. The Court of Appeal in *John Laing* had to consider a rating authority's decision to add to the valuation list a hereditament described as *"contractors' offices, canteen, huts, structures, land etc"* and, specifically, whether the claimant contractors were in rateable occupation of all or any of the structures comprised in the hereditament. The case

proceeded on the basis that the hereditaments in question were capable of being rated. On the question of rateable occupation, Tucker LJ stated:

> "Counsel for the rating authorities has said that there are four necessary ingredients in rateable occupation, and I do not think there is any controversy with regard to those ingredients. First, there must be actual occupation; secondly, it must be exclusive for the particular purposes of the possessor; thirdly, the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period" (p.228)

and the other members of the court agreed with that approach.

17. *James v Williams* [1973] RA 305 was a decision of the Lands Tribunal. A two-storey house was divided into four units let as furnished flats. Each flat was self-contained with a living room, kitchen and bedroom. Entry to the ground floor flat was via a side door, and entry to the first floor flats was via a landing reached from a staircase from the common hallway. Each tenant had a key to the front door. The tenants shared a bathroom/toilet and separate toilet on the first floor. It had been conceded on a previous case concerning the same property that there were four separate hereditaments (p.307) and that question does not appear to have arisen in the instant case. The issue, rather, was whether the valuer had correctly declined to exercise a discretion under section 24 of the General Rate Act 1967 to treat the building as a separate hereditament occupied by the (absentee) owner, having regard to the degree of sharing or common facilities, the degree of adaptation, whether the separate units of accommodation could be accurately identified, and the degree of transience of occupation.

18. In *In re Briant Colour Printing Co. Ltd*. [1977] 1 W.L.R. 942 the question was, again, whether a party was in rateable occupation of the hereditament in question. The Court of Appeal indicated that the four ingredients set out in *John Laing* did not have the same authority as would have been the case had they resolved a contested point in that case. Nonetheless, in substance the court applied those factors, save that (as counsel had in fact submitted in *John Laing*) the first ingredient, actual occupation, was held to mean actual occupation by the person sought to be made liable for rates (p.951). Buckley LJ (with whom the other members of the court agreed) confirmed that there can be only one ratable occupier of a single hereditament:

> "Both the fact of occupation and the identity of the occupier are questions of fact, to be answered on the evidence and the circumstances of the particular case. There cannot, I think, be two occupiers for rating purposes at one time of one hereditament. If a state of affairs arises in which two persons are in occupation of what is listed as one hereditament for rating purposes, each entitled to exclusive use for a particular purpose, the list must be amended to show two hereditaments in order to enable the rating authority to assess both occupiers. But if there are two persons, each of whom makes some use of an immovable property concurrently, there may either be two co-existing hereditaments, the occupier of each one of which may be rateable; or there may be two concurrent uses of one

> hereditament, in which event it may be necessary to discover which of them has the paramount position so as to be rateable as the occupier." (pp. 952-953)

19. The position as regards 'dwellings' is or can be modified under the Council Tax (Chargeable Dwellings) Order 1992 (SI 1992/549) ("***the CDO***"). Article 3 of the CDO provides for 'disaggregation' in some circumstances of a property that would otherwise constitute a single dwelling:

> "Subject to [an exception relating to care homes], where a single property contains more than one self contained unit, for the purposes of Part I of the Act, the property shall be treated as comprising as many dwellings as there are such units included in it and each such unit shall be treated as a dwelling."

20. The CDO defines a "*self-contained unit*" as:

> "a building or a part of a building which has been constructed or adapted for use as separate living accommodation".

The concept of a self-contained unit concerns the physical characteristics of the property, rather than the manner of its occupation (see, e.g., *Salisbury v Bunyan (LO)* [2022] 4 WLR 16 at § 33).

21. Article 3 is accordingly relevant to a property that would, but for disaggregation, i.e. under ordinary principles, be treated as a single dwelling. It means that there cannot be a single hereditament for rating purposes that contains more than one self-contained unit: each such unit must be treated as a separate dwelling.

22. Article 4 of the CDO, conversely, provides for the aggregation into a single deemed dwelling of units that would, under ordinary principles, be regarded as comprising more than one dwelling:

> "4.— (1) Where a multiple property—
>
> (a) consists of a single self contained unit, or such a unit together with or containing premises constructed or adapted for non-domestic purposes; and
>
> (b) is occupied as more than one unit of separate living accommodation,
>
> the listing officer, may, if he thinks fit, subject to paragraph (2) below, treat the property as one dwelling.
>
> (2) In exercising his discretion in paragraph (1) above, the listing officer shall have regard to all the circumstances of the case, including the extent, if any, to which the parts of the property separately occupied have been structurally altered."

23. A *"multiple property"* is defined as *"property which would, apart from this Order, be two or more dwellings within the meaning of section 3 of the Act"*.

24. In the present case, the Listing Officer has not exercised the power to aggregate the Rooms, and there is no challenge to that decision (or absence of decision). Thus Article 4 is not directly relevant to the present case. It is notable, though, that Article 4 specifically addresses the situation where there is a *"multiple property",* i.e. one that, but for aggregation, would be treated as comprising two or more dwellings, but which may consist of only one self-contained unit. It follows that a unit can constitute a dwelling without being a self-contained unit.

25. Section 6 of the Act stipulates the person or persons who are liable to pay council tax for any given property. These are set out in order of priority, starting with residents of the dwelling with a freehold interest in the whole or any part of it, followed by residents with a leasehold interest in the whole or any part of the dwelling (that is not inferior to another such interest held by another such resident), and including (later in the last) residents with a contractual licence to occupy the whole or any part of the dwelling. Section 8 confers central (s.8(1)) and local (s. 8(2)) powers to impose liability instead on the owner of the dwelling, or other persons, for a prescribed class of properties.

26. Regulation 2 of the Council Tax (Liability for Owners) Regulations 1992 ("***the OLR***") sets out the classes of chargeable dwellings prescribed for the purposes of section 8(1) of the Act, thus making the owner of the dwelling liable for council tax in such cases. Classes A, B, D, E and F relate to residential care homes and to dwellings occupied by religious communities, resident staff, ministers of religion and asylum seekers. Class C is as follows:-

> *"Houses in multiple occupation, etc*
>
> Class C a dwelling which
>
> (a) was originally constructed or subsequently adapted for occupation by persons who do not constitute a single household; or
>
> (b) is inhabited by a person who, or by two or more persons each of whom either—
>
> (i) is a tenant of, or has a licence to occupy, part only of the dwelling; or
>
> (ii) has a licence to occupy, but is not liable (whether alone or jointly with other persons) to pay rent or a licence fee in respect of, the dwelling as a whole."

(The word *"or"* at the end of § (a) was changed from *"and"* by SI 1995/620.)

27. Limb (a) of Class C might apply, for example, where one family moves into and uses as a home a building originally built as, or previously adapted to make, several flats. One typical application of limb (b)(i) would be a case where a household takes in lodgers, i.e. licencees of parts of the dwelling, and means that the householder alone will remain liable for council tax.

28. Sections 6 and 8 of the Act, and the OLR, use the concept of *"dwelling"*, which as noted earlier is defined in section 3 of the Act. They do not purport to alter the meaning of *"dwelling"*, though as I mention later the Appellant submits that OLR regulation 2 Class C sheds light on its meaning.

29. *R (Curzon Berkeley Ltd) v Bliss (VO)* [2001] EWHC Admin 1130 concerned a slightly complex situation where there was an error or ambiguity in the valuation list as regards buildings comprising flats let on long lease and also some non-domestic service apartments retained by the claimant building owner. The relevant point for present purposes is that the High Court again confirmed that there can be only one rateable occupier of a hereditament:

> "In my judgment any hereditament, including a composite hereditament, must be in single rateable occupation or ownership; and cannot be described so as to embrace parts of the building which are in different ownership or occupation, whether non-domestic or domestic." (§ 54)

(A composite hereditament is one that includes both residential parts and non-residential parts.)

30. The Supreme Court in *Woolway (VO) v Mazars* [2015] AC 1862 considered the principles that apply when identifying the number of hereditaments contained in property occupied for business purposes by the same person. The ratepayer, Mazars, had taken possession under separate leases of the second and sixth storeys of an eight-storey office block served by a communal lift. The issue raised was *"how different storeys under common occupation in the same block are to be entered in the rating list for the purpose of non-domestic rating"* (§ 1). Lord Sumption said at §§ 5-6:

> "5. The question which arises in a case like this is a very simple one. Given that non-domestic rates are a tax on individual properties, what is the property in question? In principle, the fact that the same occupier holds two or more properties is irrelevant to the rateable status of any of them. He must pay rates separately on each. If the law is to be rational and consistent, the circumstances in which a continuous territorial block is to be treated as several separate properties or in which geographically separate properties are to be treated as one for rating purposes, must be determined according to some ascertainable and defensible principle.
>
> 6. There are two principles on which these questions might be decided. One is geographical and depends simply on whether the premises said to constitute a hereditament constitute a single unit on a plan. The other is functional and depends on the use that is or might be made of it. The distinction was first applied in a series of rating cases in Scotland, where the question was essentially the same as the one which arises on this appeal, namely whether property should be assessed for local rates as a number of distinct heritable subjects or as unum quid ("one thing"). These cases establish that the primary test is

> geographical, but that a functional test may in certain cases be relevant either to break up a geographical unit into several subjects for rating purposes or to unite geographically dispersed units in unum quid. By far the commonest application of the functional test is in derating cases. In these cases, the functional test serves to divide a single territorial block into different hereditaments where severable parts of it are used for quite different purposes. Thus a garage used in conjunction with a residence within the same curtilage will readily be treated as part of the same hereditament, whereas a factory within the same curtilage which is operated by the same occupier may not be. There are, however, rare cases in which function may also serve to aggregate geographically distinct subjects. It is with this latter question that the present appeal is concerned."

31. After referring to the cases *Bank of Scotland v Assessor for Edinburgh* (1890) 17 R 839, *Bank of Scotland v Assessor for Edinburgh* (1891) 18 R 936, *Glasgow University v Assessor for Glasgow* 1952 SC 504, *Midlothian Assessor v Buccleuch Estates Ltd* [1962] RA 257, *Hambleton District Council v Buxted Poultry Ltd* [1993] AC 369, 378 and *Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board* [2001] RA 110, Lord Sumption stated:

> "12. I derive from these decisions three broad principles relevant to cases like this one where the question is whether distinct spaces under common occupation form a single hereditament. First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second *Bank of Scotland* case 18 R 936 illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are separate hereditaments. If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed. Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately. Thirdly, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the

> valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it."

32. Thus property in common occupation may comprise one hereditament or several, depending on the application of the principles set out above. The position may be different where discrete parts of a property are occupied by different persons, a point highlighted by Lord Neuberger PSC (with whom Lord Toulson agreed) in *Mazars*:

> "47. Normally at any rate, both as a matter of ordinary legal language and as a matter of judicial observation, a hereditament is a self-contained piece of property (ie property all parts of which are physically accessible from all other parts, without having to go onto other property), and a self-contained piece of property is a single hereditament. As the Scottish Lands Tribunal said in *Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board* [2001] RA 110, 140, "*the emphasis on the geographical test is an aspect of recognition that lands and heritages are physical subjects*". Thus, two separate self-contained buildings, even if sharing a common wall, would not be expected to be a single hereditament but two hereditaments. And a building no part of which was self-contained would be expected to be a single hereditament.
>
> 48. At first sight, it might appear that whether certain premises constitute one hereditament or two hereditaments should not depend on how those premises are occupied. To quote again from Burn Stewart, *"a 'business' is not a concept based on physical or heritable factors"*: p 141. Of course, occupation is traditionally a central issue in rating law, but at least primarily for the purpose of determining who, if anyone, is in rateable occupation. On the face of it, however, it may be thought that there should be no logical connection between the identification of the boundaries or extent of a hereditament and the identification of the rateable occupier of that hereditament.
>
> 49. Nonetheless, on further reflection, it can be seen that 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."

Similarly, in *Glasgow University v Assessor for Glasgow* 1952 SC 504 (quoted at § 9 of *Mazars*), Lord Keith pointed out that *"[t]here may be cases where geographical unity has to be departed from, as where premises within what would otherwise be a single entity are separately let, or lands or buildings within a common enclosure are used for separate purposes".*

33. The Appellant in the present case also relied on the second of the two *Bank of Scotland* cases referred to by Lord Sumption in *Mazars*, *Bank of Scotland v Assessor for Edinburgh* (1891) 18 R 936. The bank's premises were one block of building separate and detached from any other building. It was used (i) partly for carrying on the banking business; (ii) partly as a dwelling-house for Mr Bell, the cashier, who lived in the upper flats; and (iii) partly as a dwelling-house for Mr Lindsay, one of the bank-messengers, who lived in a part of the basement floor. Mr Bell and Mr Lindsay occupied their houses as officials of the bank, and their occupancy depended upon their remaining so. Lord Wellwood said:

> "I remain of the opinion which I expressed last year, namely, that when there is no internal communication between premises occupied as a dwelling-house and adjoining business premises the annual value of the former should be entered separately in the Valuation-roll if this is desired by the proprietor, although both sets of premises form part of the same tenement. For my reasons I refer to the opinion which I delivered last year reported in 17 R. 844 I therefore think that the value of the messenger's house, between which and the bank's business premises there is no internal communication, should be entered separately in the roll.
>
> The cashier's house is in a different position. But for the door of communication between the bank's business premises and the stair leading to the house, I should have held that the value of the house should also be entered separately. But in the present condition of the premises the cashier can enter the bank without going into the street. The internal private stair leading to the cashier's house, which is really part of the house, is used not merely as an access to the house, but also as an access to the bank for the purpose of shutting and opening it, and the cashier himself is the custodier of the keys after bank hours.
>
> It is true that a very slight structural alteration would cut off the bank's business premises altogether from the dwelling-house, and that other arrangements might be made for opening and shutting the bank which would not entail the use of the stair leading to the cashier's house. But I think the safer view is to deal with the premises as they at present stand. I think there is a solid distinction between a dwelling-house which has absolutely no internal communication with the business premises, and one which is connected with them in such a way that access can be obtained from the one to the other without passing into the street

> or common stair or passage. I therefore think that the value of the cashier's house should not be entered separately in the roll.

The other member of the court, Lord Kyllachy, said:

> "The test I think here is whether the houses in question are capable, not merely physically but all conditions being considered, of being separately let, and having a separate rent or value attached to them. As regards the house occupied by the messenger, and which has no internal communication with the rest of the bank, I agree with the opinion of Lord Well-wood at the last Court. I see no reason, at least none appears in the case, why, if the bank chose, this house should not be separately let to a suitable tenant … or otherwise dealt with as a separate and independent dwelling.
>
> As regards the other house, the house occupied by the cashier, I think there is room to distinguish. There is here an internal communication, and that being the case. I see no reason for differing from the judgment of last year, in which judgment both my brethren concurred."

34. The Appellant in the present case refers to *Bank of Scotland* as an application of what Lord Sumption later described as the geographical test, concluding that as there could be access between the business premises and the cashier's dwelling without passing into the street or common stair or passage, the situation differed from premises with (in Lord Wellwood's words) *"absolutely no internal communication"*. Thus, the Appellant says, the cashier's power to exclude others from his dwelling-house was not determinative as to the scope of the hereditament. The Respondent pointed out that the cashier in *Bank of Scotland* was an employee of the bank, a service occupier, who does not generally have a right of exclusive possession. It is not clear to me how that point can be reconciled with the court's conclusion about the messenger's flat. However, another point of distinction is that the cashier's house had direct internal communication with the bank's main premises, not merely communication via a common part. It was therefore similar to the situation described by Lord Sumption in *Mazars* of direct communication established by piercing a door or a staircase between what would otherwise be two premises.

35. Returning to more recent cases, in *Corkish v Berg* [2019] EWHC 2521 (Admin) an annex, capable of being separately let, was split off from a main house and, in addition, the main house had been extended. It was common ground that the annex was a new, separate dwelling, and the report states that the annex had been let on an assured shorthold tenancy (§ 10). It was also common ground that the main house was a dwelling. The issue was whether the main house, minus the annex, constituted a <u>new</u> dwelling from that which existed before, which would mean that it could be (re)valued (resulting in it falling in a higher council tax band than the one in which it had historically been placed). Andrew Baker J stated:

> "However, and perhaps unsurprisingly in those circumstances, the matter has been the subject of substantial authority over the years. It is not necessary to undertake any

> detailed review of that authority because the Supreme Court decision to which I referred above is both sufficient and recent. That decision is *Woolway v Mazars* [2015] UKSC 53. The case on its facts concerned the possible conundrum of the occupation by a single occupier of non-adjacent floors of commercial office premises. There are, or at least so it seems to me, potential additional complications in relation to cases, domestic or commercial, of the division of a building into separate occupied or occupiable premises on different floors. The potential complications to which that gives rise, as opposed to a case such as the present essentially of the splitting of what might otherwise be or could otherwise have been one single occupiable building into two attached elements, each with their own footprint, do not need to be explored in detail for present purposes. Suffice it to say for present purposes that the general approach to the question of what is a hereditament and therefore taxable as a separate unit was given authoritative consideration by the Supreme Court Justices in their judgments."

Andrew Baker J then quoted §§ 5 and 6 of *Mazars*, also making reference to §§ 12 and 32. He concluded that, once it was accepted (as it was) that the annex was a separate dwelling, it would be clear from a new plan of the properties that the main house was not the same as it had previously been, because the annex no longer formed part of it. Accordingly the main house was a new hereditament and dwelling.

36. Finally, in *Cardtronics UK Ltd v Sykes (VO)* [2020] UKSC 21, the Supreme Court had to consider the treatment for (non-domestic) rating purposes of ATM machines in supermarkets or other shops, accessible in some cases at the external wall or in other cases from inside the shop. The two main issues were (i) whether the sites of the ATMs were properly identified as separate hereditaments from the stores or shops, and (ii) if so, who was in rateable occupation. Lord Carnwath (with whom the other members of the court agreed) referred to *Mazars* as having given authoritative guidance on the application of the definition of "*hereditament*", and to *John Laing* as containing the classic statement of the ingredients of rateable occupation. Lord Carnwath also referred to authorities on the subject of concurrent occupation of the same land:

> "14. Two authorities at the highest level provide guidance as to the application of the second ingredient ("exclusive") in cases of concurrent occupation. The first is *Holywell Union Assessment Committee v Halkyn District Mines Drainage Co* [1895] AC 117, 126, in which Lord Herschell LC said:
>
> > "There are many cases where two persons may, without impropriety, be said to occupy the same land, and the question has sometimes arisen which of them is rateable. Where a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense, in occupation,

> but the occupation of the landlord is paramount, that of the lodger subordinate."

15. The concepts of "paramount" and "subordinate" occupation were taken a stage further in the second case: *Westminster Council v Southern Railway Co* [1936] AC 511. This has been at the centre of much of the arguments in the present appeal. It was held that certain retail units at Victoria Station, including bookstalls, kiosks, a chemist's shop and various showcases, occupied by independent retailers under agreements with the railway company, should be treated as separate hereditaments in the rateable occupation of the retailers. As Lord Wright MR explained (p 551):

> "The question … is whether the premises in question have been so carved out of the railway hereditament, to which they or their sites belonged, as to be capable of a separate assessment, or whether they have, though let out, been so let out as still to leave them in the occupation of the Railway Company."

As that passage shows, although it may be convenient for the purpose of analysis to separate the issues of hereditament and occupation, they are in truth linked.

…

17. [Lord Russell] also commented on the example of lodgers in a lodging-house, mentioned by Lord Herschell, which he regarded as "exceptional" and "largely the product of practical considerations", adding:

> "But it can I think be justified and explained when we remember that the landlord, who is the person held to be rateable, is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodgers' rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours, is essential to the lodger. The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts." (p 530)"

37. As to whether a separate hereditament could be identified in the case before the court, Lord Carnwath stated that he was content to adopt the reasoning of the judgments

below, in which *"Court of Appeal reviewed the Upper Tribunal's reasoning and the opposing arguments at some length (paras 51-57) but in the end endorsed the Upper Tribunal's approach … as faithful to the tests in Woolway v Mazars …"* (§ 38). The Court of Appeal cited *Mazars*, in particular §§ 6, 12 and 47 (§§ 11-12). The core of its reasoning on the hereditament point was this:

> "52. What is necessary, as Lord Sumption explained in *Woolway v Mazars* when describing the "geographical" test, is that the putative hereditament can be represented as a "single unit on a plan" and has the quality of "visual or cartographic unity". In many cases this quality may be apparent in a physical differentiation between one hereditament and another. The boundaries of the hereditament may be sharply defined on the ground. But as Lord Sumption emphasized, the principles involved in the "geographical" test will often require "a factual judgment" and the exercise of "professional common sense". The facts will vary from case to case. In some cases, there will already exist a "physically coherent unit of separate property" — as Mr Kolinsky described the concept — before a separate hereditament is created. There will be others where the physical occupation of the site by the act of placing some structure or item of plant or machinery upon it may lead to a hereditament being formed, subject always to the requirements of the "geographical" test being fully met.
>
> 53. None of this, however, detracts from the need for sufficient certainty, both on the existence of the hereditament and on its extent. One of the essential attributes here, as the Tribunal acknowledged, is self-containment. As Lord Neuberger said in *Woolway v Mazars* , a hereditament is a "self-contained piece of property". Unless the site is capable of being identified as a unit of property sufficiently defined by its own boundaries to be regarded as "self-contained", it will not be capable of constituting a hereditament.
>
> 54. The Tribunal recognized this. It concentrated on the question of self-containment, both physical and in terms of a "right of occupation". It was, I think, right to say (in paragraph 130) that in the case of what it called "a fixed ATM site", once the machine itself has been installed there ought to be no difficulty in defining the boundaries of the site with "sufficient precision to satisfy the geographic test of self-containment". As a general statement, this seems correct. In cases of "more mobile equipment", however, the Tribunal distinguished — again rightly in my view — between circumstances in which the bank operating the ATM has a "right of occupation of a specific unit of property" and those in which it has nothing more than a "right of access to a machine wherever it [happens] to be located". What was required in such a case was that the occupier of the site had a "sufficient right of occupation". If it did, there would be no difficulty in

> identifying the "unit of occupation". In my view this conclusion is also sound. It reflects the requirement that to be a hereditament a site must not be inchoate or ephemeral, but identifiable as a self-contained "unit of property". This is consistent with the underlying scheme of non-domestic rating as a tax on property. As a tax on property, it depends on the relevant property being clearly defined."

(F) ANALYSIS

(1) Ground 1: test for identification of a hereditament

38. The Appellant submits, in summary, that:

i) the VTE wrongly treated the test for rateable occupation as determinative of what constituted a hereditament: though linked, they are separate concepts;

ii) it should have applied the test set out in *Mazars*, and was wrong in seeking to distinguish that case;

iii) the correct test was to ask

a) (geographical element) are the spaces of which the common occupier is in exclusive possession contiguous, or adjoining? If so, and there is a means of access from one space to another, it is a strong indicator of a single hereditament. If those two adjoining spaces do not intercommunicate, that is suggestive of separate hereditaments; and

b) (functional element) where the two spaces are geographically distinct there is a functional test to be applied, which is answered by the question "could the two spaces reasonably be let separately?"

iv) the VTE wrongly regarded the ability of the tenants to exclude the others from their rooms as determinative of the question of hereditament, whereas in truth it is immaterial to that question; and

v) if the VT's reasoning with respect to rateable occupation were the correct test for a hereditament, then there would be no scope for the operation of Class C of the OLR, because parts of premises that are "*inhabited*" would be inevitably rateably occupied as separate dwellings and accordingly could not comprise a single "*dwelling*" so as to fall within Class C.

39. The Respondent, again in summary, submits that:

i) *Mazars* was a case about spaces under common occupation, and the approach set out there is of limited assistance in other situations;

ii) in any event, there are numerous cases, including at the highest level, where the number of hereditaments in a building turns on the analysis of the pattern of occupation: see for instance *Cardtronics*, where (as quoted earlier) Lord Carnwath noted that the issues of hereditament and occupation are linked. It was also recognised by Lord Neuberger in *Mazars* itself;

iii) thus the VTE applies the *Mazars* approach in the way it is intended to be applied, rather than seeking (as the Appellant does) to apply it in circumstances for which it was never designed;

iv) the Appellant is wrong to suggest that, on the VTE's approach, Class C in the OLR would never apply: there can be a single dwelling with multiple inhabitants where (a) inhabitants occupy pursuant to mere licences not giving exclusive possession, or (b) the listing officer has aggregated what would otherwise be separate dwellings pursuant to Article 4 of the CDO; and

v) on the Appellant's approach, the Property would consist of a single hereditament which, however, contained discrete areas in separate rateable occupation from other discrete areas of the same hereditament. Such a state of affairs would be directly contrary to the principles laid down in *Curzon Berkeley* and *Re Briant*.

40. The case law discussed in section (E) treats the concepts of hereditament and ratable occupation as distinct, albeit there is a degree of linkage between them. This can be seen with particular clarity from *Cardtronics*, where the Supreme Court referred to *Mazars* as having given authoritative guidance on the application of the definition of hereditament, and to *John Laing* as containing the classic statement of the ingredients of rateable occupation; and then proceeded to address the two questions separately in its judgment. The Court of Appeal in *Cardtronics*, whose approach the Supreme Court endorsed, explicitly applied the *Mazars* test when deciding the hereditament issue (see § 36 above). Andrew Baker J in *Corkish* also treated *Mazars* as giving authoritative guidance on the question of identifying a hereditament. Although § 12 of *Mazars* focusses on a common occupation situation, it applies to that situation the more generally expressed principles referred in §§ 5 and 6 about identification of a hereditament.

41. Equally, it is clear in my view that the VTE in the present case, in §§ 11-12 and 26 of its decision, conflated the test for rateable occupation and the question of whether each unit was a separate hereditament. Further, it drew support in § 28 from a case, *James v Williams*, where the question of whether separate hereditaments *prima facie* existed (subject to the exercise of the statutory discretion) appears not to have been in dispute. In declining to apply *Mazars*, the VTE in my view overlooked the fact that *Mazars* was, at least in part, setting out or restating principles of general application.

42. Accordingly I consider the Appellant to be correct in his central contention under Ground 1 that the VTE did not address itself to the correct test.

43. I do not, on the other hand, consider the Appellant's summary of the correct test (see § 38.iii) above to be entirely accurate.

i) *Mazars* and *Cardtronics* (particularly the decision of the Court of Appeal) make clear that the primary, geographical, test is whether the putative hereditament can be represented as a single unit on a plan and has the quality of visual or cartographic unity, typically apparent in physical differentiation with a sharply defined boundary on the ground between one hereditament and another.

ii) The significance of intercommunication between two adjoining spaces depends on its nature, as the discussion in § 12 of *Mazars* illustrates. If a door or staircase leads directly from one living space to another, they are likely to be part of a single hereditament. If, on the other hand, it is necessary to go through a common part or a public area, then they are likely to be separate hereditaments.

iii) The functional aspect of the test may enable two geographically distinct spaces to be treated as a single hereditament, where the use of one is necessary to the effectual enjoyment of the other (*Mazars* § 12). That may commonly be tested by asking whether the two sections can reasonably be let separately. However, the latter point does not, in my view, introduce into the concept of hereditament the requirement that it must have all the elements of a self-contained unit: as noted earlier, the legislation assumes that not to be the case;

iv) The way in which premises are occupied can be relevant when determining how many hereditaments they comprise: see, e.g., *Mazars* § 49 and *Cardtronics* § 15. Although exclusive possession is not determinative of the existence of a separate hereditament, it may be relevant to it.

v) The application of these principles, as was stated in *Mazars*, cannot be a mere mechanical exercise; it will commonly call for factual judgment on the part of the valuer and the exercise of a large measure of professional common sense.

44. Further, for the reasons given by the Respondent (see § 39.iv) above), the Appellant is in my view incorrect wrong to suggest that, on the VTE's approach, Class C in the OLR could never apply.

45. Conversely, I am unpersuaded by the Respondent's suggestion that, if the Appellant were correct, the Property would consist of a single hereditament with more than one person in rateable occupation. In my view that begs the question of who is in fact in rateable occupation: each of the individual occupiers, or only the owner. I do not understand the Appellant's Grounds or written submissions to have conceded that each of the tenants of the Rooms was in rateable occupation; and in oral submissions, his counsel indicated that satisfying the *John Laing* criteria for rateable occupation did not mean that there was in fact rateable occupation by each of the six tenants.

46. For these reasons, I consider Ground 1 to be well founded, to the extent that the VTE did not correctly address itself to the test for identifying the number of hereditaments involved.

(2) Ground 2: application of the *Mazars* tests

47. As an alternative to Ground 1, the Appellant submits that, applying the *Mazars* tests, the Property comprised a single hereditament:

i) The geographical test would result in a finding of a single hereditament because there is a means of access from the communal areas to each of the rooms without having to use street access or commonly held parts of the building. The communal areas are not to be regarded as analogous to a common stairwell because the tenants exclusively possess those communal

areas jointly together, whereas if access was by a common stairwell or walkway, the tenant's proprietary rights over the stairwell or walkway would be in the nature of an easement or right of way only.

ii) In any event, applying the functional test, none of the rooms had access to cooking facilities, which they are required to have in order to be fit for human habitation, and it is right to have regard to the statutory standards of rented accommodation when asking whether the rooms could be separately let. *James v Williams* does not assist, because the question of hereditament was not in issue there and the presence or absence of certain facilities there was considered in relation to a different statutory test. Unlike the situation with a shared hallway, the Rooms were functionally dependent on the shared kitchen facilities in the communal area and could not have been let without them. The communal area, like the Rooms, was rateably occupied by the Tenants, as reflected in the tenancy agreement terms quoted earlier.

iii) The VTE should have considered whether the communal area could have been separately let. It could not, since there were no toilet facilities in the communal areas and no means of excluding the tenants of the Rooms from the communal areas. Equally, the communal area could not form part of six separate hereditaments, each including one of the Rooms.

iv) It follows from (ii) and (iii) above that the only possible answer is that the Property comprised a single hereditament including the Rooms and the communal area.

48. The Respondent counters that:

i) As to the geographical test, the key consideration about interconnection is whether the space said to form part of the same hereditament *"can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession"* (Mazars § 12). Here, each individual tenants is not in exclusive possession of the communal area. The body of tenants, who have rights over the communal area, are not the same person as any individual tenant. Moreover, the tenancy agreement on its true construction gives only a right to use the communal area, rather than conferring exclusive possession of it to the body of tenants.

ii) It is not necessary for a unit to have cooking facilities in order to be capable of separate letting. The concept of a hereditament does not automatically import all the statutory standards of private rented accommodation. As noted earlier, Article 4 of the CDO expressly contemplates that a dwelling may not comprise a self-contained unit. It is not usual for an occupier of a dwelling to need to use communal facilities in order to meet his/her needs.

iii) It was not necessary to decide whether the communal area was capable of being separately let. The existence of shared rights of use or occupation over communal parts does not prevent the separately-let parts of a building from being different hereditaments: see, for example, Lord Neuberger's example in *Mazars* § 49 of an office building in which each floor is let to a different occupying tenant, retaining the common parts for their common use. The

practice with residential properties is not to treat common parts as a hereditament at all.

49. I see considerable force in the Respondent's submissions on these points. However, I bear in mind that Ground 2 is put forward only as an alternative, relevant in the event that I had found that the VTE did apply the correct test. As it is, I have concluded that the correct test was not applied. The Respondent did not explicitly invite me to remake the decision myself if I came to that conclusion. In any event, the VTE is an expert specialist tribunal, and will be familiar with the 'landscape' in terms of the treatment of differently configured multiple occupancy properties and issues such as whether a separate residential hereditament can exist even where cooking or other facilities are communal. Accordingly, I consider the appropriate course to be to remit the case to a differently constituted VTE for them to redetermine it in accordance with the applicable principles.

(G) CONCLUSION

50. For the reasons given above, the appeal will be allowed. I shall hear counsel as to the precise form of relief, but in substance it will involve remission of the case to the VTE for redetermination.

51. I am grateful counsel for their helpful written and oral submissions.