Neutral Citation Number: [2024] EWHC 1112 (Admin)

Case No: AC-2023-CDF-000100

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 14 May 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

THE KING on the application of HOWARD GARDENS MANCO LIMITED	**Claimant**
- and -	
LUCY FORMELA-OSBORNE (LISTING OFFICER)	**Defendant**
-and-	
CARDIFF CITY COUNCIL	**Interested Party**

- -
- -

Cain Ormondroyd (instructed by **Ward Hadaway LLP**) for the **Claimant**
Horatio Waller (instructed by **HM Revenue and Customs**) for the **Defendant**

Hearing date: 2 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. The claimant is the owner of a block of purpose-built student accommodation at Howard Gardens, Cardiff ("the Property"). The Property contains 61 flats. Each flat contains a number of en-suite bedrooms—from four to eleven such bedrooms—together with communal kitchen and dining facilities and living space. The communal facilities and living space reflect the number of bedrooms in the flat; so, for example, a flat with four bedrooms will have a kitchen with one oven, whereas a flat with eleven bedrooms will have a kitchen with three ovens, and the provision for seating and dining will vary with the size of the flat.

2. The defendant is the current listing officer appointed pursuant to section 20 of the Local Government Finance Act 1992 to exercise statutory functions in respect of the council tax list in the relevant area. The interested party, which has taken no part in the proceedings, is the local authority with responsibility for collecting the council tax on the basis of the list maintained by the defendant.

3. The claimant seeks review of a decision made by an officer on behalf of the defendant on 13 June 2023 concerning the treatment of the Property for council tax purposes ("the Decision"). The defendant decided not to exercise her discretion to "aggregate" the bedrooms within each flat, with the result that council tax is charged in respect of each bedroom rather than each flat. The claimant challenges the Decision on five grounds, which I shall explain and discuss below. Permission to apply for judicial review was given on all five grounds by Judge Meleri Tudur, sitting as a Judge of the High Court, on 7 February 2024.

4. I am grateful for the rigorous and lucid submissions of Mr Ormondroyd, counsel for the claimant, and Mr Waller, counsel for the defendant.

Statutory Framework

5. Council tax is payable in respect of "dwellings": section 1 of the Local Government Finance Act 1992 ("the 1992 Act"). The definition of "a dwelling" is provided by section 3 of the 1992 Act. For the purposes of the issues in the present case, nothing turns on the details of the definition; it suffices to say, broadly, that a dwelling is a hereditament that is not liable to non-domestic rates because it is a domestic property. Sections 22 and 23 of the 1992 Act have the effect of requiring the listing officer for a local authority area to compile and maintain a list ("a valuation list") for the area, showing "each dwelling which is situated in the billing authority's area".

6. Section 3(5) of the 1992 Act provides:

> "(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 exercise mentioned in section 3(5)(a) is commonly referred to as "disaggregation", and the exercise mention in section 3(5)(b) is commonly referred to as "aggregation".

7. The Council Tax (Chargeable Dwellings) Order 1992 ("the 1992 Order") was made in exercise of the powers conferred on the Secretary of State by section 3(5) of the 1992 Act. In the version that existed at the date of the Decision and still applies in Wales, the 1992 Order makes relevant provision as follows:

> "2.
>
> In this Order—
>
> 'the Act' means the Local Government Finance Act 1992;
>
> …
>
> '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."
>
> 3.
>
> 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.
>
> 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."[1]

8. A self-contained unit is to be identified objectively by reference to the physical characteristics of the building, not by reference to the purposes for which those physical characteristics were achieved. It is common ground in the present case that each flat in the Property was a self-contained unit and that each bedroom constituted a unit of separate living accommodation and that, accordingly, the defendant's discretion to aggregate the bedrooms in each flat was engaged.

9. In the exercise of the discretion, the extent of structural alterations to parts of the property separately occupied is a relevant factor: article 4(2). Other relevant factors are (a) the degree of sharing or common facilities (kitchen, bathroom etc), (b) the degree of adaptations to the property, (c) whether separate units of accommodation can be accurately identified, and (d) the degree of transience of the occupiers: see *James v Williams (Valuation Officer)* [1973] RA 305, at 309 and 311, and *R v London South East Valuation Tribunal, ex p Moore* [2001] RVR 92, *per* Simon Brown LJ at [9] and [11].

10. The Valuation Office Agency has published a guidance document, *Practice note 6: premises in multiple occupation (aggregation of dwellings)* ("Practice Note 6"), for the purpose of giving guidance to listing officers in respect of the interpretation and application of article 4 of the 1992 Order. The text of Practice Note 6, as it stood at the date of the Decision and as it still applies in Wales, was published on 8 February 2022, subject to an amendment made on 9 February 2023. Before me, it was accepted on behalf of the defendant that Practice Note 6 constituted a policy to which she was required to have regard and that, if she departed from the policy, she was required to give clear reasons for doing so. Practice Note 6 includes the following relevant passages:

> "Where the LO [listing officer] finds multiple properties within a single self-contained unit, they must then consider if it is appropriate to aggregate. If the multiple property contains more than one self-contained unit, then Article 4 of the CDO92 [the 1992 Order] will not apply and the LO does not have the discretion to aggregate.
>
> There are several factors to consider when deciding whether to aggregate or not. A judgement will be needed in every case. The thought process and decision must be fully recorded as a record of the decision might be needed if there is a legal challenge.

[1] Amendments to the 1992 Order, having effect after the date of the Decision, make aggregation mandatory rather than discretionary in certain circumstances. However, those amendments apply only in England; the applicable text in Wales remains that set out above. It is therefore unnecessary to consider here the detail of the amendments.

> The table below sets out some of the factors that can be considered as 'all the circumstances of the case', although other information may also be relevant.
>
> IMPORTANT: The table is NOT a 'tick box' exercise – each factor will have a different weight of importance and this will vary case by case. The table is to help you consider those issues that are usually relevant, but there may be others that are not included in the table."

(The final paragraph of this extract is the addition made by the amendment in February 2023.) The table is set out at the end of this judgment. It sets out 18 factors that could fall within "all the circumstances of the case", with an indication against each factor of what might make aggregation more or less likely.

Facts

11. The Property opened in January 2021 and has at all times since then been used for its intended purpose of student accommodation.

12. In April 2022 the claimant received from the interested party council tax bills in respect of the Property, which treated each bedroom at the Property as a single dwelling for the purposes of council tax. The claimant asked the interested party to treat each *flat* as a single dwelling, but the interested party refused.

13. Therefore on 31 August 2022 solicitors acting for the claimant wrote to the defendant, asking that she exercise her discretion to aggregate the bedrooms within each flat pursuant to the 1992 Order. After setting out the law and the reasons why the discretion to aggregate arose, the letter explained why it was said that the discretion ought to be exercised:

> "In this case, the parts of the property separately occupied (i.e. the individual rooms) have not been structurally altered at all. This points in favour of aggregation. They have clearly been constructed not for completely separate living but for occupation as part of a communal group within each flat. That again points in favour of aggregation. Finally, the occupiers are relatively transient. Whilst they satisfy the test for rateable occupation (as will always be the case in any situation where the discretion to aggregate is engaged) they characteristically live in the same room for one year or less. This points strongly in favour of a decision to aggregate as otherwise the administration of hundreds of different council tax accounts will be complex and onerous. There are no factors of which we are aware that point away from a decision to aggregate.
>
> It is therefore clear on the merits that the discretion should be exercised.
>
> However, in this case there is also a further overriding consideration, namely the need for consistency of decision

> making and equality of taxation. This principle means that a decision to aggregate is the only lawful decision. A decision to refuse to aggregate will be legally flawed and subject to challenge in the courts.
>
> This is because in multiple other equivalent properties the decision to aggregate has been exercised. If it is not exercised at Howard Gardens then that property will bear a disproportionately high tax burden in comparison with its nearby competitors. This is so basically unfair that we think a court would readily intervene to correct the situation if you do not."

The letter gave details of the "other equivalent properties" referred to.

14. The defendant allocated Mr Ian Dewhurst, a Lead Valuer within the National Council Tax Technical Team of the Valuation Office Agency, to make the decision on aggregation on her behalf. He ascertained that no record existed of a decision on whether aggregation was appropriate in respect of the Property and that a fresh review of the matter was required. Mr Dewhurst conducted this review with the assistance of discussions with Mr Steve Hickman, a Technical Adviser in the Litigation & Technical Policy Team within the Chief Valuers Group. Mr Hickman was the author of the current version of Practice Note 6, which he wrote after obtaining counsel's opinion and consulting with colleagues.

15. Mr Dewhurst requested from the local office of the Valuation Office Agency and from the claimant copies of any documents they might have in relation to the Property or the "comparable" properties. He found no records of the reasons why the "comparable" properties had been aggregated. He combined all of the information provided to him in respect of the Property into a single nine-page document that incorporated photographs and embedded pdf files. The information may have included scale plans of one or more of the "comparable" properties, but it did not include any scale plans of the Property. Embedded in the nine-page document was a floorplan extracted from "The Howard Gardens Brochure", which had been provided to Mr Dewhurst. The plan showed an example of a shared kitchen / living area within the Property.

16. On 12 October 2022 Mr Dewhurst requested certain further information from the claimant. This included details regarding ownership of the Property and the letting arrangements and information regarding any relationship between the claimant and the landlords of the "comparable" properties. Mr Dewhurst did not ask for further information in respect of the internal layout of the flats at the Property.

17. On 10 November 2022, while he awaited the further information requested from the claimant, Mr Dewhurst received a file note from Mr Hickman, which set out Mr Hickman's views on whether or not there should be aggregation. The file note, which was an internal document and did not constitute a decision, said:

> "Layout
>
> Prime Student Living, Howard Gardens, Cardiff CF24 0FA is a purpose built block of student accommodation. The LO has not inspected and the only plan I've seen is a marketing plan

> which doesn't appear to be to scale. The plan does not show ensuite facilities within each room, whilst the marketing particulars say each bedroom has its own private bathroom. There are 391 bedrooms which are spread over 61 'cluster flats'. Each cluster has some shared space and there are additional shared facilities on the ground floor. (Reception, games area, property team office, cinema room, lounge area, study room, private dining room, gym and bike store)
>
> Breakdown of clusters / rooms is:
>
> • 4 bed – 5
> • 5 bed – 15
> • 6 bed – 20
> • 7 bed – 8
> • 8 bed – 3
> • 9 bed – 7
> • 11 bed – 3
>
> Most of the clusters give the impression from the plan of being a long corridor with rooms and a shared kitchen at one end.
>
> Discussion
>
> Following counsel's advice and much internal discussion, the CTM PN6 was redrafted. The PN lists a number of considerations and indicates whether they would be more or less likely to point towards aggregation. It is stressed there is no 'tick box' exercise and you must look at all the circumstances of the case.
>
> Looking at the 18 points in the table:".

The note then set out comments against each line of the table. These included the following (for the table contents, see the annex to this judgment):

- Line 2: "Majority of clusters are 5 or more"
- Line 3: "N/A – purpose built"
- Line 6: "None"
- Line 7: "All"
- Line 9: "Appears small within clusters, some additional shared space on the ground floor"
- Line 10: "One within cluster"
- Line 11: "None within cluster".

Mr Hickman's conclusion was as follows:

> "My view is the LO shouldn't aggregate any of the clusters.
>
> There is an argument that the smaller clusters could be aggregated. The obvious difficulty is where do you draw the line? My view on this is I look at the whole property; its [sic] purpose built and the majority of the clusters shouldn't be aggregated. My discretion is then not to aggregate any.
>
> In my view, the comparables mentioned need to be reviewed as do other student blocks in Cardiff."

18. On 22 May 2023 the claimant's solicitor provided to Mr Dewhurst the further information that he had requested in October 2022. The email said in part:

> "There is no connection with the Landlord or Prime Student Living with the above sites [i.e. the 'comparable' properties], however there is a working relationship between these sites in so far as the landlords and/or managing agents discuss common issues. When the 391 bills were received for each room, following enquiries West Wing confirmed to our client that they had also been originally billed per individual room but that following discussions direct with the Council this was reversed (and the rooms apparently 'aggregated') such that each flat is shown as a single dwelling on the valuation list. It was understood by our client that none of the other sites dealt with the VOA, although after initial approach the Council referred our client to the VOA to seek to address the issue."

19. On 8 June 2023, following a further discussion with Mr Hickman, Mr Dewhurst sent to Mr Hickman a note setting out his reasoning and conclusions. The note, which contained sample photographs of large and small flats which he had obtained from the claimant's website, included the following passages.

> "I would start by saying that it is not general practice to aggregate cluster flats in general which have the adaptations of an en-suite in every room. This is however not true in every case, which has led to a mixed tone when considering discretion to aggregation that leaves inconsistent decisions within certain localities. It is also fact and degree in every case; and as we are aware and decisions can alter dependant [sic] on certain specific facts.
>
> In consideration of the updated information supplied by Ward Hadaway, my opinion is not to aggregate is based on the following:
>
> …
>
> *Consideration of James v Williams 1973*

> - Degree of sharing common facilities (excluding areas outside the cluster flat). The plans delineate a shared kitchen which proportionately would seem difficult to dine / eat collectively. This is the main crux of the argument to me on the decision to aggregate or not.
>
> Although we have 4 to 11 bedrooms per a cluster, the kitchens appear small in relation to the rooms being offered within the cluster flats. Whilst we know it is not an exact science or specific area per person to be housed in the kitchen / living area, it is difficult to determine without an inspection how the kitchens feels with regards to how spacious or comfortable the kitchen is for the number of shared tenants.
>
> - The Howard Gardens brochure depicts a shared kitchen / Living area for eight people.
>
> - Degree of adaptation and self-containment – Each room has an en-suite with a lockable door.
>
> - Capability of accurate identification – Each room or hereditament is clearly definable.
>
> - Degree of transience of occupation – Minimum 44–52 week tenancy available (subject to remaining a student) supporting a stable pattern of occupation.
>
> Overall it is a very borderline decision which could go either way in my opinion. However, given current practice of not aggregating in general circumstances where all rooms are adapted with en-suites and the proportionality of the communal facilities (i.e. Kitchen / living area) to the cluster, I would fall on the side of not aggregating in this case."

20. Mr Dewhurst discussed the note with Mr Hickman, who agreed with his conclusion.

21. On 12 June 2023 Mr Dewhurst wrote a further note, which dealt with the "comparable" properties. The note contained summary particulars of those properties and annexed a more detailed statement of the available evidence concerning them. Relevant parts of the text of the note included the following:

> "It is worth mentioning that the local office provided the information in the form of plans, but no tenancy agreements were available to verify terms of occupation of the individual rooms or cluster flats.
>
> It is normal practice to consider fact and degree in every circumstance, whilst private or University owned property including tenancy agreements can affect the final decision. Ladies Hosiery and Underwear Ltd v West Middlesex

> Assessment Committee (1932) should be noted that *correctness should not be sacrificed for the sake of conformity*.
>
> The review of the original decision surrounding comparables is therefore difficult based on whether sufficient research has been undertaken to support individual hereditaments of the rooms; and then aggregation taking place of the clusters. No evidence has been seen that specifically relates to the decision on aggregation or not has been considered.
>
> …
>
> *Summary of Comparables*
>
> It can be seen from the comments above that the Listing Officer's discretion to apply aggregation has happened on every occasion, except Howard Gardens.
>
> Decisions regarding the bandings (except Howard Gardens) were undertaken in 2016, 2017 and 2019. In terms of decisions, they are relatively recent which seems to be the decision of the local office, although the reasoning for the decision to aggregate is limited on the information available.
>
> Whilst it could be said that the comparables set a tone of aggregating cluster flats within the locality, I remain of the opinion that properties such as Howard Gardens should not be aggregated based on previous decisions within the locality."

The detailed annex contained a comparative table showing the accommodation in the Property and in the "comparable" properties, followed by this text:

> "Howard Gardens is correct - 391assessments – Distinguished from comparables in that no independent living for 1 / 2 / 3 beds with minimal 4 beds.
>
> Comps – Everything 5 rooms or more not aggregated = 1,222 alterations required
>
> 5 bedroom cut-off point – Will not be aggregated
>
> Agreed with Steve".

22. The Decision was communicated to the claimant's solicitors in an email on 13 June 2023 ("the Decision Email") in the following terms:

> "I am instructed that the Respondent Listing Officer in the above proceedings has now reviewed the additional evidence provided by your client through your email sent on 22 May 2023. The LO's conclusion is that the hereditaments should not be aggregated pursuant to the discretion contained in article 4 of the

Council Tax (Chargeable Dwellings) Order 1992. Please find below a brief note on the said decision:

> 'Howard Gardens is a large, purpose built block with student accommodation arranged in 'cluster' flats. There are 391 rooms in 'clusters' of 4 to 11 rooms. Each cluster has a kitchen and all the rooms are en-suite. Additionally, there are common facilities in the block for all residents; mainly on the ground floor.
>
> The tenancy/licence agreements indicate each room is a separate hereditament and so each room is a single 'section 3' dwelling under the LGFA92. I think this is accepted by the taxpayer.
>
> As the starting point is separate 'section 3' dwellings, the remaining question is should the LO engage article 4 of the CD092 (SI 1992/549). The LO's conclusion is no.
>
> No single point is determinative but factors weighing against aggregation include:
>
> - The number of rooms per cluster
> - The ratio of shared space within each cluster
> - Each room being en-suite with no other WC facilities within the cluster.
>
> This decision is in line with published VOA instructions in the Council Tax Manual — Practice note 6.'"

23. On 14 June 2023 Mr Hickman made a further note on the "comparable" properties, which contained an analysis of the living accommodation they provided, noting in particular the extent to which they contained single room studios. Although the note was made with reference to the Property (which was referred to as "the subject property") and not for the purpose of any subsisting reconsideration of the listing of those other properties, the contents of the note actually focussed on Mr Hickman's thoughts about the extent to which aggregation would or would not be appropriate in respect of those other properties.

24. On 29 June 2023 Mr Hickman wrote a further note for the purpose of setting out "the history, issues and conclusions of the SMEs in this case [namely, himself and Mr Dewhurst]." Under the heading "Discussion" the note said:

> "Aggregation is a discretion on the LO and the wording in the legislation [Chargeable Dwellings Order 1992 (SI1992/549) Article 4] doesn't really help. Even within the CT tech leadership there are a range of views and all cases are very fact specific. The VOA published guidance [Practice Note 6] sets

> out a table of items to consider; this was recently updated following discussions with Sols and legal advice from counsel.
>
> In the case of Howards Gardens, the SMEs feel it is inappropriate to aggregate any of the units. There are several points leading to this including the number of cluster flats with larger numbers of bedroom, the shared facilities, the size of the shared living space within each cluster and the overall layout with no single rooms.
>
> The SMEs then reviewed the 'comparables' mentioned and the striking thing to note is that all the comparables mentioned have single room studios whereas the subject property does not.
>
> The Fitzalan is very different with mainly single studios. The 2 bed flats, according to their website, are not en-suite. The 2 bedrooms share a kitchen area and a single bathroom. It is appropriate to aggregate the 2 bed flats here.
>
> The other 4 blocks are similar to each other with a mix of single studios (or bedsits) and 'cluster flats', where a number of en-suite rooms share a kitchen.
>
> The SMEs feel, on balance, the individual flats within a block need to be looked at and this may lead to some flats being aggregated within the block rather than a blanket all or nothing approach. Where there are fewer bedrooms, it seems more appropriate to aggregate. The question then is where to draw the line and we think all clusters with 4 or less rooms should be aggregated. Those with 5 or more should be assessed as separate rooms.
>
> This leads to one issue within Howard Gardens; there are 5 four bed flats. Given the small percentage of the total accommodation and the difference in overall accommodation, the SMEs feel it is still a rational decision not to aggregate any units having regard to **all** circumstances of the case.
>
> This will result in action required to 'split' all the cluster flats with 5 and more rooms." (emphasis in the original)

25. No review has yet been undertaken of the listing of the "comparable" properties. I was informed that the defendant is awaiting the outcome of these proceedings before beginning any such review.

Grounds of Challenge

Ground 1: Material consideration – structural alterations

26. Ground 1 is that the defendant either (a) failed to have regard to a material consideration, namely the extent, if any, to which the parts of the property separately

occupied had been structurally altered or, if she did have regard to it, (b) failed to give sufficient reasons to show how she had taken it into account.

27. The ground relates to article 4(2) of the 1992 Order. The claimant contends that the defendant was obligated by that provision to have regard to the presence or absence of structural alterations and that line 3 of the table in Practice Note 6 shows that the absence of structural alterations is a factor in favour of aggregation. However, the Decision Email does not make any mention of this matter, which apparently (it is said) was not taken into consideration by the defendant. If, on the contrary, the defendant did have regard to the matter, she has not provided any reasons that either explain what part it played in her reasoning or justify her departure from the policy in line 3 of the table in Practice Note 6.

28. I reject ground 1. As a matter of substance the defendant adverted to the matter, because both the Decision Email and the preceding file notes recognised the obvious point that the Property was a purpose-built block of flats and because there was no question of structural alteration having taken place, and there was no rational basis for attributing any relevance, either pro or con, to the fact that no structural alterations had taken place.

29. A useful starting point is to identify why Article 4(2) mentions structural alterations specifically and why line 3 of the table in Practice Note 6 suggests that the absence of structural alterations is a factor tending in favour of aggregation. It is not immediately apparent why structural alterations are relevant at all or why they might point in one direction rather than another. The answers can be inferred from the legislative history.

30. Section 23(1) of the Rating and Valuation Act 1925 provided:

> "Where a building which was constructed or has been adapted for the purposes of a single dwelling-house, or as to part thereof for such purpose, and as to the remainder thereof for any purpose other than that of a dwelling or residence, is occupied in parts, the rating authority or the assessment committee in preparing, or revising a draft valuation list, or in amending a current valuation list may, if they think fit, having regard to all the circumstances of the case, including the extent, if any, to which the parts separately occupied have been severed by structural alterations, treat the building or any portion thereof as a single hereditament, and a building or portion of a building so treated as a single hereditament shall, for the purposes of rating, be deemed to be a single hereditament in the occupation of the person who receives the rents payable in respect of the parts."

In all material respects that wording was replicated in section 57 of the Local Government Act 1948 and again in section 24 of the General Rate Act 1967. These provisions had no application to a purpose-built block of flats, which by definition was not constructed or adapted either (a) for the purposes of a single dwelling or (b) as to part of it for the purposes of a single dwelling and as to the remainder of it for any purpose other than that of a dwelling. Section 3 of the 1992 Act and Article 4 of the 1992 Order have thus extended the scope of the available jurisdiction to aggregate. However, the texts of the statutory predecessors indicate that the mention of structural alterations originated in a concern with the extent to which such alterations, in what had

formerly been either a single dwelling or a building comprising both a single dwelling and non-residential parts, had effected a severance of the parts now being separately occupied. With reference to the text of section 24 of the General Rate Act 1967, *Ryde on Rating* (13th edition, 1976) observed at p. 142 (footnotes omitted):

> "It applies where the building was constructed or adapted to serve as a single dwelling-house, or as a single dwelling-house with business or other premises attached, e.g., a shop with a dwelling-house over it; but it does not apply where the house has been constructed to serve as two or more dwelling-houses, for example, as ordinary flats. Structural alterations which have made the building into a set of separate self-contained flats may prevent the application of the section as a result of the direction to have regard to 'the extent, if any, to which the parts . . . have been severed by structural alterations.' Indeed it is possible that the direction is intended as a warning that if the severance is complete, there is no power to exercise the discretion."

31. The legislative history provides the context for understanding the potential relevance of structural alterations. It has nothing to do with, for example, the question whether existing student bedrooms in a flat ("the parts of the property separately occupied") have themselves been structurally altered. Rather, it has to do with the question whether the multiple residential occupation of a single self-contained unit (or such a unit together with non-domestic premises) has been effected or facilitated by structural alterations that involve a degree of severance of parts from the whole or from each other. It is for this reason that the presence or absence of structural alterations is capable of being logically relevant to the question whether or not to aggregate and of pointing towards a particular answer to that question. This is the logic perceived and expressed in the 13th edition of *Ryde on Rating*. It is also, I think, reflected in the table in Practice Note 6, where line 5 shows that aggregation is less likely where "Purpose built or converted for use as an HMO" but more likely where "Former house previously occupied by single household". The potential logical relevance of structural alterations, as explained above, demonstrates why lines 3 and 5 of the table are not inconsistent with each other.

32. This being so, the criticism of the Decision in ground 1 lacks substance. On any fair and sensible reading of the Decision Email and the preceding file notes, the decision-maker clearly had the physical characteristics of the Property and of the flats firmly in mind. The observation that the Property was purpose-built directs attention to the relevant point regarding the presence or absence of structural alterations. Mr Ormondroyd's objection that a purpose-built building may itself have been subject of structural alteration is hardly in point, because it does not relate to the circumstances of this case and does not engage with the potential logical relevance of structural alterations. Similarly, concern with the possible difference between, on the one hand, having no regard to the factor mentioned in Article 4(2) (cf. the comment "N/A – purpose built" in Mr Hickman's file note of 10 November 2022) and, on the other hand, attributing no weight to a factor that has been considered appears to me, in the circumstances of this case, to be no more than a verbal quibble. It is clear that the question of structural alterations was not overlooked, and it is common ground that the weight to be attributed to any particular factor, even a mandatory factor, is a matter for

the decision-maker. The decision-maker simply considered that the question had no bearing on the matter, because he was dealing with purpose-built student flats; the absence of structural alterations did not weigh in the balance. In my view, the decision-maker was entirely correct in that regard.

33. Accordingly, I see no merit in the complaint that the defendant has failed to provide reasons justifying a departure from the policy in Practice Note 6. First, the actual Decision does not at all constitute any departure from the policy, because the policy does not mandate any particular outcome; therefore the decision not to aggregate is not contrary to policy. Second, on any fair and sensible reading of the policy, the decision to attribute no weight to the absence of structural alterations was not a departure from the policy, for either of two reasons: (i) the potential relevance of the absence of structural alterations was not engaged in this case, as already explained; (ii) Practice Note 6 does no more than identify factors that might be relevant and how they might typically play out in the exercise of discretion in any given case, but it certainly does not establish a policy that factors do weigh on a certain side of the balance, such as might give rise to a duty to explain a contrary view. Third, in any event, by adverting to the particular nature of the Property the defendant sufficiently showed why the question of structural alterations was irrelevant to her decision. Only if one ignores or fails to understand the reasons why structural alterations might be relevant might the reference to the nature of the Property seem to be a less than sufficient explanation.

Ground 2: Irrelevant consideration – number of bedrooms

34. Ground 2 is that the defendant had regard to the number of separately occupied bedrooms within each flat *as a distinct factor*, not merely in conjunction with the amount of communal space and facilities within each flat, and that as such it was not a relevant consideration.

35. This ground arises from the terms of the Decision Email, where the first of the identified "factors weighing against aggregation" was "The number of rooms per cluster", and where that factor was distinguished from the next factor, namely "The ratio of shared space within each cluster". The claimant contends that, if viewed as an independent factor, the number of rooms is logically, and therefore legally, irrelevant, because it has no logical relation either to the factors that the courts have identified as being relevant or to the scheme of the legislation and the power to aggregate. If, on the contrary, the number of rooms is a material consideration, the claimant contends that the defendant (a) failed to exercise the discretion separately in respect of each flat, but merely made one decision for all the flats, and (b) failed to distinguish between those flats in respect of which the number of rooms counted against aggregation and those flats in respect of which it did not.

36. The number of letting rooms is identified as a potentially relevant factor in line 2 of the table to Practice Note 6. Therefore the first way of putting ground 2 amounts to a challenge to the rationality and legality of this part of the policy, although it has not been formulated as such. In my view, in any event, there is nothing irrational about this part of the policy. Even if the amount of communal living space were increased in proportion to the number of bedrooms (cf. line 9 of the table), the number of bedrooms is itself liable in practice to affect the extent of communal living within the flat. A large amount of communal living space may make it possible for all occupiers of the flat to be together in one space, but the extent to which such communal space will be used in

that manner is liable to be affected by the number of occupiers. (Imagine, to take facts other than those of the present case, the differing communal lives of three students sharing a house with a common living room and, say, 10 or 15 students in a purpose-built flat with a large dining/living area.) There is nothing irrational about treating this factor as a consideration potentially relevant to the decision whether or not to treat a flat as a single dwelling. As Mr Waller submitted, it is both reasonable and pragmatic for the policy to focus on the number of rooms rather than the number of occupiers, because the former is unlikely to change significantly over time and provides an indication of the likely number of occupiers, whereas the latter is liable to fluctuate and constitutes a less useful factor for a consideration of whether or not to aggregate.

37. The alternative way in which ground 2 is put is, as mentioned, that if the number of bedrooms is indeed a relevant factor it was incumbent on the defendant to make a decision in respect of each flat rather than to take them all together, in circumstances where the number of bedrooms differed from flat to flat. I reject this complaint. It is correct to say that each flat constituted a distinct unit in respect of which aggregation fell to be considered individually, but it does not follow that separate, in the sense of different, decisions had to be given in respect of them. To repeat a point already made: Practice Note 6 does not create or contain a policy that flats with this number of bedrooms will be aggregated but flats with that number will not be aggregated; rather, it sets out factors that are likely to be relevant in practice and the manner in which they will tend to weigh in the balance. The pre-decision file notes show the manner in which the number of rooms was considered: I refer in particular to the conclusion to Mr Hickman's file note of 10 November 2022 (paragraph 17 above) and to the annex to Mr Dewhurst's file note of 12 June 2023 (paragraph 21 above). Of 61 flats in the Property, only five (about 8%) had fewer than five bedrooms; of 391 bedrooms in the Property, only 20 (about 5%) were in flats containing fewer than five bedrooms. All flats in the Property share a common entrance and common facilities on the ground floor and all occupiers have a standard tenancy agreement with a common landlord. It must be remembered that neither the 1992 Order nor Practice Note 6 contains any formula by the application of which a specific answer is to be arrived at in any given case. In circumstances where the decision on aggregation was one of discretion, where the point of distinction lay in a single indicative factor, and where that factor pointed in favour of aggregation only in respect of a very small minority of the flats and bedrooms at the Property, and then only marginally (there were no 1-, 2- or 3-bedroom flats), I consider it perfectly reasonable for the defendant to have decided to prefer consistency across the Property to different treatment of 5 of the 61 flats.

Ground 3: Error of fact and/or irrationality – communal space

38. Ground 3 is that, in treating "The ratio of shared space within each cluster" as a factor militating against aggregation, the defendant acted on the basis of a mistake of fact and therefore irrationally.

39. The ground relates to line 9 in the table to Practice Note 6, which identifies as a potentially relevant factor "Amount of communal space compared to the number of bedrooms". The table indicates that a consideration making aggregation less likely is, "Small amount—few of the occupiers to use it at the same time." The claimant contends that, in the context of line 9, the reliance on this in the Decision Email as weighing against aggregation indicates that the defendant was proceeding on the basis that it was possible for only a few of the occupiers of a flat to use the communal space

at the same time. This, it is said, is incorrect, as in each flat there are adequate seats in the dining and living areas for each occupant, and it therefore appears that the defendant has proceeded on the basis of an error of fact that undermines the exercise of her discretion. If, on the other hand, the defendant had a correct understanding of the facts, she has not treated them in the way indicated by the policy and has not explained why she has not done so.

40. The claimant relies on the principles derived from the judgment of the Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, at [63]:

> "In our view, the *Criminal Injuries Compensation Board* case [1999] 2 AC 330 points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between 'ignorance of fact' and 'unfairness' as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that 'objectively' there was unfairness. On analysis, the 'unfairness' arose from the combination of five factors:
>
> i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
>
> ii) The fact was 'established', in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
>
> iii) The claimant could not fairly be held responsible for the error;
>
> iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;
>
> v) The mistaken impression played a material part in the reasoning."

41. In respect of the first factor, the claimant points to the Decision Email, where the second bullet point said to point against aggregation ("The ratio of shared space within each cluster") is taken to relate to the second column in line 9 of the table in Practice Note 6 ("Small amount – few of the occupiers to use it at the same time").

42. In respect of the second factor, the claimant refers to the witness statement of Ryan Salter, who is the Property Manager of the Property. He states at paragraph 22 of his witness statement:

> "All of the kitchens in each flat at the Property increase in size with every additional tenant, the smallest being in respect of 4 room cluster and our largest being the 11 room cluster. There is

> always a seat at the dinner table and a seat on a sofa for every occupant of a bedroom in the cluster for the flat to enable them all to socialise in the space at the same time. The amenities in the kitchen also increase with size, so the smallest kitchens have 1 oven whereas the largest have over 3 ovens."

43. In respect of the third factor, the claimant says that it cannot fairly be held responsible for the defendant's error, in circumstances where the defendant had not found this factor to militate against aggregation in the cases of the "comparable" properties and did not communicate any concern on the point to the claimant or seek further information or clarification.

44. In respect of the fourth factor, the claimant says that the maintenance of the valuation list is not an adversarial process and that both the defendant and it have a shared interest in ensuring that the list is correct.

45. In respect of the fifth factor, it is said that error clearly played a material part in the defendant's reasoning, because it informed the second of the three points mentioned in the Decision as militating against aggregation.

46. I reject ground 3, which in my view is merely a veiled disagreement with the Decision.

47. The key point, in my judgment, is that review on the ground of an error of fact is available only where the decision-maker's decision has been materially informed by "misunderstanding or ignorance of an established or relevant fact", meaning a matter of fact that could have been demonstrated to the decision-maker by objective and uncontroversial evidence: see *E v Secretary of State for the Home Department* in the passage set out above and also at [91]. In the present case, the defendant does not accept that it made any error of fact in respect of the factor in line 9 of the table. Of course, that is not an end of the matter; the defendant could not make itself immune to challenge on this ground by a refusal to acknowledge the plain truth. However, I consider that the defendant is correct to say that the factor in question does not solely involve simple objective facts but incorporates an element of judgement. The fact that an evaluative assessment is involved is not necessarily fatal to reliance on the ground of challenge identified in *E v Secretary of State for the Home Department*, but it may be so and is always a reason for being cautious in the application of that ground: cf. *R (Chalfont St Peter's Parish Council v Chiltern District Council* [2014] EWCA Civ 1393 at [106]. Practice Note 6 does not contain any formula for assessing the amount of communal space relative to the number of bedrooms or likely occupiers. The mere fact that a space contains as many dining chairs and sofa seats as there are occupiers hardly suffices to inform a judgement as to whether there is a sufficient amount of communal space to make it possible or convenient for many or all to socialise together. Thus it is incorrect to put forward Mr Salter's statement as though the facts he asserts were dispositive of this factor. Mr Dewhurst was entitled to decide what information he required to make a reasoned exercise of his discretion. He obtained from the website sample photographs of large and small kitchens and also considered a brochure that showed floor plans that, though not said to be to scale, have not been suggested to show anything other than a fair picture of the layout. He also noted that additional communal areas for occupiers of rooms in any flat within the Property were provided on the ground floor. There may be room for disagreement as to his conclusion on this aspect of the case and as to his decision not to inspect the flats before reaching it, but neither can properly be regarded

as irrational or outwith the scope of his discretion as decision-maker, and it has certainly not been shown that he proceeded on the basis of a clearly demonstrated and objectively uncontroversial misapprehension. Therefore this ground of challenge fails.

Ground 4: Irrationality and/or failure to follow policy – shared facilities

48. Ground 4 is a complaint that the Decision irrationally failed to follow the guidance concerning the relevance of shared facilities in lines 6, 7, 8, 10 and 11 of the table in Practice Note 6 and failed to give adequate reasons to justify a departure from the policy.

49. The table is set out at the end of the judgment; I shall not set out the relevant parts here. The short point is that aggregation is less likely where each bedroom has private cooking and washing/toilet facilities and more likely where the bedrooms share such facilities. Line 8 of the table deals with the situation where, as with the flats at the Property, each bedroom has a private bathroom/toilet but all bedrooms share kitchen facilities: the third column indicates that in such a case aggregation is more likely. However, the Decision Email identified as a factor weighing against aggregation, "Each room being en-suite with no other WC facilities within the cluster." The claimant contends that this represents a partial and irrational application of the Practice Note, in that it fails to apply line 8 of the table or to give any reason why line 8 has not been applied.

50. In my view, the attraction of ground 4 is specious. It is, again, important to have in mind that Practice Note 6 does not establish a policy to the effect that aggregation will follow if a property has such and such characteristics. It identifies certain characteristics that are usually relevant and how they will tend to operate, but it makes clear that "each factor will have a different weight of importance and this will vary case by case." Therefore there is no question of a decision not to aggregate being *ipso facto* a departure from Practice Note 6 just because the property in question has shared kitchen facilities. The complaint in ground 4 is, accordingly, properly concerned not with outcome but with what is said to be an unexplained misapplication of or departure from the guidance in the table regarding the relative weight of competing factors. I regard the complaint as misguided. The Decision identified the fact that each bedroom was en-suite as a factor militating against aggregation. This was both entirely reasonable and perfectly in accord with line 7 of the table[2]. Line 8 of the table does not mean that en-suite facilities are not a factor weighing against aggregation; it merely indicates that the need to share kitchen facilities will tend to be a weightier factor in the opposite direction. The Decision simply identified the main factors weighing in the decision-maker's mind against aggregation, none of which was said to be determinative. Mr Ormondroyd submitted that the decision-maker ought to have considered that shared facilities counted in favour of aggregation and explained why other factors outweighed this one. However, this does not identify any departure from policy and goes no further than to identify a factor militating in favour of aggregation. It was for the decision-maker to have regard to *all* the circumstances of the case, including the adverse factor that each bedroom had en-suite facilities, and to give them

[2] One may also note the illustration given in Example 2 under the table in Practice Note 6: "A guest house which has been converted into a 14 bed HMO. All the rooms have en-suite facilities, there is a shared kitchen and two shared living/dining rooms. All the rooms are let on ASTs. From the circumstances in the case, it would not be appropriate for the LO to aggregate."

such weight as he thought fit. As no departure from policy has been identified and the decision not to aggregate cannot be considered to be irrational just because kitchen facilities were shared, ground 4 fails.

Ground 5: Inconsistency of treatment

51. Ground 5, which relates to the central concern expressed in the communications before the Decision (see paragraphs 13 and 18 above), is that the defendant has irrationally failed to treat the Property in a manner consistent with the treatment of the "comparable" properties and has failed to give adequate reasons for this inconsistent treatment.

52. Mr Ormondroyd advanced this ground as concerned primarily with the substantive rationality of the Decision. He submitted that "It is a cardinal principle of public administration that all persons in a similar position should be treated similarly"[3]. He relied in particular on the judgments in *R (Gallagher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96. At [24]-[26] Lord Carnwath JSC, with whose judgment all the Justices agreed, observed, by reference to previous authority, that in domestic administrative law equal treatment of like cases did not constitute a distinct principle but, as a "generally desirable" objective, might fall for consideration as an aspect of rationality. In a concurring judgment, Lord Sumption JSC said at [50]:

> "I agree with Lord Carnwath JSC's analysis of the relevant legal principles. In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories. To say that a decision-maker must treat persons equally unless there is a reason for treating them differently begs the question what counts as a valid reason for treating them differently. Consistency of treatment is, as Lord Hoffmann observed in *Matadeen v Pointu* [1999] 1 AC 98, 109 'a general axiom of rational behaviour'. The common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities."

53. The Amended Statement of Facts and Grounds refers to the pre-decision communications and puts the heart of the complaint as follows:

> "71. The Decision was subsequently made apparently without reference to the situation at these other properties, and without any attempt to justify the difference in treatment between them and the Property. The result is that the Property continues to bear

[3] *Per* Lord Donaldson MR in *R (Cheung) v Hertfordshire County Council* (The Times, 4 April 1998), cited by Stanley Burnton J in *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin) at [74]).

> a disproportionate and unfairly high tax burden compared to its direct competitors.
>
> 72. The Claimant has also investigated whether the factors referred to in the Decision (namely the number of rooms, ratio of rooms to communal space and extent of shared facilities) do serve to differentiate the Property from these comparables. The results of these investigations are set out in the evidence of Ryan Salter. The Claimant is unable to discern any meaningful difference which would justify failing to aggregate flats at the Property when similar flats elsewhere have been aggregated. The main difference is in terms of the ratio of bedrooms to shared space, and in that respect the flats at the Property have in most cases *more* shared space than equivalent flats elsewhere.
>
> 73. Furthermore, and alternatively, if the Defendant did have some reason for differentiating the Property from its competitors, the reasons given for the Decision are entirely silent on that. Given the fact that this point had specifically been raised with the Defendant that failure of reasoning represents a significant departure from the legal standard." (italics in the original)

The evidence referred to of Ryan Salter appears at paragraphs 20 to 30 of his witness statement, where he addresses the three factors mentioned in the Decision as weighing against aggregation and in that connection compares the Property and the "comparable" properties. At paragraph 23 of his statement Mr Salter makes clear that his research was based on information available in the public domain, though he had no access to any special information obtained from the proprietors of those other properties.

54. The analysis in the *Gallagher Group* case offers a helpful way of approaching this ground. The question then becomes whether rationality required the defendant to treat the Property in the same manner as the "comparable" properties had been treated (that is, to aggregate the rooms within each flat); or, to put it another way, whether there was an objective justification for reaching a different decision in respect of the Property from that which had been reached in respect of the "comparable" properties.

55. In his file note dated 12 June 2023, Mr Dewhurst referred to a principle drawn from *Ladies Hosiery and Underwear Ltd v West Middlesex Assessment Committee* [1932] 2 KB 679. In that case premises had been assessed at a certain rateable value in the valuation list. The evidence showed that the assessment was correct in accordance with the statutory criteria in the Rating and Valuation Act 1925. The assessment was challenged on the sole basis that seven other hereditaments of the same class in the same valuation list had been assessed at lower figures and that valuations of hereditaments in the same class should be fair and equal. The Court of Appeal upheld the decision of the Divisional Court to dismiss the challenge. Although neither the legislation nor the precise point is the same as in the present case, a passage from Scrutton LJ's judgment at 686-688 is instructive:

> "It is a vital principle of the law of rating that each hereditament should be independently assessed. … If, then, the Assessment

Committee is to begin with an independent valuation of the particular hereditament, the position of that hereditament in regard to the test of gross value imposed by the statute is the first question to be considered, and if the only evidence before the Court, and given by the occupier of the hereditament, is that £325 is the rent which the hypothetical tenant would be expected to pay for a tenancy of that hereditament in statutory terms, there is an end of the case. But it may be that, regarding the hereditament in question alone, the Assessment Committee is in doubt as to the hypothetical statutory rent. In such a case it is admissible to tender evidence of the assessment of another hereditament said to be comparable, and to do so without asking, in the alternative, that such second assessment should be varied, and therefore without giving notice to the occupier of the second hereditament … But while such evidence is admissible in chief, it is generally of very little value. Banices LJ gives the reason in *Pointer's* case [1922] 2 KB 476: 'With regard to the first objection, that as to the admissibility of the evidence, Salter J in his judgment in the Court below, speaking of rents actually paid for similar premises in the neighbourhood, said: "Certainly it has been the practice both in rating Courts and in compensation Courts to discourage evidence of this kind where it is tendered in chief," and in that respect my experience has agreed with that of the learned judge. But the reason why it has been discouraged is not because it is inadmissible, but because there are so many circumstances to be taken into consideration that comparisons of that kind are practically valueless. And if evidence of the actual rent paid for the premises sought to be compared is valueless, much more so must be evidence as to their rateable value. But although evidence of the rateable value of such other premises is in the majority of cases of but little value, I agree with the Deputy Recorder and the Divisional Court that it cannot as matter of law be regarded as inadmissible.'

While, therefore, the Assessment Committee and Quarter Sessions cannot exclude such evidence, it is not of much weight, and especially of practically no weight when they have direct and uncontradicted evidence as to the hypothetical statutory rent of the hereditament to be assessed.

The appellants here, however, say that besides the principle of independent valuation, there is another vital principle: that as between different classes of hereditaments, and as between different hereditaments in the same class, the valuation should be fair and equal. I agree, but in my view there is a third important qualification, that the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error."

56. For present purposes, several relevant things can, I think, be taken from that passage.

1) Each property is to be independently assessed.

2) If the applicable criteria show that one particular decision is correct in the instant case, the decision-maker is not entitled to make a different (and therefore wrong) decision on the basis that it accords with the decisions in other cases.

3) Where the applicable criteria do not dictate a particular decision, regard may be had to evidence of the treatment of other properties. Insofar as Mr Waller submitted that other properties are necessarily irrelevant, I reject his submission. It is contrary to the logic of the *Ladies Hosiery* case and is not supported by the authority he relied on, *Halliday v Melville* (1964) 10 RRC 364, where the Lands Tribunal observed that the valuation officer had considered and distinguished the treatment of other properties but did not say that he ought to have ignored them. An example of the application of this principle, albeit again in a slightly different statutory context, is the decision of the Queen's Bench Division in *R v Hastings Justices* [1962] 2 QB 11. A drainage board had assessed drainage rates on a certain basis, but on appeal the justices considered it proper to assess the drainage rates on a different basis, because that was the basis on which almost all the other properties in the same drainage area had been assessed. Lord Parker CJ and Widgery J decided (Slade J dissenting) that the justices had made no error of law in taking that approach, because the statute did not lay down any precise formula for the making of an assessment. Having referred to Scrutton LJ's judgment in the *Ladies Hosiery* case, Widgery J said at page 20 and then, with reference to the facts before him, at page 22:

> "For my part, I have no doubt that the same principles must be applied in connection with drainage rates, but I do not regard the judgment of Scrutton LJ as in any way discounting the desirability of obtaining equality and fairness where that is possible without departing from the accurate application of any settled formula provided for making the assessment."

> "Could the board, in those circumstances, do what has been done in this case? For my part, I am quite satisfied that the board must make their assessment in the light of circumstances prevailing in 1958; but, in 1958 on the facts of this case the great majority, if not all, other ratepayers had a figure representing the annual value of the premises in 1958, which figure was derived from a valuation made in 1936. I find nothing inconsistent in the drainage board approaching this problem on the footing that for the purpose of property assessed under Schedule A the annual value may properly be arrived at on the basis of assessment in 1936, and that the same considerations might be applied to premises under their control. Indeed it seems to me when one remembers the importance underlying all rating problems of achieving fairness, if possible, that the board is permitted to have regard to such considerations, and when faced in 1958 with the fact that all or almost all its existing hereditaments have their values assessed

> on their 1936 standard that the board should say: 'It is fair and right and it is the best solution which we, under our powers can achieve if we in 1958 apply the same standard of valuation which is applicable to all the remaining hereditaments in the area.' Bearing in mind that there is nothing in the *Ladies Hosiery* case which excludes fairness, if the board or the justices thought it right to take account of fairness and equality, I can find no error of law in their so doing."

It is, however, to be noted that the decision in the *Hastings Justices* case was that there was no error of law in assessing on the same basis as the other properties, not that it would have been an error of law to assess on a different basis.

4) As between different properties that are relevantly similar, the treatment should be fair and equal. However, as Lord Briggs JSC observed in *Telereal Trillium Ltd v Hewitt* [2019] UKSC 23, [2019] 1 WLR 3262, at [64], "The requirement to abide by the principle of equality does entail the same principles being applied to each property in the rating list, but not uniformity of outcome, where the evidence … demonstrates otherwise". (This was a dissenting judgment, but Lord Briggs considered that the legal principle was not in dispute.)

5) However, caution should be exercised in the use of other properties, because of the principle that each property falls to be considered independently and because of the many circumstances that will fall to be considered in respect of each individual property.

57. In the present case, I see no error of law in the defendant's approach.

58. First, the decision whether or not to aggregate was a matter for the discretion of the defendant. Where that discretion arose, as it did here, neither statute nor policy prescribed any particular answer. Mr Dewhurst was therefore entitled to have regard to the treatment of other properties, and he did so.

59. Second, Mr Dewhurst noted that there was some inconsistency in the treatment of cluster flats with en-suite facilities. His file note of 8 June 2023 recorded that it was not currently the general practice to aggregate such flats, although there were exceptions. He has not been shown to have been in error regarding either current general practice or some inconsistency in treatment. His file note of 12 June 2023, which dealt with the specific "comparable" properties mentioned by the claimant, noted that aggregation had occurred in respect of each of them and that these were decisions of the local listing office. He was therefore cognisant of the fact that local decisions were consistent among themselves but did not represent the current general practice.

60. Third, he noted that the question was one of fact and degree in every case and that decisions might turn on specific facts (cf. file note of 8 June 2023).

61. Fourth, the decisions in respect of the "comparable" properties were made in 2016, 2017 and 2019, when the applicable policy guidance was in an earlier version of Practice Note 6. That earlier version contained no table and its text was very different from that of the current version, in particular making no mention of "cluster flats" or

"purpose built" flats. The fact that the applicable policy had altered since the earlier decisions would itself be a sufficient reason for disregarding them or attributing to them little or no weight in the balance against the considerations pertaining to the Property.

62. Fifth, Mr Dewhurst noted there was limited information as to why the flats in the "comparable" properties had been aggregated. In particular, "no tenancy agreements were available to verify terms of occupation of the individual rooms or cluster flats", and there were no records of the reasons for the decisions in respect of those properties. The Amended Statement of Facts and Grounds, paragraph 76, complains that the absence of such records is "flatly contrary to the requirements of the Practice Note" and "makes it impossible for the Claimant to assess for itself what the Defendant considers the differences to be, and therefore reinforces the need for clear reasoning to be provided in the instant case." However, the following points should be noted: (1) If the absence of records was contrary to the requirements of Practice Note 6, that was a default relating to the decision-making in respect of those other properties, not the Property itself. (2) In fact, the "requirement" to record fully the thought process and decision was introduced into Practice Note 6 in February 2022, which was after the decisions in respect of the "comparable" properties had been made. (3) The "requirement" in the current version of Practice Note 6 is clearly not by way of imposing an obligation to provide reasons; rather, it is by way of internal guidance of good practice in order that the listing officer may be able to respond to a legal challenge. Indeed, there is no legal requirement for the listing officer even to publish any decision; she is simply required to make an entry in the valuation list. In this context, the file note of 8 June 2023 recorded:

> "The review of the original decision surrounding comparables is therefore difficult based on whether sufficient research has been undertaken to support individual hereditaments of the rooms; and then aggregation taking place of the clusters. No evidence has been seen that specifically relates to the decision on aggregation or not has been considered."

63. Sixth, in these circumstances, it was perfectly rational to decline to make a decision on the basis of consistency with decisions made in respect of other properties. Mr Dewhurst considered that the facts relating to the Property itself indicated a decision against aggregation. He considered the decisions to aggregate the flats in the other properties as being out of line with the current general practice and *prima facie* inconsistent with what he regarded as good practice. However, as each case had to be considered on its own circumstances, and in the absence of detailed information, he did not know why the decisions had been made in the other cases or whether they were in fact now justified. Accordingly, in my judgment, he was entitled to proceed on the basis that his decision ought to be made on the basis of his assessment of the Property and that the question of the correct treatment of the "comparable" properties ought to be reconsidered. Mr Ormondroyd complained that "the proof of the pudding [was] in the eating" and that the defendant had never sought to split the "comparable" properties pursuant to her duty to maintain an accurate list. However, any ground of complaint in that regard relates not to the Decision but to inaction thereafter. Anyway, I am disposed to accept, as being plausible, what Mr Waller told me on instructions, namely that the defendant has been awaiting the outcome of these proceedings.

64. In the circumstances, Mr Dewhurst considered the "comparable" properties but took the view that they did not weigh against the conclusion that was indicated by other matters. That was a reasonable and permissible course for him to take. The Decision Email simply informed the claimant of the principal factors that had led to the Decision. I regard that as sufficient. In any event, the file note of 12 June 2023 shows clearly how Mr Dewhurst dealt with this aspect of the matter and why he did not accede to the suggestion that he ought to follow the earlier decisions.

Conclusion

65. The claim is dismissed.

THE TABLE IN PRACTICE NOTE 6

	'All the circumstances of the case'	**Less likely to Aggregate**	**More likely to Aggregate**
1	Other property in the locality? Pattern of use. What's a normal layout.	Similar to properties occupied by multiple households in the locality –see examples below	Similar to properties occupied by single households in the locality
2	Number of letting rooms - Large HMO needs to be registered if there are 5 or more occupiers	5 or more rooms	4 or less rooms
3	Structural alterations (separate to "adaptations" as these words appear in the CDO 92)	There have been structural alterations	There have been no structural alterations
4	Adaptations	Significant adaptations	Few/no adaptations
5	Previous use / converted or adapted?	Purpose built or converted for use as an HMO	Former house previously occupied by single household
6	Number of letting rooms with "private" cooking facilities	All	None
7	Number of letting rooms with "private" washing/WC facilities	All	None
8	Difference between private cooking facilities and private washing/WC facilities?	Each room has a private kitchen	Each room has a private bath/WC but kitchen facilities are in shared space
9	Amount of communal space compared to the number of bedrooms	Small amount – few of the occupiers to use it at the same time	Large amount of communal living space – possible for all occupiers to socialise

10	Number of shared kitchens	None	One (or more)
11	Number of shared bathrooms	None	One or more
12	Contractual letting arrangement/s. (This is separate to the identification of the hereditament issue.)	Multiple ASTs or longer term agreements	Shorter term agreements or single joint tenancy of the whole
13	Marketing?	Long term lets	Short term lets
14	Planning permission	Not relevant – All HMOs require planning permission	Not relevant – All HMOs require planning permission
15	Registered HMO?	Yes	No
16	Ownership	Multiple owners/landlords of different units	Single owner/landlord of whole
17	Number of SCUs identified in property	If there are multiple SCUs, then Article 4 does not apply and the LO cannot aggregate	Aggregation only possible where there is a Single SCU (self-contained unit)
18	Any other factors specific to the property	Seek advice	Seek advice