Easter Term
[2020] UKSC 21
On appeal from: [2018] EWCA Civ 2472

JUDGMENT

Cardtronics UK Ltd and others (Respondents) *v* Sykes and others (Valuation Officers) (Appellants)

before

Lord Reed, President
Lord Kerr
Lord Carnwath
Lady Black
Lord Kitchin

JUDGMENT GIVEN ON

20 May 2020

Heard on 11 and 12 March 2020

Appellants
Timothy Morshead QC
Galina Ward
(Instructed by HMRC Solicitor's Office and Legal Services (Bush House))

Respondent (1)
Daniel Kolinsky QC
Luke Wilcox
(Instructed by DMH Stallard LLP (Crawley))

Respondent (2)
Timothy Mould QC
Guy Williams
(Instructed by Bryan Cave Leighton Paisner LLP)

Respondent (3)
Richard Drabble QC
Christopher Lewsley
(Instructed by Dentons UK and Middle East LLP)

Respondent (4)
Timothy Mould QC
Christopher Lewsley
(Instructed by Dentons UK and Middle East LLP)

Respondents:-

(1) Cardtronics UK Ltd ("Cardtronics")
(2) Tesco Stores Ltd and Tesco Personal Finance Plc
(3) Sainsbury's Supermarkets Ltd and Sainsbury's Bank Plc
(4) The Co-operative Group Ltd

LORD CARNWATH: (with whom Lord Reed, Lord Kerr, Lady Black and Lord Kitchin agree)

1. The common subject matter of these appeals is the treatment for rating purposes of ATMs (or "automated teller machines") situated in supermarkets or shops. That turns on two main issues: first, were the sites of the ATMs properly identified as separate hereditaments from the stores or shops? Secondly, if so, who was in rateable occupation? The present appeals have been designated as lead appeals. Appeals relating to some 10,000 other sites (amounting to some 34,000 appeals in all) have been stayed pending the final decision in these cases. For convenience I shall refer to the respondents collectively as "the retailers", to include (where different) the companies operating the ATMs.

2. Different conclusions were reached at each level below. The Valuation Tribunal for England decided that in each case the sites of the ATMs were in separate rateable occupation. The Upper Tribunal (Lands Chamber) upheld that decision in respect of all the "external" machines, but not the "internal" machines. The Court of Appeal held that none of the machines, external or internal, were separately rateable.

3. These questions have attracted a wealth of learning below, and in this court. I would pay tribute to the comprehensive and insightful treatment of the complex legal and factual issues at all three levels: the Valuation Tribunal for England (92 paragraphs: Alf Clark, Vice-President); the Upper Tribunal (Lands Chamber) (195 paragraphs: Martin Rodger QC, Deputy Chamber President and A J Trott FRICS), and Court of Appeal (100 paragraphs: Lindblom LJ, with whom Gloster and King LJJ agreed).

4. It is important however to be clear where lies the primary responsibility for reviewing the Valuation Officer's decisions. Although the first appeal is to the Valuation Tribunal, and the Upper Tribunal acts as an appellate body, it does so by way of a full rehearing, not simply review, if necessary hearing evidence for that purpose (*Johnson v H & B Foods Ltd* [2013] UKUT 539 (LC); [2014] RA 490 per Sir Keith Lindblom CP). By contrast, onward appeal to the Court of Appeal lies only on points of law. Accordingly, it is to the Upper Tribunal's judgment that we must look first for the relevant findings of fact and their evaluation. To justify intervention at a higher level it is necessary to identify something more than a difference of evaluative assessment. Further in this highly specialised area of the law the higher courts should give particular weight to the expertise which has been developed by the senior judges and members of the Upper Tribunal (Lands Chamber). That weight

is not necessarily diminished by the fact that in this particular appeal, none of the parties before the court has seen it as in their own interests to defend the Upper Tribunal's decision in its own terms. This of course is not to overlook the expertise in this field of Lindblom LJ, himself a former President of the Lands Chamber.

External and internal ATMs

5. The great majority of the ATMs in issue are "external": typical "hole in the wall" machines fitted in the external walls of superstores or supermarkets belonging to the major national retailers, and as such available for use by the general public whether or not they are shopping there.

6. In each case the ATM itself was installed and operated, not directly by the retail company but under contractual arrangements with a related banking company. This separation, we were told, was necessary for regulatory reasons. Although the contractual arrangements vary between the different groups, as discussed in detail in the judgments below, I do not understand these differences to have played a significant part in the ultimate decisions. That seems to me correct. It would be surprising if the rating treatment of such standard items were to vary according to the particular organisational arrangements of the companies concerned. As I understood his submissions, Mr Morshead QC for the appellant Valuation Officers did not attach particular weight to those differences, but was rightly concerned to establish principles of general application.

7. Of the external ATMs, I can take as typical the ATM in Sainsbury's supermarket in Worcester, as described by Lindblom LJ (para 6). The store was first shown in 2010 as "Superstore and Premises" with a rateable value of £875,000. That was replaced, as a result of the decision now under appeal, by separate entries of £875,000 for the store alone and £8,300 for the ATM site. (These figures can be taken as broadly illustrative for all the cases. The figures are not agreed and subject to future determination. But it is not in dispute that separate treatment of the ATMs is liable to have a significant impact in financial terms both in individual cases, and particularly when multiplied by the number of cases awaiting decision.)

8. The Worcester ATM is in an external wall, next to the main entrance door, and can be used 24 hours a day. It sits on a metal plinth, is chained to the floor of the cash room in the store, and is connected to the supermarket's electricity supply. Sainsbury is the leasehold owner of the store, including the site of the ATM. An associated company, Sainsbury's Bank plc, has a contractual licence to install and operate the ATM, and for that purpose to enter the ATM site. The cash dispensed by the ATMs is owned by the bank, but is kept in the security room of the store,

under the control of Sainsbury's staff. Maintenance is carried out daily by Sainsbury's staff during the opening hours of the store.

9. Some of Tesco's ATMs are described as "internal", in that they are available for use only from within the store, and accessible only during store opening hours. Apart from that, and with one exception, the physical and organisational arrangements are for practical purposes the same as for the external machines.

10. The exception is the so-called "moveable" ATM on the first floor of the Tesco's store in Nottingham. It will be described later in this judgment. This difference led the Upper Tribunal to conclude that the site of this ATM, unlike all the others, did not qualify as a separate hereditament, so that the issue of rateable occupation did not arise.

11. The last category can be described as a "convenience store ATM", represented by the Cardtronics ATM in a Londis convenience store in Harefield. It is similar to the other external ATMs, but the main difference is the much smaller floorspace of the store, so that maintenance and loading leads to greater interference with the ordinary working of the store. I take the description from Lindblom LJ (para 9):

> "Cardtronics operates an ATM in a Londis 'convenience store' in Harefield, with about 60 square metres of floor space. The ATM is in an external wall, next to the entrance door. The ATM was placed in the store under a licence agreement with Londis, dated 26 March 2007, which makes provision for Cardtronics to gain access to it. It is owned, operated, maintained and loaded by Cardtronics. Maintenance and loading are undertaken within the store. Loading blocks an aisle, and the store is sometimes closed while it is being carried out."

The Upper Tribunal gave further detail of the physical arrangement within the store (para 149):

> "Within the store the machine is partially concealed from view by a pillar on one side but otherwise its metal cabinet is in plain sight, not being housed in any separate structure created for the purpose. The top of the cabinet is used to display magazines and other goods. The only adaptation to the store which has been undertaken to accommodate the ATM is the creation of a separate panel on the front of the building through which the

> display and keypad can be accessed and where we assume there would previously have been a window."

The legal principles

12. I turn to the relevant statutory provisions, and the leading authorities. Section 64(1) of the Local Government Finance Act 1988 defines a hereditament as anything which would before the passing of the Act have been a hereditament for the purposes of section 115(1) of the General Rate Act 1967. That section in turn provides that "hereditament" means:

> "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."

Authoritative guidance as to the application of that definition has recently been given by this court in *Woolway (Valuation Officer) v Mazars LLP* [2015] UKSC 53; [2015] AC 1862.

13. As to rateable occupation, section 65(2) provides that "whether a hereditament … is occupied, and who is the occupier" are to be determined by reference to the rules which would have applied under the 1967 Act. They were well established long before the 1967 Act. The classic statement of the "ingredients" of rateable occupation is that of Tucker LJ in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344, 350:

> "... there are four necessary ingredients in rateable occupation ... 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."

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.

16. Lord Russell of Killowen (at pp 529-530) made some general observations on rateable occupation, including the treatment of concurrent occupation, which have been regarded as authoritative in later cases:

> "The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact - namely, whose

> position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate, but who is in paramount occupation of the particular premises in question."

17. He 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)

18. He referred to this as the "landlord-control principle", and having discussed its application to other cases, such as docks, he summarised the position:

> "In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent

> with his enjoyment of them to the substantial exclusion of all other persons." (p 532)

19. Lord Wright MR, in his concurring judgment, also distinguished the lodging-house cases:

> "… the position of the lodger is authoritatively explained by Lord Hatherley in *Cory v Bristow* ([(1877)] 2 App Cas 262, 276). 'Although', he says, 'a lodger' may have 'the exclusive use of the chambers he occupies, still there is a concurrent right reserved by the person who lets the lodgings, of using the … lodging house for whatever purposes he may think fit for managing the establishment and all purposes connected with it'. In other words the landlord occupies his premises and uses them for his business of keeping lodgers. Such a case is far removed from the case of the tenants here, who occupy their shops in order to carry on their business ..." (p 556)

20. As illustrations of the application of these principles in wholly different factual situations, reference has been made to two Court of Appeal decisions:

i) In *Wimborne District Council v Brayne Construction Co Ltd* [1985] RA 234, contractors were engaged by the owner of a fish farm to excavate lakes and ponds on an area underlain by deposits of gravel. They engaged subcontractors who paid a royalty to the contractors for any gravel taken. It was held that the subcontractors were in rateable occupation because their occupation was exclusive for the particular purpose of winning the gravel, and not interfered with by the contractual control exercised by the contractors. Mr Morshead for the Valuation Officers relies on Lloyd LJ's suggestion (at p 243) to reconcile the concepts of "exclusive" and "concurrent" occupation:

> "Another way of explaining the difficulty might be that an occupier, in order to qualify for rateable occupation, has only to be in exclusive occupation for his own particular purposes. This does not exclude others from occupying the same hereditament for their particular purposes. Paramountcy is a way of choosing between exclusive occupiers in that sense. The degree of control exercised by one occupier over the other, or by a third party, seems to be relevant to both questions …"

Sir George Waller added (p 247):

> "In my opinion, in the phrase 'the particular purposes of the possessor', the word 'particular' is to emphasise the work that the possessor is doing - selling newspapers and not running a railway - in the *Southern Railway* case; the carrying out of the contract in *Laing's* case.
>
> In this case also, the particular purpose of the subcontractors was the carrying out of the contract, ie excavating the gravel. … So far as the subcontractors were concerned, while no doubt the ultimate objective was to enable the contractors to complete the construction of the ponds, the particular purposes of the subcontractors were the excavation of gravel."

ii) *Vtesse Networks Ltd v Bradford (Valuation Officer)* [2006] EWCA Civ 1339; [2006] RA 427 concerned a fibre optic telecommunications network consisting of pairs of fibres, encased within the cables and ducts owned by third parties, and leased to the ratepayer, Vtesse, for use in the transmission of its own signals. The network was held to be a hereditament of which Vtesse was in rateable occupation. The Court of Appeal upheld the Lands Tribunal's conclusion that Vtesse was in paramount occupation of the network, notwithstanding that the owner of the ducts controlled access to the fibres and was responsible for maintenance. Suggested analogies with the landlord-lodger relationship were rejected.

21. One other House of Lords case, *London County Council v Wilkins (Valuation Officer)* [1957] AC 362, is of assistance in showing how chattels may be relevant to the identification of a rateable hereditament. It was held that wooden or corrugated iron huts, used as offices, stores and a canteen on a building site, could be included in the rating list (the building site itself not being rated). The House rejected the argument that the structures were chattels and should not be rated for that reason. Lord Radcliffe said (p 378):

> "No one supposes, of course, that a man is rateable in respect of the enjoyment of chattels as he is in respect of the occupation of land. But, on the other hand, I think that that is a long way from saying that the presence of chattels on land can never be a relevant factor either in determining the assessment of the rateable value of a hereditament or in determining whether there is a rateable occupation or not."

22. In the present case it is not in dispute, as I understand it, that in appropriate cases chattels may be taken into account in defining the land to be included in the

hereditament. In the case of the ATMs, however there is however an issue as to whether that is compatible with their status as "non-rateable" plant for valuation purposes under the special legislation relating to plant and machinery.

The Bank of Ireland case

23. To show how those principles have hitherto been applied to ATMs at tribunal or appellate court level, it is helpful to refer to a decision which is uncontentious, at least in its result. That is the decision of the Scottish Lands Valuation Appeal Court in *Assessor for Central Scotland Joint Valuation Board v Bank of Ireland* [2010] CSIH 91; [2011] RA 195. It related to a "hole in the wall" ATM in an outside wall of a sub-post office. The court distinguished an earlier case, in which it had been decided by the same court that free-standing ATMs inside various supermarkets and shops, to which the public had access only from within the premises, were not separately rateable (*Clydesdale Bank plc v Lanarkshire Valuation Joint Board Assessor for Lanarkshire* 2005 SLT 167).

24. To illustrate the factors which have hitherto been regarded as relevant, it is worth setting out in full the reasoning of Lord Gill, as that of one of the most experienced judges in this field:

> "[15] In my opinion, the crucial difference in this case is that there is no direct link between the ATM site and the operation of the sub-post office. The ATM cannot reasonably be said to be one of the retail attractions provided in the sub-post office for its customers. Where an ATM is sited within a retail store, it is reasonable to infer that its primary purpose is to provide a facility for shoppers enabling them to access cash in-store in the course of shopping there. It is reasonable also to infer that few users will go to the store solely to obtain cash from the ATM.
>
> [16] In this case, however, although the ATM rests on the floor of the sub-post office, the operative part of it from the user's point of view is accessible only from outside. The ATM is therefore not an in-store facility. Within the sub-post office the site of it is in effect dead space. The ATM is intentionally provided for the use of the general public. For that purpose the building has been altered and adapted by the opening of an aperture in the glass frontage of the building in virtue of a planning permission and a building warrant. Furthermore, the

> usage of the ATM is entirely unrelated to the opening hours of the sub-post office.
>
> [17] The sub-postmaster has no access to the ATM site save for re-filling and for simple first line maintenance, for all of which he receives a commission. Beyond that, he has no rights or duties in relation to the machine."

Although Mr Morshead QC for the Valuation Officers criticised some of that reasoning as departing from the *Southern Railway* principles as he identified them, he did not question the actual decision.

The Principle of Equality

25. Mr Morshead urged that the approach of the Court of Appeal risked undermining a fundamental rating principle, the principle of equality. It meant that identical ATMs of adjacent High Street buildings would be treated differently depending on the use of the building. With respect, however, he seems to me to overstate the significance of the principle in these cases. It is already the position that identical ATMs in adjacent buildings may be treated differently. Lindblom LJ (para 1) recorded that in 2015 there were some 70,000 ATMs in the United Kingdom, "most of them in bank premises". It seems clear that a typical "hole in the wall" ATM in the external wall of a high street bank is part of the same hereditament as the rest of the bank, and is no different in that respect from a similar machine within the bank. It is equally clear that an ATM in a building adjacent to the bank, for example a post office (as in the *Bank of Ireland* case) whose occupation has no direct link with the function of the ATM, may be treated as a separate hereditament. The present appeals are not about such fundamental issues of principle, but simply about where to draw the line, in cases where the functions of the ATM and of the host building are not wholly disconnected.

General comment on the authorities

26. I should add that, even in respect of authorities at the highest level such as those summarised above, there is a danger of over-analysis. As Lord Sumption noted in *Woolway v Mazars* (supra at paras 1 to 4), the rating system has a very long history. As a fair and effective method of taxing property of all kinds, it has proved remarkably resilient and adaptable to technological developments and new forms of property. However, although the core concepts are well-understood, they have not always proved susceptible to precise formulation, as indeed he observed of the term "hereditament" in that case.

27. The same may be said of the concepts of "paramount" and "subordinate" occupation, which are at the heart of the second issue in these appeals. The underlying principles were authoritatively laid down in the *Halkyn* case. The notable length of the leading speeches in *Southern Railway* can be attributed to the attempts of their Lordships to develop those principles by drawing together the threads of a wide range of decided cases relating to disparate factual circumstances, not all readily reconcilable with each other. Inevitably in such an exercise, as anyone who has attempted the task will know, some tensions and inconsistencies are likely to arise. It may be misleading to extract particular statements, and to treat them as definitive propositions of law, without regard to their overall context. Further, as Lord Russell was at pains to emphasise, the principles as stated by him provide no more than a framework for the evaluation of the facts of any particular case.

Identifying the hereditament

28. The first issue is whether the sites of the ATMs are capable of identification as separate hereditaments. As the Upper Tribunal explained (para 115) there were two aspects to the arguments under this head:

> "[The retailers] submitted first that the boundaries of a hereditament could not be defined by reference only to the presence of a piece of machinery which was not itself liable to be rated. If the ATM was ignored there was nothing to identify the area said to constitute the hereditament, as it was otherwise indistinguishable from any other part of the floor area of the host store. Secondly, it followed from the inability to define the area of the purported hereditament that the geographical test in *Woolway v Mazars* could not be satisfied."

On both issues the Upper Tribunal's reasoning and conclusions were approved by the Court of Appeal. I take the two aspects in turn.

"Non-rateable plant"

29. The first argument, which was developed in this court by Mr Kolinsky QC for the first respondent, arises from the Valuation for Rating (Plant and Machinery) (England) Regulations 2000 (SI 2000/540), under which the ATM is left out of account for valuation purposes. Regulation 2 provides that in assessing the hypothetical rent for rating purposes, other than in respect of plant or machinery within the classes set out in the Schedule to these Regulations:

> "(b) … the prescribed assumption is that the value of any plant and machinery has no effect on the rent to be so estimated."

An ATM does not fall within any of the classes set out in the Schedule, and it must therefore be assumed to have no effect on the rateable value of the hereditament on which it is sited. Items within paragraph (b) are sometimes described as "non-rateable" plant, but that is no more than a term of convenience. On its face the Regulations are concerned solely with issues of valuation, not issues of rateability such as those raised by the appeal.

30. However, it was argued that the ATM, being "non-rateable plant", must be disregarded for all purposes, including for the identification of the hereditament. This argument was supported by reference to a number of authorities, but most particularly to the decision of the House of Lords in *Kennet District Council v British Telecommunications* [1983] RA 43. The issue there was whether BT was in rateable occupation of two telephone exchanges while they were being fitted out with machinery and were not yet ready to be used as exchanges. The machinery was non-rateable plant under the then current legislation (the predecessor of the 2000 Regulations). The House of Lords upheld the finding that BT's business purpose was the housing of telephone equipment, and the exchanges were used for that purpose once the first equipment was moved in.

31. There had been an argument that the equipment was an essential part of the telephone exchange, which was thus incapable of beneficial occupation until the equipment was fully installed. It was in rejecting that argument that Lord Keith of Kinkel had used the words on which Mr Kolinsky relies. Having observed that the hereditament was "the land with the building on it", and did not include any part of the plant and machinery in it, Lord Keith said (at p 46):

> "The subsection provides that it is for the purposes of valuation that plant and machinery within para (b) is to be left out of account, but it must, I think, follow *that it is impossible to treat such plant and machinery as part of the hereditament for any rating purpose*, even though it be so fixed or attached that it would have fallen to be valued as part of the hereditament under the law prevailing before the statutory ancestor of section 21 was enacted in the form of section 24 of the Rating and Valuation Act 1925. Nothing can be rated which is not capable of being valued for the purposes of rating, and nothing which is not so capable can be the subject of rateable occupation. So it was rightly conceded by counsel for the respondents that the hereditament in issue here was land with the bare shell of the

> building on it, excluding all of the equipment therein." (Emphasis added)

32. Mr Kolinsky's argument, as the Upper Tribunal noted (para 122), was that, if the ATM could not be treated as part of a hereditament "for any rating purpose", it must also be ignored in deciding whether the site on which it is placed is a separate hereditament. Against that Mr Morshead had argued that such a wide interpretation of Lord Keith's words was not consistent with statutory provision, and was contradicted by the decision itself, which did in fact treat the equipment as relevant to the issue of rateable occupation. The Upper Tribunal also referred (para 123) to *Edmondson v Teesside Textiles Ltd* (1984) 83 LGR 317, in which Oliver LJ had explained the specific nature of the argument which Lord Keith had been addressing. The finding that the hereditament was the building alone did not require it to be assumed that the equipment had been "magically removed leaving an empty building".

33. The Upper Tribunal agreed that neither *Kennet* nor any of the other authorities relied on was of assistance, since:

> "each concerned a building whose boundaries clearly defined the extent of the relevant hereditament, the existence of which was not in doubt."

They concluded:

> "In principle, therefore, we consider that the presence of an item of non-rateable machinery, such as an ATM, should not be ignored when determining whether a separate hereditament exists. The statutory assumption applies only for the purpose of valuation and may not legitimately be applied in answering the logically prior question of whether there is or is not a hereditament which needs to be valued." (paras 124-126)

In the Court of Appeal, Lindblom LJ agreed in substantially similar terms (paras 45-50). Since I agree with both, and without disrespect to Mr Kolinsky's attractive restatement of the arguments in this court, I am content to adopt their reasoning without further explanation.

Defining the hereditament

34. On the second aspect the principal argument for the retailers, as the Upper Tribunal noted (paras 127ff), relied on the observation by Lord Neuberger of Abbotsbury in *Woolway v Mazars* (para 47) referring to a hereditament as:

> "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) …"

It was argued (on behalf of Tesco and Cardtronics) that the site of an ATM did not satisfy this description because it was not self-contained, and it was unusable without extensive use of the adjoining parts of the host store for servicing and for access by the public. Against that it was argued for the Valuation Officers that in this respect the ATM sites were no different in principle from separate shop units in a shopping centre which would undoubtedly qualify as separate hereditaments even though dependent for some purposes including access on other parts of the shopping centre. The Upper Tribunal agreed; as they said:

> "Once a machine has been installed there should, in our view, be no difficulty in defining the boundaries of a fixed ATM site with sufficient precision to satisfy the geographic test of self-containment." (para 130)

35. They distinguished these cases from *Clydesdale*, in which the bank had been given a right of access to "a more or less free standing moveable machine placed in a location chosen by the store from which it could be readily moved". They added:

> "The deliberate creation of a specific space in a fixed and apparently permanent location, visibly different from the generality of the host store and clearly intended for a particular use, is sufficient to differentiate most of these cases from the arrangements considered in *Clydesdale*. In such cases enhanced security, visibility and permanence all contribute to the separation and identification of the unit." (paras 135-136)

36. As already noted, they took a different view of the "moveable" ATM at Tesco's Nottingham store. They described it as follows:

> "On the first floor of the Nottingham store is a third ATM, which stands in a corner adjacent to a café and customer toilets. The store itself has not been adapted to receive this machine, which could be unbolted from the floor and moved without difficulty to the ground floor lobby or to a different part of the retail area. The ATM is housed in a large metal cupboard, about 2 metres tall and 1.5 metres deep, which can be rolled forward to create a secure working area at the front of the ATM from which it can be serviced and replenished. Although this arrangement is slightly more substantial than some entirely free-standing ATMs, its essential qualities are impermanence and mobility. We do not regard the space occupied by the machine from time to time as a unit of property separate from the remainder of the store." (para 143)

37. They concluded as follows on this aspect:

> "We are therefore satisfied that each of the appeal sites, with the exception of the first floor site at Tesco's Nottingham store (where the machine is free standing), is capable of being the subject of a separate entry in the rating list. With that single exception, each site is more than just an indistinguishable space on the shop floor which happens to be occupied by an ATM; in each case the site has either been designed or adapted to accommodate such a machine. We are satisfied that the physical characteristics of a site, rather than incidental details of access or servicing arrangements, justify treating it as a potential hereditament. There are inevitably borderline cases (Cardtronic's machine at Harefield, and Tesco's at Walsall being closest to the boundary), but a clear distinction can be drawn between the space occupied by free standing machines on the one hand and specific sites which have been designed or adapted for the purpose on the other. That distinction is practical and appropriate to a tax on property, it is consistent with the Scottish jurisprudence and it provides a clear answer to the first issue for each of the appeal sites." (para 151)

38. The 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, including the exception made for the "moveable" ATM, as faithful to the tests in *Woolway v Mazars*, and unimpeachable in its findings of fact (para 58). Again, although the main arguments were rehearsed in similar form in this court, I am content on this issue also to adopt the reasoning of the judgments below.

39. I should note Mr Morshead's attempt to persuade us that the Upper Tribunal had been wrong to distinguish the Nottingham ATM, which though described as "moveable" was not regularly moved in practice. The tribunal had failed to consider the only relevant question, which was whether the occupation was so transient as to lack the necessary quality of permanence required by the *Laing* tests. However, that point seems to me sufficiently answered by the Upper Tribunal's finding that the "essential qualities" of this ATM were "impermanence and mobility". That was a finding of fact open to them. Like the Court of Appeal, I see no error of law in their approach.

Rateable occupation

40. I turn to the second issue, whether the retailer or the bank was in rateable occupation. This proved to be the most contentious issue below, and the only one on which there was a significant difference between the tribunal and the Court of Appeal. Both judgments deal with this issue at considerable length, in the course of which the relevant authorities and respective arguments are fully discussed. To avoid overburdening this judgment, I have consigned my (selective) account of their findings to an Appendix. I am grateful for this valuable groundwork which makes it possible to narrow down the scope of the investigation, and to concentrate on what seem to me the critical points of contention.

41. At the heart of the submissions for the retailers, as I understand them, is the relationship between the service provided by the ATMs and the general retail business of the store. From their point of view, the ATM service is not a distinct business activity, but an integral part of the business activity of the store. It is, they say, one of the typical services provided at a modern retail store, and so regarded by their users. It is no different from other common facilities in such stores, such as photo-booths, or coin change machines. It would be difficult to suggest that the sites of such individual services, at least if operated by the retailer, would be separately rateable. That relationship, they submit, is not altered by fact that for regulatory reasons the ATM is operated by a separate banking company.

42. Such a situation they say is clearly distinguishable from cases such as *Southern Railway* or *Wimborne*. Selling newspapers was no part of the railway company's business; nor was commercial digging for gravel part of the business of the fish farm. Issues such as "general control" and "interference" as highlighted by Lord Russell may of course be important in the context of what he called "rival" occupations. By that I think he meant, not rivals in any commercial sense, but simply distinct business activities (selling newspapers or running railways in *Southern Railway*), and as such competing candidates for identification as "paramount" occupiers.

43. Here by contrast there is of course no "rivalry", and no question of any control exercised by the retailer "interfering" with the operations of its banking arm in respect of the ATM machines, since they share a common interest in their success. Their purpose is rather to facilitate that operation. However, the underlying principle remains that stated by Lord Herschell in *Halkyn*:

> "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 …"

Thus in a case such as the present one starts from the position, as recognised by the unamended rating list, that the retailers were in exclusive occupation of their stores. One then asks how that has been affected by the transfer of operation to an associated company, and the limited possession given of the ATM sites, and whether nonetheless the occupation of the store owner remains "paramount" - a concept which Lord Herschell chose to illustrate by reference to the "familiar" case of a landlord and his lodger. The retailers argue that, like the landlord, the retailer retains control of the whole premises and the ATM remains part of the overall business.

44. Mr Morshead criticises the retailers' approach for departing from what he calls "the core principle" derived from Lord Russell's speech in the *Southern Railway* case as to the identification of the person who has "paramount control" of the area in question. That question is to be approached, he says, as in the *Southern Railway* case itself, by focussing on the particular sites in question (the bookstalls or showcases in that case, or the ATM sites in this), and asking whether the degree of control exercised by the host interferes with the enjoyment by the ATM operator of the site of the ATM for the purpose for which it is occupied, to the substantial exclusion of all other persons.

45. Thus in that case, although the railway company retained a degree of control over each individual area, that control did not interfere with the enjoyment by each operator of that space for its own purpose. In the present cases, similarly, none of the factors identified by the Court of Appeal constitutes any interference by the host with the occupation by the bank for the purpose for which the bank occupies the ATM site, which is for the provision of ATM services. Rather the presence of the bank through its ATM excludes the host from any occupation of the ATM site for the same purpose, and excludes the host from any beneficial occupation of the ATM site for any other purpose, including the retail purpose which it conducts elsewhere in the store.

46. I am with respect unpersuaded by Mr Morshead's analysis. While his analysis can perhaps be supported by a strict application of Lord Russell's words, it sits uneasily with Lord Herschell's approach, and in particular his comparison with the landlord-lodger example. The lodging house has always been treated as a single hereditament in the occupation of the landlord, even though his control of the premises does not interfere with, but rather supports, the enjoyment by the lodgers of their own rooms for their own purposes. Mr Morshead appears implicitly to acknowledge this tension. His answer to that is in Lord Russell's reference to the principle as "exceptional" and based on "practical considerations". In the light of that, Mr Morshead submits that the landlord-lodger example is anomalous and should not be extended:

> "the lodger principle has no independent contribution to make to this area of the law. Whatever contribution it once had to make in this field has been fully absorbed, and fully expressed, in *Southern Railway*."

47. I find that difficult to accept. The principle was long-established by the time of Lord Herschell's reference. He would hardly have described it as "familiar", or have used it as his example of paramount and subordinate occupation, if he thought it in any way anomalous. It is true that Lord Russell appears to have had reservations about the principle, but he felt able to justify it by reference to the fact that the landlord would be "occupying the whole premises for the purpose of his business of letting lodgings". Lord Wright also referred to the landlord-lodger example, without suggesting that it was exceptional or anomalous; as he said "the landlord occupies his premises and uses them for his business of keeping lodgers".

48. In the present case the Upper Tribunal has found that the retailers retained occupation of the ATM sites:

> "The Store has not, in any of these cases, parted with possession of the site of the ATM, but it has agreed to confer rights on the Bank which substantially restrict the Store's use of that small part of its premises which comprises the ATM site. The Store has agreed to that restriction because the presence of the ATM furthers its own general business purposes and because the operation of the ATM by the Bank provides the Store with an income." (para 169)

49. I agree with the Court of Appeal that this was a finding which they were entitled to make on the evidence. Further at para 176, although they may perhaps have read more into the concept of "rivalry" than Lord Russell had intended, they

were clearly right to reject it as of any relevance in these cases, and entitled to find in respect of the retailers and the banking companies that:

> "Both parties derive a direct benefit from the use of the site for the same purpose and share the economic fruits of the specific activity for which the space is used."

This in my view was sufficient to support their conclusion, affirmed by the Court of Appeal, that the sites of the internal ATMs remained in the occupation of the retailers.

50. It is necessary however to consider the Upper Tribunal's reason for treating the external machines differently. This appears most clearly from the following passage:

> "Although obviously the Bank and the Store have a mutual interest in providing ATM services, and both derive a benefit from the presence of the machines, where the parties have chosen to make the service available to all, and at all times, and have physically separated the ATM from the facilities offered within the Store, we consider it is right to treat the primary purpose of the occupation of the site of the machine as being a purpose of the Bank. The Bank's occupation for that purpose is exclusive: only one machine can be accommodated on the site and in each case the arrangements between the Store and the Bank provide that only the Bank is to have the right to locate such a machine in the Store." (para 185)

51. With respect, I find that distinction difficult to understand. Like Lindblom LJ (para 96), I do not see that the factors identified by the tribunal support the conclusion that:

> "where the retailer's and the bank's purposes in providing an ATM in a store are either the same or closely aligned, the retailer remains in occupation and possession of the ATM site, and the contractual, physical and functional arrangements are as they were here, an internal ATM site is in the paramount occupation of the retailer, but an external site is in the paramount occupation of the bank."

52. I agree with the Court of Appeal that the Upper Tribunal erred in law by taking an unduly narrow approach. The only differences identified by them were the fact that the external ATMs were available to a wider market and at all times, and "physically separated" from the other facilities in the store. However these factors did not detract from their finding that the retailer remained in occupation of the ATM site, nor did they suggest that it was any less part of the retailer's overall business. As Lindblom LJ said (para 93), this was in "stark contrast" with the "independent uncontrolled occupation … by the bank for the purposes of the bank's business" and the absence of a "direct link" with the Post Office use, as found in the *Bank of Ireland* case (see para 24 above). The difference is no greater in principle than that between internal and external ATMs in a bank building. No one, I think, would suggest that in that case the external ATM should be treated as a separate hereditament. On this issue also I consider that the retailers' analysis is correct in law and should be supported.

Conclusion

53. For all these reasons I would dismiss these appeals by the Valuation Officers and uphold the order of the Court of Appeal.

Appendix - Rateable Occupation

1. In this appendix I set out what seem to me the principal points from the treatment of this issue by the Upper Tribunal and the Court of Appeal.

The Upper Tribunal

2. In their discussion of this issue, the Upper Tribunal began (paras 161-168) by referring to the Scottish cases, in particular *Clydesdale* and *Bank of Ireland*, which, contrary to the view of the Valuation Tribunal, it regarded as faithful to the principles in *Southern Railway*. In the Upper Tribunal's view, the "sole modification" made by the Scottish court to the approach taken in Southern Railway concerned "the value of 'control' as a means of resolving the issue of paramount occupation". As the Upper Tribunal explained:

> "In this very different factual context, where 'occupiers are not truly rivals but are both deriving a direct benefit from the same use of the subjects' it regarded 'the question of control ... as essentially subordinate to the broad question of purpose'. That seems to us to be an unobjectionable refinement of the approach to paramount occupation where the circumstances do not justify treating concurrent occupiers as deriving different benefits from the use of the same unit of occupation."

3. They also accepted the retailers' argument that, in respect of both internal and external machines, the floor space on which an ATM stands "may be regarded as occupied both by the Store and by the Bank":

> "The Store has not, in any of these cases, parted with possession of the site of the ATM, but it has agreed to confer rights on the Bank which substantially restrict the Store's use of that small part of its premises which comprises the ATM site. The Store has agreed to that restriction because the presence of the ATM furthers its own general business purposes and because the operation of the ATM by the Bank provides the Store with an income." (para 169)

They cited Lord Russell's statement that what matters is the position and rights of the parties in respect of the premises in question, and "the purpose of the occupation of those premises", not of the larger premises of which they form part; and to the extent that there is concurrent occupation to consider "which party's possession is

paramount and which subordinate" (para 170). However, they found less assistance in his references to "rival claimants to the occupancy" or to the issues of "control" and "interference". They said:

> "176. We do not consider that it is generally helpful to characterise the Store and the Bank as rivals in their occupation of the site of an ATM. Both parties derive a direct benefit from the use of the site for the same purpose and share the economic fruits of the specific activity for which the space is used. In smaller stores it may be easier to detect an element of rivalry or competition associated with the presence of an ATM, despite the shared interest in providing the machine, because relative to the area of the store as a whole the potential sales space taken by the ATM is much greater than in a larger store. But even in the case of a small store we regard the concept of rivalry in occupation as artificial and unhelpful when considering which party's occupation of an ATM site is rateable.
>
> 177. When considering rateable occupation in the context of a complementary activity like the provision of an ATM, we do not regard control or interference as particularly relevant considerations either. Clearly where a segregated secure room has been created to accommodate the handling of cash, a high degree of security is to be expected. It suits the purposes of both the Bank and the Store for there to be very limited access to such a room, but there is no suggestion that the mutually beneficial security arrangements in place deprive the Bank of access which it would otherwise wish to have to enable it to operate its ATM facilities. The restrictions in place should therefore be seen as facilitating the Bank's enjoyment of the site, rather than as interfering with it."

4. Instead they preferred to consider the purpose of the occupation in question, in respect first of the external ATMs:

> "179. We find it more helpful to consider the purpose of the occupation of the site in the light of the decisions the parties make about the manner in which the space dedicated to ATMs will be used. We regard it as significant that, by design, the target market of an external ATM is much broader than the retail customers of the store. An external ATM is not only physically remote from the generality of the 'retail offer of the store', as it was described, but its purpose is also distinctively

> different. It is to reach as wide a market for ATM services as possible, rather than to restrict usage to those who have entered the Store to make use of facilities only available to customers of the Store."

They accordingly agreed with the approach exemplified by the decision in *Bank of Ireland*, "that external ATMs available to the public at large should not be regarded as an in-store facility" (para 181). They then considered whether a different approach was required in respect of ATMs in small convenience stores but reached the same conclusion (paras 182-184).

5. Their overall conclusions in respect of external ATMs were stated thus:

> "185. Having regard to the broad customer base at which the service of an external ATM is targeted, the distinct character and branding of the space and the security arrangements associated with its use, the practical impossibility of the Store making any different use of the same space while it is occupied by the Bank's ATM, and the inconvenience and impracticality of the machine being removed to a different location, we consider it to be realistic and workable to regard the Bank as being in paramount occupation. Although obviously the Bank and the Store have a mutual interest in providing ATM services, and both derive a benefit from the presence of the machines, where the parties have chosen to make the service available to all, and at all times, and have physically separated the ATM from the facilities offered within the Store, we consider it is right to treat the primary purpose of the occupation of the site of the machine as being a purpose of the Bank. The Bank's occupation for that purpose is exclusive: only one machine can be accommodated on the site and in each case the arrangements between the Store and the Bank provide that only the Bank is to have the right to locate such a machine in the Store."

6. However, they reached a different view in respect of the internal ATMs:

> "190. We consider that the sites of these internal ATMs are in the paramount occupation of the Store, and not the Bank. The service is primarily offered to shoppers in the store, and is not aimed at attracting passing trade (although no doubt there will be occasions when someone who wishes to use an ATM and is

> aware of its presence inside a store may make an incidental purchase). The purpose of the Bank's occupation of the site is to provide a service to the Store's customers, which is also the purpose of the Store's occupation of the whole of the premises including the site. By its control of the opening hours of the premises the Store limits the use which may be made of the ATM by the Bank. We do not think it is appropriate to make any distinction between the normal arrangement where access for all purposes is from within the store and the arrangement at Tesco's store in Rugby where, for servicing, access to the room which houses the machine itself is from outside the store.
>
> 191. An internal site, even one which has been designed or adapted to house an ATM, is likely to be more easily relocated elsewhere in the store than an external hole in the wall site. The space vacated by an internal ATM is also likely to be more readily usable for an alternative purpose (the recess in which the machines at Walsall are housed could equally accommodate the vending machines, display cabinets or recycling bins seen in other photographs of Tesco stores).
>
> 192. These considerations are sufficient, in our judgment, to justify treating the Store as the party in paramount occupation of the site of an internal ATM."

The Court of Appeal

7. Having summarised the relevant principles of law, which he described as "well established, familiar and complete" (para 83), Lindblom LJ pointed to the Upper Tribunal's finding (at para 169) that:

> "in each instance here the retailer had not parted with possession of the ATM site and had remained in occupation of it, sharing actual occupation with the bank, that retailer and bank were not 'rivals in their occupation' of the site, and that they were using it 'for the same purpose' …"

Having regard to that finding he saw no justification for the Upper Tribunal's conclusion that the bank rather than the retailer was in paramount occupation of an external ATM as the paramount occupier (para 85). He continued:

> "87. I think there is force in the submission [for the retailers] that where the 'owner' has given up neither possession nor actual occupation of the site in question, where the purpose for which that site is occupied - in this instance, the operation of an ATM - is a common purpose with that of the other party in occupation and is of direct benefit to the 'owner', and where the 'owner' retains physical or contractual control over the site to realize that benefit and this can be demonstrated by objective evidence, the principle of 'general control' applies, in the normal way. Rateable occupation is not resolved in such a case by weighing one party's 'purpose' against another's. 'General control' remains the decisive factor in establishing who is in rateable occupation of the site. There is no need for a further test to be imposed to gauge which of two purposes is the 'dominant' or 'primary' purpose, or for the 'general control' principle to be subordinated or made subject to such an enquiry. Such a test is not prescribed in the jurisprudence. And in my view it is neither necessary nor appropriate to resort to it as a means of resolving the question of rateable occupation …
>
> 88. On a straightforward application of the 'general control' principle, in the light of the facts the Tribunal accepted, the correct answer seems to me to have been that the retailer, as 'owner', had in all these cases - both internal and external ATM sites - retained sufficient control of the site, in contractual, physical and functional terms, to be regarded as being in rateable occupation of it."

8. Lindblom LJ referred to the "undisputed evidence" that:

> "the ATMs the retailers had chosen to have sited in their stores, whether inside the store or in an external wall, enhanced their store's 'retail offer' by adding to the range of services available at the store; that some at least of the stores had been either designed to accommodate an ATM or physically adapted to accommodate it; that access to the ATM for regular servicing, maintenance and loading could only be achieved from within the store, and with the retailer's co-operation or consent …" (para 92)

He noted also the Upper Tribunal's acceptance that:

> "'[both] parties' - bank and retailer - 'derive a direct benefit from the use of the [ATM] site for the same purpose, and share the economic fruits of the specific activity for which the space is used'." (para 176)

He contrasted the position in the *Bank of Ireland* case:

> "The bank's shared occupation of the ATM site with the retailer, the retailer's continued possession of that site, and the fact that the retailer had, as the Tribunal also found (in para 169), agreed to restrict its own use of the site 'because the presence of the ATM furthers its own general business purposes …', are in stark contrast with the 'independent uncontrolled occupation … by the bank for the purposes of the bank's business' and the absence of a 'direct link', as was found to be so on different facts in *Bank of Ireland* . There, on the evidence, the synergy one sees in this case was lacking. Here the retailers remained in occupation and possession of the ATM sites in their stores, the banks had not been given exclusive possession for their own purposes, the relevant purpose of the banks and the retailers was the same, and the retailers had retained 'general control' over those sites in the relevant sense (para 93)."

He concluded accordingly that the Upper Tribunal had been wrong to hold that the sites of external ATMs should be entered as in separate rateable occupation (para 94). The same criticism did not apply to its treatment of the internal sites, in respect of which its conclusions were consistent with previous decisions, but did not validate its approach to the external sites:

> "They do not justify the conclusion that, where the retailer's and the bank's purposes in providing an ATM in a store are either the same or closely aligned, the retailer remains in occupation and possession of the ATM site, and the contractual, physical and functional arrangements are as they were here, an internal ATM site is in the paramount occupation of the retailer, but an external site is in the paramount occupation of the bank. In short, it is not clear from the Tribunal's decision how the application of the principles established in the authorities, including the principle of 'general control' in *Westminster Council v Southern Railway Co*, could properly lead to that result." (para 96)

9. The Court of Appeal accordingly allowed the retailers' appeals in respect of the external ATMs and dismissed the Valuation Officers' appeal in respect of the internal sites.