IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0135 (LC)
Case No: BNO/37/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BLIGHT NOTICE – preliminary issue – whether two properties separated by a lane should be treated as a single hereditament – property blighted by safeguarding direction for the route of HS2

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

JON HARDING AND SARAH CLEMENTS **Claimants**

- and -

SECRETARY OF STATE FOR TRANSPORT **Respondent**

Re: The Barn, Yarlet Lane,
Marston, Staffordshire,
ST18 9ST

Hearing dates: 7 and 8 March 2017

The President and Mr P D McCrea FRICS

Royal Courts of Justice, London WC2A 2LL

Timothy Morshead QC, instructed by Beswicks Legal, for the Claimants
Stephen Whale, instructed by the Government Legal Service, for the Respondent

The following cases are referred to in this Decision:

Woolway v Mazars LLP [2015] AC 1862
Gilbert v S. Hickinbottom & Sons Ltd [1956] QB 40, 48
Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board [2001] RA 110
North Eastern Railway Company v York Union [1900] 1 QB 733
London County Council v Erith Parish Council [1893] AC 562
Williams v Scottish & Newcastle Retail Limited [2001] RA 41
SJ & J Monk v Newbigin [2017] 1 WLR 851
Dawkins v Ash [1969] 2AC 366
Fir Mill Ltd v Royton UDC (1960) 7 RRC 171
Re Mouland [2012] RA 85
Re Reeves [2007] RA 168
Burvill v Jones [2012] RA 23
Cheale Meats Limited v Ray [2012] RA 145
VRCC Limited v French [2014] RA 261
Giles v County Building Constructors (Hertford) Ltd (1971) 22 P & CR 978
Tithe Redemption Commission v Runcorn UDC [1954] Ch 383
University of Glasgow v Assessor for Glasgow (1952) S.C. 504
Roxburghe Estates v Scottish Borders Council Assessor [2004] RA 15
Morton v Dickinson (1977) 21 RRC 4
Oldschool v Coll [1966] RA 265

DECISION ON A PRELIMNARY ISSUE

Introduction

1. On 9 March 2016 the claimants served on the respondent a single blight notice under section 150(1) of the Town and County Planning Act 1990 ("TCPA 1990") in respect of their three freehold titles SF453149, SF531714 and SF582945. The first two titles relate to land south west of Yarlet Lane and the third to land north east of the Lane. The notice treated all these areas of land as forming one "hereditament" and required the respondent to purchase the whole of that ownership. The notice stated that the land was "blighted" within paragraph 6(b) of Schedule 13 to TCPA 1990, because it fell within the ambit of a direction by the respondent to the local planning authority to restrict the grant of planning permission in order to safeguard land for development for "relevant public functions". The direction was made in respect of the route proposed for Phase 2a of HS2 between the West Midlands and Crewe. The route runs broadly from the south east to the north west and lies to the north of Yarlet Lane. It crosses approximately the southern half of the claimants' land lying to the north east of Yarlet Lane. The northern half of that land would be severed.

2. By letter dated 9 May 2016 the Secretary of State objected to the validity of the blight notice on the sole ground that it did not relate to a single hereditament. He contended that the three land titles comprise two hereditaments, firstly the land to the south west of Yarlet Lane, SF453149 and SF531714 (referred to as "plot 1") and secondly the land to the north east of Yarlet Lane, SF582945 (referred to as "plot 2"). However, the respondent added that rather than requiring the claimants to resubmit new blight notices he would treat their notice as if it comprised two notices, one in respect of plot 1 and the other for plot 2.

3. On that basis, the Secretary of State served two counter notices under section 151(1) of TCPA 1990. The first was a notice in respect of plot 1 and stated that no part of that land fell within the description of "blighted land". If it is correct to treat plot 1 as a separate hereditament, the claimants accept that that land is not "blighted" under Chapter II of Part VI of TCPA 1990.

4. The second counter-notice related to plot 2 and relied upon section 151(4) of TCPA 1990, to the effect that the claimants did not have a "qualifying interest" in the property in that they did not have an interest in either a "hereditament" or an "agricultural unit". Although there is no dispute that the claimants do not have an interest in an agricultural unit, taken in isolation the counter-notice was somewhat confusing, because the respondent's stance was and remains that plot 2 does indeed comprise a separate hereditament. However, the respondent's position was explained in the covering letter which stated that plot 2 did not qualify as a hereditament because it was "not subject to … rating".

5. On 3 June 2016 the claimants issued a notice of reference in the Tribunal to resolve this dispute. In his Statement of Case dated 3 October 2016 the respondent proposed that a preliminary issue be determined. By order dated 7 November 2016 the President directed a trial of the following preliminary issue:-

"Whether the claimants' land (title numbers SF453149, SF531714 and SF582945) comprises a "single hereditament" within the meaning of Part VI, Chapter II of the Town and County Planning Act 1990".

6. The claimants were represented by Mr Timothy Morshead QC, who called Miss Clements to give evidence, and Mr Charles Roger Bedson BSc FRICS FAAV to give expert evidence. Mr Stephen Whale of counsel appeared for the Secretary of State, and called Mr Richard Edwards BSc(Est Man) FRICS to give expert evidence.

7. On the morning of 6 March 2017, we inspected the property, accompanied by the claimants, Mr Bedson and Mr Edwards.

Facts

8. From our inspection, the evidence, and a statement of agreed facts, we find the following facts. A brief chronology is of assistance.

9. On 4 October 2002, the claimants bought 0.632 hectares (1.562 acres) of land on the southern side of Yarlet Lane, Marston, Staffordshire which has title number SF453149. On the land there was a barn and a garage. They converted the barn into a domestic dwelling, now known as "The Barn". They had already applied for planning permission from Stafford Borough Council ("SBC") for a tack room, stables, feed store and hay barn, which was granted on 10 October 2002 under reference 41818. They then built this out.

10. In 2006, the claimants took a tenancy of land to the west of The Barn. In September 2007 they bought about half of this land, comprising 0.206 hectares (0.509 acres), having title number SF531714.

11. On 25 January 2012, SBC granted a conditional planning permission for a hay and straw storage shed, having two bays, under reference 11/16453/FUL. The claimants subsequently built this, but in addition they built a third bay.

12. On 31 August 2012, the claimants purchased plot 2, on the opposite, northern side of Yarlet Lane. It extends to 2.095 hectares (5.176 acres), and has title number SF582945.

13. On 19 March 2013, the highway authority, Staffordshire County Council, approved the claimants' application for a licence to place private apparatus within the public highway. The claimants subsequently constructed a culvert between plot 1 and plot 2, passing beneath Yarlet Lane, described below.

14. On 18 March 2016, retrospective planning permission was granted by SBC for the third bay extension, under reference 16/23578/FUL.

15. It is common ground that there have not been any material changes to plots 1 and 2 between the date of service of the Blight Notice, 4 March 2016, and when we inspected the property.

16. There is approximately 0.65 hectares (1.6 acres) of land available for grazing within plot 1. However, around 0.2 hectares (0.5 acres) of this land is a former quarry area, more or less centrally located, which is grassed over but cannot practically be cultivated. Thus, although

approximately 0.65 hectares is suitable for grazing, it does not lend itself to hay or forage production given the small field sizes and the former quarry area.

17. Yarlet Lane is an adopted vehicular highway, approximately 3m wide, with grass verges either side of this surface each approximately 1.5m wide. The culvert under Yarlet Lane contains three conduits, one of which carries an insulated water pipe, within which water is supplied from plot 1 to plot 2. The two other conduits are not currently used. The conduits cannot be seen from Yarlet Lane, but they are visible from two inspection chambers, one in each plot.

18. Plot 1 is accessed by a private drive leading south from Yarlet Lane. There is a dirt surface at the access point and a wooden gate set back approximately 3 metres off Yarlet Lane. There is a wooden fence and wooden kerb on the southern side of the access point. The property is indicated by a sign adjacent to and to the north of the access point. On either side of the access there are stones on the grass verge preventing verge parking, reflector posts, a trimmed hedge parallel to Yarlet Lane, and telegraph poles in or adjacent to this hedge carrying wires.

19. The access to plot 2 is by way of an access point exactly opposite the drive to plot 1. This has a dual, padlocked, 5-bar metal gate, and a surface made of a permeable paving grid and stone chippings. There is no sign. As with plot 1, on either side of the access point there are a number of verge stones to prevent verge parking and a hedge. There are no telegraph poles in or adjacent to this hedge, but there are reflector posts either side of the entrance as in the case of plot 1.

20. Behind the plot 2 entrance gate there is a catching pen bounded by wooden and metal fencing with gates. The surfacing is a mixture of dirt and stone hardcore. There is a gate to the east from this pen into the larger contiguous arable field which is not in the claimants' ownership or use. The catching pen is of sufficient size to accommodate a horse and carriage.

21. Most of plot 2 is to the north of this enclosure. It is laid to grass, with a pond encroaching into it. There is a black plastic water trough half way down the hedge on the south-western field boundary. It is laid on a concrete breeze block and slab base and supplied via an insulated water pipe which passes beneath Yarlet Lane to plot 1, as described above. Plot 2 is bounded by a combination of wooden post & rail fencing, wooden post & wire fencing and quick-thorn hedging. There is an arable field to the east and a grass pasture field to the west. There are some mature border trees between plot 2 and this grass pasture. There are no buildings on plot 2. In the northern part of plot 2 there are a series of "gates" used in the training of horses with carriages.

22. The Barn is assessed for council tax. None of the property is assessed for non-domestic rating.

Evidence

Miss Clements

23. Miss Sarah Clements said that she had ridden and owned horses from an early age. She and Mr Harding learned about carriage-driving in the late 1990s, keeping one carriage/riding horse at livery until they could find a suitable property at which they could develop and extend their equestrian activities. They bought the subject property for that very purpose and in order to

convert the barn into a family home. The purchase was subject to obtaining planning permission for the stables etc as described above. She said that the claimants rented the additional plot to the west in 2006 to provide additional grazing land needed for the two horses which the claimants then kept, being one horse and one pony. In 2007 they were able to buy half of that tenanted area.

24. By spring 2011 it was apparent to the claimants that to accommodate their increasing activities, more land was needed. They viewed several properties and made an offer on a property at Haughton, which had a house and up to 15 acres of land. The offer was unsuccessful. However, based on an informal agreement reached with their neighbour to purchase plot 2, the claimants made a planning application to build the hay and storage shed. The third bay of the shed is used as a work shop and to store a tractor, muck-spreader and other equipment used on both plots. The combination of the extra five acres in plot 2 and the new facilities enabled the claimants to keep three horses. Typically, they would keep a riding horse, a competition driving horse, and a young horse being trained to compete, each of which required approximately 1 to 1.5 acres of land to comply with British Horse Society standards. They have sometimes had three competition horses on the land.

25. Miss Clements said that plot 2 is of fundamental importance to the equestrian activities carried out. It is used for growing haylage, for winter grazing, and for training purposes. Plot 2 is large enough to accommodate a 100m by 40m grass dressage area, to train horses for the demanding 16km marathon events with obstacles and to bring them up to the fitness required for competitions.

26. The claimants actively manage the land including spreading fertiliser, tending, cutting and baling of haylage, so that plots 1 and 2 can be self-sufficient as an equestrian unit. The operations undertaken ensure the production of grass and haylage of a good quality suitable for horses. In an average year, plot 2 is used between January and March for grazing, and training towards the end of that period if the weather permits. Between April and May, plot 2 is chain-harrowed, fertilised, and a hay crop is sown. A track is maintained around the boundary to enable the land to also be used for training. A crop is taken off in June, and if this is sufficient, the whole of plot 2 can be used for training in July and August. If not, a second crop is grown over the summer on the section of the land nearest Yarlet Lane. Training begins to wind down in September and October, and the land is harrowed and reseeded and used for winter grazing.

27. Whilst plot 1 is used for summer grazing, it is not sufficiently large (and flat) to allow training or to provide grazing throughout the year for three horses.

28. Upon the HS2 plans being published, it was immediately apparent to the claimants that losing the land within the safeguarded area would have a dramatic impact on the equestrian activities. Effectively they would lose plot 2 and would have to relocate to another house, stables, outbuildings and grazing/training land. The HS2 project would result in the effective loss of about 70% of the claimants' landholding, involving the loss of all of their training and haylage land, and most of their grazing land. It was impractical to train the horses elsewhere.

29. Miss Clements said that the claimants' equestrian operation had been specifically laid out so that the stables, workshop, office, feed store, vehicle parking and horse training areas were all in close proximity. Plot 2 was not used for an entirely different purpose to plot 1: their uses were inextricably linked.

Mr Bedson

30. Mr Charles Roger Bedson BSc FRICS FAAV is a Chartered Surveyor and a Fellow of the Central Association of Agricultural Valuers, employed by Hinson Parry of Stone, Staffordshire. He had been instructed by the claimants to state whether the property should be regarded as one single or two separate hereditaments. A substantial part of Mr Bedson's expert report related to HS2's Express Purchase Scheme, but Mr Morshead QC accepted that it is unnecessary for us to refer to that.

31. Mr Bedson considered that he was qualified to express an expert opinion of "professional common sense" envisaged by Lord Sumption JSC in Woolway v Mazars LLP [2015] AC 1862.

32. The barn conversion was modest but well-designed. The stable building was bespoke and built with a concrete yard, separate storage buildings for housing feed, machinery and equipment, all within 0.38 acres. After deducting land occupied by the buildings, there remains only 1.6 acres within plot 1, which includes the area of a former pit unsuitable for grazing.

33. In Mr Bedson's opinion, the reference property, *rebus sic stantibus*, was not a collection of disaggregated buildings, each of which was suitable for separate letting or sale. It was a single unit consisting of a residential dwelling with facilities for carriage driving and training horses for that activity. The property which would remain in the claimants' ownership, if only the land within the safeguarded zone was taken, would be unsuitable for the current use of the land. Indeed, the stable block and outbuildings would become a "white elephant" without the other land to serve them.

34. As regards the first of the three tests in Mazars, Mr Bedson did not accept that the fact that Yarlet Lane, a minor D road, ran between plots 1 and 2 should result in them being treated as geographically separate for the purposes of Mazars. His understanding was that other than the "top two spits", which were vested in the highway authority, the subsoil was owned by the claimants, and accordingly the two plots were contiguous. The absence of one "layer" from "this otherwise uniform contiguity" was not sufficient to make the plots separate. Additionally, the conduits which the claimants had installed under the highway demonstrated the dependency of plot 2 on plot 1.

35. In the absence of a geographic connection, Mr Bedson considered the functional test, and whether the use of plot 1 was necessary to the effectual enjoyment of plot 2. He presumed that Lord Sumption JSC's comment that this functional test may *commonly* be tested by asking whether the relevant land could reasonably be let separately did not mean that it is essential to satisfy this test in every case. He noted that Lord Neuberger PSC emphasised that the test was not one of strict necessity, and that the tests outlined by Lord Sumption JSC had to be applied with professional common sense to the facts of each case. In the opinion of Mr Bedson, the claimants have a bespoke range of buildings for the purposes he had identified which required the land comprised in plot 2 in order to service them. The claimants' land had been configured so that plots 1 and 2 are "inextricably connected in terms of utility to the other." He considered that neither plot is, without the other, "capable of serving the purpose for which the property is used *rebus sic stantibus*. Both plots are needed for this purpose."

36. Mr Bedson had agreed with Mr Edwards that plot 2 *could* be let separately, but in his view this was only in the sense that a field or part of a field, or garage or part of a house could be let separately if there was market demand. However, in Mr Bedson's opinion it would make no

sense or be reasonable to let either of the two plots in this case separately having regard to the physical configuration and relationship between them.

37. Mr Bedson was aware that whether the effectual enjoyment of one plot was necessary to the other depended not on the business needs of the occupier but on the ascertainable character of the subject premises, which could not be assessed mechanically, but called for factual judgement of the valuer and a large measure of professional common sense. Mr Bedson stressed the contiguous nature of two plots, separated only by the "top two spits" of a minor road, and that they had been physically configured to ensure that they served each other reciprocally and the gateways to the plots had been located exactly opposite each other, giving direct access.

38. Mr Bedson sought to provide examples of cases elsewhere - at Whittingdon Hill Farm and Cappers Lane, Lichfield - where HS2 had accepted blight notices under its Express Purchase Scheme on properties that *could* have been occupied as separate hereditaments. But he accepted in cross-examination that neither of those cases involves the issue raised by this reference. He also accepted that it would not be "pointless" for plot 2 to be occupied separately, but this was only in the context of considering other uses, namely grazing a few sheep or exercising dogs.

Mr Edwards

39. Mr Richard Edwards BSc (Est Man) FRICS is a Chartered Surveyor employed as a Principal Surveyor within the Transport and Infrastructure Section of District Valuer Services, part of the Valuation Office Agency. He had been instructed on a narrow basis, as he himself put it, namely whether plot 2 "could sensibly be occupied or let other than together with ...plot 1".

40. In what was consequently a brief report, Mr Edwards said that plot 2 had no unique or peculiar features that would preclude its separate occupation or letting independently from plot 1. It was not landlocked, having its own separate access from the highway. He referred to the fact that plot 2 had previously formed part of a large field when it was used for arable cultivation. In his report, Mr Edwards implied that the pond within plot 2 could provide a source of drinking water for animals, but accepted in cross-examination that this was an assumption that he made before discovering that there was a pollution issue.

41. In cross-examination, Mr Edwards accepted that his report did not assess the actual use of plot 1 or plot 2. He said that the narrow ambit of the instructions he had been given, explained why his report did not address what use should be assumed when considering whether plot 2 could sensibly be let separately.

42. In answer to subsequent questions of clarification from the Tribunal, Mr Edwards said, almost as an afterthought, that there would be demand for plot 2 from people wanting to graze horses, owing to a shortage of supply of small enclosures in the area. Water could be made available by bringing a bowser to the land, or by connecting from the water supply in the Yarlet Lane, and a shelter could be erected on the land. None of this was included in his expert report, and he accepted in further cross-examination that he had not made any enquires in support of this view.

Issues which do not arise in this reference

43. It is appropriate for us to record issues which, in the light of the oral submissions we heard, do not arise in this reference, before proceeding to deal with the preliminary issue.

44. The respondent's objection to the claimants' blight notice could have been dealt with by the service of a single counter-notice stating that under section 151(4)(f) of TCPA 1990 the claimants' interest specified in the blight notice was not a qualifying interest under section 149(2) because it did not relate to a single hereditament. The technical argument might have been raised that because the respondent failed to serve a single counter-notice to the claimants' blight notice within the 2 month period allowed by section 151(2), the respondent is deemed (under section 154(1)(a) and (2)) to have served a notice to treat on the claimants in respect of both plots 1 and 2 (a notice which cannot be withdrawn – see section 167). That would have entitled the claimants to pursue a claim for compensation in the Tribunal. However, the claimants do not take any such technical point. Instead, both parties have proceeded on the basis that by his letter dated 9 May 2016 the Secretary of State fairly and squarely (a) objected to the validity of the blight notice served and (b) helpfully indicated that if his objection should be upheld he would nonetheless treat the claimants' notice as if two blight notices had been served, one in respect of each of the two hereditaments for which he contends, plot 1 and plot 2. We will proceed on the same basis.

45. For his part the respondent now accepts that if he should succeed on the preliminary issue, the blight notice which he treats as having been served in respect of plot 2 alone is valid, notwithstanding the objection raised in his letter of 9 May 2016 (see paragraph 32 of the respondent's Closing Submissions). The respondent pointed out that the claimants had not served a blight notice in respect of an agricultural unit. His objection had been that the claimants did not have a qualifying interest in a hereditament (being a non-residential hereditament) the "annual value" of which fell below the prescribed limit (£34,800) because the land was "not subject to … rating." With respect, that objection was unsustainable.

46. For the purposes of the statutory blight code "hereditament" means a "relevant hereditament" as defined in section 64(4)(a) to (c) of the Local Government Finance Act 1988 ("LGFA 1988") (see section 171(1) of TCPA 1990). The application of the blight code does not depend upon whether a "relevant hereditament" is also rateable. Section 64(4) of the LGFA 1988 simply defines types of real property which qualify as a "relevant hereditament". Whether a "relevant hereditament" is also rateable (and thus a rateable value needs to be ascertained) is dealt with in other parts of the 1988 Act (see eg. sections 42 to 44, 56 and schedule 6). This separate question of rateability depends essentially upon whether a "relevant hereditament" also falls within the definition of a "non-domestic" hereditament (section 64(8)). It is because of this distinction that section 149(3)(a) of TCPA 1990 deliberately refers to "annual value" rather than "rateable value". "Annual value" is then defined in section 171(1) so that (inter alia) where a hereditament is not rateable, its annual value is established by the alternative methods set out in section 171(2) and (3). The statutory code therefore makes it plain that a blight notice may be served in respect of a "hereditament", whether or not that property is rateable.

47. The claimants' case placed some reliance upon the Government's Express Purchase Scheme for HS2, which relaxes some of the usual statutory requirements. In particular, a landowner does not need to show that he has made reasonable endeavours to sell his interest (under section 150(1)(b)) before serving a blight notice. The policy also states that if more than 25% of "the whole of the property" owned by a landowner is within the safeguarded area for

HS2 then the scheme is applicable. It was pointed out that the policy refers to the notion of a "property" rather than a hereditament, and therefore might be considered to involve a looser, or more flexible, approach. However, Mr Timothy Morshead QC rightly confirmed that the claimants do not rely upon that approach for the purposes of the preliminary issue. The Tribunal is only concerned with whether the whole of the property the subject of the blight notice comprised a single "hereditament" as defined in section 171(1) of TCPA 1990.

The definition of "hereditament"

48. Section 64(1) of LGFA 1988 provides that:-

> "A hereditament is anything which, by virtue of the definition of hereditament in section 115(1) of the 1967 Act, would have been a hereditament for the purposes of that Act had this Act not been passed".

That is a reference to the General Rate Act 1967, section 115(1) of which provides:-

> " "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."

Thus, "the result ... is that the meaning of "hereditament" is left to be elucidated by the courts in accordance with the principles underlying the rating Acts" (Lord Sumption JSC in Mazars at paragraph 4).

49. The claimants' skeleton (paragraphs 28 to 31) referred to the provisions for service of a blight notice in respect of an "agricultural unit". Where such a notice is valid, the starting point is that the authority is deemed to have served a notice to treat not in respect of the whole unit, but only the "affected area", that is so much of the unit as on the date of service of the blight notice consists of land falling within one of the descriptions of "blighted land" in schedule 13 of the TCPA 1990 (sections 154(2), 168 and 171(1)). However, under section 158 a claimant may include in his blight notice (a) a claim that the "unaffected" part of the agricultural unit is not reasonably capable of being farmed, either by itself or in conjunction with "other relevant land" and (b) a requirement that the authority purchase the "unaffected" part as well as the "affected" land. Section 159 enables the authority to object to a claimant's reliance upon section 158 and for that issue to be determined by the Tribunal. If the blight notice and the claim in relation to unaffected land are upheld (or otherwise treated as valid) then the authority is deemed to have served a notice to treat in respect of the whole of the agricultural unit.

50. It was suggested in the expert evidence for the claimants, and to some extent in their legal submissions, that the legislature would not have intended to differentiate between an "agricultural unit" on the one hand and, for example, a hereditament formed by an equestrian unit on the other, when seeking to protect a landowner against a partial acquisition which would unreasonably interfere with the use of his remaining land.

51. We do not accept that this aspect of the statutory code dealing with "agricultural units" offers any guidance in other cases on how a hereditament is defined or to be identified, or that the notion of "hereditament" in rating law is in some way modified when applied in the context of blight notices so as to allow this aspect to be taken into account. First, the claimants rightly accept that the concept of an "agricultural unit" is not concerned with the rateable unit of

property, the "hereditament", or with rating principles (paragraph 28 of skeleton). An "agricultural unit" simply means "land which is occupied as a unit for agricultural purposes, including any dwelling-house or other building occupied by the same person for the purpose of farming the land" (Section 171(1) of TCPA 1990). Second, TCPA 1990 makes it plain that the concept of a "hereditament" for the purposes of the blight code is the same as the general definition contained in rating legislation and the principles in the case law upon which it is founded. Section 171(4) reinforces that conclusion by disapplying one of the rules formerly used in rating law, that a hereditament may not traverse a boundary between different rating authority areas (see eg. Gilbert v S. Hickinbottom & Sons Ltd [1956] QB 40, 48).

52. Accordingly, the outcome of the preliminary issue depends solely upon whether plots 1 and 2 are to be treated as a single "hereditament" applying rating law principles.

Case law on identifying the extent of a hereditament

53. The principles which should generally be used to identify a hereditament for rating purposes have been laid down by the Supreme Court in Mazars. In that case, a ratepayer occupied the second and sixth floor of an eight-storey office building served by a communal lift. The ratepayer applied to have the two floors treated as a single hereditament rather than two separate hereditaments, on the grounds that they were functionally interdependent. The Supreme Court held that the two floors should each be treated as separate hereditaments and disapproved Gilbert v S. Hickinbottom & Sons Ltd.

54. Where the issue is whether distinct spaces in common occupation should be treated as a single hereditament, Lord Sumption JSC, with whom all the other members of the Court agreed, laid down three "broad principles" (paragraph 12):-

> "First, the primacy test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second *Bank of Scotland* case 18 R 936 illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are separate hereditaments. If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed. Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately. Thirdly, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical

characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it".

This last statement is in line with the "core concept" that rates are a tax on property and not on persons or businesses (paragraphs 1 and 40).

55. Applying these principles to the facts in Mazars, the Court held that the second and sixth floors were separate hereditaments because there was no direct communication between the two floors and access could only be obtained via common parts of the building which were not in the exclusive possession of the occupier of the second and sixth floors. To go from one floor to the other the occupier had to enter other property which he did not possess or occupy exclusively. Therefore, applying the primary geographical test, the two floors were to be treated as separate hereditaments. The functional test was not satisfied simply because it suited the business needs of the actual occupier to run its activities on the two floors. Instead, that test depended upon whether, looking solely at the objectively ascertainable character of those office floors, the use of one was necessary to the effectual enjoyment of the other. Each of the two floors was self-contained, could reasonably be let separately and there was nothing in the physical characteristics of the property to indicate that the use of one floor was necessary to the effectual enjoyment of the other (see eg. paragraphs 21, 42 and 56).

56. The Supreme Court recognised that the application of the three principles it laid down will commonly require factual judgment on the part of the valuer and the Tribunal, using a large measure of professional common sense (paragraphs 12, 17 and 52-3). It also recognised that these principles would have to be applied to land uses which are specialised, or which are rather different from properties of a standard nature such as floors within an office building (paragraphs 11-12, 52-3 and 55). The land uses in the present case, as defined by the parties, are not of a standard nature.

57. Given the primacy of the geographical test, the Supreme Court considered that the functional test would only be satisfied in a limited category of cases, or on relatively exceptional facts (paragraphs 12 and 51).

58. The geographical test is based on visual or cartographic unity or direct communication between the premises under consideration. The functional test depends upon whether there is a necessary interdependence between the use of one property and another that is objectively ascertainable (Lord Gill, with whom Lords Neuberger and Toulson agreed, at paragraph 39). Lord Neuberger, with whom Lord Toulson agreed, stated that it is insufficient that one property serves as a "convenience or accessory" for the other; it would have to be *difficult* or impossible to let them separately. Thus, strict necessity is not the test (paragraph 52). That approach is consistent with Lord Sumption's statement that a common method for applying the functional test is to ask whether the two properties could or could not *reasonably* be let separately. Similarly, the Supreme Court cited with approval (at paragraphs 11, 38 and 53) the guidance given by Lord McGhie, sitting in the Lands Tribunal for Scotland, in Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board [2001] RA 110 at pp. 140-2. Thus, where two properties "share characteristics of function which in a robust practical sense, support the use of a single term to describe the physical subjects, they can be treated as one unit...". Lord Neuberger referred to one of the examples given in Burn Stewart namely a golf course bisected by a public highway (paragraph 53).

59. Lord Neuberger added that in applying the functional test it is necessary to have regard not only to the use of the two properties, but also the plant, machinery and other fixtures which form part of the property for rating purposes (paragraphs 49 and 55).

60. The criterion of "separate lettability" begs the question "let for what purpose or use?" Given that the Supreme Court referred to that criterion in the context of the functional test, plainly the issue of whether the premises could or could not reasonably be let separately is to be judged by reference to the *use* of the premises identified in accordance with rating law principles. This was common ground between the parties. They also agreed that the principles of *rebus sic stantibus* should be applied both to the geographical and the functional tests and hence to the determination of the use of the premises. We agree. The relevance of the *rebus* principles, not only to the ascertainment of rateable value but also to the identification of the hereditament as the rateable unit of property, accords with the analysis in Mazars (see the example given in paragraph 12 of the introduction of a direct means of communication between two hitherto self-contained properties). It is also supported by earlier authority (for example North Eastern Railway Company v York Union [1900] 1 QB 733, 739; London County Council v Erith Parish Council [1893] AC 562, 600; Williams v Scottish & Newcastle Retail Limited [2001] RA 41 at paragraphs 59-62).

Rebus Sic Stantibus

61. Property is to be considered "as things stand". The principle has two limbs, one relating to the physical state of the property and the other its use (SJ & J Monk v Newbigin [2017] 1 WLR 851 at paragraphs 12 to 14). Thus, a property is to be considered according to its actual state and use on the relevant date. The *rebus* principle requires the intrinsic characteristics of a hereditament to be taken into account and other qualities to be disregarded (see eg. Dawkins v Ash [1969] 2AC 366, 382, 385-6).

62. In Williams the Court of Appeal endorsed the main aspects of the Tribunal's approach to the application of the *rebus* principle. As for the first limb, the premises must be taken to be in the same physical state as they were in on the relevant date, save for the possibility of making alterations which, taken overall, are no more than minor. The second limb requires the actual use of the premises to be determined by reference to "the principal characteristics" of the use. Some uses are described in terms of broad categories, such as shops, offices and factories. Others fall outside broad categories of that kind and are *sui generis* (paragraphs 52 and 67-79).

63. Williams also confirmed that the approach taken by the Tribunal in Fir Mill Ltd v Royton UDC (1960) 7 RRC 171 was "on the right lines". Thus, common land uses are defined by general categories, so that a shop is treated as a shop rather than a particular type of shop, such as a jeweller's or a tobacconists. Likewise, a factory is treated as a factory, rather than a factory for a particular type of manufacture, such as a cotton mill. Office premises are treated as offices, without reference to the type of business activity conducted. In paragraph 111 of its decision, the Tribunal explained that by the "principal characteristics" of the actual use, it was referring to "those features of the occupation that reflect the general purpose of the use – *rather than the particular operations of the individual occupier*" (emphasis added). This approach has been followed in many subsequent decisions of the Tribunal. It is entirely consistent with the principle laid down by the Supreme Court in Mazars that the functional test must be applied by reference to the objectively ascertainable character of the property and not by reference "to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of [the property]".

64. It is helpful, by way of example, to see how the Tribunal has applied the principles in Williams when defining uses for rating purposes. In Re Mouland [2012] RA 85 it was decided that a floor of an office block at Gatwick Airport used to provide fully serviced meeting, conference and touchdown facilities along with fully serviced office accommodation fell into a different category of use from offices, namely a "business centre", albeit that *some* of the activities would be found in a general office use. The Tribunal's categorisation reflected the principal characteristics of the actual use, or its general purposes, rather than the particular operations of the actual occupier.

65. In Re Reeves [2007] RA 168 the Tribunal held that a purpose-built office building used by a college to provide a learning centre open to the public (in particular disadvantaged adults) should be treated as an educational institution, and not as an office use (or quasi-office use), although there were some elements of office use. On the other hand, the Tribunal refused to treat an open learning centre as a *sui generis* use, presumably on the basis that that was too specific.

66. In Burvill v Jones [2012] RA 23 the Tribunal decided that a warehouse unit converted to, and used as, an MOT testing centre should be defined by reference to that use and not as a warehouse. In that case it was found that only "minor alterations" would be needed to convert the building to a warehouse use. But the Tribunal recognised that the use limb of the *rebus* principle falls to be applied separately, with the consequence that the category of use of the property was defined as an MOT testing centre, a *sui generis* use distinct from a warehouse use. Once again the identification of the principal physical characteristics of the premises in order to define that use did not infringe the principle that the matter should not be determined by reference to the particular operations of the occupier.

67. In Cheale Meats Limited v Ray [2012] RA 145 the Tribunal rejected the valuation officer's contention that an abattoir should be categorised as an industrial rather than a *sui generis* use. That outcome was justified by reference to the principal physical characteristics of the premises and their use. Similarly, in VRCC Limited v French [2014] RA 261 the Tribunal decided that a veterinary surgery facility created from a warehouse was a different type of use from a warehouse.

68. As we have said, in their oral submissions the parties agreed that the functional test in Mazars should be applied on the basis of the *rebus* principle as explained in Williams. To summarise, the use of these two plots should be described by reference to the intrinsic physical characteristics of the properties and of the use of that land on the relevant date.

The relevant date

69. By the conclusion of the hearing it was also common ground between the parties that the geographical and functional tests in Mazars should be applied as at the date on which the blight notice was served, which they took to be 11 March 2016. Given that the issue raised by the counter-notice is whether the blight notice was served in respect of a qualifying interest in a hereditament, we consider that the parties must be correct on this point. This is consistent with the language used in section 149(2) and (3) which allows a blight notice to be served if "on the relevant date" the interest in the hereditament satisfies (inter alia) the condition that the "annual value" of the hereditament does not exceed the prescribed amount. That condition can only be applied by reference to the hereditament in existence on "the relevant date", which is the date of service of the blight notice (section 149(4) and see also the definition of "annual value" in

section 171(1) to (3)). There is no rational basis for drawing any distinction between grounds (e) and (f) in section 151(4) of TCPA 1990.

70. Although the use and state of the property must be assessed as at the date when the blight notice was served, both parties agree that the use should not be confined to the activities actually taking place on that very date. That would be artificial. Here the particular activities vary according to time of year and it is common ground that the Tribunal's decision should be based on the pattern of use over the course of a year which had come into existence by 11 March 2016.

The geographical test

71. We do not accept that there is a visual or cartographic unity between plots 1 and 2. In visual terms the two areas of land are quite distinct. They appear as separate areas of land on either side of the highway, each bounded by its own hedgerow and with its own separate gated access. The Lane also prevents the two plots from being treated as a single cartographic unit.

72. By the end of the hearing it became common ground that, in view of the contiguity between the claimants' ownership of plots 1 and 2 and the public highway Yarlet Lane, there being no other intervening land ownership held by any third party, the presumption that the claimants own the subsoil from the boundary of each plot to the middle of the road, and thus beneath the whole width of the highway, applies and there are no indications to the contrary (see eg. Giles v County Building Constructors (Hertford) Ltd (1971) 22 P & CR 978). Staffordshire County Council, as the highway authority, is the owner of the surface of the Lane and so much of the soil beneath as is necessary for it to exercise its statutory functions (Tithe Redemption Commission v Runcorn UDC [1954] Ch 383, 397-8).

73. Mr Morshead QC submitted that there is therefore contiguity between plots 1 and 2 *beneath* the surface of the lane. He pointed to the relatively narrow width of the lane (a metalled surface only 3m wide and grass verges either side each 1.5m wide), the thinness of the layer vested in the highway authority and the light usage of the lane as a rural road. He also pointed to the absence of any evidence that the use of the highway interferes with the use of plots 1 and 2 as an integral landholding. On the other hand, Mr Whale referred to University of Glasgow v Assessor for Glasgow (1952) S.C. 504 (approved in Mazars) in which the fact that some of the university buildings were separated by only a few yards did not prevent them from being treated as separate rateable subjects (p. 510-511).

74. We accept that in the present case there is a degree of contiguity whereas in Mazars there was none at all. However, we do not consider that the contiguity of ownership beneath the surface of the highway and the narrow width of the highway go towards satisfying the geographical test. These arguments could be replicated in many similar situations, but they fail to accord with the principles laid down in Mazars. As Lord Sumption pointed out, "unity is not simply a question of contiguity". If adjoining houses in a terrace do not intercommunicate and so access from one to another has to be gained via other property, such as a public street, of which the common occupier of the houses is not in exclusive possession, this is a strong indication that they are separate hereditaments. That is the position in the present case. In order to gain access between the two plots the claimants have to cross a public highway. By definition, they do not have exclusive possession of that area of land which separates the two plots.

75. The claimants then rely on the three ducts which they have laid in a culvert in the subsoil beneath the Lane and which connect plots 1 and 2. Two of the ducts are not in use, but one contains a water pipe which provides mains water from the metered supply on plot 1 to the water trough inside plot 2 for the horses kept there to drink from. Mr Morshead QC submitted that the water pipe sufficed to provide direct communication between the two plots and satisfy the geographical test.

76. On the facts of this case we do not agree. As Mr Whale pointed out, the "direct communication" described in paragraph 12 of Mazars was a doorway or a staircase inserted into a boundary wall, or in other words a passage which would have enabled humans to pass from one property to another. We are not persuaded that the examples given in that decision were necessarily intended to delimit the type of link which might satisfy the geographical test. They may have been influenced by the nature of the properties and the land use under consideration. But this point has not been fully argued before us and must await another case. For present purposes we need only say that we do not accept that the ducts and the water supply in this case amount to a sufficient connection for the 0.838 ha area of land on plot 1 to be treated as a single geographical unit with the 2.095 ha area of land on plot 2 from which it is separated by Yarlet Lane. Instead, the water supply is a factor to be considered when applying the functional test.

The functional test

77. By reference to the objectively ascertainable character of the property, and not the business or other personal requirements of the occupier, the issue is whether the use of one plot is necessary to the effectual enjoyment of the other. Lord Sumption went on to suggest that this might commonly be tested "by asking whether the *two* sections could reasonably be let separately" (emphasis added), and not simply by considering whether only one of the two plots could be separately let.

78. Plot 1 has an overall area of 0.838 hectares and contains the following buildings, structures and spaces:-

- A former barn converted to a "modest three bedroom detached dwelling" (para. 9 of the Statement of Agreed Facts)

- An L-shaped block providing 3 stables for horses, a tack room and a carriage store

- A three bay barn, of which two bays are used to store the baled hay crop taken from plot 2 and one bay is used as a work shop and store for the tractor and machinery used on plots 1 and 2

- A manure store

- A yard area

- A catching pen or corralled area large enough to take a horse hitched to a carriage

- 0.65 hectares of grazing land, of which 0.2 hectares is a former quarry area unsuitable for cultivation. We also accept that the area of 0.65 hectares does not lend itself to hay or forage production given the small field sizes and the former quarry area.

79. The boundaries of plot 1 comprise a mixture of thorn hedging and horse-proof fencing similar to that found on plot 2.

80. As regards plant on the property, neither party suggested that any of the items referred to should be disregarded as being non-rateable. There is no dispute that plot 1 has 5 water troughs on hardstandings to provide drinking water for the horses. The water comes from the metered mains supply for the Barn.

81. There is an inspection pit just inside the boundary of plot 1 with Yarlet Lane which provides access to the ducts (including water supply) which runs under the road to plot 2. There is a similar inspection pit within plot 2.

82. Plot 2 has an area of 2.095 hectares. This plot did not exist until it was purchased by the claimants on 31 August 2012 from a neighbouring farmer. The boundaries on three sides (to the north-east, north-west and south-west) already existed and mainly comprise thorn hedging. The vendors required the claimants to employ a land agent to mark out the south-eastern boundary and to install horse-proof fencing. Plot 2 contains no shelter for horses. But the claimants have installed on the south-western boundary a water trough on a hardstanding connected to the water supply under the road from the Barn.

83. Whereas plot 1 broadly has a squarish shape, plot 2 is elongated as Mr Edwards put it. It has a boundary to Yarlet Lane about 59m long and extends north-eastwards away from the Lane by about 375m. The long irregular north-western boundary abuts pasture land associated with Park Farm. We were told that plot 2 was formed from the arable farm land to the south east. For that reason, its south-eastern boundary is straight. The south-western boundary of plot 2 is contiguous with Yarlet Lane and lies directly opposite the greater part of the north-eastern boundary of plot 1. The site access in the south eastern corner of plot 2 has been positioned so as to be directly opposite the access to plot 1 in its north eastern corner. In this way, the claimants are able to secure the passage of either horses or horse and carriage directly from one plot to the other over the country lane.

84. The width of plot 2 is restricted in two places. Nearly half way into the site there lies a pond. The width of plot 2 between the edge of the pond and the plot's south eastern boundary is agreed to be only 16.5m. Immediately beyond the pond there is a substantial indentation into plot 2 along its north-western boundary for over one quarter of its length. This results in the width of plot 2 reducing once again to about 16m. In Mr Bedson's opinion the awkward shape of plot 2 renders it unsuitable for arable use. For example, modern spray booms are typically 24m wide. Mr Edwards did not disagree with that opinion, which we accept.

85. The claimants understand that the pond was polluted in the past. There was no detailed evidence about this, but their decision to pay for a dedicated water supply to plot 2 for their horses, involving not only the initial outlay, but also the ongoing costs of the water supplied, is consistent with that understanding. The Advice on Pasture Management issued by the British Horse Society states that "it is imperative that there is a constant supply of fresh clean water available in the field", either from an automatically filling trough or buckets. Either way the containers must be large enough to provide a constant supply of water for all the horses in the field, which must be checked and cleaned regularly. The Society refers to the need for a "plentiful supply" and makes the obvious point that water consumption will increase in hot weather. The BHS advises that ponds are often unsuitable. Owing to their unregulated source a pond poses a risk of being contaminated, or becoming stagnant or too dry in hot weather. Mr

Edwards candidly stated that in his evidence he had *assumed* that the pond would provide an adequate supply of drinking water. But he has not checked that point. On balance, we conclude that the supply from the pond is not reliable and that the keeping of three horses on plot 2 requires that a fresh water supply be provided from the main in the highway. Currently that supply is provided via the supply to plot 1 and the claimants' culvert under the Lane, but not otherwise.

86. It is helpful to consider how the equine use of plots 1 and 2 has evolved in so far as it has affected the objective characteristics of the land, including its use. The claimants bought the Barn (forming part of plot 1) on 4 October 2002. We accept Miss Clements' evidence as to how the property was used. Initially they kept one pony on the land. A few days after the purchase, the claimants' prior application for planning permission for the L shaped stable block was formally granted. At that point one of the areas now used as a stable was used as a store for hay and other horse feed. Condition 6 of the permission stated that the building could only be used for the private use of the occupiers of the Barn and not as a commercial use.

87. Then the claimants were able to rent a paddock to the south west of the Barn so that they could bring a second horse on to plot 1. On 5 September 2007 the claimants bought about one half of the rented land. The area of the land purchased was 0.206 hectares and together with the Barn forms the totality of plot 1.

88. By the spring of 2011 the claimants had become more involved in carriage driving, and also dressage and marathon driving. They wished to buy a third horse, a competition horse, but the advice published by the BHS confirms that the land available within plot 1 could not support three as opposed to two horses. They looked for properties elsewhere to which they could relocate entirely, both to live and to carry on equestrian activities. They found one property at Haughton which had up to 6 ha of land available, but their offer was not accepted. Then their neighbour on the other side of Yarlet Lane offered to sell the land which eventually became plot 2. The sale was the subject of a gentleman's agreement, in reliance upon which the claimants applied for planning permission for the hay barn (which was granted in January 2012), which they erected (after Easter 2012). Once the vendor had taken his crop off plot 2 that summer, the purchase was completed on 31 August 2012. Condition 4 of the planning permission requires that the barn be used only for agriculture or equine related purposes and not as a building incidental to the Barn as a dwelling or for storage purposes within the B8 use class.

89. The relocation of the storage for hay and horse feed from the stable block to the new barn enabled the claimants to increase the number of stables to three and to store carriages in that block. The new barn was sized so as to take one or as necessary two crops of hay from plot 2 and to store feed for three horses. Plot 2 provided not only haylage but also (a) additional grazing so that the claimants could keep three horses and (b) land for carriage and dressage training which was not possible within plot 1. The third bay of the barn is used to store the equipment (including a tractor and a harrow) used on plot 2 as well as on plot 1.

90. It follows from Miss Clements' evidence and we accept, that without plot 2, the claimants would only be able to keep two rather than three horses on plot 1. The use of plot 1 and its buildings would revert to the position as it was before plot 2 became available to the claimants. The feed for the horses would be kept in the L shaped stable block as before and the hay barn would become redundant. Miss Clements disagreed with the suggestion, raised only as a question to her in cross-examination, that without plot 2 the horses kept on plot 1 could

reasonably be taken to a remote centre for training in carriage driving. She said that there are few such centres, training needs to be carried out for 5 to 6 days each week, and therefore generally competitors train their horses on their own land. The respondent called no evidence on these points to contradict the claimants. Accordingly, we conclude on the balance of probabilities, that without plot 2, it would be wholly impractical to continue to keep horses on plot 1 for training and use in carriage driving and dressage events.

91. We also accept the description given by Miss Clements as to the way in which plots 1 and 2 are used over the course of a year. Between October/November and March/April, and depending on the weather, plot 2 is used for the winter grazing of the claimants' horses. The animals are kept in the stables on plot 1 each night. In the spring the horses are transferred to plot 1 for grazing. There the claimants operate a system of "strip grazing" because it is necessary to limit the amount of grass eaten by horses during the summer and so there are 5 water troughs in different locations on plot 1. In the spring the claimants chain harrow plot 2 and sow grass seed, using types suitable for producing grass and hay suitable as food for the horses. A track around the perimeter of plot 2 is kept free for carriage and marathon training. A hay crop is taken from the inner areas in about June and transferred to plot 1 for storage. If a second crop is needed, haylage continues in the southern part of plot 2 but the northern part is used for competition training. This involves the placing of "gates" and other features on the land, but none of these are permanent structures or fixtures. The grazing on plot 1 continues until about September/October.

92. In defining the use made of plots 1 and 2 for the purposes of applying the functional test with the *rebus sic stantibus* principle, Mr Whale described the use of plot 1 as comprising:-

- residential dwelling and garden

- stabling for three horses

- paddock and grazing land for the horse

- the hay barn and equipment stores used in connection with seeding, haylage and training on plot 2

He described the use of plot 2 as comprising:-

- grazing of horses

- growing haylage

- carriage driving and dressage training.

In relation to each of the plots he also accepted that none of the uses he described should (a) be treated as incidental or ancillary uses or (b) disregarded as uses reflecting only a personal choice made by the claimants (contrary to the third principle in paragraph 12 of Mazars). In other words, the respondent agrees that the uses set out above form part of "the objectively ascertainable character", or the intrinsic characteristics, of the two plots of land. We should also record the respondent's acceptance that neither plot 1 nor plot 2 comprises agricultural land.

93. But Mr Whale then submitted that on these facts the functional test could not be satisfied. He said that this was because the essential functions of the two plots are different; they "do not share an ascertainable character". His argument is that plot 1 contains a residential use but plot 2 does not and plot 2 is used in part for haylage and carriage and dressage training but plot 1 is not.

94. However, Mr Whale is arguing for a test which is more restrictive than the ones laid down by the Supreme Court in Mazars. The true test is whether the use of one unit is necessary to the effectual enjoyment of the other or whether, or as Lord Gill put it in paragraph 39 of his judgment, there is a necessary interdependence of the separate parts that is objectively ascertainable. In order to satisfy that test it is unnecessary for all the key constituents of the mix of uses on one plot to be present on the other. The test does not require equivalence between the precise uses or activities taking place in the two areas. For example, the respondent accepts that a use such as a golf course bisected by a road should still be treated as one hereditament following Mazars. The land either side of the road is necessary in use to the other. As Mr Whale said, it does not matter whether 9 holes lie on one side of the road and 9 on the other, or whether 18 holes lie on one side of the road and the clubhouse and car park lie on the other. The particular uses or activities on one area which are necessary to the effectual enjoyment of the other may be different. The same point is illustrated by Roxburghe Estates v Scottish Borders Council Assessor [2004] RA 15, a decision cited with approval by the Supreme Court, where the two interdependent uses were different: exhibition rooms in the castle and a gift shop and café elsewhere. It may be sufficient to establish the necessary interdependence between 2 units of property by reference to at least some of the physical features and principal uses present on each unit.

95. The respondent accepts that the objective character of plot 1 includes the keeping of three horses on the land and that that plot is too small for that purpose. There is insufficient grazing for three horses. The respondent also accepts that the training of horses for carriage driving and dressage forms part of the objective character of plot 2. In our judgment this function is shared with plot 1, in that two of the horses stabled on plot 1 are kept, and equipment is stored there, for that same purpose. Miss Clements stated that plot 2 lacks any adequate natural shelter for horses. There is no dispute about that. In addition, in its current state plot 2 lacks any man-made shelter of the kind advised by the BHS. Such shelters need to be of a sturdy construction and situated on hard standing or at least a free draining site. The Tribunal was told that plot 2 does not drain well, which was also apparent on our inspection. In this case a shelter would also need to be large enough for three horses. Miss Clements said that the horses kept on plot 2 between October and April each year needed to be stabled on plot 1. She was not challenged on this. It was not suggested to her that temporary, moveable shelters on plot 2 would be sufficient for keeping three horses on a permanent basis. There is also no dispute that the size and topography of plot 1 is unsuitable for carriage or dressage training. The two horses stabled on plot 1 for that purpose are trained on plot 2. On the other hand, by itself plot 2 lacks an adequate supply of fresh drinking water for three horses (see paragraph 85 above). Although the parties did not address the point in any detail, doing the best we can on the evidence, we consider that as a matter of judgment the alterations necessary to provide proper shelter and a water supply for three horses on plot 2, which alterations must be taken as a whole (see Williams), exceed what could be reasonably be considered to be "minor" for property of this nature.

96. For these reasons, which reflect points which have been accepted or not disputed by the respondent, we are satisfied that on the facts of this case the use of each of plots 1 and 2 is necessary for the effectual enjoyment of the other. There is a necessary interdependence between the two plots at least in relation to the shared functions of accommodating three horses, the training of two of those horses for carriage driving and dressage, haylage and the storage of that hay crop, and the storage and use of equipment for grazing, haylage, carriage driving and dressage. On the evidence in this case we accept the analysis of Mr Morshead QC that this interdependency between plots 1 and 2 can be described by a single term, use as an equine unit. The respondent has not suggested that because plot 1 also contains a dwelling, either the whole or that part of plot 1 should be treated as a separate hereditament. We note that it is common ground that the conditions imposed on the planning permissions granted for the buildings erected since 2002 form part of the intrinsic features or objective character of that land (see eg. Morton v Dickinson (1977) 21 RRC 4; Oldschool v Coll [1966] RA 265). Condition 6 of the 2002 permission for the stable block restricts its use to the private use of the occupiers of the dwelling on plot 1.

97. The matter may also be examined by applying Lord Gill's test (paragraph 41 of Mazars), which asks whether the occupation of one plot would be "pointless" without the other. He accepted that the collection of educational buildings forming the main core of a university, planned and built as such (the Glasgow University case), and a physically separate restaurant operated together with exhibition rooms in an historic castle and within an area for which admission charges were payable (Roxburghe Estates), were both examples of cases where that test was satisfied. He made it plain that *mutual* dependency is not essential. In the Roxburghe case it sufficed that the restaurant (and also a gift shop) "owed their existence to the castle". In the present case, the respondent accepts that Lord Gill's test must be applied to the use of the land in question applying *rebus* principles. We accept Miss Clements' evidence that without plot 2 one of the existing stables plus the whole of the hay barn would be redundant or "pointless". In our judgment these represent a substantial proportion of both the physical facilities and the "*rebus* use" of plot 1, so that it would be pointless to occupy plot 1 without plot 2 *as things stand*. On the basis of the evidence called by both sides in this case, that is sufficient to satisfy Lord Gill's test.

98. We arrive at the same conclusion by considering whether *each* of plots 1 and 2 could *reasonably* be let separately. The *rebus* principle requires the boundaries of each plot to be taken as they were on the relevant date. It is not possible to imagine, for example, that plot 2 had been re-integrated with farm land to the east.

99. It became common ground during the hearing that the "separately lettable" criterion cannot be applied without identifying the purpose of the letting, or the use to which the land may be put. But in his oral closing submissions Mr Whale suggested that the user limb of the *rebus* principle did not apply. He cited no authority for that proposition. We reject it. There is no logical reason why the *rebus* principle should apply to the functional test or the "pointlessness of separate occupation" criterion, as the respondent accepts, and yet not to the "separately lettable" criterion. We consider that the respondent's submission does not accord with the rationale of paragraphs 12 and 52 to 53 of Mazars.

100. The fallacy in the respondent's submission is illustrated by the way in which it was sought to be applied here. It was put to Mr Bedson in cross-examination that plot 2 could be separately let at a peppercorn rent to someone who wished to use it to let their dogs run around. Postulating a letting for a use of that kind has nothing to do with testing, in accordance with the

principles of rating law, whether properties which are separate, are nonetheless occupied and used together in a functionally interdependent manner. The use assumed in Mr Whale's question has been decoupled from the use which, on the respondent's own case, forms part of the definition of the objective character of the property in this case. If the "separately lettable" criterion were to be so lax, it could easily be satisfied in virtually all cases and so realistically there would be little prospect of the functional test ever being met. Furthermore, the approach suggested by the respondent does not accord with "the large measure of professional common sense" or the "robust practical" approach which the judgments in Mazars require.

101. The respondent's erroneous approach began in paragraph 6 of his Statement of Case where the issue was defined as being whether *plot 2* could sensibly be occupied or let other than together with plot 1. That formulation ignores the requirement in Mazars that the "separately lettable" criterion be applied to *each* of the separate areas of land under consideration and not just one of them. *Mutual* dependency is not essential. The same error infected the respondent's formulation of the issue in paragraph 2 of the Statement of Agreed Facts and the instructions given to Mr Edwards as to the scope of his expert evidence (paragraphs 3.3 and 9.1 of his report). In his oral evidence Mr Edwards went on to say that the narrow ambit of the instructions he had been given explained why his report did not address what use should be assumed when considering whether plot 2 could sensibly be let separately. Thus, he had not considered its suitability for equine activities if separately let. Consequently, he had not carried out any research into those aspects. In these circumstances, we are unable to attach any significant weight to the opinions he put forward on separate lettability. In his oral evidence, when he proffered a view for the first time that there was "no reason to think" that there would be "no demand for *grazing pasture*", it was plain that because of the instructions he had received, he had not addressed the separate lettability of plot 2 for the mix of uses which are agreed to represent the objective character of that land. In any event, Mr Edwards confirmed in his oral evidence that he was not asked to give, and did not give, any opinion on whether *plot 1* could be separately let for the existing mix of buildings and land use. These errors in the respondent's approach must also have affected Mr Edwards' contribution to the Statement of Agreed Facts and thus the drafting of paragraph 18, which therefore cannot attract any significant weight in the determination of this preliminary issue.

102. By contrast Mr Bedson's instructions allowed him to apply the "separately lettable" criterion to each of the two plots. He expressed the view that neither of the two plots could be used, or indeed let separately, for the purposes to which they are put as defined in accordance with the *rebus* principle. His opinion was not challenged *by reference to those uses*. We accept this evidence.

103. Our overall conclusion on all the evidence we have seen and heard is that plot 1 could not reasonably be let separately for the relevant range of uses to which it is put, which includes stabling for three horses, the three bay hay barn and the carriage store. By itself plot 1 could not sustain three horses or the training of horses for carriage driving and dressage. That is sufficient to dispose of the application of the "separate lettable" criterion in the claimants' favour. But in addition, we consider that plot 2 could not reasonably be let by itself for such training and related purposes, taking a robust, common sense and realistic view, as it is necessary to do. There is no evidence of any freestanding need to configure and use plot 2 for such purposes. That need simply comes from the fact that horses suitable for training are stabled on plot 1, which also serves to overcome the lack of shelter on plot 2.

Conclusion

104. We should emphasise that decisions on whether two separate pieces of land are to be treated as one hereditament by the application of the functional test are highly fact-sensitive. On the basis of the site inspection, and the particular evidence and submissions presented in this case, the claimants succeed on the preliminary issue and we determine that:-

> "The claimants' land (title numbers SF453199, SF531714 and SF582945) comprises a single "hereditament" within the meaning of Chapter II of Part VI of the Town and Country Planning Act 1990".

105. This decision is final on all matters other than costs. The parties may now make submissions in writing on the issue of costs and a letter containing further directions accompanies this decision.

Dated: 31 March 2017

The Hon. Sir David Holgate

Mr. Peter McCrea FRICS

Addendum on Costs

106. Following receipt of our decision on the preliminary issue, the parties have agreed the issue of costs on the following terms, which we so Order.

107. The respondent shall pay the claimants' costs of and occasioned by the preliminary issue, such costs to be assessed by the Registrar on the standard basis if not agreed.

108. The respondent shall make a payment on account of such costs to the claimants' solicitors in cleared funds by 4pm on 14 April 2017 in the amount of £30,000 plus VAT.

Dated: 5 April 2017

The Hon. Sir David Holgate

Mr. Peter McCrea FRICS