UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 138 (LC)
Case No's: RA/29-39/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – HEREDITAMENT – OCCUPATION – sites of automated teller machines operated by banks in supermarkets, convenience stores and petrol filling stations – whether to be separately entered in non-domestic rating list – held – sites of free standing ATMs not separate hereditaments –sites of internal ATMs in rateable occupation of host store –external ATMs in rateable occupation of ATM operator – appeals determined accordingly

IN THE MATTER OF APPEALS AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

(1) SAINSBURY'S SUPERMARKETS LTD
(2) SAINSBURY'S BANK PLC
(3) CARDTRONICS EUROPE LIMITED
(4) TESCO STORES LTD
(5) TESCO PERSONAL FINANCE PLC
(6) CO-OPERATIVE GROUP LIMITED

Appellants

-and –

CHRIS SYKES AND OTHERS
(VALUATION OFFICERS)

Respondents

Re: ATM sites at various retail stores

Before: Martin Rodger QC, Deputy Chamber President and A J Trott FRICS

Sitting at: Royal Courts of Justice, London, WC2A 2LL
on

10 – 13 January 2017

Richard Drabble QC and *Christopher Lewsley,* instructed by Dentons, appeared for the first and second appellants

Daniel Kolinsky QC and *Luke Wilcox,* instructed by Gerald Eve LLP, appeared for the third appellant

Timothy Mould QC and *Guy Williams,* instructed by BLP, appeared for the fourth and fifth appellants

Timothy Mould QC and *Christopher Lewsley,* instructed by Dentons, appeared for the sixth appellant

Timothy Morshead QC and *Galina Ward,* instructed by HMRC Solicitors, appeared for the respondents

The following cases are referred to in this decision:

Assessor for Central Scotland Joint Valuation Board v Bank of Ireland [2011] RA 195
Assessor for Lanarkshire Valuation Joint Board v Clydesdale Bank Plc [2005] RA 1
Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board [2001] RA 110
Edmondson v Teesside Textiles Ltd (1984) 83 LGR 317
John Laing & Sons Ltd v Kingswood Assessment Committee [1949] 1 KB 344
Kennet District Council v British Telecommunications [1983] RA 43
London County Council v Wilkins (Valuation Officer) [1957] AC 362
Selecta UK Ltd v Lothian Valuation Joint Board Assessor [2010] RA 37
Stringer (VO) v J Sainsbury Plc [1992] RA 16
Townley Mill Company (1919) Limited v Oldham Assessment Committee [1937] AC 419
Vtesse Networks Ltd v Bradford [2006] EWCA Civ 1339
Westminster Council v Southern Railway Company Ltd [1936] AC 511
Wimborne DC v Brayne Construction Co Ltd [1985] RA 234
Woolway (Valuation Officer) v Mazars LLP [2015] UKSC 53
Halkyn District Mines Drainage Company v Holywell [1895] AC 117
Esso Petroleum Co Ltd v Walker (VO) [2013] UKUT 052 (LC)

The following further cases were referred to in argument:

Case (VO) v British Railways Board [1972] RA 97
Cory v Bristow (1877) 2 App Cas 262
Gilbert (VO) v Hickinbottom [1956] 2 QB 40
Hoare v National Trust (1999) 77 P&CR 366
Kirby v Hunslet Union Assessment Committee [1906] AC 43
Iceland Foods v Berry (VO) [2016] EWCA Civ 1150
Magon v Barking and Dagenham London Borough Council [2000] RA 459
Williams (VO) v Scottish and Newcastle Retail Ltd [2001] RA 41
London, Midland and Scottish Railway Company and others v Assessor for Glasgow 1937 SC 317

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Introduction

1. The issue raised by these appeals is whether the sites on which automated teller machines ("ATMs") are placed in supermarkets, convenience stores and petrol filling stations are liable to be entered in the non-domestic rating list separately from the premises within which they are situated. In 2008 there were said to be 63,900 ATMs in the UK and by 2015 the number had increased to 69,900. Many of these were in banks or other premises where the operator of the ATM and the occupier of the premises are one and the same so that the question of separate rateability does not arise; but a substantial proportion will have been machines belonging to and operated by a bank or ATM provider and placed in premises occupied by a different party for its own purposes. How are the sites of those machines to be treated for rating?

2. The issue is not free of authority. In *Stringer (VO) v J Sainsbury Plc* [1992] RA 16 the Lands Tribunal decided, on the facts of that case, that ATMs belonging to high street banks and placed in a Sainsbury's store were not separately rateable from the host store. In Scotland the Land Valuation Appeal Court considered the same question in *Assessor for Lanarkshire Valuation Joint Board v Clydesdale Bank Plc* [2005] RA 1, and *Assessor for Central Scotland Joint Valuation Board v Bank of Ireland* [2011] RA 195. No clear common solution emerged from these decisions.

3. In the current appeals three of the appellants are well known supermarket operators in whose premises ATM services are provided by banks within the same corporate structure; the fourth is an ATM provider which operates more than 16,000 of its own ATMs in convenience stores run by independent retailers and in other similar locations.

4. The appeals arise out of action taken in 2014 by Valuation Officers (collectively "the VOA" or "the respondent"), to amend the 2010 rating lists to create separate entries in respect of the sites of many thousands of ATMs in supermarkets operated by Sainsbury's, Tesco and the Co-op, and in convenience stores and other locations where ATMs are operated by Cardtronics. Before 2014 the ATM sites in each location had not been distinguished from the host store. The effect of each of the alterations was to include the ATM site in the list as a separate hereditament with its own rateable value, but without (in most cases) any corresponding reduction in the rateable value of the host store.

5. Each of the sites treated in this way was the subject of an appeal to the Valuation Tribunal for England ("VTE") against the respondent's refusal to alter the rating list by deleting the new entry and merging the ATM site with the host store. The appeals relating to 11 locations were selected as lead case appeals. In its decision dated 4 March 2016 the VTE dismissed each of the appeals and determined that at all 11 locations the ATM sites were separate hereditaments from the stores which were in the rateable occupation of the bank or ATM provider and not of the proprietor of the host store. Each site should therefore be the subject of a separate entry in the rating list. Each of the appellants now appeals against the VTE's decision.

6. Although the issue is the same in each of these appeals, the contractual and practical arrangements at the various locations differ in some notable respects. Accepting the contentions of the VOA that these factual differences were irrelevant, the VTE did not find it necessary to distinguish between the sites and it applied the same reasoning to them all. We have considered the appeals in relation to nine of the locations examined by the VTE (it was agreed that the appeals concerning two other locations were not factually distinct and could be stayed for the time being).

Parties and representation

7. The appeals by Sainsbury's Supermarkets Ltd ("Sainsbury's") and Sainsbury's Bank plc, which were represented at the hearing by Richard Drabble QC and Christopher Lewsley, concern ATM sites at two host stores operated by Sainsbury's at Worcester and Stroud.

8. The appeals by Tesco Stores Ltd ("Tesco") and Tesco Personal Finance plc, which were represented by Timothy Mould QC and Guy Williams, concern ATM sites at three host stores operated by Tesco at Walsall, Nottingham and Rugby.

9. The appeals by Co-operative Group Limited ("the Co-op"), represented at the hearing by Mr Mould and Mr Lewsley, concern ATM sites at two host stores at Newcastle Under Lyme and Keighley, and a third site at Lockwood Service Station, Huddersfield.

10. The single appeal by Cardtronics Europe Ltd, represented by Daniel Kolinsky QC and Luke Wilcox, concerns the site of an ATM at a Londis convenience store at Harefield.

11. At each of the Sainsbury's, Tesco and Co-op stores the ATMs themselves belong to Sainsbury's Bank plc, Tesco Personal Finance plc and Co-op Bank plc respectively. We will refer to "the Store" and "the Bank" in each case. Cardtronics owns the ATM at Harefield and we will refer to it by name (except when it is unnecessary to distinguish it from the other ATM operators, referred to collectively as "the Bank") and to its host as "the Store".

12. The nominal respondents to the appeals are the valuation officers for each of the areas in which the appeal properties are located, but the appeals were managed centrally by the VOA. Timothy Morshead QC and Galina Ward appeared on behalf of the respondents.

The VTE's decision

13. The VTE determined that the ATM sites at each of the appeal locations was a hereditament separate from the host Store and was in the rateable occupation of the Bank and not of the Store. It began by considering whether the site was a separate

hereditament at all, having regard to the decision of the Supreme Court in *Woolway (Valuation Officer) v Mazars LLP* [2015] UKSC 53. Each site was a clearly defined area and although it was small and could not be identified precisely until the ATM was placed upon it neither of these features was an obstacle to recognising the occupied site as a hereditament or self contained unit of property in its own right.

14. The VTE next determined that the land in question was occupied by the Bank and was not, and could not be, used or occupied by the Store. Directing itself by reference to the speech of Lord Russell of Killowen in *Westminster Council v Southern Railway Company* [1936] AC 511 the VTE stated that when considering which party was in occupation it was first necessary to adopt a "blinkered approach" when identifying the hereditament in dispute; only then was it permissible to have regard to the relationship between the Store and the Bank in connection with that hereditament (and not any larger area) and to consider which was in rateable occupation. Applying that approach none of the evidence going to the purpose of the Stores in installing ATMs or their involvement in operating them was material, as none of their activities in the retail premises as a whole interfered with the enjoyment by the Banks of the premises in their possession, the sites of the ATMs, for the purpose for which the Banks occupied them.

15. In reaching its conclusion the VTE was persuaded by the respondent that the Lands Tribunal for Scotland and the Court of Session (sitting as the Land Valuation Appeal Court) had misdirected themselves in law when they considered the same issue in the *Clydesdale Bank* and *Bank of Ireland* cases. Nor did the VTE detect any inconsistency between its own decision and the decision of the Lands Tribunal in *Stringer*.

The issues in the appeals

16. The appeals were advanced on two separate grounds.

17. Tesco, the Co-op and Cardtronics each argue that the VTE was wrong to accept that the site of an ATM could be a separate rateable hereditament. As is common ground, an ATM is an item of non-rateable machinery. The appellants submit that land may not be identified as a separate hereditament only by reference to the presence on the land of an item of non-rateable machinery. Additionally, they submit that, applying the principles identified by the Supreme Court in *Woolway v Mazars* at [12], the host Store and the small area of floorspace on which an ATM is placed within that store comprise a single hereditament. Only Sainsbury's did not put its case in this way.

18. Each of the appellants also submitted that the VTE had been wrong in its finding that the Banks were in sole occupation of each of the ATM sites and that the Stores were not in occupation. They argued that, properly understood, the facts established in each case that the Store was not only in occupation but that as between it and the Bank, the Store's occupation was paramount (and therefore rateable). The Bank did not have exclusive occupation of the ATM site, but simply operated the ATMs as part

of the retail offer provided by the Store. The Store was in day to day control of the retail premises as a whole and, to a greater or lesser extent in each case, of the ATM site itself.

19. Mr Morshead QC, for the respondent, submitted that in each case the VTE had been right for the reasons it gave. Each ATM site was a separate hereditament in the sole occupation of the Bank and no question of joint or paramount occupation arose.

20. We have not been asked to consider the value which should be attributed to ATM sites.

The facts relevant to Sainsbury's appeals

21. The appeal by Sainsbury's was presented as the lead appeal and we will therefore deal with the relevant facts in a little detail.

22. Uncontested evidence was provided on behalf of Sainsbury's by Simon Coates, its Head of Estates Management, and by Sue Commercial, a cash analyst responsible for procedures and staff training in connection with ATMs in Sainsbury's stores. The relevant facts were not disputed. Unless otherwise stated the facts we describe below reflect the position on 1st April 2010, which is agreed to be the material day for the purpose of determining the issues in these appeals.

23. The Sainsbury's stores at Worcester and Stroud are both large modern supermarkets, located close to the town centres and surrounded by their own extensive car parks.

Worcester

24. At Worcester a single external ATM is located adjacent to the store's main entrance. The ATM is of the familiar "hole in the wall" style with an outward facing customer display accessible from outside the building 24 hours a day. The machine itself sits on a metal plinth on the other side of the external wall and is chained to the floor of the store's cash room. The store's daily trading hours are from 8am to 10pm with reduced hours on Sunday.

25. We received no detailed description of the ATM but from the photographs we were shown it appears to be about 1.6 metres tall (including the metal plinth) and to occupy an approximately square floor space of about $1m^2$. It is connected by loose cables to the Store's electricity and data supplies. The top of the ATM can be lifted up to remove cards and to replenish stationery, while the back of the machine can be opened to access the secure cash compartment.

26. There was no evidence about how difficult it would be to remove the ATM but from the photographs we were shown this would appear to be a relatively simple exercise which would be unlikely to cause damage to the fabric of the building. Unless the machine was replaced it would be necessary for the hole in the wall to be reinstated.

27. The cash room which accommodates the ATM is about $20m^2$ and is accessed through a secure lobby with an outer and inner door.

Stroud

28. The Stroud store is equipped with two outward facing ATMs situated adjacent to each other within a slightly larger secure cash room adjoining the main entrance to the store. The frontage of the store was redeveloped in 2011 and the ATMs were moved. The layout we were shown is of the ATMs in their current location, although there is no suggestion that the previous arrangements were materially different. The Bank was provided with plans of the proposed redevelopment at the design stage but had no comments to make.

Rateable values

29. The Worcester store was originally entered in the rating list with effect from 1 April 2010 as Superstore and Premises with a rateable value of £875,000. The entry included both the building itself and its surrounding car parks and service areas. This entry was deleted by the respondent on 25 March 2014 and replaced by two separate entries; the first, for the host store, at £875,000, and the second, for the site of the ATM, at £8,300.

30. The same occurred at Stroud where the original Superstore and Premises entry, with a rateable value of £1,070,000 was replaced in March 2014 by separate entries for the host store (£1,070,000) and the ATM site (£11,750).

Operating arrangements

31. The operating arrangements at both stores and across most of the Sainsbury's estate are identical.

32. The secure rooms in which the ATMs are housed are staffed by the Store's own staff seven days a week for between four and six hours a day; on six of those days the room is used for receiving and counting cash taken through the Store's tills. Only the Store's senior staff (and not staff of the Bank) have keys and alarm codes for the cash room. A safe in the cash room is used for cash from the store as well as for the ATM, although cash intended for different purposes is kept separate within the safe.

33. Each ATM is protected by the Store's alarm system and monitored by the Store's CCTV system. The machine is connected to the Store's electricity supply and uses the Store's electronic communications network to connect to the LINK banking system enabling customers of other banks to use the Bank's ATMs to make withdrawals and conduct other business.

34. Cash for both the ATMs and the Store's general use is delivered weekly by a security company courier under an agreement between the security company and the Store. Cash destined for an ATM belongs to the Bank, but it is transported at the Store's risk and insured at the Store's expense. Couriers do not have access to the cash room itself, and are permitted to enter the secure lobby only after an identity check has been undertaken by the Store's staff. Cash is placed by the courier in a secure airlock from which it is removed to the cash room by the Store's staff once the courier has left the secure lobby.

35. The cash delivery is checked by the Store's staff and any anomaly is reported to the Bank; a proportion of the sum delivered is loaded by them into the ATM with the surplus being kept in the safe to replenish the machine as required. The Store's staff carry out a daily check of the cash remaining in the ATM and refill the cash cassettes when necessary. The Store's staff also play a minor role in determining the amount of cash to be delivered for the ATM. They also order and replenish consumables such as the ATM receipt rolls.

36. Routine maintenance of the ATM is undertaken by the Store's staff, who are responsible for checking receipt rolls and retrieving damaged notes. Faults in the operation of the ATM are monitored remotely by the Bank. When a fault is detected the Store's staff are alerted by the Bank and attempt to rectify the problem (a responsibility for which all Store staff receive training). If the fault cannot be rectified an engineer is summoned.

37. The ATMs are maintained under a contract between the Bank and NCR Ltd. An NCR engineer who attends to rectify a fault will be permitted access to the cash room only in the company of a member of the Store's staff. Before the engineer is allowed access to the cash compartment within the ATM the cash is removed by the Store's staff and placed in the safe.

Contractual arrangements

38. Sainsbury's (the Store) is a wholly owned subsidiary of J Sainsbury plc. As at 1 April 2010 the Bank was a joint venture owned by J Sainsbury plc and Bank of Scotland (itself then a subsidiary of Lloyds Banking Group). From 1 February 2014 the Bank became a wholly owned subsidiary of J Sainsbury plc.

39. The ATMs in Sainsbury's stores were operated at the material date pursuant to an agreement between J Sainsbury plc and the Bank which took effect on 8 February 2007 and is described on its title page as an "Agreement relating to the siting of

ATMs". The Agreement recites that it had been agreed between the parties that the Bank "shall have the right to install and operate ATMs" at the supermarkets, petrol stations, convenience stores and other retail sites owned and operated by the Sainsbury's Group.

40. The Agreement runs to 71 pages with 13 schedules, but the principal operative provisions are found in clauses 3, 4 and 5.

41. Clause 3.1 provides that during the term of the Agreement the Bank shall "install and operate" at least one ATM at each of Sainsbury's retail sites and J Sainsbury's plc shall permit (and procure others within the Group to permit) it to do so. By clause 3.3 if the number of cash withdrawals at a particular site exceeds 12,000 per ATM per month over a rolling 6 month period the parties are to meet to consider whether an additional ATM should be installed, and if they exceed 14,000 per month the Bank is obliged to install an additional machine and Sainsbury to permit it.

42. Clause 4 is an exclusivity provision in favour of the Bank: during the term of the Agreement no third party is to be permitted to install, manage or operate an ATM at any of Sainsbury's retail sites.

43. Clause 5 is headed "Licence to enter and install [Bank] ATMs on the retail sites" and provides for the grant to the Bank by the relevant operator of each retail site ("the JS Occupier") of rights "to be enjoyed in common with the JS Occupier", namely (we paraphrase):

1. Access during trading hours to and from the ATM and the secure room over so much of the retail site as is reasonably necessary.
2. Support and shelter for the ATM and the secure room.
3. Access to utilities.
4. The right to display the Bank's trade logo on the ATM and to erect other signage.

Consistently with these limited rights, clause 5.8 is an acknowledgement by the Bank that nothing in the Agreement is intended to create a letting or confer any greater rights than a bare licence on the terms of the Agreement.

44. Numerous other provisions support these basic terms and anticipate the operating arrangements we have already described in which the Store arranges, pays for and assumes the risk of cash deliveries, is responsible for security, networking and the cost of telecoms and other utilities and provides first line maintenance.

45. The cost of providing and installing the ATMs is the Bank's. The work required to provide a suitable site and secure room is carried out and paid for by the Store (clause 6.2) which is entitled to receive a capital contribution (variable depending on

the specification of the secure room) (clause 11). A reviewable annual licence fee, originally £11,082, is payable by the Bank for each ATM but a reduced fee of £3,783 is payable in those locations where it has been agreed the Bank rather than the Store will provide first line maintenance (clause 10). The fee includes all charges for electricity and telecoms access and all business rates and service charges (if any) (clause 10.10). If ATM availability is kept above agreed thresholds a bonus of up to £500,000 is payable by the Bank to the Store, but if those standards are not achieved the licence fee payable by the Bank is reduced by up to £500,000 (Schedule 4). These mechanisms are described as an incentive to the Store to increase ATM availability.

46. The Store has the right to relocate the ATM on 60 days notice if it intends materially to change the layout of a store, and although the Bank has a right to be informed and suggest an alternative location, and to request relocation in other circumstances, the ultimate decision on location remains with the Store (clauses 6.7 to 6.10).

47. The Agreement as a whole is to continue until terminated by written notice (for material breach, *force majeure* or insolvency, or on cessation of the joint venture) (clauses 14 to 16). In relation to individual stores the Bank's licence to enter and its other rights may be terminated by Sainsbury's by giving not less than 20 days notice in the event of it ceasing to trade from that store (clause 19).

48. We were also referred to agreements between Sainsbury's and its security and signage contractors for the provision of services in connection with the retail sites (including the ATMs) and to an agreement between the Bank and NCR Ltd for the maintenance of the ATMs. Nothing turns on the detail of those agreements.

Sainsbury's objective in securing the presence of ATMs at its retail premises

49. Mr Coates explained that the Bank had been created to service Sainsbury's customers, promote its brand and increase its revenue. For regulatory reasons it was necessary that it be a separate entity and that its assets and liabilities be kept separate from other subsidiaries so that the Group as a whole did not have to comply with the onerous supervisory and regulatory regimes applicable to banks. In 2010 the only ATMs operated by the Bank were at Sainsbury's retail premises.

50. As day to day experience demonstrates and the evidence in these appeals confirms, ATMs have become a standard part of the UK supermarket format. Sainsbury's regards the provision of ATMs as an integral part of the retail offer of its stores which its customers expect it to provide for their convenience in obtaining cash for use in the store and elsewhere. Its stores provide not only groceries, homeware, clothing and other retail items, but services including lottery tickets, recycling facilities and, in larger stores, pharmacies, restaurants and on-line collection points. This style of trading, of which ATMs are an integral part, strengthens Sainsbury's brand and furthers its own commercial purposes.

51. Surveys carried out in 2015 for use in these proceedings showed that on a single day 713 people used the ATMs at Stroud and 538 at Worcester; of these ATM users 410 (58%) also entered the Stroud store and 275 (51%) the Worcester store. According to Mr Coates a "sizeable" (but unquantified) proportion of the Store's customers (in particular those on modest incomes) prefer to use cash and Sainsbury's perceives there to be a risk that those customers (and others) would go elsewhere if ATMs were not available. We accept Mr Coates' evidence on the preferences of Sainsbury's customers and the competitive disadvantage which the retailer would experience if it chose not to provide ATMs at its stores.

52. As well as servicing its own customers, the Bank derives an income from an inter-bank tariff when ATMs in Sainsbury's stores are used by the customers of other banks to make withdrawals or balance enquiries, or for mobile phone top-ups.

The facts relevant to the other appeals

53. A substantial body of uncontested evidence was also presented in support of the other appeals, all of which we have considered, but which we can summarise more economically with a view to identifying any distinctive features.

The Tesco appeals

54. Tesco's appeal concerns the sites of ATMs belonging to Tesco Personal Finance plc located in three stores owned and operated by Tesco Stores Ltd:

(i) A Tesco Superstore in Walsall (with two internal ATMs);

(ii) A Tesco Extra store (the largest trading format) in Nottingham (with two external ATMs and one internal ATM); and

(iii) A Tesco Express store (the convenience store trading format) in Rugby (one internal hole in the wall ATM).

Further details of the ATM arrangements at each store are given in paragraphs 141 to 145 below.

55. The Walsall store was entered in the 2010 compiled list as a Superstore and Premises with a rateable value of £780,000 with effect from 1 April 2010. On 14 August 2014 this entry was replaced by two separate entries: one for the store of £780,000 RV and a second for the site of an ATM with a rateable value of £16,500. The ATM entry was later divided into two sites each with a rateable value of £8,300.

56. The Nottingham store appeared first in the 2010 list as a Superstore and Premises at £1,840,000 RV, but in 2014 this was replaced by two separate entries: the store with its rateable value unchanged and the site of an ATM with a rateable value of £11,250. These were later replaced by three new entries, with the store reduced to £1,540,000 RV and the ATM entry split into two sites; with rateable values of £7,500 and £3,750.

57. At Rugby the store was first shown as a Shop and Premises with a rateable value of £29,750 in the 2010 list which was replaced by separate entries of £29,750 for the store alone and £8,300 for the site of an ATM.

58. At the material day the maintenance and cleaning of the ATMs and cash replenishment was undertaken by a security company, G4S, under an agreement with the Bank. Machine faults were reported to G4S by an error code generated automatically and the Store's staff did not undertake any ATM maintenance. The maintenance of the ATM secure rooms and housings and the necessary power supplies and telecommunications networks was carried out and paid for by the Store which also met the operating costs of the machines. Problems related to the environment of the ATMs, such as lighting, door faults or damaged housings, would be reported by the Store's staff or G4S to the Store's own maintenance team.

59. Each ATM was monitored as part of the Store's integrated security systems. Keys for the machines and their secure rooms were kept in a secure area of the store, and a further set was held by G4S. Access for G4S was restricted to store opening hours, and could be denied by Store staff for operational reasons.

60. In 2002 the Bank entered into an ATM Site Licence Agreement with the Store which conferred the sole and exclusive right to install and operate ATMs at all of the Store's premises. The Bank warranted to install, operate and maintain the ATMs and service levels were agreed. The Bank receives all ATM screen advertising revenue and pays the Store an annual fee of £100 per ATM site. The Bank originally contracted with G4S for cash replenishment and maintenance services but in 2011 the contractual arrangements were altered so that the same services were deemed to have been provided by G4S to the Store with effect from February 2010. The Store's costs were recharged to the Bank and we were told that in practice the Bank continued to manage the relationship with G4S.

61. Mr Steven Rigby, Tesco's Group Property Director, explained that ATMs were an essential part of Tesco's retail offer. Customers had a strong expectation that an ATM would be available and Tesco sought to provide at least one in every store. Half of all in-store transactions were paid for in cash. A survey undertaken at the three appeal stores over a period of 17 days in 2015 showed that 77% of ATM users planned to use the store and that 55% of store customers who had also used the ATM spent some of the money in the store.

The Co-op appeals

62. At the material day ATMs were placed in stores belonging to Co-operative Group Ltd by Co-operative Bank plc. The Co-op's appeal concerns ATM sites at three stores, each with one external ATM. In each case the site of the ATM was not entered separately in the 2010 list until January 2014 but the entry was back-dated with effect from 1 April 2010. None of the rateable values of the stores was reduced when the ATM sites were included as separate entries. The three appeal properties are:

(i) A detached food store with residential upper parts at Newcastle-under-Lyme (Shop and premises: £35,250 RV; ATM site £5,900 RV);

(ii) A convenience store at a petrol filling station in Huddersfield (Petrol Filling Station and Premises: £44,750 RV; ATM site £11,250 RV); and

(iii) A detached convenience store in Keighley (Shop and Premises: £28,750 RV; ATM site £8,300 RV).

Further details of these arrangements are given in paragraphs 146 to 148 below.

63. The ATMs were installed in the stores pursuant to an agreement between the Store and the Bank made in 2008. After an initial five year period the contract rolled over on a twelve month basis until in 2014 the ATM portfolio was sold to Cardtronics.

64. At the material day the ATMs and the cash they held were owned by the Bank but the machines were under the day to day control of the Store staff. In practice the Bank's access to the ATMs was also under the control of the Store's staff and was limited to store opening hours. The Store was responsible for the electrical power supply and for security and insurance. Store staff were responsible for weekly checks to comply with LINK requirements. Faults were reported to the Bank's maintenance contractor and cash replenishment was the responsibility of another of the Bank's contractors.

65. The 2008 agreement granted the Bank a licence to install and operate ATMs at specified stores "in a prominent location by mutual agreement". The Bank was to provide the machines and was responsible for all associated hardware and software, installing and operating the ATM, cash replenishment, maintenance, cleaning and problem resolution. The Store was to provide access during normal working hours. Minimum performance standards were agreed which applied to ATMs which had been operative for 24 months or more and had not made an operational loss of more than £4,000 in the previous 12 months. No fee was payable to the Store except where it had previously hosted a profitable ATM under a profit sharing agreement with the Bank, which would continue for a transitional period.

66. The Co-op Group considers that ATMs provide an additional offering which encourages people to shop at their stores. A market research exercise conducted in three stores over two days in 2015 showed that 37.5% of customers who visited the stores used the ATM and that 54.2% of these also shopped in the store, i.e. just over one in five shoppers used the ATM. 40% of customers interviewed said that they were more likely to attend the store because of the ATM.

67. The Bank receives a fee whenever a withdrawal or balance enquiry is made at an ATM. Given the Bank's relatively low High Street representation the presence of ATMs helped service its customers' cash requirements as well as a range of other services such as balance enquiries, statements, PIN services and mobile phone top ups.

The Cardtronics' appeal

68. Cardtronics is an independent provider of ATMs. Most of its customers are convenience stores, petrol filling stations and other retailers, but it also provides machines in building societies, hospitals and railway stations. Most small retailers who host ATMs rely on providers like Cardtronics for the machines in their stores. Cardtronics operates through LINK, the network of UK ATM operators, and generates revenue mostly from LINK interchange fees paid by the card issuing bank, and to a much smaller extent (7% of transactions) by a surcharge, typically £1.75, paid by the user of the ATM.

69. We heard only one Cardtronics' appeal, it being agreed that the others considered by the VTE did not contain any significant points of distinction. The appeal concerns the site of an ATM owned by Cardtronics and installed in a Londis convenience store at Harefield. Details of the arrangements at Harefield are given at paragraphs 149 and 183 below.

70. The store itself was entered in the 2010 compiled list as a Shop and Premises with a rateable value of £9,700. This was replaced in March 2014 by two separate entries: the shop at £9,300 RV and the site of an ATM at £3,750 RV both with effect from 1 April 2010.

71. Cardtronics owns and operates the ATM. It owns the cash in the machine and is responsible for its replenishment. The ATM contains sensing equipment which enables remote monitoring and facilitates re-stocking and maintenance. The host Store will also report faults. Access for maintenance is at times which are convenient to the Store but the host is usually keen to ensure the availability of the ATM.

72. The current ATM at Harefield is an external hole in the wall machine installed in 2007 to replace an early free standing ATM located inside the premises. The 2007 licence agreement was between the owner of the store and a company subsequently acquired by Cardtronics. The licence was for a term of 7 years at a fixed annual fee of £6,000 payable to the retailer plus £0.25 on transactions over 1,250 per month. Cardtronics was granted the right to enter the premises during operating hours (06:30 to 21:00 and 07:00 to 18:00 on Sundays) to install, maintain and use the ATM. The licence was automatically renewable for further periods of 7 years unless terminated by 6 months notice.

73. Cardtronics' business model is based on the proposition that the presence of an ATM in the host premises will attract customers to those premises. In evidence given by Mr Alastair Mayne, its Managing Director of European Business, Cardtronics emphasised the importance of ATMs to small, independent retailers such as the host of the Harefield convenience store. The customers of such stores tend to make small purchases for which payment by card could be disproportionately expensive for the retailer so that retailers often charge a fee for card use. Research by LINK in 2006 was said to show that the installation of an ATM in a convenience store increased the number of customers and also increased their average spend by 65%.

74. Cardtronics commissioned its own research in 2013 in which 53% of respondents said they would not use the store if the ATM was not present. The average spend of that group was £11.49. 28% of respondents mentioned easy access from home as the principal benefit of a convenience store ATM. 77% of respondents who withdrew cash at the ATM said they spent some of it inside the store. In convenience stores 90% of all payments were in cash.

75. Further research in 2015 specifically at Cardtronics' Harefield and York host stores suggested that 74% of ATM users used the ATM at least once a week, and 91% of ATM users were also customers of the store, with 86% visiting at least once a week. 17% of respondents said they would not have shopped at the store if the ATM had not been there or had been unavailable.

General principles of non-domestic rating

76. Non-domestic rates are a tax on individual units of property, known in England as hereditaments. Where a hereditament is wholly or partly occupied, rates are payable by the person who is in rateable occupation; statute also provides for the owner to be liable where a non-domestic hereditament is unoccupied. Only one occupier may be in rateable occupation of any hereditament.

The hereditament

77. In these appeals the existence of separate hereditaments is in issue. The valuation officer is required by section 41 of the Local Government Finance Act 1988 to prepare and maintain a local non-domestic rating list for the area of each billing authority. The relevant list for the purpose of these appeals is the 2010 list. By section 42 the rating list must show each hereditament which is a relevant non-domestic hereditament. A hereditament is a relevant hereditament if it consists of "lands" (section 64(4)(a)).

78. Section 64(1) of the 1988 Act 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 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." The statutory definition therefore provides only limited assistance and whether a unit of property is a hereditament is to be determined by applying principles developed by the courts since the seventeenth century.

79. In *Woolway v Mazars* Lord Sumption observed (at [4]) that, notwithstanding more than four centuries of experience, the question how a hereditament is to be identified for rating purposes remains in important respects unclear. The issue in that case was whether the second and sixth storeys of an eight storey office block, each in the occupation of the same person, comprised a single hereditament or two separate hereditaments. Disapproving the functional approach which had been applied in England for almost sixty years, the Supreme Court held that the primary test of whether distinct spaces under common occupation were to be assessed for rates as a

single hereditament was geographical. Where distinct units in the same occupation within a building (even if adjoining or on contiguous floors) could be reached only by leaving one unit and passing through areas of which the common occupier was not in exclusive possession to get to another unit, they should be seen (absent very special facts) as separate hereditaments.

80. *Woolway v Mazars* was concerned with the proper treatment of geographically distinct units in the occupation of the same person. The issue in these appeals is whether a single space in the concurrent occupation of different people should be treated as separate from the hereditament surrounding it. Reliance was nevertheless placed by both sides on statements of principle in the judgment of the Supreme Court. Mr Mould QC and Mr Kolinsky QC drew attention, in particular, to the following passage in the judgment of Lord Sumption (at [12]) in which, after reviewing a series of leading cases in Scotland, he derived three broad principles relevant to the question whether distinct spaces occupied by the same person form a single hereditament:

> "First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second *Bank of Scotland* case 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. Third, 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."

81. Whether a unit of property is a separate hereditament is a question of law, to be determined having regard to the three principles identified by Lord Sumption, which were endorsed by the other members of the Court.

82. The last of the series of Scottish rating decisions from which Lord Sumption derived his three broad principles was *Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board* [2001] RA 110, in which the Lands Tribunal for Scotland held that premises under common occupation but situated on opposite sides of a main road

constituted two hereditaments. Lord Sumption cited a long passage, at pp 140-141, which began with the following important reminder:

> "We consider that the emphasis on the geographical test is an aspect of recognition that lands and heritages are physical subjects. The underlying purpose is to provide a proper basis for a tax on property, not a tax on persons or businesses. Where the subjects 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. … On the other hand, we are satisfied that the fact that certain heritable subjects function together as one business will, by itself, be insufficient to demonstrate that they are to be regarded as a unum quid in any physical sense. A "business" is not a concept based on physical or heritable factors. Entry in the roll is based on identification of heritable subjects. The fact that one business may need to occupy two separate physical subjects does not change the character of the subjects."

Rateable occupation

83. These appeals are also concerned with the rateable occupation of the putative hereditaments. There is no statutory definition of rateable occupation beyond the statement in section 65(2) of the 1988 Act that whether a hereditament is occupied, and who is the occupier, is to be determined under the rules which would have applied under the General Rate Act 1967. Those judge made rules were identified in the following passage from the decision of Tucker LJ in *John Laing & Sons Ltd v Kingswood Assessment Committee* [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."

84. To satisfy these conditions the actual occupation in question must be "exclusive for the particular purposes of the possessor" but it is not necessary for the occupier to be the owner of a legal estate conferring a right of exclusive possession. Authority for that proposition, which was not disputed, is found in the speech of Lord Russell of Killowen in *Westminster Council v Southern Railway Company Ltd* [1936] AC 511, 533: "the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."

Concurrent and paramount occupation

85. The requirement that, to be rateable, the occupation of a hereditament must be exclusive for the particular purposes of the occupier leaves open the possibility that the same unit of property may concurrently have more than one occupier, each occupying for a purpose of their own. Only one can be in rateable occupation, and it

is usual to identify that person by asking whose position in relation to occupation of the hereditament is paramount and whose is subordinate.

86. The practice of classifying concurrent occupiers as paramount or subordinate derives from the speech of Lord Herschell LC in *Halkyn District Mines Drainage Company v Holywell* [1895] AC 117, 126:

> "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."

87. The proper application of this principle was in issue in *Westminster Council v Southern Railway Company,* which concerned units of occupation at Victoria Station including bookstalls, kiosks, a chemist's shop and various show cases used for advertising goods. The issue was whether those units, occupied by independent retailers under agreements with the railway company, were capable of separate assessment from the station as a whole. Lord Russell included among some general observations on rateable occupation (at page 529), the following passage on which the VTE relied in reaching its decision in these appeals:

> "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."

The premises in question in these appeals are the sites of the ATMs entered in the list. The VTE considered that the appellants' arguments gave insufficient weight to Lord Russell's direction, and focussed impermissibly on the occupation of the host store rather than on the site of the ATM alone.

88. In *Westminster Council v Southern Railway Company* (at page 530) Lord Russell identified the exercise of "general control" over the jointly occupied premises as the critical consideration in determining which occupier was paramount:

> "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."

89. Lord Russell called this the "landlord-control principle" and referred to a number of cases in which it had been applied to commercial as well as domestic occupiers. He concluded his remarks on control at page 532:

> "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."

90. We were also referred by Mr Morshead to the decision of the Court of Appeal in *Wimborne District Council v Brayne Construction Co Ltd* [1985] RA 234 for a further explanation of the requirement that possession or occupation must be exclusive for the particular purposes of the possessor. Lloyd LJ explained at page 239 that when considering the purpose of an activity it was relevant to consider "the object of the activity in question, rather than the motive behind the activity."

91. In *Wimborne* contractors were engaged by the owner of a fish farm to excavate a number of lakes and ponds on an adjoining area of 26 acres which was underlain by deposits of gravel. The contractors were to be entitled to dispose of the gravel arising from the excavation, and they exploited this right by engaging subcontractors who agreed to pay a royalty to the contractors for any gravel they took from the land. The question was whether the sub-contractors were in rateable occupation. It was accepted at first instance that the purpose of the sub-contractor's occupation was to create the lakes and ponds and that the beneficial extraction of the gravel was a subsidiary purpose, which was said to lead to the conclusion that they were not in rateable occupation. The Court of Appeal disagreed and held that the sub-contractors were in rateable occupation of a hereditament comprising the seam of gravel and the surface above it on the basis that they were in actual and beneficial occupation, that their occupation was exclusive for the purpose of taking the gravel, and that although the terms of the sub-contract controlled the performance of their obligations, determined where they were entitled to dig and required that they dig in areas where there was no gravel profitably to be taken, those terms did not interfere with the quality of the sub-contractor's occupation.

92. At page 243 Lloyd LJ confessed to having had some difficulty in understanding how the requirement that occupation must be exclusive could be reconciled with the rule that where there are two competing occupiers of the same hereditament it is the

paramount occupier who is rateable: if there are two occupiers of the same hereditament how can either be exclusive? He resolved this difficulty in the following passage:

> "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 – that is to say, to whether an occupier is in exclusive occupation for his own particular purposes, and also to which of two competing occupiers is in paramount occupation."

93. The issue of paramount occupation and the *Southern Railway* guidance were most recently applied by the Tribunal in *Esso Petroleum Co Ltd v Walker (VO)* [2013] UKUT 052 (LC) which concerned a petrol filling station in a motorway service area. The issue was whether the filling station operated by Esso (through the agency of staff employed by Roadchef) should be assessed as a separate hereditament or as part of the larger service area operated as a whole by Roadchef. At paragraphs [87] and [88] the Tribunal first considered the question "to what extent does Esso's degree of control interfere substantially with the occupation of the premises by Roadchef for the purposes for which Roadchef occupies them?" It then asked: "to what extent does Roadchef's degree of control interfere substantially with the occupation of the premises by Esso for the purposes for which Esso occupies them?" The Tribunal concluded on the facts that Esso was in paramount occupation of the filling station notwithstanding the involvement of Roadchef's staff as its on-site agents.

Plant and machinery

94. Plant and machinery is the subject of special consideration in the law of rating. Some items of plant and machinery are rateable while others are non-rateable.

95. It is common ground that an ATM is an item of machinery falling within regulation 2(b) of the Valuation for Rating (Plant and Machinery) (England) Regulations 2000. Regulation 2 provides as follows:

> 2. **Prescribed assumptions as to plant and machinery**
>
> For the purpose of determining the rateable value of a hereditament for any day on or after 1st April 2000, in applying [the statutory valuation criteria]… -
>
> (a) in relation to a hereditament in or on which there is plant or machinery which belongs to any of the classes set out in the Schedule to these Regulations, the prescribed assumptions are that:
>
> (i) any such plant or machinery is part of the hereditament; and
>
> (ii) the value of any other plant and machinery has no effect on the rent to be estimated as required by para 2(1); and

(b) in relation to any other hereditament, the prescribed assumption is that the value of any plant and machinery has no effect on the rent to be so estimated.

96. An ATM does not fall with any prescribed class of rateable plant and machinery set out in the Schedule to the 2000 Regulations. As machinery the value of which must be assumed to have no effect on the rateable value of the hereditament on which it is sited, an ATM itself may be referred to as non-rateable.

97. The respondent has not sought in any of these cases to enter in the rating list a hereditament which includes the ATM itself. In each case the contentious entry is in respect of the floor space upon which the ATM is located and is described as "site of ATM". That description limits the putative hereditament to the ground on which the ATM stands and the space it occupies; it does not extend to the secure rooms in which some of the ATMs are accommodated.

The role of chattels, plant and machinery in defining a hereditament

98. In *Woolway v Mazars,* at [49], Lord Neuberger pointed out that although at first sight whether premises were one hereditament or two should not depend on how they were occupied, in certain circumstances occupation of premises can "serve to control their status as one or more hereditaments", for example where an office building was let as a whole rather than in separate parts. Lord Neuberger went on:

> "Furthermore, it is well established that premises are not merely liable to have their rateable value assessed, but also to have their status as a hereditament assessed, by reference to the machinery, plant and other structures which have been placed in or on them, whether by the occupier or someone else, sometimes even if the structure retains its character as a chattel – see per Lord Radcliffe in *London County Council v Wilkins (Valuation Officer)* [1957] AC 362, 378."

99. *Wilkins* was concerned with wooden or corrugated iron huts used as offices, stores and a canteen on a building site. The structures had remained on the site for 18 months and the issue was whether they should be included in the rating list as rateable hereditaments (the building site itself not being rated). It was argued on behalf of the contractor that the structures were chattels, and ought not to be rated for that reason. The passage in the speech of Lord Radcliffe at page 378 to which Lord Neuberger referred is as follows:

> "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. For instance, in 1906, before the rating of plant and machinery had come under statutory regulation by the Rating and Valuation Act, 1925, this House held in *Kirby v. Hunslet Union Assessment Committee* [1906] AC 43 that a factory's assessment to poor rate must be based on the standing equipment of machinery in the factory, irrespective of whether or not it

was affixed to the freehold so as to form part of it. In doing so, as Lord Macnaghten pointed out, the House was doing no more than affirm a rule that had constantly been applied throughout the preceding 50 years."

100. Lord Radcliffe also disagreed with the proposition that the hereditament must be confined to the land alone and could not extend to the structure upon it so long as the structure remained legally a chattel, pointing out, at page 380:

> "When the owners of pipes, cables, posts, etc., are rated as occupiers they are rated in respect of those things themselves, by means of which they occupy land, not merely in respect of the land that is occupied."

101. One extreme example of a hereditament identified only by the presence of a chattel leased to the occupier and by means of which it occupied the land in question, is *Vtesse Networks Ltd v Bradford* [2006] EWCA Civ 1339. The leased chattel was a fibre optic telecommunications network comprising specific pairs of fibres each, in cross-section, the size of a human hair and encased within the cables and ducts of other operators; the fibres were leased to the ratepayer, Vtesse, for use in the transmission of its own signals. The network of leased fibres was held to be a unit of property so as to form a hereditament of which Vtesse was in rateable occupation, notwithstanding the size of the fibres or the fact that it had no physical access to them. Mr Morshead QC relied on this decision as demonstrating that the size, shape or complexity of a unit of property had nothing to do with whether it could be a hereditament, and that the need to use other property in order to enjoy the use of the hereditament was similarly irrelevant.

102. The builder's huts in *Wilkins* and the network of optical fibres in *Vtesse*, though chattels, were rateable property in their own right, and the assessments were of the huts and cables and not simply of the space they occupied. ATMs, in contrast, are non-rateable. Whether the presence of a piece of non-rateable machinery may be relied on to define a hereditament comprising only the site of the machinery is an aspect of the first issue in these appeals.

Previous ATM decisions

103. It is convenient now to consider the existing body of authority, in the Lands Tribunal and in Scotland, dealing specifically with the sites of ATMs.

104. The only English decision concerning ATM sites is *Stringer (VO) v J Sainsbury Plc*, a decision of the Lands Tribunal (T Hoyes FRICS) to which we referred in paragraph 2 above. *Stringer* concerned the cash room in a Sainsbury's supermarket in Leicester which housed "hole in the wall" ATMs belonging to six separate banks and building societies. The cash room and the ATMs were managed in much the same way as the cash rooms at the Worcester and Stroud stores. The issue was whether the room was part of a single hereditament comprising the supermarket or whether the individual ATM sites were six separate hereditaments. The Tribunal treated the issue as a question of fact and held that the ATM sites were not separately rateable. Having

referred to the *Southern Railway* case the Tribunal directed itself that the issue of paramount (and therefore rateable) occupation was to be answered having regard to the position and rights of the parties and the purpose of the occupation of the premises. The ATMs provided a mutually beneficial service and their presence was a complementary joint venture; the banks could not benefit from the arrangement without the day to day oversight and control of the ATMs by the store and their infrequent access to the machines was under the supervision of the store's staff; the store's occupation should therefore be regarded as paramount.

105. *Stringer* was cited in argument before the Lands Tribunal for Scotland in the *Clydesdale Bank* case where it was criticised by counsel, but the Tribunal itself treated the decision as one on its own facts on which it was not necessary to comment. There were important factual differences between the machines and the arrangements in *Stringer* and those in *Clydesdale* which concerned free standing internal ATMs. The Tribunal held that the sites of those ATMs, to which the public had access only from within the host supermarkets and convenience stores, were not to be entered separately in the valuation roll. The Tribunal's decision was upheld by the Lands Valuation Appeals Court (whose members are judges of the Court of Session) where (at [21]) Lord Gill summarised the decision of the Lands Tribunal as follows:

> "..... its essential reason was that before the subjects could be treated as having been carved out of the shop so as to be in the rateable occupation of the Nationwide or Clydesdale - I shall refer to them both as 'the bank' - it would be necessary to identify some degree of occupation by the bank which in a realistic way could be said to interfere with use of the whole premises for the retailer's purposes. The tribunal was unable to find a realistic basis for any such conclusion. It considered it abundantly clear that the machines were primarily for the benefit of the retailer in operating its store efficiently as a trading unit. Balancing the whole evidence as to the physical circumstances, the arrangements for use of the machines and the practical purpose of the occupation of the subjects, the tribunal was satisfied that there was no basis for treating the subjects as separate units of lands and heritages."

106. The Tribunal had warned specifically that care should be taken not to prejudge the issue of rateable occupation by assuming the existence of a separate hereditament and then addressing the issue of occupation by reference only to that unit. At page 16 the assessor's argument was said to have:

> "… proceeded in a series of logical steps. A particular part of the floor could be identified. It was said to be obvious that the floor was 'land and heritages'. It had been given over to a particular use for a substantial period of time. Accordingly the question was said to be simply one of rateable occupation and it was contended that the answer to that question had to be found by looking only at the piece of floor selected for scrutiny. Such scrutiny led to the conclusion that the selected heritable unit was used for banking purposes because it was wholly occupied by the bank's machinery."

The Tribunal rejected this approach (at page 19) because it:

> "… does not take proper account of the inter-related questions of use and identity. The process of creating heritable units by reference to use inevitably makes that use the dominant characteristic of occupation. This cannot be regarded as a sound approach."

107. The Tribunal also cautioned against the use of dicta from cases concerning conventional subjects with distinct physical characteristics, such as banks or shops at a railway station, when the unit of property in question "cannot be identified without examination of agreements relating to the nature of their occupation." Referring to the test of control as a means of identifying which of two occupiers was to be regarded as paramount it also commented (at page 21) that:

> "… it is not always clear that this test can provide an answer where the supposed occupiers are not truly rivals but are both deriving a direct benefit from the same use of the subjects. We think that the question of control must be seen as essentially subordinate to the broad question of purpose."

108. The Lands Valuation Appeals Court affirmed the decision of the Tribunal on the basis that the agreements under consideration conferred no right of occupation of the floor space on the Bank but merely a right of access to moveable equipment which the Bank supplied to the retailer for use by the retailer as one of its retail attractions. The Banks were not in any real sense occupiers of the floor space at all. At [29] Lord Gill gave an alternative reason for his decision, on which the appellants relied:

> "In any event, if the question of rateable occupation had truly arisen, I would have considered that any right of occupation that the agreement could be thought to confer upon the bank was subordinate to that of the retailer."

109. It is apparent from *Clydesdale* that the fact that the ATMs in question were internal and free standing "moveable equipment" was significant. It was accepted by the ratepayers that many external "hole in the wall" ATMs were properly included on the roll and reference was made to a Valuation Appeal Committee decision to that effect concerning such machines at Asda and Sainsbury's stores. The Tribunal cast no doubt on that decision but it noted (at page 23) that "difficult issues undoubtedly arise in relation to occupation of such machines". It considered that the Committee had been entitled to proceed on the basis that the hole in the wall units were properly characterised as being in separate occupation, describing them as "not in fact within another unit of heritage". It is not clear what the relevant facts were but being fixed to the external walls of the premises they would have been more difficult to relocate than internal ATMs which the Lands Valuation Appeals Court repeatedly referred to as "moveable machines".

110. The Lands Valuation Appeals Court subsequently had the opportunity to consider the rateability of hole in the wall ATM sites in *Assessor for Central Scotland Joint Valuation Board v Bank of Ireland* [2011] RA 195. The Court held that such an ATM within a sub-post office and accessible to customers externally 24 hours a day was separately rateable. Referring to *Clydesdale* Lord Gill said that in those cases the

paramount occupation of the ATM sites had been that of the store operators, the banks not occupying in any real sense or only subordinately to the retailer. He distinguished *Clydesdale* at [15] by applying a test of purpose:

> "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."

In the case of the external ATM there was no direct link between the ATM site and the business of the sub-post office, and the sub-post master was not involved in its operation (other than being responsible for re-filling the ATM and simple first line maintenance). The machine could not be regarded as an in-store facility and should be entered separately in the roll.

111. At page 202 Lord Malcolm also distinguished *Clydesdale* principally by reference to considerations of purpose. The free-standing ATMs in *Clydesdale* were regarded as "accessory to the retailers' premises and purposes", whereas the 24 hour street-facing ATM was "not an adjunct to services offered to customers of the Post Office". There was "sufficient disconnection between the usage and purposes of the ATM site and the rest of the premises to indicate independent uncontrolled occupation of the appeal site by the bank for the purpose of the bank's business."

112. The basic principles of the law of rating are the same in England and Scotland. As Lord Sumption observed in *Woolway v Mazars* at [13], in a rating context "one would not expect the law to be any different when the identical questions arise for decision in England." Lord Gill at [34] and Lord Neuberger at [46] said much the same. Although the decisions of the Scottish appellate courts are not strictly binding on this Tribunal or on the VTE they are entitled to considerable respect and for reasons of consistency and comity they ought to be followed unless the doctrine of precedent or some other very good reason prevents it.

113. The VTE nevertheless accepted Mr Morshead's submission that the Scottish approach was wrong in principle and contrary to authority binding on this Tribunal. The first limb of that submission was certainly brave, but Mr Morshead pointed out that for almost 60 years until the Supreme Court's decision in *Woolway v Mazars*, the law of rating in England had diverged from that in Scotland on a matter as fundamental as the identification of the unit of assessment. That unhappy example is a reminder that the Tribunal is not free to follow persuasive Scottish authority if it is irreconcilable with binding authority in this jurisdiction.

114. Once we have dealt with preliminary arguments we propose to consider the extent to which the reasoning in the Scottish decisions points to a resolution of these

appeals, and then to decide whether any authority relied on as binding on the Tribunal is inconsistent with that reasoning. In doing so we are conscious of Lord Neuberger's reminder in *Woolway v Mazars* at [50] that valuation officers and others are entitled to know what approach to adopt, so that as far as possible we should seek a solution "which is not only principled, but which is as clear and practical as possible."

Issue 1 – Are the sites of the ATMs separate hereditaments?

115. There are two aspects to this issue. Mr Mould and Mr Kolinsky 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.

What assumption should be made about the presence or absence of the ATM?

116. For the respondent Mr Morshead submitted that while an ATM was to be disregarded for the purpose of valuation (by reason of regulation 2(b) of the 2000 Regulations) that did not require the presence of the ATM to be disregarded for any other purpose and, in particular, for the purpose of identifying the boundaries of the unit of property which the machine occupied. For that purpose the site of the ATM was to be considered in its actual state, at the point in time when the question of separate rateable occupation arose, which was when the machine was first placed in position. The sites of ATMs were therefore liable to be treated as in rateable occupation by the ATM operator through the presence of the ATM, regardless of the fact that those same machines are themselves non-rateable. Looked at in that way there was no reason why the site should not be a hereditament, applying the approach adopted by the Supreme Court in *Woolway v Mazars.*

117. Lord Radcliffe's consideration of the significance of the presence of chattels on land in *Wilkins* (see paragraph 99 above) was not directed to the issue in this appeal and we do not think it assists either party. The basis of the appellants' argument is the direction in regulation 2(b) that "for the purpose of determining the rateable value of a hereditament" it is to be assumed that the value of any plant and machinery has no effect on rental value. Mr Mould acknowledged that at first sight this provision is concerned only with valuation which, as Mr Morshead argued, makes it an unpromising starting point from which to consider the prior question of whether there is a rateable hereditament at all. Nevertheless, the appellants relied on two further decisions of the House of Lords as indicating that, in principle, the scope of the statutory disregard was more far-reaching.

118. The first of these was *Townley Mill Company (1919) Limited v Oldham Assessment Committee* [1937] AC 419 which concerned the application of section 24 of the Rating and Valuation Act 1925 (a predecessor of regulation 2 of the 2000 Regulations) to the valuation for rating of a redundant mill in which non-rateable

machinery remained. The speeches of Lord Russell at page 430, and Lord Maugham, at page 440, address the scope of section 24 but in his reply to Mr Morshead's submissions, Mr Mould was inclined to agree that these passages were concerned solely with the statutory valuation hypothesis and did not advance his argument.

119. Much greater weight was placed by Mr Mould and Mr Kolinsky on *Kennet District Council v British Telecommunications* [1983] RA 43, in which the issue was whether BT was in rateable occupation of two telephone exchanges for a period of months while they were being fitted out with machinery and were not yet ready to be used as exchanges. The Justices had found that the buildings were in use "for the housing of telephone equipment" despite the equipment not yet being operational. BT argued successfully in the Court of Appeal that during the disputed period they could not and were not making beneficial use of the hereditaments because they had not reached the stage when they were capable of use as functioning telephone exchanges. The House of Lords rejected that contention and restored the hereditaments to the valuation list on the grounds that the Justices had been entitled to find 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.

120. It was common ground that telephone exchange equipment fell within section 21(1)(b) of the General Rate Act 1967 (the immediate predecessor of regulation 2 of the 2000 Regulations) which required that "for the purpose of the valuation of any hereditament … no account shall be taken of the value of any plant or machinery in or on the hereditament." Although the issue concerned rateable occupation, Lord Keith explained at page 45 (and the other members of the House of Lords agreed), that it was first necessary to give close attention to the nature of the hereditament sought to be rated:

> "That hereditament is land with a building erected on it. It does not include any plant or machinery within the building."

Referring to section 21(1)(b) of the 1967 Act he continued:

> "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 s 21 was enacted in the form of s 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".

121. It was only after "the limits of the hereditament liable to be rated" had been defined in this way that the question whether BT was in rateable occupation could be addressed. The hereditaments themselves, bare buildings empty of equipment, were

complete at the beginning of the disputed period and it followed from the finding that BT's business purpose was the housing of telephone equipment in the hereditaments that they were in rateable occupation when equipment was first moved in, even though the equipment was not yet operational.

122. The appellants submitted on the basis of *Kennet* that non-rateable machinery must be ignored for all rating purposes including for the purpose of determining whether the site on which the machinery is placed is a separate hereditament. For his part Mr Morshead contended that *Kennet* supported his argument that such machinery was not to be assumed to be absent, but was simply to be taken to have no effect on value. It was by moving non-rateable machinery into the hereditament that BT began to be in rateable occupation and (despite the wide terms in which Lord Keith had expressed himself) the suggestion that the presence of the machinery should be ignored "for any rating purpose" was contradicted by the decision itself.

123. In *Edmondson v Teesside Textiles Ltd* (1984) 83 LGR 317 the Court of Appeal found *Kennet* of no real assistance in determining whether non-rateable plant and machinery should be assumed to be present, but of no value, or to be absent; the issue in *Edmondson* was the area of a non-operational but fully equipped factory which should be treated as available for occupation. Oliver LJ explained that in *Kennet* Lord Keith had been dealing only with the argument that the hereditament was an incomplete telephone exchange of which the equipment formed an essential part so that, being incomplete, it was as yet incapable of beneficial occupation. The finding that the hereditament was the building alone did not require that it be assumed the equipment had been "magically removed leaving an empty building".

124. In *Edmondson*, just as in this case, there was no suggestion that the machinery formed part of the hereditament and we consider that Mr Morshead was right to distinguish *Kennet* on that basis. The 2000 Regulations are made under a power conferred by paragraph 2(8) of Schedule 6 to the 1988 Act; Schedule 6 itself contains provisions concerned exclusively with valuation, and regulation 2 directs the making of assumptions "for the purpose of determining the rateable value of a hereditament." None of the authorities raised the issue which we have to consider since each concerned a building whose boundaries clearly defined the extent of the relevant hereditament, the existence of which was not in doubt. We do not think they are of assistance in determining whether a unit comprising only the space occupied by an item of non-rateable plant or machinery should be recognised as a hereditament.

125. We note also that the appellants' suggestion that the presence of the ATM must be ignored for all purposes was not raised in either of the Scottish ATM cases.

126. 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.

Self containment and other geographic considerations

127. The alternative basis on which the appellants contended that no separate hereditament could be found to exist in these cases was that the site of an ATM could not be regarded as self-contained. In *Woolway v Mazars* at [47] Lord Neuberger referred to a hereditament as: "a self-contained piece of property (i.e. property all parts of which are physically accessible from all other parts, without having to go onto other property), and a self-contained piece of property is a single hereditament". Mr Mould and Mr Kolinsky argued that the site of an ATM did not satisfy this description because no use could be made of it at all without extensive use of adjoining premises forming part of the host store for replenishment and servicing and, in the case of internally sited machines, for access by the public wishing to use the ATM. Even external ATMs cannot be used by the public except from other land, whether the car park or curtilage of a store or petrol station or the public highway.

128. The putative hereditament was also said to satisfy the second requirement identified by Lord Sumption in *Woolway v Mazars*. Even if the site was taken to be a geographic unity, it was functionally dependent on the host store, the use of which was necessary to the effectual enjoyment of the ATM, so that the site should be regarded as inseparable from the host.

129. The respondent submitted that the ATM site was not different in these respects from a shop unit in a shopping centre, which would require access from areas not forming part of the hereditament for deliveries, repairs, servicing and customer access. The need for easements for access did not prevent an otherwise self-contained unit from being recognised as a separate hereditament.

130. We think there is force in that point. 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. In cases involving more mobile equipment it may additionally be necessary to consider the nature of the occupancy and whether the Bank's right was a right of occupation of a specific unit of property or simply a right of access to a machine wherever it happened to be located. But assuming the occupier of the site had a sufficient right of occupation, identifying the unit of occupation would not be problematic.

131. Although we are satisfied that in many cases the identification at any relevant time of the boundaries of a putative hereditament will not give rise to insuperable difficulty, a simple comparison of ATM sites with self-contained offices or shops will not always be helpful. In some cases such a comparison may not sufficiently recognise the elusive character of a hereditament which is said to comprise only the foot print of a piece of non-rateable plant and machinery the site of which is not fixed by the grant of any interest.

132. Unlike shops, offices or other readily identifiable structures, the sites of ATMs and other non-rateable machines may remain, to a greater or lesser degree, inchoate or indistinguishable until the moment of occupation; even then the question of

ownership and the basis of occupation may be important to the recognition of the hereditament as a separate unit of property. In the case of an ATM operated by the proprietor of a host store on its own behalf there would be no question of the ATM site being a separate hereditament. Nor, where an item of non-rateable machinery is owned and operated by a third party, is there likely to be any question of there being a separate entry in the list until the machine itself is placed in position and the situation and boundaries of the putative hereditament become capable of being defined.

133. In the case of a hole in the wall machine the element of uncertainty will be more limited since the general location of the proposed hereditament will be readily defined; nevertheless, even in that case the extent of the hereditament cannot be fully ascertained until a specific model is installed, and may change if it is replaced by one of a different size.

134. In the Lands Valuation Appeal Court in *Clydesdale* Lord Gill was of the view that an area of floor space within a larger unit of property which was used as the site of an item of moveable property can be entered in the list as a hereditament in separate rateable occupation "but only … if the ratepayer has a right of occupation of it." The Court distinguished between a right of occupation of a unit of property and a right of access to a moveable piece of equipment, not itself rateable.

135. That distinction is a further reflection of the fact that a hereditament is a unit of property and that rates are a tax on property, and it is an important one when considering the status of the sites of non-rateable machinery. We see no reason in principle to doubt the approach taken by the Land Valuation Appeal Court to the type of arrangement under consideration in *Clydesdale* in which the Bank was 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 (and the right of access diverted) when the operational requirements of the Store so required. In such a case there is nothing to identify a unit of property at all before the machine has been put in position, and little to indicate once it is there whether the current site is a distinct unit of property without examination of the rights granted. In such a case no separate hereditament can be said to have been created and no question of rateable occupation by the Bank which supplies the machine arises for consideration.

136. Arrangements of that nature can be distinguished from the different factual circumstances with which we are concerned in most of these appeals. Where premises have been designed or adapted to receive an ATM by the construction of a separate enclosed space to house the machine or by the creation of an opening in an external wall (or both), the physical circumstances will make the identification of a unit of property with the potential to be recognised as a separate hereditament more realistic. 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.

137. That appears to have been the view of the Lands Tribunal for Scotland in *Clydesdale*, which described *Stringer* as a case involving "sites specially adapted to accommodate hole in the wall machines" and noted that "if the machines were absent, the special nature of the site would remain readily apparent." The physical characteristics of the sites gave rise to the question of whether they were to be regarded as part of the store or as separate hereditaments in their own right. Similarly, in *Bank of Ireland* both Lord Gill (at [16]) and Lord Malcolm (at [27]) relied on the physical characteristics of the site ("fixed to the frontage of the building in a clearly defined position … altered to accommodate the ATM") as justifying a different conclusion from that reached in *Clydesdale*.

138. A comparable degree of certainty over the extent of the hereditament will exist in cases where the site of the ATM is fixed by the agreement, although that is not the case in any of these appeals.

Sainsbury's

139. The Sainsbury's appeal concerns hole in the wall machines located at or close to the entrance of the stores, in convenient locations for customers. In our judgment there is no uncertainty over the boundaries of the hereditaments entered in the list by the valuation officers, nor any other reason not to recognise the sites as hereditaments capable of separate rateable occupation from the host stores. From outside the buildings the general location is clearly indicated by prominent signage drawing attention to the presence of the machines which are beneath a protective canopy and (in the case of Stroud) individually lit. The external limits of the hereditament are defined by the hole and the surrounding frame and casing. Within the secure cash room the location of each site has been pre-determined by the original design of the building (or of a later extension in the case of Stroud) which included the necessary openings in the exterior walls. The precise boundaries of the site are defined by the footprint of the machine and are capable of being measured and depicted on a plan.

140. The fact that customers make use of the machines while standing outside the boundaries of the putative hereditament does not compromise their self-containment; nor does the fact that servicing requires access from an area within the secure cash room which is not part of the hereditament. External interaction by customers does not distinguish the sites from kiosks, refreshment stands or ticket booths on station or shopping centre concourses or city centre pedestrian precincts. Essential external servicing is commonplace in property of all sorts, from window cleaning or refuse collection from a shop or office to bill posting on an advertising hoarding. Some functional relationship is to be expected between any unit of property and the property surrounding it and we agree with the submission of Mr Morshead that the need for such arrangements is not inconsistent with the necessary quality of self-containment.

Tesco

141. Tesco's appeal provides examples of no fewer than four different arrangements for the provision of ATMs.

142. The two hole in the wall ATMs at the ground floor entrance to Tesco's Nottingham store face directly onto a pedestrian precinct, rather than onto a supermarket car park, and it is not necessary for the public to enter either the Store itself or land within the occupation of the Store in order to use the ATMs. The machines are in a fixed location and the secure room in which they are housed has been created for that purpose and appears to serve no other function; the secure room is within the ground floor lobby which provides access to the trading areas of the Store at first floor level. The ATMs stand on metal plinths which define the foot print of the unit. We have no difficulty in identifying the ATM sites as units of property with the potential to be recognised as separate hereditaments.

143. 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.

144. The arrangement at Tesco's Rugby store is a third variant. The single ATM is of the hole in the wall variety, housed in a secure room specially constructed in a corner of the ground floor, but it faces onto the shop floor, rather than onto the street and so is accessible only from within the retail area. Entry to the secure room is by means of a single metal door from the forecourt outside the building. Within the store the ATM is in a prominent position adjacent to the check out and immediately visible to any customer entering the building or looking in from the street. The site is permanent and substantial and we consider it is realistic to regard it as a hereditament in its own right, capable of separate occupation.

145. Finally, Tesco's Walsall store has two internal ATMs facing onto the shop floor to the left of the main entrance. These are not located in a secure room, but nor are they free-standing, as they occupy an alcove or recess adjacent to the customer toilets. It is not clear from the evidence whether this alcove was designed specifically to accommodate ATMs but we think that likely. The machines themselves are housed in a pair of metal cupboards similar to the one on the first floor of the Nottingham store which can be pulled out to enable the machines to be securely serviced; when these housings are in their retracted position they fill the alcove and their front face is flush with the internal wall of the store. Although the machines may be identical to the one in use on the first floor at Nottingham, the arrangement is noticeably different; by their location within a distinct space, by the visual impression created by their associated housings fitting closely into that space and by the signage which spans the alcove, these ATMs have an appearance of permanence and solidity which is absent from the arrangement at Nottingham. We are therefore satisfied that the site of these ATMs is also capable of being regarded as a hereditament in its own right.

Co-op

146. All three ATMs which are the subject of the Co-op's appeal are external, hole in the wall machines, housed within secure rooms or cupboards inside the building but accessible to the public from outside. At the Newcastle Under Lyme store the machine faces onto the street immediately adjacent to the customer entrance (it was formerly in a less prominent location at the opposite end of the main frontage). At Keighley it is on the flank wall facing the car park so that customers using the car park pass it on their way into the store. In each case a prominent sign draws attention to the availability of cash. In both of these locations the machines are shielded from view and protected from interference by large wooden cupboards within which servicing can take place. In each case the ATM keyboard and display are also protected by a corrugated steel shutter. At Keighley this shutter serves only the ATM, but at Newcastle Under Lyme the shutter also covers the store's entrance, so that access to the ATM is available only when the store is open and the shutter is raised.

147. The Co-op ATM at Huddersfield is on the front wall of the convenience store at a service station, with public access available from the forecourt without entering the store. The front display panel is not protected by a shutter but the main body of the machine is housed in a secure office where it appears not to be bolted to the floor. The office is also used for other purposes.

148. In all three cases, by reason of their physical characteristics, their prominence and permanence, the sites of these machines are capable of being separate hereditaments.

Cardtronics

149. The Cardtronics appeal concerns the site of the ATM at the Londis convenience store at Harefield. The machine is immediately adjacent to the customer entrance and is an external, hole in the wall ATM, accessible to the public from the pavement in front of the store 24 hours a day. 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 key pad can be accessed and where we assume there would previously have been a window.

150. Mr Kolinsky submitted that the circumstances at the Harefield store were not relevantly distinguishable from those of the Spar convenience stores considered by the Lands Valuation Appeals Court in *Clydesdale,* although the ATMs in that case were internal. He suggested that the hole in the wall itself should be disregarded in defining the site or assumed to be absent, as filling it in would be the sort of minor alteration which an incoming tenant might make on taking a new tenancy. We do not agree. The principle of reality allows it to be assumed that minor alterations have taken place to make a hereditament better suited to the mode of occupation for which

it is assumed to be let, but it does not require such an assumption to be made where the premises have already been adapted for that mode of use and the suggested alteration is to undo the original work. Despite the very modest footprint of the machine and the absence of any other enclosure we consider that the physical adaptation of the premises to create a specific space for an ATM not only confers a degree of permanence on the arrangement, but justifies recognising it as a distinct site, capable of being a separate hereditament.

Conclusion on issue 1

151. 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.

Issue 2: Who is in rateable occupation?

152. It is next necessary to consider in the case of each ATM site capable of being a separate hereditament whether the Bank or the Store is in rateable occupation.

Submissions

153. On behalf of Sainsbury's Mr Drabble submitted that it was the Store, and not the Bank, which was in rateable occupation of the ATM sites as part of its operation of the store as a whole. The Store had exclusive possession of the entire site by virtue of its lease and had not parted with, or shared, possession of any part of it to or with the Bank, which had no more than a bare licence for the shared use of a small area under the day to day management control of the Store.

154. The VTE had been wrong, Mr Drabble suggested, to treat the sites of the ATMs as not being used by the Store and to regard the Bank as their sole occupier. The reality was that the sites of the ATMs were used by the Store to provide cash and other banking services to the public as part of the "offer" of the Store which Mr Drabble characterised generally as the provision of goods and services to customers. Taking that purpose into account together with the day to day control and operation of the site by the Store, justified the further conclusion that the Bank was not the sole occupier of the ATM sites, but rather that they were jointly occupied by both the Store and the Bank. The proposition that this was a case of joint occupation was said to

have been accepted by the respondent in the evidence of Mr Angell. Mr Drabble submitted that the Bank did not have exclusive occupation of the ATM site for a purpose separate from that of the Store; occupation was shared and the joint purpose of both parties was the provision of the same service to customers for their mutual benefit. This distinguished the ATM cases from the shops, banks and other premises at Victoria Station considered in the *Southern Railway* case.

155. Mr Drabble invited us to examine the degree of control exercised over the site by the Store, from the perspective identified by Lord Russell in the *Southern Railway* case i.e. "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". The Store controlled the hours and conditions of access to the Store itself, limiting these to business hours and requiring that access be accompanied by its staff. The Bank's staff and contractors had no access to the secure room, except when requested to attend to remedy faults which the Store's staff, trained for that purpose, were unable to resolve; in practice, therefore, they had only very limited access to the ATM itself, and no unaccompanied access. The Bank was also dependent on the Store's staff for routine maintenance and replenishment of cash and consumables.

156. The VTE ought therefore, Mr Drabble submitted, to have followed *Stringer*, which was indistinguishable on its facts. Contrary to the VTE's apparent understanding, the Tribunal in *Stringer* had not focussed impermissibly on the secure room or security lobby as a potential hereditament, but on whether there were seven separate hereditaments within the store, six of them being the floor-space occupied by the ATMs of the separate financial institutions. It had found that the Store was in paramount occupation and nothing of significance had changed in the relevant operating arrangements in Sainsbury's premises since that decision.

157. Similar submissions were made by Mr Mould on behalf of Tesco and the Co-op. The evidence established that the Store had permitted the Bank to install and operate an ATM on the Store's premises for the purpose of providing services to the Store's customers as part of the retail "offer" of the Store. Neither had exclusive occupation of the ATM site and they shared the common purpose of providing services to customers in the store. The terms on which the Bank installed and operated the ATM machines facilitated rather than frustrated or interfered with the Store's purpose of servicing its own customers. The occupation of the Store was therefore paramount and there was no separate rateable occupation by the Bank.

158. Mr Kolinsky also submitted that the occupier of the Harefield Store was in paramount occupation of the site on which the Cardtronics ATM was situated. Both the host and Cardtronics were in occupation of the site for complementary and mutually beneficial business purposes. There was no element of rivalry in their concurrent occupation and, in particular, occupation by Cardtronics furthered the business purposes of the Store. In practice the Store exercised a greater degree of control than the contractual documents might imply; it was in control of access to the

ATM for replenishing cash and consumables, activities which involved such interruption of the Store's business that they had to be carried out at times dictated by the Store. In the event of disagreement the Store could also exert control over the daily operation of the ATM as it controlled the power supply.

159. For the respondents Mr Morshead submitted that the four leading English authorities to which he made detailed reference (*Southern Railway*, *Laing*, *Wimborne* and *Vtesse*) established the following propositions:

(i) Whether the primary facts support a conclusion that a particular occupier is in rateable occupation is a question of law, not a question of fact.

(ii) The test of rateable occupation falls to be applied in relation to the particular premises in question, and not to any wider premises.

(iii) Occupation must be exclusive for the purpose of the occupier, and it is the occupier's use of the premises which is relevant. The second and third propositions meant that it was irrelevant that the Store regarded it as essential to have ATMs on its premises.

(iv) The questions which influence whether occupation is exclusive also influence whether it is paramount.

(v) In order to apply the correct approach it is necessary to distinguish between activities or controls which constitute the use of the premises, and those which simply affect that use. The only use which was material was the provision of ATM services. The fact that the host provides support without which the ATM could not function is, Mr Morshead submitted, legally irrelevant, as it does not interfere with the use of the site by the Bank.

(vi) Sainsbury's did not relevantly use or operate the ATM machines when its staff replenished them; this assistance enhanced the enjoyment of the site by the Bank for the purpose of its business, but it did not amount to a use by the Store of the site for its business.

(vii) The fact that some of the host's services were essential to the operation of the ATM did not place them in a special category.

(viii) Control over performance of a contract is not enough to show interference with the occupier's exclusive right of occupation.

(ix) The obligation on the Banks to provide ATMs was no different from a keep open clause in the lease of a shop or pub. The Banks had obligations to the Stores to keep providing their own ATM services, not obligations to provide the operations of the Stores. In contrast, the Stores were obliged to provide day to day services to facilitate the operation of the ATMs by the Banks.

(x) Finally, there was no analogy between the ATM and a lodger. A lodger is given special treatment because the landlord is said to occupy the whole

premises for the purpose of his business of letting lodgings. The ATMs were operated by the Banks for their own purposes, and operating them was no part of the Stores' businesses.

160. Mr Morshead submitted that a Store which regarded the presence of an ATM on its premises as beneficial to its business had a choice either to install and operate the machine in its own right or to contract with a Bank to confer on it the exclusive right to provide and operate the equipment. If it took the latter course the Store had to accept the consequence that the sole purpose which would be relevant in determining the rateability of the site of the ATM would be the purpose of the Bank's occupation, namely its purpose of providing banking services to its own customers. The Store's role would simply be to provide the site and its wider retail purpose in occupying the store as a whole would be of no significance whatsoever on the issue of separate rateability. Mr Morshead suggested that, in having regard to the purpose of the Store in its occupation of the whole of its premises, the Scottish decisions were inconsistent with the decision of the Court of Appeal in *Wimborne* and that it was not open to the Tribunal to follow them.

Discussion

161. Where a distinct space has been created to receive a machine and the question arises whether there are rival candidates for rateable occupation of that space, the Scottish cases have focussed on whether, objectively assessed, the dominant purpose of the arrangement is to provide a facility or "retail attraction" for the host's customers, or whether that purpose is insufficiently connected to the host's own business to enable the host's occupation (if any) to be regarded as paramount. That was the crucial factual difference between *Clydesdale*, where the use of the ATM was "part of the business of the shop" (p.20), and *Bank of Ireland*, where to a degree the businesses of the Bank and the sub post office were in competition with each other and the site of the ATM was exclusively dedicated to serving the business of the Bank.

162. It cannot credibly be suggested that the law relating to ATM sites in Scotland has developed by a succession of Judges with exceptional experience in the field of rating repeatedly asking themselves the wrong questions. The Scottish judges have neither ignored nor disregarded Lord Russell's direction in *Southern Railway* that, in cases of "rival occupancy", when determining whose position in relation to occupation is paramount, and whose position is subordinate, what matters are the rights of the parties in respect of the premises in question, and the purpose of the occupation of those premises (the ATM sites).

163. In *Bank of Ireland* the degree of separation between the use of the site and the business of the sub post office was sufficient for the Bank to be seen as in sole occupation. As far as the post office was concerned the site was "dead space" (Lord Gill at [16] with whom Lord Hardie agreed). To Lord Malcolm (at [27]) the degree of disconnection between the uses and purposes of the ATM site and the remainder of the premises indicated "independent uncontrolled occupation of the appeal site by the

bank for the purposes of the bank's business." If, contrary to that view, there was any element of shared occupation "no rivalry is involved" and the bank's rights were paramount. We see nothing unorthodox in that treatment.

164. In *Clydesdale* the basis of the Lands Valuation Appeal Court's decision was the fundamental point that the bank enjoyed no right of occupation so that the issue of rateable occupation did not arise. If that analysis was wrong any occupation by the bank was subordinate to that of the retailer, which was unsurprising given the insubstantial nature of the bank's rights and the movable character of the machines themselves.

165. In the context of ATMs it is only in the decision of the Lands Tribunal for Scotland in *Clydesdale* that the applicability of dicta in *Southern Railway* concerning concurrent occupation of self-contained buildings and structures rateable in their own right was considered. The Tribunal's point, with which we agree, was that the very different context of hereditaments comprising the sites of non-rateable machinery, capable of being moved around the shop floor, required a different approach. The existence of separate hereditaments should not be assumed where no independently identifiable unit could be recognised without considering the nature of the occupancy.

166. When, as in *Clydesdale*, the site of a machine is not fixed and may be relocated with relative ease anywhere within a store, the Lands Tribunal for Scotland obviously thought it made sense to determine the issues of paramount and subordinate occupation by considering whether there was some degree of occupation by the Bank which in a realistic way interfered with use of the whole premises for the retailer's purposes. The same approach was taken by the Lands Tribunal for Scotland in a case concerning the site of vending machines on a railway station concourse: *Selecta UK Ltd v Lothian Valuation Joint Board Assessor* [2010] RA 37. It does not follow that the same approach is required in the case of "sites specially adapted to accommodate hole in the wall machines" and the Lands Tribunal for Scotland did not suggest that it was.

167. Far from disregarding *Southern Railway* the Tribunal in *Clydesdale* explained (at page 21) that in cases of concurrent occupation "the question of rateable occupancy depends upon the question of whose possession is paramount and that is to be considered in regard to the purpose of occupation." The Tribunal's sole modification of the approach taken in *Southern Railway* concerned the value of "control" as a means of resolving the issue of paramount occupation. 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. On the facts the Tribunal considered (and the Lands Valuation Appeal Court agreed) that the use of the ATM site was "for a purpose integral to the basic operation of the store" so that "although physically occupied by the machine owned by the bank, the substantive purpose of

use of the site can properly be described in terms of being to facilitate ready access to cash for customers of the company." That view of the facts led to the conclusion that the Store was in rateable occupation; if it is assumed (contrary to the approach on appeal in *Clydesdale*) that a moveable machine is capable of being a separate hereditament, we would have reached the same conclusion on those facts.

168. We therefore do not agree with the VTE or with Mr Morshead that the approach taken in the Scottish cases was defective or unreliable as a guide to the resolution of these appeals. The VTE appears not to have appreciated the factual differences between the machines and arrangements under consideration in *Clydesdale* and most of those with which it was concerned.

169. We also differ from the VTE in that we agree with the appellants that 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.

170. Lord Russell explained in *Southern Railway* 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" and not the extent and quality of their occupation of the larger railway station or store premises of which the putative hereditament forms part. In these appeals (to the extent that they involve fixed sites) it is therefore necessary to address the question of rateable occupation in the conventional way, by examining the degree to which there is concurrent occupation of the ATM sites and considering which party's possession is paramount and which subordinate.

171. When applying that approach to external hole in the wall ATMs, the sites of which are identifiable as separate units of property, and which are accessible by the public at large without entering the store, there is no need to consider the occupation of the store as a whole. What matters is the purpose for which the ATM has been installed on the external wall of the building.

172. In *Wimborne* (at page 239) Lloyd LJ explained that when considering the purpose for which premises are occupied it is "the object of the activity in question, rather than the motive behind the activity" which is important. Mr Morshead relied on this distinction as rendering irrelevant the evidence adduced by the appellants to explain their reasons for having ATMs in their stores. Liability to pay a tax on property could not, he submitted, sensibly depend on evidence of the subjective motivation of the occupier. To give weight to private motives would render the question "unjusticiable" Mr Morshead suggested.

173. We agree that the individual business decisions of retailers and their reasons for those decisions have very little to contribute to the determination of these appeals. The relevant purpose for which a site is being used cannot depend on the subjective intentions of the occupiers of the site ("the motive behind the activity" as Lloyd LJ put it), but must be objectively ascertainable. In any event, much of the evidence of motivation in these appeals concerns what is readily observable in town centres and out of town shopping locations and does not require to be supported by a specific explanation from the proprietor of the Store. The availability of ATMs in almost all larger supermarkets and in many smaller stores demonstrates their attraction to customers, who clearly wish to have access to the services provided by ATMs and find it convenient to do so in the location where they shop. Retailers naturally wish to satisfy that expectation to attract and retain their customers.

174. Nevertheless, retailers could choose to satisfy the demand for ATM services in a number of different ways, as the facts of these appeals demonstrate. They may do so by locating a machine entirely within their own premises, where it can very readily be seen as an additional facility offered by the Store to its own customers. Alternatively the Store may choose to locate an ATM on an exterior wall. By choosing to locate the public face of the machine outside the premises the Store minimises the obstruction or interference which customers using the facility may create on the shop floor. More significantly, the choice of an external ATM is also a choice to make the service separately accessible to the public at large, irrespective of the usage of the other services provided within the store.

175. The survey evidence was not undertaken on a consistent basis by the different appellants and in some respects it is difficult to interpret. The survey at Sainsbury's Stroud and Worcester stores suggests that a large proportion (almost half) of those who were observed using an ATM were not also observed using the store (it is not clear whether a proportion of these ATM users may already have used the store before using the ATM). The Co-op survey showed that 62.5% of customers did not use the ATM and that 37.5% of customers used the ATM of whom just over half went on to use the shop; we infer that the remaining 46% of ATM users either had already shopped before using the ATM or did not shop at all. Tesco's survey was a smaller interview based exercise but of 215 ATM users interviewed 23% were not using the store. The Cardtronics survey data is difficult to compare; it showed that of a sample of 60 store customers surveyed 74% also used the ATM at least weekly, and that 91% of ATM users were also customers of the store; the survey did not indicate what proportion of users of the ATM used the store when they used the ATM. Doing the best we can with these results they suggest to us that, as would be expected, the location of an ATM outside a store, even where it is accessible only by coming into the car park, significantly widens the pool of users of the ATM service beyond the customers of the Store itself.

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.

178. Nor do we regard the arrangements for servicing ATMs as of much significance, one way or the other. The evidence shows that different levels of involvement by the host store are possible, even within the scope of a single agreement (as illustrated by the distinction between "occupier maintained" and "remote" ATMs in the Sainsbury's agreement). In the context of a tax on units of property, the manner in which a particular occupier chooses to arrange for servicing, cleaning and maintenance does not change the physical character of the property or the purpose of its occupation. Too close a focus on day to day practical arrangements in determining who is in paramount occupation would risk introducing undesirably narrow and impractical distinctions between different businesses occupying similar property. A greater level of involvement by the Store in front line servicing seems also to result in a higher annual fee (in the case of Sainsbury's a fee of £11,082 was agreed for each ATM maintained by the Store, but only £3,783 for a "remote ATM" where the Bank was responsible for all servicing). The payment of a fee makes it more difficult to regard the servicing provided by the Store as an aspect of its occupation of the site of the ATM. For those reasons we regard front line servicing practices as subsidiary to the physical characteristics of the sites and the purpose of their occupation.

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.

180. Many ATM customers (77% or 80% in the Tesco and Co-op surveys and perhaps a higher proportion in the case of users of Cardtronics' machines) will also be

customers of the host store, but for most of them the business they wish to transact is likely to be unconnected to the other services of the Store, and (in larger stores at least) only a small proportion of those customers is likely to use the ATM to provide cash to spend in the Store. The evidence on exactly what that proportion might be is limited and we accept that it is likely to be significantly higher at smaller convenience stores, as Cardtronics' evidence suggests. The extent to which an ATM at a store is used as a source of cash to be spent immediately in-store is likely to depend on the availability of alternative sources of ATM services and other very local factors which cannot sensibly form part of an assessment of liability to tax. In any event we do not consider the proportion of ATM users who use some of the cash they have withdrawn to make a purchase in the host store is a significant factor, given the evidence adduced by Cardtronics that (in its stores) the total average spend by such users was only about £13.

181. The presence of an ATM in a retail location is no doubt a convenience for all its users, but when users of an external ATM withdraw cash, top up a mobile phone, check the balance of an account or perform some other banking transaction we consider it is more appropriate to characterise them as customers of the Bank using a service which happens to be available at their local supermarket or convenience store, rather than as customers of the Store making use of an "in-store facility". We therefore agree with the approach taken in Scotland, exemplified by the Lands Valuation Appeal Court's decision in *Bank of Ireland*, that external ATMs available to the public at large should not be regarded as an in-store facility.

182. We have considered whether a different approach is required in the case of very small stores, such as the Londis convenience store at Harefield which is the subject of the Cardtronics' appeal. The circumstances attending the introduction of an ATM into a very small store are distinctly different from those encountered elsewhere. In a very confined space the minimal segregation which it is possible to achieve between the two uses creates a degree of rivalry or interference which is absent from larger stores where there is the opportunity to accommodate the ATM in a secure room or housing of some description. The examples we have seen demonstrate that where space is available the choice is invariably made to secure the ATM behind a wall or within a housing of some sort either at all times, or when it is being serviced. That is not an option in the smallest stores, and we have considered whether that makes a difference.

183. We were shown photographs of the ATM in the Harefield store being serviced. The ATM cabinet is surrounded by goods offered for sale and occupies space which would otherwise be fully used for retail purposes. The whole of the aisle is blocked when the machine is opened for servicing, which sometimes requires that the store close temporarily. In this situation, as we have already said, we consider it is more realistic to regard the arrangement as involving an element of rivalry or interference.

184. The physical segregation of an external ATM site from the general retail activities of a store (even if it is within a secure room which is also used for other purposes) contributes to the recognition of the Bank as being in paramount occupation

of the site because the activities of the Store in and around the site are restricted. Where physical segregation cannot be achieved we have nevertheless concluded that the case for regarding the Bank as being in paramount occupation of a fixed ATM site is just as strong. The presence of the ATM imposes to a greater degree on the practical operation of a very small store, even to the extent on some (relatively rare) occasions of requiring that the store be closed temporarily to enable cash to be replenished. In our judgment this imposition on the use and management of the store points to the paramountcy of the Bank's occupation of the ATM site. On the other hand, the fact that this level of interference is tolerated by the Store confirms the benefits which the Store must see in having the ATM available, which might be said to enhance the case for regarding the machine principally as part of the retail offer of the Store. We do not think that this conclusion would be justified as the interference consequent on re-provisioning the machine would be no different if the ATM was internal and served only the Store's customers and not the public at large. An external ATM is a facility available to all, whether or not they are customers of the Store, and in our judgment that justifies treating the Bank as the party in rateable occupation.

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.

186. We are therefore satisfied that the sites of externally accessed ATMs should be entered as separate hereditaments in the occupation of the Bank.

187. The ATM sites which fall into that category in these appeals are those at Sainsbury's Stroud and Worcester stores, at the entrance to Tesco's Nottingham store, at all three Co-op stores, and at the Londis store in Harefield. We make no distinction in the case of the Co-op store at Newcastle under Lyme, where the ATM is available only during the trading hours of the store because at other times it is concealed behind the shutter which protects both the entrance and the machine. The purpose of the ATM is to provide ATM services to all who wish to use them, whether Co-op customers or not, and the fact that those services are not available round the clock does not alter that purpose.

188. We appreciate, of course, that at least as far as Sainsbury's stores are concerned, this conclusion is inconsistent with the conclusion of the Lands Tribunal in *Stringer*, which concerned a very similar arrangement for the provision of external, hole in the wall ATMs at Sainsbury's store in Leicester. We are not unduly disturbed by our divergence from the Tribunal's 1991 view, which it regarded as a decision on the facts applicable to a proposal made in March 1987. We are concerned with entries in the 2010 rating list and the passage of time has obviously brought changes in payment technology which are relevant to the assessment of the purpose of the occupation. Although there was no evidence in *Stringer* of the extent to which bank notes dispensed from the six ATMs in the Leicester store were used to purchase goods from the store, the "ready availability of bank notes to be spent in the supermarket" was clearly a more significant motivation for the host store in 1987 than it was, on the evidence before us, in 2010. The Tribunal in *Stringer* also placed considerably more weight than we have on the role played by Sainsbury's employees in providing front line servicing for the ATMs; as we have explained we do not regard this as a factor to which much significance should be given. It is also relevant that *Stringer* has not commanded universal acceptance and that, in Scotland at least, it has not been regarded as authoritative.

189. It remains to consider the proper treatment of internal ATMs, those which face onto the shop floor and are accessible only by those who have entered the store and can therefore be assumed (in the great majority of cases) to be customers of the store. Only the pair of ATMs in Tesco's Walsall store and the single machine in its Rugby store provide examples of this mode of operation.

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.

Disposal

193. For these reasons we are satisfied that the appeals in respect of the first floor of Tesco's Nottingham store (where there is no separate hereditament in the suggested location) and its Walsall and Rugby stores (where the sites are for internal ATMs) should be allowed but that the remaining appeals should be dismissed and the decision of the VTE affirmed.

194. At the conclusion of the appeal both sides indicated that they would be likely to wish to appeal an adverse decision to the Court of Appeal. Subject to seeing the proposed grounds of appeal we are minded to grant permission to appeal as the issue is clearly one of considerable importance.

195. This decision is final on all matters other than costs, on which subject the parties may now make submissions in writing.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)

12 April 2017

Costs

1. The Tribunal has received submissions from each of the parties on the issue of costs.

2. As we have been reminded, the general rule in appeals from the VTE is that the successful party is entitled to have its costs paid by the unsuccessful party unless there is some reason to make a different order.

3. At an earlier stage in the appeals the respondents reached agreement with Cardtronics that neither would seek the payment of their costs of the appeal from the other in the event that they were successful. It is therefore unnecessary for us to consider Cardtronics' position further.

4. The respondents seek an order that Sainsbury's, Tesco and the Co-op each pay the respondents' costs of their appeals. That application is made on the basis that the respondents were successful in the appeals brought by Sainsbury's and the Co-op, and although not wholly successful in the appeals brought by Tesco, successfully resisted the grounds of appeal advanced by Tesco and were partially unsuccessful only on the basis of an analysis which had not been advanced by Tesco.

5. The submission made on behalf of Sainsbury's and the Co-op is that the parties should each bear their own costs of the appeals. This is said to be justified because the appeals were necessary to bring clarity to the treatment of ATM sites, and were therefore in the public interest, and because the Tribunal rejected the analysis advanced by the respondents, on which they had succeeded before the VTE.

6. Tesco contends that the appropriate order is that the respondents pay 75% of its costs of its appeals because it has succeeded in its Rugby and Walsall appeals and has been partially successful in its Nottingham appeal (in the case of one of the three ATM sites). The respondents reject that analysis and suggest that the factual distinctions on which the Tribunal based its determination were not identified as significant by Tesco and that its success was "entirely adventitious" since similarly situated ATMs can be found in the portfolios of each of the appellants.

7. The identification of the successful party is complicated by three features of these appeals.

8. The first is that, as all parties have recognised, the Tribunal did not fully accept the analyses put forward by any of them, but chose a more nuanced middle course with the result that some ATM sites are liable to be included in the list while others are to be excluded.

9. We are not inclined to give great weight to that factor. In each appeal there was a single issue – rateable or not-rateable – and our appreciation of the various aspects of that issue was greatly enhanced by the helpful submissions we received from all parties. In identifying the successful party, and considering the degree of success achieved in each case, we therefore prefer to have regard more to the outcomes of the appeals than to the route by which we have arrived at those outcomes.

10. The second complicating feature pulls in the opposite direction, away from a focus on the outcomes of the individual appeals. It is that the sites chosen for consideration in these appeals are each representative of the sites of many thousands of ATMs in the premises of the various appellants. We anticipate, therefore, that

despite losing their own appeals, both Sainsbury's and the Co-op will benefit from the success achieved by Tesco on some of its sites. Despite being successful in two of its three appeals, the Tesco estate as a whole is likely to be as adversely affected by our conclusions as those of the other operators. We are not aware of any information about the relative numbers of the different types of ATMs (fixed or free-standing, internal or external) which would enable us to gauge the practical consequences of our conclusions for each of the appellants, but we think it unlikely that there will be much difference between them.

11. The third factor is that each of the appeals raised issues of general importance in the context of specific sites. It was therefore necessary for costs to be incurred in the preparation of site-specific evidence, as well as evidence of significance to all ATM sites.

12. We think it realistic to regard the respondents as having enjoyed the greater success in the appeals. The appeals concerning six of the nine sites were dismissed and the decisions of the VTE were affirmed. The respondent successfully resisted the argument advanced by Tesco and the Co-op that in principle ATM sites were not capable of being separate hereditaments. They also succeeded in the issue of rateable occupation in most of the appeals and we think it likely that, as a result, most ATM sites will be rateable.

13. The respondents' success was not total. They failed in two of the three Tesco appeals and were only partially successful in the third. The ambitious proposition that the analysis by the Scottish Tribunals was wrong and provided no assistance in the resolution of these appeals was rejected.

14. As for Tesco it might be said that it secured a partial tactical victory at the expense of a more substantial strategic defeat. The site-specific costs incurred in achieving a successful outcome to its Walsall and Rugby appeals, and partial success at Nottingham, must be balanced against the costs of generic questions which have, mostly, been answered in the respondents' favour. On balance we think it right that there should be no order for the costs of the Tesco appeals.

15. In the case of Sainsbury's and the Co-op the starting point is that in each of their appeals the respondents were the successful party and should be entitled to their costs. Nevertheless, we think it appropriate to acknowledge that Sainsbury's and the Co-op will benefit from the outcome of the Tesco appeals and to make a modest allowance in their favour as a result.

16. We reject the invitation to make no order on the ground that the bringing of the appeals was in the public interest and has brought clarity which was previously absent; these appeals are commercially driven and at each of the Sainsbury's and Co-op premises selected for scrutiny the respondents' decisions to make separate entries for the ATM sites has been vindicated.

17. As a fall back position it was also suggested by Sainsbury's and the Co-op that they should each be responsible for 25% of the respondents' costs. We do not think that would be a fair reflection of the degree of success achieved by the respondents and it would result in the largely unsuccessful parties sharing unjustifiably in the benefits of the arrangement between the respondents and Cardtronics.

18. It is necessary to distinguish between costs incurred by the respondents which were common to all appeals and the costs specific to individual appeals (in particular the preparation of the respondents' own evidence and, more importantly, their consideration of the voluminous evidence relied on by the appellants). The respondents should recover all of the site-specific costs of the Sainsbury's and Co-op appeals. On the other hand there is no reason why Sainsbury's and the Co-op should be responsible for the costs incurred by the respondents in dealing with the detail of the Cardtronics and Tesco appeals. Subject to the allowance we have mentioned, the respondents should also recover from Sainsbury's and the Co-op the whole of their non-site specific costs.

19. We have suggested to the parties that it would be convenient for the Tribunal to decide on the proper apportionment of costs between the generic issues of principle and issues relating to specific sites, and none has dissented from that suggestion.

20. Based on our knowledge of the material and arguments presented to us, we consider that it is appropriate to assume that site-specific costs and generic costs each account for half of the respondents' total costs of the appeals. We acknowledge that this approach may be rough and ready but it has the benefit of simplicity and in our judgment it represents a fair apportionment of the respondents' total costs. It will also avoid the need for the parties and the Registrar, in the event of disagreement, to engage in a detailed debate over the relative costs of each individual appeal,

21. The respondents should recover their generic costs (50% of their total costs) subject only to an allowance to reflect the extent of the appellants' collective success on issues of principle. We assess that allowance as 20% of the respondents' generic costs. The respondents should therefore recover 80% of their generic costs (40% of their total costs) of all appeals.

22. The respondents should also recover the whole of their site-specific costs of the Sainsbury's and Co-op appeals. We assess those in each case as representing 12.5% of the respondents' total costs of all of the appeals.

23. On that basis, in aggregate, the respondents are to recover 65% of their costs of all appeals jointly and severally from Sainsbury's and the Co-op.

Martin Rodger QC

Deputy Chamber President

A J Trott FRICS

Upper Tribunal Member

18 July 2017