UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0237 (LC)
UTLC Case Number: RA/47-48/2019
RA/50/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – PROCEDURE - statutory interpretation and the use of Explanatory Notes – contiguous and interconnected premises - occupation – control - appeals dismissed.

CONJOINED APPEALS AGAINST DECISIONS OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

LIBRA TEXTILES LIMITED T/A BOUNDARY MILLS STORES — **Appellant RA/47-48/2019**

CENTRIC ASSETS LIMITED — **Appellant RA/50/2019**

and

Respondents
RA/47-48/2019
RA/50/2019

RITCHIE ROBERTS
DAVID ALFORD
(VALUATION OFFICERS)

Re: RA/47-48/2019: Shop and Premises, Boundary Mills, Vivary Way, Colne, Lancs, BB8 9NW
Re: RA/50/2019: Units 1 and Units 2-4, Elliott Printing Works, Alchorne Place, Portsmouth, PO3 5QL

Judge Elizabeth Cooke and Peter McCrea FRICS
24 June 2020
by Skype for Business

Richard Glover QC for Libra Textiles Limited
Cain Ormondroyd for Centric Assets Limited
Alistair Mills for the Valuation Officers

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The following cases are referred to in this decision:

John Laing & Son Limited v Assessment Committee for Kingswood Assessment Area [1949] 1 KB 344

Sainsbury's Supermarkets Limited and others v Sykes (VO) [2017] UKUT 138 (LC)

Cardtronics UK Limited v Sykes (VO) [2020] UKSC 21

Holywell Union assessment Committee v Halkyn District Mines Drainage Co [1895] AC 117

Westminster Council v Southern Railway Co [1936] AC 511

Wimborne District Council v Brayne Construction Limited [1985] RA 234

Woolway (VO) v Mazars LLP [2015] UKSC 53

Roberts (VO) v Backhouse Jones Limited [2020] UKUT 38 (LC)

John Reeves (Listing Officer) v Randy Northrop [2013] EWCA Civ 362

The Mayor and Burgesses of The London Borough of Brent v Ladbroke Rentals Limited [1981] RA 153

R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38

R(D) v Secretary of State for Work and Pensions [2010] EWCA Civ 18

Introduction

1. This is the Tribunal's decision in conjoined appeals from two decisions of the Valuation Tribunal for England ("the VTE"). Both relate to proposals to alter the 2010 non-domestic rating list on the basis that property shown on the list as two hereditaments should have been shown as a single hereditament, because the two units of occupation are both contiguous and interconnected; in both appeals the proposal was made at a time that would ordinarily have been too late for an alteration of the 2010 list, but each appellant claims to have made the proposal in time by virtue of regulation 5(3) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 ("the 2009 Regulations"). In each case the VTE decided that the proposal was out of time and therefore invalid.

2. We heard the appeals by means of a remote video conferencing platform on 24 June 2020. Libra Textiles Limited were represented by Mr Richard Glover QC; Mr Cain Ormondroyd of counsel represented Centric Assets Limited while the respondent Valuation Officers were represented by Mr Alistair Mills of counsel. We are grateful to all three.

3. In the paragraphs that follow we begin by setting the factual scene in relation to both appeals, without at this stage going into the detail of the evidence. We then address an issue that arises in only one of the appeals, namely whether the two premises were in common occupation for the purposes of non-domestic rating. Having concluded that they were, we then set out the law on contiguous and interconnected premises and finally discuss the issue common to both appeals, namely whether the proposals were valid or were out of time.

The factual background in outline

The Boundary Mill appeal

4. The appeal brought by Libra Textiles Limited trading as Boundary Mill Stores ("BMS") relates to premises in Colne, Lancashire. The 2010 rating list for Pendle showed two hereditaments: a shop and premises known as Boundary Mill, and a fish and chip restaurant and premises known as Banny's. It is BMS' case that the two premises are a single hereditament.

5. BMS provides premises for the sale of discount clothing by a wide range of retailers. The Colne site is its flagship outlet. Its clients are mostly over 50; they arrive by car or by coach and many of them will spend the whole day there. There is little or no passing "footfall". The shop and the restaurant are approached by a single entrance to the car park from the public highway, and a mini-roundabout segregates the approach to the store and the fish and chip restaurant car parks. The shop is a large building within which retailers such as Marks and Spencer, Portmeirion, or Branbantia sell their goods. There are some food and drinks outlets in the store, operated by BMS itself. The Executive Chairman of BMS is Mr Richard Bannister.

6. The fish and chip restaurant is in a separate building and it has a separate car park; it is operated by Banny's Limited, a company of which the directors and shareholders are Mr Richard Bannister, his wife Janine Bannister and their son Mr Ben Bannister. We refer to father and son as "Mr Bannister" and "Ben" for the avoidance of confusion and without intending any disrespect to Ben. The day-to-day running of Banny's Limited is in Ben's hands, and the company was formed in order for him to have a business to run when he left school.

7. Between the shop and the restaurant are the two car parks and a hedge. BMS owns the freehold of the whole site. We shall have more to say about the business relationship between BMS and Banny's Limited when we come to discuss the occupation issue, which is whether BMS is in rateable occupation of the whole site including the shop, restaurant and car parks or whether Banny's Limited, and not BMS, is in rateable occupation of the restaurant and the restaurant's car park (to which we refer as "Banny's").

8. If the shop and restaurant are in common rateable occupation, then it is not in dispute that they are contiguous, being separated only by a hedge and without any intervening space or land occupied by anyone else, and that they are interconnected meaning that each can be accessed from the other without passing over land occupied by any other person. BMS says that they should therefore have been rated as one hereditament in the 2010 rating list as they are in the 2017 list.

9. Two proposals for alteration of the 2010 list were made on 13 February 2019, one with effect from 1 April 2010 and one with effect from 13 April 2010 because of an alteration made on that date to the restaurant. We refer to the two as one proposal in the decision, and our decision applies to both.

The Centric Assets appeal

10. The appeal brought by Centric Assets Limited relates to Units 1, 2, 3 and 4, Elliott & Co Printing Works, Alchorne Place, Portsmouth. At present Unit 1, and Units 2 to 4, are separately rated. They are industrial units, and it is not in dispute that they are occupied by Centric Assets. It is not in dispute that they are contiguous, and that they are interconnected because each can be accessed from the other without entering land in the occupation of any other person.

11. A proposal was made to alter the 2010 rating list, so as to show Units 1, 2 3 and 4 as one hereditament instead of two, on 6 March 2019 with an effective date of 30 October 2014 when the premises came into common occupation. The only issue in the Centric Assets appeal is whether the proposal was valid. That is an issue of law and there is nothing else we need to say about the facts in the Centric Assets appeal.

The occupation issue

12. In the Boundary Mill appeal in the Tribunal the VOA has raised a point that had not been in issue before the VTE, namely whether the appellant was in rateable occupation of the

two premises, Boundary Mill Stores and Banny's. Obviously if it was not then the two premises cannot in any event form a single hereditament.

Rateable occupation and paramount occupation: the law

13. Business rates are a tax on property, payable by the person in rateable occupation of the unit known as a hereditament. Where there is more than one occupier, only one will be in rateable occupation, namely the one whose occupation is paramount.

14. Any analysis of occupation in the context must begin with the statement of the "ingredients" of rateable occupation in *John Laing & Son Limited v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344, where Tucker LJ said at 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."

15. The second ingredient, exclusive occupation, is not – as we shall see (paragraph 22 below) – incompatible with another person being in occupation; exclusive occupation in this context does not mean exclusive possession.

16. In *Sainsbury's Supermarkets Limited and others v Sykes (VO)* [2017] UKUT 138 (LC) the Tribunal had to decide whether supermarkets, in whose premises ATMs were situated, were in occupation of the space where the ATMs sat. At paragraph 169 the Deputy President and Mr Andrew Trott FRICS said:

> "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."

17. In *Cardtronics UK Limited v Sykes (VO)* [2020] UKSC 21 the Supreme Court (at paragraph 49) approved that finding.

18. The Supreme Court's decision in *Cardtronics* is the leading authority on paramount occupation, which has to be considered where occupancy is shared. Lord Carnwath (with whom Lord Reed, Lord Kerr, Lady Black and Lord Kitchin agreed) went through the authorities; he warned (at paragraph 26) of the danger of over-analysis, and said that the underlying principles were authoritatively laid down in *Holywell Union Assessment Committee v Halkyn District Mines Drainage Co* [1895] AC 117, where Lord Herschell said at page 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."

19. The key concept in determining whose occupation is paramount is control. *Westminster Council v Southern Railway Co* [1936] AC 511 was about the occupation of retail units at Victoria Station including bookstalls and a chemist's shop. It was held that the retailers were in rateable occupation of their own units, which they operated autonomously and without the railway company playing any role in the running of their business. At page 530 Lord Russell commented on the example of the landlord and the lodger from *Halkyn* and said:

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

20. At page 532 he added:

> "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."

21. What matters is control; Lord Wright MR at page 555 said that the "theory of the lodger" did not depend on the fact that the landlord lives in the house but on the fact that "he still retains control for purposes of his business of the whole house."

22. In *Wimborne District Council v Brayne Construction Limited* [1985] RA 234, Lloyd LJ commented at page 243 on the concept of exclusive occupation, and the possibility of more than one occupier being in exclusive occupation (see paragraph 15 above):

> "… [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."

Occupation: the facts

23. We turn to the undisputed evidence of the one witness of fact, Mrs Jill Laws.

24. Mrs Laws is Mr Bannister's assistant. Over the last 26 years she has been actively involved in all aspects of the development and growth of the BMS business.

25. Mrs Laws explained BMS' business model, in which retailers take concessions within the store to sell their excess stock, paying a concession fee linked to turnover. An offer to grant a concession (in legal terms, a contractual licence to sell goods in the store, in some cases in a defined area and in other cases in a variable area) will depend upon whether BMS considers the retailer will be attractive to its customer base – the greater the range of offer, the greater the footfall, the greater the turnover and revenue. Another important factor is "dwell time", and to encourage customers to stay at the store it is important to offer ample catering facilities. While BMS exercises control over its retail concession partners (as Mrs Laws calls them), the catering offer is so central to the success of the business that BMS retains direct control over it.

26. BMS also has direct control over advertising and marketing. Concession partners are prevented from carrying out their own marketing but instead are required to take part in BMS' promotional activities, including on television, radio, mailings and in house promotions. All of the concession partners apart from Marks and Spencer are required to mark down prices by 10% from time to time, as part of a general promotion.

27. As for the Vivary Way site, Mrs Laws explained the background to its development as BMS' new flagship location after its acquisition in 2005. It had sufficient space to realise Mr Bannister's long-held ambition to offer fish and chips on the site, expected to be a major draw to customers. The fish and chip restaurant was always intended to be located away from the main unit, because while "everyone loves fish and chips", the smell can cause difficulties in a clothing store. The planning authorities required an attractive building at the entrance to the site, and so to solve both issues it was decided to locate the fish and chip outlet there (we have described the access arrangements in the introduction).

28. At the time of Mrs Laws' statement, BMS operated 234 concession agreements at varying commission rates where BMS provide the staff, and a further 193 where the concession partners staff the area themselves. With the exception of Banny's, all are controlled by written agreements. Banny's Limited was formed as a company for Ben to run when he left school in 2006; the intention was that he would operate the fish and chip restaurant,

learn how to run a business, and generally "earn his stripes". While Mr and Mrs Bannister were also Directors, the intention was for Ben ultimately to own the company himself. The plan was that Banny's Limited would operate the fish and chip restaurant on an unwritten concession agreement, paying a turnover rent.

29. Mr Banister arranged for his son's training, set up a mentoring arrangement for Ben with BMS' catering manager, and engaged a local couple with experience in running a fish and chip shop to act as managers for Ben until 2014. Ben is the managing director of Banny's Ltd.

30. BMS own the large deep-fat fryers, but Banny's Limited owns the rest of the equipment. Banny's controls the menu, costing and pricing, and pays a percentage of turnover to BMS. BMS' finance director is a director of Banny's Ltd, and the company's accounts are run in the main building by BMS staff, as is HR for the staff of Banny's Limited and the leasing, insuring and servicing of company vehicles. Ben has developed the menu and pricing, in the understanding that the restaurant is to remain a competitively-priced fish and chip restaurant; any significant change would require BMS' approval. As with most other concessions, Banny's must comply with discount promotions, and the restaurant is required to remain open for an hour after the main store so that customers are encouraged to stay to the end of the day and then have a meal. Banny's Limited has its own keyholders, but BMS retains keys for emergency purposes.

31. Mrs Laws expressed the view that Banny's Limited is more closely monitored than other concession outlets because of the close contact between Ben and Mr Banister. Instead of the regular formal meetings that BMS has with its concession partners, there is a constant sharing of information and of BMS' requirements.

Occupation

32. Looking at the facts in the light of the law, we have to ask first whether BMS was in occupation of Banny's at all. Only if it has not parted with possession of Banny's restaurant and car park can there be any possibility of BMS being in paramount, and therefore rateable, occupation of Banny's. The essence of Mr Mills' argument on these points for the respondent is that BMS does not retain sufficient control of Banny's to be regarded as being in occupation of it, let alone in paramount occupation.

33. BMS is a legal person, not a natural one; it can only occupy premises by operating and controlling them. Its business is the operation of outlets for the sale of discount clothing, and to that end it purchased the whole site, built the shop and restaurant, and offered concessions to the various retailers. It operates food and drinks outlets in the store. It does not itself operate the fish and chip restaurant, which is run by Banny's Limited, but on terms that severely limit its autonomy. BMS controls the opening hours and all the publicity, as well as setting the broad outlines of pricing and the menu. BMS provides training and mentoring, and provides accounts and HR services.

34. Mrs Laws has explained that the only reason why Banny's is run by a different business entity is the fact that it is Ben's business, set up for him to provide him with a job and a

training opportunity. We do not think that the origin of the arrangement is relevant to the question of occupation. We have to look at the business arrangement and the fact of control, without regard for the reason why the arrangement was set up.

35. Banny's is part of what is on offer at the Boundary Mill site; it is part of what keeps customers there, offering a meal during the day or even after the shop has closed so as to maximise what Mrs Laws calls "dwell time". Turning to the four ingredients in *John Laing*, BMS is in actual occupation, its occupation is exclusive for its particular purpose (because no other business can carry out that purpose there); it derives a profit from that occupation, and its occupation is in no sense transient.

36. BMS cannot, as things stand, do anything else in the building where Banny's Limited operates; it cannot for example allow a concession partner to sell clothing there. The position is similar to that of the supermarkets in the ATMs case, which restricted their own ability to use the space in which the ATMs sit so as to further their own business and to share the economic fruits of the use of that space. The fish and chip restaurant is an integral part of BMS' operation, and the restaurant business is under the tight control – whether contractual or informal is unclear, but control it is - of BMS and is carefully designed for consistency with what happens in the store and to maximise BMS' profits.

37. So we have no difficulty in finding that BMS is in occupation of Banny's in a *John Laing* sense.

38. That being the case, we equally have no difficulty in finding that, by virtue of the control we have already highlighted, BMS is in paramount occupation. Both BMS and Banny's Limited are in exclusive occupation in the rating sense (see paragraphs 15 and 22 above), occupying Banny's for their respective purposes. As discussed above, the crucial concept is control, and it is apparent that the situation is very different from that of the retailers in the *Southern Railway* case. Banny's Limited has very little autonomy; BMS plays a major role in the way the business is run, keeping tight control over almost every aspect of it.

39. Mr Mills suggested to Mrs Laws in cross-examination that Mr Bannister exercised control over the business as director of Banny's Limited. Mrs Laws rejected that suggestion, and we agree with her. The whole point of the controls that are exercised over Banny's Limited is the furthering of the interests of BMS; accordingly Mr Bannister in imposing those controls is obviously acting in his capacity as director of BMS and not of Banny's Limited.

40. The only difference between Banny's and the other concessionaires' areas is the fact that Banny's is physically separate from the store – inevitably because of the nature of fish and chips. The situation is clearly analogous to the landlord and the lodgers in *Halkyn*. Mindful of Lord Carnwath's warning about over-analysis, we think nothing further needs to be said.

Conclusion on rateable occupation

41. In conclusion we find that the shop and the restaurant were both in the rateable occupation of BMS throughout the period covered by the 2010 list. That being the case it is not in dispute, as we said above, that they are contiguous and interconnected. Accordingly in both appeals it remains for us to decide the legal issue, namely whether the proposals made in each case were valid or were out of time.

The law about contiguous and interconnected premises

42. In each appeal, the proposal to alter the 2010 rating list is made on the basis of regulation 4(1)(k) of the 2009 regulations, namely that:

> "property which is shown in the list as more than one hereditament ought to be shown as one or more different hereditaments."

43. In each case the appellant says that the property shown in the list as two hereditaments ought to be shown as one. It is common ground that a proposal to alter the 2010 list on that basis could have been successfully made before 1 April 2017. The respondent says, and the VTE held, that the proposals are too late; the list is now closed. The appellants' case is that their proposals are valid because they rely on sections 64(3ZA) to 64(3ZD) of the Local Government Finance Act 1988, which were inserted with retrospective effect by the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 ("the 2018 PICO Act").

44. In order to explain that we have to go through some recent history; as those who are familiar with this area of the law will know, what follows is the story of the decision in *Woolway (VO) v Mazars LLP* [2015] UKSC 53 ("*Mazars*") and its aftermath.

45. The Supreme Court in *Mazars* held that properties in common occupation that are contiguous, but are not interconnected – meaning that they can only be accessed one from another by passing through other property such as the street or the common parts of a building - were to be rated as two or more hereditaments.

46. That represented a departure from the practice of the Valuation Office before that decision.

47. The Deputy President in *Roberts (VO) v Backhouse Jones Limited* [2020] UKUT 38 (LC), paragraphs 11 – 12, explained what happened next:

> "the practice of treating contiguous floors in single occupation as single hereditaments was convenient and had previously been thought unobjectionable. In the 2017 Autumn Budget the Chancellor of the Exchequer therefore announced that the government would legislate to reinstate the practice. A public consultation followed in December 2017 entitled "Business rates in multi-occupied properties: reinstating the practice of the Valuation Officer Agency prior to the decision of the Supreme Court in Woolway (VO) v Mazars."

12. The proposal in the draft Bill which accompanied the consultation was to revert to the practice of treating contiguous units as single hereditaments. It was favourably received…"

48. Accordingly the 2018 PICO Act was enacted. It introduced an additional definition of a hereditament by adding subsections 3ZA to 3ZD to section 64 of the Local Government Finance Act 1988. We refer to them as "the new provisions". The new provisions so far as relevant read as follows:

> "(3ZA) In relation to England, where -
>
> (a) two or more hereditaments (whether in the same building or otherwise)
> are occupied by the same person,
> (b) the hereditaments meet the contiguity condition (see subsection (3ZC)),
> and
> (c) none of the hereditaments is used for a purpose which is wholly different from the purpose for which any of the other hereditaments is used,
>
> the hereditaments shall be treated as one hereditament.
> …
> (3ZC) The hereditaments meet the contiguity condition if—
>
> (a) at least two of the hereditaments are contiguous, …
>
> (3ZD) For the purposes of subsection (3ZC) two hereditaments are contiguous if—
>
> (a) some or all of a wall, fence or other means of enclosure of one hereditament forms all or part of a wall, fence or other means of enclosure of the other hereditament, or
> (b) the hereditaments are on consecutive storeys of a building and some or
> all of the floor of one hereditament lies directly above all or part of the ceiling of the other hereditament,
>
> and hereditaments occupied or owned by the same person are not prevented from being contiguous under paragraph (a) or (b) merely because there is a space between them that is not occupied or owned by that person."

49. The effect of these provisions can be seen in a number of examples given in the Government publication "How we value some non-domestic properties with more than one occupier",[1] in particular:

[1] https://www.gov.uk/government/publications/how-we-value-some-non-domestic-properties-with-more-than-one-occupier

> "Company K occupies two adjacent retail units within a shopping centre. There is no access between the two units, except by exiting from one unit into the shopping mall and then entering the other. Company K will have one assessment as the two units are in the same occupation and contiguous."

50. The two units in that example are contiguous (because they are adjacent) but not interconnected – one has to go out into the shopping mall in order to go from one to the other. They are rated as one unit, reversing the change in the law effected by *Mazars*.

51. What has not changed is the fact that two premises or units that are both contiguous and interconnected – as is agreed to be the case with the shop and the restaurant in the Boundary Mill appeal and the units in the Centric Assets appeal – are treated as one hereditament. That was the case both before and after the decision in *Mazars.* The law relating to properties that are both contiguous and interconnected was not changed by the 2018 PICO Act.

52. The 2018 PICO Act came into force on 1 November 2018. By then it was too late to make a proposal to alter the 2010 rating list; but it was Parliament's intention that it should be possible to propose the alteration of the 2010 list on the basis of the reversal of *Mazars.* That was achieved by section 1(2), giving retrospective effect to the 2018 PICO Act from 1 April 2010, and by the snappily-titled Non-Domestic Rating (Alteration of Lists) and Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England) Regulations 2018 ("the 2018 regulations") which came into force on 17 December 2018.

53. Regulation 2 of the 2018 regulations says this:

> "The 2009 Regulations as they have effect … in relation to—
>
> (a) a local non-domestic rating list compiled on 1st April 2010; and
> (b) a proposal for the alteration of that list,
>
> apply to a relevant proposal with the modifications set out in regulations 3 to 9."

54. That means that the amended wording of the 2009 regulations applies to a relevant proposal. A relevant proposal is defined in paragraph 1 of the 2018 regulations as follows:

> "… a proposal—
>
> (a) made by a ratepayer on the ground in regulation 4(1)(k) of the 2009 Regulations;
>
> (b) which can only be made on that ground as a result of the coming into force of section 64(3ZA)(2) or (3ZB) of the Local Government Finance Act 1988."

55. Accordingly, where a proposal is made to alter the 2010 list, on the grounds that property which is shown as two hereditaments should have been shown in the list as one, and can

only be made as a result of the coming into force of the new provisions, then the 2009 regulations are to be read with the modifications set out in regulations 3 to 9 of the 2018 regulations.

56. It is important to appreciate that the 2018 regulations did not amend the 2009 regulations for all purposes. That can be seen both from the wording of regulation 1 and from the wording of regulations 3 to 9. Each of those regulations states that the 2009 Regulations are to be read "as if" certain words were inserted. They do not simply insert the words. The 2009 regulations are to be read as if those words had been inserted in the circumstances set out in regulation 2, namely where a relevant proposal (as defined in regulation 1) is made to alter the 2010 list the 2009 regulations are to be read as if they had been modified as set out in paragraphs 3 to 9 of the 2018 regulations. We refer to this as the "as-if-amended" version of the 2009 regulations.

57. Regulation 5 of the 2018 regulations provides that regulation 5 of the 2009 Regulations is to be read as if certain words are added. Regulation 5 of the 2009 Regulations, as it stood for the purpose of proposals to alter the 2010 list immediately before the coming into force of the 2018 regulations and as it still stands for that purpose[2] except in cases where the amendments take effect, says this:

> "(1) Subject to paragraph (2), a proposal to alter a list compiled on or after 1st April 2005 may be served on the VO at any time before the day on which the next list is compiled.
>
> (2) A proposal on the ground set out in—
>
> > (a) regulation 4(1)(d) or (f) may only be served on the VO before the day on which the next list is compiled or within six months of the date of the alteration, whichever is the later;
> >
> > (b) regulation 4(1)(e) may be served on the VO no later than six months after the day on which the next list is compiled."

58. When that regulation is read as if amended by the insertion of words by paragraph 5 of the 2018 Regulations it says this (with the additional words underlined):

> "(1) Subject to paragraph (2) <u>(3) and (5)</u> a proposal to alter a list compiled on or after 1st April 2005 may be served on the VO at any time before the day on which the next list is compiled.
>
> (2) A proposal on the ground set out in—

[2] It has been revoked by the Non-Domestic Rating (Alteration of Lists and Appeals) (England) (Amendment) Regulations 2017/155 reg.9 with effect from 1 April 2017, but the revocation applies only in relation to a local non-domestic rating list compiled on or after 1 April 2017.

(a) regulation 4(1)(d) or (f) may only be served on the VO before the day on which the next list is compiled or within six months of the date of the alteration, whichever is the later;

(b) regulation 4(1)(e) may be served on the VO no later than six months after the day on which the next list is compiled.

(3) Subject to paragraph (5), a relevant proposal may only be served on the VO before 1st January 2020.

(4) Paragraph (5) applies where some or all of a hereditament ("hereditament A") was comprised in a hereditament ("hereditament B") in respect of which an alteration is made to a 2010 list in order to give effect to a relevant proposal.

(5) Where this paragraph applies, a relevant proposal in respect of hereditament A may only be served on the VO before 1st January 2020 or within six months of the date on which the alteration is made to the 2010 list in respect of hereditament B, whichever is the later."

59. It is not in dispute that paragraphs (4) and (5) are not relevant to these appeals.

60. In the circumstances described in regulation 2, regulation 3 of the 2018 Regulations provides that regulation 3 of the 2009 regulations is to be read as if the following definition were inserted:

> ""relevant proposal" means a proposal made by a ratepayer on the ground in regulation 4(1)(k) as a result of the coming into force of section 64(3ZA) or (3ZB) of the Act."

61. It follows from what we have said above that that definition of a relevant proposal is only read into the 2009 Regulations when the proposal is a relevant proposal as defined by the 2018 Regulations. Put another way, the 2009 regulations apply to a relevant proposal (as defined in regulation 1 of the 2018 regulations) as if there were inserted in paragraph 3 of the 2009 regulations the definition of a relevant proposal just quoted.

62. This is horrible drafting. We are reminded of Sir Alan Ward's comment, at paragraph 9 of *John Reeves (Listing Officer) v Randy Northrop* [2013] EWCA Civ 362, where he said of the statutory definition of a hereditament:

> "If prizes are to be offered for legislative gobbledegook then the foregoing would surely qualify."

63. It is not known whether the difference in the two definitions of "relevant proposal" is deliberate. But it is clear that unless a proposal satisfies the definition in regulation 1 of the 2018 regulations, it does not get the benefit of the "as if amended" version of the 2009

regulations and in particular cannot make use of the extension of time afforded by the amended regulation 5 of the 2009 regulations.

64. Accordingly the crucial issue in the conjoined appeals is whether the proposals fall within the meaning of "relevant proposal" in regulation 1 of the 2018 regulations.

The arguments made on the appeal

65. It is convenient to repeat here the definition of "relevant proposal" in regulation 1:

> "… a proposal—
>
> (a) made by a ratepayer on the ground in regulation 4(1)(k) of the 2009 Regulations;
>
> (b) which can only be made on that ground as a result of the coming into force of section 64(3ZA)(2) or (3ZB) of the Local Government Finance Act 1988."

The arguments for the appellants

66. The appellants say that their proposals are relevant proposals within that definition. They rely upon section 64(3ZA); they agree that it is not enough for the proposal merely to state that it relies upon the new provisions, but in each case they say that they rely in substance upon them. In each case the proposal can only be made as a result of the coming into force of those sections, because the list was otherwise closed. On the clear, ordinary meaning of the regulation, they say, they were entitled to make their proposals when they did in reliance upon the new provisions, within whose scope they fall, and they could not at that time have made those proposals otherwise than in reliance upon the new provisions.

67. The appellants note the difference in wording between the definitions of "relevant proposal" in the 2018 and the 2009 regulations. Mr Glover took the view that the difference was accidental and that the additional words in the 2018 definition add nothing; there could not have been an intention to make the definition in the 2018 regulations narrower than that in the 2009 regulations. There is no question, he says, as to whether a successful proposal could have been made in the past; the regulation is in the present tense, "can only be made", and once the 2018 regulations came into force a proposal to alter the list on the basis of regulation 4(1)(k) "can only be made" by relying on section 64(3ZA) or (3ZB).

68. Mr Ormondroyd accepted that the 2018 definition is a gateway to the ability to read the 2009 regulations as if amended – and as we have already indicated (at paragraph 63 above) we agree. But, like Mr Glover, Mr Ormondroyd says that what is needed to pass through the gateway is substantial reliance upon the new provisions; there is no additional requirement that a proposal would have been unsuccessful if it had been made before 1 April 2017.

The arguments for the respondent

69. In considering the respondent's argument we have a puzzle because it changed. The argument Mr Mills advanced at the hearing was very different from that put forward in the respondent's statement of case. We begin therefore by discussing Mr Mills' argument at the hearing – which we have to say we found neither convincing nor attractive - and then go on to the respondent's pleaded case where a different argument is set out.

Mr Mills' argument at the hearing

70. Mr Mills' argument at the hearing focused on the words of section 64 of the Local Government Finance Act 1988. Section 64(1) defines a hereditament by reference to section 115 of the General Rate Act 1967, which says that a hereditament is:

> "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".

71. Section 64(2) and (2A) go on to say that "in addition" certain rights to use land for advertising or for metering gas or electricity are hereditaments.

72. Section 64(3) says:

> "(3) The Secretary of State may make regulations providing that in prescribed cases—
>
> (a) anything which would (apart from the regulations) be one hereditament shall be treated as more than one hereditament;
>
> (b) anything which would (apart from the regulations) be more than one hereditament shall be treated as one hereditament."

73. Mr Mills says that that sub-section enables regulations to be made in order to create an artificial hereditament, which is in fact (for example) one hereditament but is to be treated as two, because the sub-section does not say that it "is" two hereditaments but that it is "to be treated" as such. Mr Mills says that likewise section 64(3ZA) – which also uses the expression "is to be treated as" - creates an artificial hereditament when two or more hereditaments meet the prescribed conditions (common occupation, contiguity and not occupied for a wholly different purpose).

74. On that basis Mr Mills' argument is quite simply that the new provisions are inapplicable to the conjoined appeals because in each case there was already only one hereditament. Banny's restaurant and the Boundary Mills shop (and Unit 1 and Units 2 -4 in the Centric Assets appeal) were occupied by the same person; but they are not only contiguous within the meaning of section 64(3ZC) but also interconnecting. Therefore they are one hereditament, and have been for as long as they have been in common occupation; and the new provisions, enacted post-*Mazars* in order to reverse the effect of *Mazars*, have no effect upon either the Boundary Mill site or the Centric Assets units. Neither situation was

affected by *Mazars* and therefore neither is affected by the legislation that reversed *Mazars.*

75. Therefore neither proposal was made "as a result of the coming into force of section 64(3ZA)(2) or (3ZB) of the Local Government Finance Act 1988." Neither can rely upon the new provisions, which apply only where there are "two or more hereditaments". Still less can it be said that the proposals "can only be made" as a result of the coming into force of those sections.

76. On this view of the meaning of the new provisions, a proposal "which can only be made on that ground as a result of the coming into force of section 64(3ZA)…" is one that would have failed after and as a result of the decision in *Mazars* because the units were not interconnecting (whether made because the VO split the contiguous units into two or more hereditaments in response to *Mazars*, or whether the contiguous units had, perhaps because of an oversight before *Mazars*, been separately rated all along); the proposals in the conjoined appeals would not have failed and so they are not relevant proposals.

77. Mr Glover rightly observed that this argument was not pleaded. We can see, with hindsight, that there are hints of it in the skeleton argument, but only at the hearing was it fully articulated.

78. Despite its neatness we are not persuaded by it. We think the argument flies in the face of the meaning of the word "hereditament." As Mr Glover observed, a hereditament is defined by the statute as a unit of property "which is, or would fall to be, shown as a separate item in the valuation list". If, as here, two units of property are shown as separate items in the valuation list then they are two hereditaments.

79. Obviously that does not mean that the rating list is definitive and that a hereditament is only what is shown as such in the compiled rating list; the statute says "is, or would fall to be, shown as a separate item"; the list can therefore be corrected and extended. But unless the list is altered, a unit of property shown in the list as a hereditament is a hereditament.

80. As Griffiths LJ put in *The Mayor and Burgesses of The London Borough of Brent v Ladbroke Rentals Limited* [1981] RA 153:

> "the term "hereditament" in rating law is a term of art used to identify a property that has two attributes: (1) that is rateable and (2) that it is or can be shown as a separate unit in the valuation list. (See Section 115). The property does not gain or lose any physical attribute or change in any way by calling it a hereditament, the term hereditament is a legal shorthand used to denote the fact that that property is or will be separately rated."

81. We are unconvinced by the notion that section 64(3ZA) creates an "artificial hereditament". However, we do not need to explore that; we are not aware that regulations have been made under section 64(3) and so cannot comment on the effect of such regulations. Section 64(3ZA) is primary legislation. It was not enacted in order to do what could have been done by regulations under section 64(3).

82. Mr Mills' construction of the new provisions gives rise to the consequence that they refer only to hereditaments that are contiguous but not interconnected (assuming the other conditions in section 64(3ZA) or(3ZB) are met), because on his reading contiguous and interconnected properties are one hereditament and so the new provisions are inapplicable to them. Mr Glover and Mr Ormondroyd argued that Mr Mills was reading additional words into the new provisions, namely an exclusion of interconnected properties. He is not, because he relies upon a particular view of the meaning of the term "hereditament" rather than on the implication of additional wording. But the consequence is odd nonetheless; a straightforward reading of the new provisions would lead one to suppose that they apply to any hereditaments that meet the conditions set out in section 64(3ZA), whether or not they are interconnected, but on Mr Mills' argument that is not the case.

83. If Mr Mills is correct, then in cases where there is any argument in the context of the 2017 rating list or any later list about contiguous units that happen to be interconnected, the new provisions will not be relevant. Argument will have to focus on the common law instead, even where the only issue is about contiguity. That would be a very strange way for the statute to operate; it is far simpler to be able to work on the basis that where reliance is placed upon contiguity, the go-to provisions are the new provisions whether or not the units are interconnected. If that were not the case one would have expected the draftsman to include a much clearer signpost. One then has to wonder what would be the purpose of such a needlessly complicated arrangement. Mr Mills' construction of the new provisions safeguards the 2010 list from unwelcome alteration but sets up a very strange arrangement for the future.

84. We said above that we find this argument unattractive as well as unconvincing. As Mr Ormondroyd put it, it is founded upon the VO impugning his own list; he is saying that precisely because the list is incorrect – because there is in fact one hereditament where the list shows two – it cannot be corrected. To use an old-fashioned expression, we think that the VO cannot be heard to say this.

85. Accordingly we do not accept the argument Mr Mills put forward at the hearing. The difficulty that each appellant has is that it occupies two hereditaments, which they say should be one, and each seeks to alter the 2010 rating list so that it will show their property as one hereditament. By virtue of the statutory definition, anything shown as a hereditament in the rating list is a hereditament, until the list is altered. The proposals in each appeal fall within the scope of the new provisions. The question is whether they are now able to access those new provisions for the purpose of altering the 2010 list.

The VO's pleaded case

86. The respondent's pleaded case rests not on the construction of the statute but on the construction of the 2018 regulations and in particular on the meaning of "which can only be made on that ground as a result of the coming into force of section 64(3ZA)(2)…etc". In summary it is said that these words mean that the proposal is made because of the new provisions and could not – before or after the 2018 regulations came into force - have been made without them. If the proposal could have been made before the amendments to section 64, it will not be made "as a result of" those amendments coming in to force.

87. The respondent says that a relevant proposal is one that could not have been successfully made during the lifetime of the 2010 list and is only made possible by the coming into force of the amendments. Mr Mills points out that the purpose of the 2018 PICO Act was to reverse the effect of *Mazars*. It must therefore have been Parliament's intention that only those ratepayers affected by *Mazars* should be able to make use of the new provisions. These ratepayers, by contrast, could have made a proposal for alteration at any time before or after *Mazars* while the 2010 list was open. There is no reason for the new provisions to have opened the door to ratepayers unaffected by *Mazars*, and the new provisions are not to be read as a general licence to reopen the 2010 rating list in any situation where it is claimed that two or more hereditaments should be merged.

88. In support of that interpretation Mr Mills refers to the Explanatory Memorandum that accompanied the 2018 regulations. He says that it is legitimate and useful to do so because the Memorandum sets out the context of the legislation (which, we would add, is in any event well-known – see paragraph 47 above) and the mischief at which it is aimed. He refers to Lord Steyn's observations at paragraph 5 of *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38:

> "The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen,… Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction."

89. In *R(D) v Secretary of State for Work and Pensions* [2010] EWCA Civ 18 Carnwath LJ (as he then was) referred to that passage and cautioned that the court may not re-write unambiguous legislation by reference to the Explanatory Notes (see paragraph 45); nevertheless, he endorsed the use of such material to assist where a statute is ambiguous and went on, at paragraph 49:

> "the case for using such assistance may be even stronger in relation to a statutory instrument than a statute, at least where the explanatory material emanates from the Secretary of State who is directly responsible for making the instrument."

90. The Explanatory Memorandum to the 2018 regulations was prepared by the Ministry of Housing Communities and Local Government and therefore emanates from the Minister responsible for the regulations. It referred to the retrospective effect of the 2018 PICO Act (and also to amendments relating to nursery gardens) and said:

> "7.6 the new rights of proposal are limited in scope to grounds as a result of the coming in to force of the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 and to hereditaments which are of form part of a nursery ground … This will ensure that **only those ratepayers affected by the changes in law in the two Acts can make new proposals on the 2010 rating**

list and that ratepayers cannot use this new right of proposal to access the 2010 rating list on wider grounds of challenge."

91. The emphasis is ours. Mr Mills argues that there was simply no intention that ratepayers in the position of the appellants, who were unaffected by the decision in *Mazars*, should benefit from legislation that was intended only to reverse the effect of *Mazars.* And that dictates the meaning of the requirement that a relevant proposal "can only be made as a result of" the new provisions. Where *Mazars* has no effect, the new provisions have no application; where a proposal could have been successfully made before the new provisions were enacted, the proposal is not one that can only be made as a result of their coming into force. The appellants' argument, says Mr Mills, relies upon mere serendipity; it is not the case that the 2018 regulations permit an application out of time that could and should have been made in time, merely because it happens to fall within the scope of the new provisions.

The appellants' response to the VO's pleaded argument, and our conclusions

92. The appellants do not agree that the Explanatory Memorandum is admissible. The regulation is not ambiguous, and they say therefore that its plain meaning should be followed; but Mr Ormondroyd accepts that there may be a stronger case for using an Explanatory Memorandum to a statutory instrument than there is for using the Explanatory Notes to a statute. Even so, Mr Glover says, the Explanatory Memorandum is consistent with the appellants' case; it says that the 2010 list can be re-opened only where a proposal falls within the new provisions, which these do.

93. We have to say that we have no doubt about the legitimacy and usefulness of considering the Explanatory Memorandum in this case. The fact that learned counsel are in such vehement disagreement about what each regards as the plain meaning of the words in the 2018 regulation indicates that those words are not unambiguous. What we take from the Explanatory Memorandum is not that the amended 2009 regulations, allowing late proposals, are available in all situations that fall within the scope of the new provisions; the Memorandum states very clearly that only ratepayers who were affected by the change in the law can re-open the 2010 list. The ratepayers in the conjoined appeals were not so affected. The intention in allowing certain ratepayers to make late proposals to alter the 2010 rating list was to reverse, for the 2010 list, the change effected by *Mazars.* It was not to give a second bite at the 2010 cherry to those who had not been affected by *Mazars*.

94. The appellants say that the respondent's argument imports into the 2018 definition of a relevant proposal the requirement that it could not have been made while the 2010 list was still open. There are no words to that effect and such a requirement cannot be read into the regulation.

95. We take the view that the respondent's pleaded argument does not read additional words into the new provisions; instead it depends upon the meaning of the definition of a relevant proposal in the 2018 regulations. That definition acknowledges a wider application for the

new provisions, for the future, by restricting applications to alter the 2010 rating list to proposals that can **only** be made as a result of their coming into force.

96. The appellants' strongest point was made by Mr Ormondroyd. He pointed out that there are bound to be cases where it is unclear whether a ratepayer was affected by the change in the law effected by the new provisions. Interconnectedness is not a binary idea. There are degrees of interconnection. It was the intention of the legislature to allow through the gateway created by the 2018 regulations, and into the window of opportunity presented by regulation 5 of the 2009 regulations, not only those premises that were not interconnected at all – and had therefore had their position changed by the decision in *Mazars* - but also those where the position was in doubt. The extent of interconnectivity might be an issue; are pipes or service ducts enough? What about a locked door or a fire escape?

97. In the light of that, Mr Ormondroyd suggests three ways in which the gateway could have been defined. It could have been open only to those whose premises are contiguous but not interconnected. The regulations chose not to say that. It could have been open both to those that were clearly affected by *Mazars* and to those where the point was arguable, which would have led to contentious argument about degrees of interconnectivity. Third, the gate could be opened to all cases that fall within the new provisions on the basis of contiguity. That, he says, is what the 2018 regulation does. It is simple, practical, and requires no argument about borderlines. The downside of that is that it allows in cases where the properties were unambiguously interconnected and were unaffected by *Mazars*; but – and this is why the point is a strong one – in such cases the 2010 list was admittedly wrong, so letting such cases through is hardly a bad thing.

98. We acknowledge the strength of that argument. But we are unpersuaded by it for three reasons. The first is that it flies in the face of the clear intention of Parliament in enacting the regulation – and we think that that intention would be plain from the context, even if it had not been spelled out in the Explanatory Memorandum. Only those whose legal position is changed by the new provisions may make use of the as-if-amended 2009 regulations. Second, it makes redundant the word "only" in the 2018 regulations definition of relevant proposal. Third, it overplays the difficulty caused by borderline cases of interconnectedness. We take the view that such cases will be few, and that where there is uncertainty, such that it is not clear whether the ratepayer was affected by the decision in *Mazars* and the new provisions, the point can be argued. There is no need to open the gateway wide enough to let in what are, as the respondent says, serendipitous applications that were not intended to benefit.

Conclusion

99. We conclude that all the proposals in the conjoined appeals were made out of time. They cannot benefit from the extended window offered by the 2009 regulations. They are therefore invalid. The appeals are therefore dismissed.

100. This decision is final on all aspects except costs. The parties are now invited to make submissions on costs and a letter giving further directions for the exchange of submissions accompanies this decision.

Judge Elizabeth Cooke Peter McCrea FRICS

Dated: 31 July 2020