Neutral Citation Number: [2024] UKUT 204 (LC)

Case No: LC-2023-731

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

15 July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECSION OF THE VALUATION TRIBUNAL FOR ENGLAND

RATING – HEREDITAMENT – whether a warehouse and office unit is one hereditament or two – occupation by two companies – paramount occupation by the company holding the lease of the unit

BETWEEN:

SHYNAR ZHYLZHAXYNOVA

Appellant

-and-

Ms JO MOORE (VALUATION OFFICER)

Respondent

Unit 1 Slater Court,
Harrier Way,
Peterborough,
PE7 3SE

Upper Tribunal Judge Elizabeth Cooke and Mark Higgin FRICS FIRRV
10 July 2024

Mr Richard Dumare for the appellant
Mr Michael Ripley for the respondent, instructed by HMRC solicitors' office

The following cases are referred to in this decision:

Hollywell Union and Halkyn Parish v Halkyn District Mines Drainage Co [1895] AC 117
John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area [1949] 1 KB 344
Libra Textiles Ltd (t/a Boundary Mills Stores) v Roberts (VO) [2020] UKUT 237 (LC)
Ludgate House Ltd v Ricketts (VO) [2020] EWCA Civ 1637
Westminster Council v Southern Railway Co [1936] AC 511
Woolway (VO) v Mazars LLP [2013] UKSC 53

Introduction

1. This is a 2017 rating list appeal from the decision of the Valuation Tribunal for England that Unit 1 Slater Court, Peterborough PE7 ("the Unit") is a single hereditament for the purposes of non-domestic rating. The appellant Ms Zhylzhaxynova says that it comprises two separate hereditaments occupied by two different companies. The Unit was originally assessed at rateable value £18,750 with effect from 21 January 2021 and was subsequently reduced to rateable value £16,250, effective from the same date.

2. At the hearing the appellant was represented by her husband, Mr Richard Dumare, and the respondent by Mr Michael Ripley of counsel, and we are grateful to them both. We visited the Unit the day before the hearing and are grateful to Mr Dumare, Ms Zhylzhaxynova and their very small children for showing us round.

3. Ms Zhylzhaxynova is not the ratepayer; business rates are paid by Quality and Price Limited ("QPL") which holds a ten-year lease of the Unit from 21 January 2021. Ms Zhylzhaxynova is the director and sole or majority shareholder both of QPL and of QNP Toys Ltd ("QNP Toys"), the company that uses the warehouse within the Unit (now known as iProActive Products Ltd). It was not explained to us why Ms Zhylzhaxynova was the applicant to the VTE rather than QPL, although we think that that reflects her view, and that of Mr Dumare, that in fact she is the occupier of the Unit and is in control of it; at any rate, the respondent did not take any point about her participation in the proceedings.

4. In the paragraphs that follow we first describe the Unit and set out the evidence about it, then explain the relevant law, and lastly set out the arguments in the appeal and our conclusion.

The Unit

5. Our description of the Unit is taken from our own observation, and from the evidence of Mr Dumare and of Mr Thomas Tidy, a graduate valuer in the District Valuer Services within the Valuation Office Agency. Mr Dumare did not require Mr Tidy to attend the hearing.

6. The Unit is on Eagle Business Park, a retail and light industrial estate in Peterborough, of recent construction. It consists of a warehouse and mezzanine office, with a total floor area of 264.5 m^2; the appellant's case is that the warehouse and office are two separate hereditaments, the office being occupied by QPL and the warehouse by QNP Toys. The two companies run distinct businesses. QPL is engaged in the design, manufacture and marketing of kitchen equipment. It is a fairly new company, incorporated in 2019, and goods have been designed and produced but none have yet been sold. QNP Toys imports and sells children's toys; it is operated by the appellant from home and the warehouse is used to receive toys and to dispatch them to customers when they are purchased. Neither business has any employees. QPL works with designers who have visited from time to time; temporary staff have been used by QNP Toys to receive or dispatch goods.

7. The appellant runs both businesses. Mr Dumare supports her and does whatever is needed, although he is neither an officer nor an employee of either company. The family lives in Harrow and generally it is Mr Dumare who attends the Unit as necessary, which is infrequent; he has been there twice this month but not for three or four months before that.

The Unit has therefore been pretty much unattended for some time. There are almost no toys in the warehouse; Mr Dumare explained at the hearing that QNP Toys lost money some months ago and currently has no stock to sell. The impression we had is that both companies are relatively new and trying to grow their businesses.

8. Turning to the Unit itself, therefore: it is a semi-detached building of steel portal frame construction with internal blockwork walls. Four parking spaces outside are labelled "Quality and Price Limited". The photograph below shows the front of the building and the sign above the warehouse shutters; the small logo, which to our eyes was illegible from the other side of the road, reads "QNP Toys".

9. To the left of the frontage is a glazed pedestrian entrance with a reception area inside. Stairs lead up to the mezzanine office, which is nicely fitted-out with carpeted floors and pictures on the wall, three work-stations, a meeting table, a sofa, a wall-mounted television and a free-standing storage unit with microwave and minifridge. There is a toilet in the reception area which serves the office above. On the stairs and in the reception area we saw a number of boxes of kitchen items such as kettles, and some were on display on the table in the office. There is a landline telephone in the office.

10. The warehouse can be accessed from a door in the reception area, which is lockable but stood open when we visited. The warehouse extends to the full height of the right-hand half of the building (5.98 m to the eaves) and continues underneath the mezzanine floor on the left-hand side. In that area there is a kitchenette and a WC alongside it. A door from

the full-height area gives access to a walk-in cupboard which contains personal items such as clothes on a stand.

11. When Mr Tidy visited in June 2022 there were boxes stacked on the floor of the warehouse, although as we said above there were very few left when we attended. At the rear of the warehouse is a fire escape; when we visited it was wedged shut with polystyrene blocks and had a pallet against it. Mr Dumare explained that this is the only access for staff attending the warehouse to deal with delivery and dispatch; it has an external handle, and staff are given a key and also a fob to turn off the alarm system. There is a single alarm system serving the entire property, controlled from a box at the front of the warehouse which also contains the meters for electricity and water, of which there is a single supply. There is a single security camera system, controlled remotely by the appellant and Mr Dumare on their mobile phones. There is no landline phone in the warehouse; Mr Dumare explained that there are several mobile numbers used by QNP Toys and by QPL.

12. As to the title to the Unit, as we said above QPL holds a ten-year lease granted in 2021 by P.J. Slater Scaffolding Services Limited; the lessee's covenants include obligations not to "assign, underlet, charge, part with or share possession or occupation of this Lease or of the whole or part of the Property" (clause 18), except that it may assign or sub-let the whole of the Unit if it obtains the landlord's consent in accordance with clauses 19 and 20. The lessee is required to keep the property in repair, and to decorate it inside and out.

13. The appellant does not suggest that QPL has assigned or sub-let the warehouse to QNP Toys. The hearing bundle includes a copy of a short document on QPL headed paper which states as follows:

> "To Whom It May Concern
>
> This is to confirm that I Shynar Zhylzhaxynova, the owner and director of Quality & Price Ltd, the leasee of Unit 1 Slater Court, hereby confirm that QNP Toys Ltd, from this day, 15 January 2021, shall have the usage of the warehouse space at Unit 1 Slater Court, Harrier Way, Yaxley, PE7 3SE and pay 50% of the yearly rent.
>
> Kind regards,
>
> Shynar Zhylzhaxynova"

14. The document is undated and Mr Dumare said at the hearing that he did not know when it was created.

The arguments in the appeal

15. The appellant's case is that she is the lessee of the Unit and that she runs two totally separate businesses from it, in two self-contained units; it is because she is the occupant that the landlord is content to have the two separate businesses operating there despite the terms of the lease. Neither business needs the other in order to operate. Legal title to occupy is irrelevant, the point is that the businesses are completely independent. They have no staff in common. Temporary staff at the warehouse do not access the reception or the office. The sharing of an electricity supply, of water and of security arrangements are

commonplace in shared buildings between separate hereditaments, and QNP Toys pays QPL for its occupation.

16. The respondent's case is that this is a single hereditament, with QPL as lessee in occupation of the whole. Insofar as QNP is in occupation then QPL remains in paramount occupation (we explain that term below) and therefore remains in rateable occupation, but that in any event these are not really two distinct businesses because both are engaged in retail. They share a single building, the parts not being self-contained, and in the building they share utilities, CCTV, an alarm system, a land-line telephone and a letter box. They are operated by common personnel, namely the appellant and Mr Dumare.

17. The question in the appeal is simply whether the Unit is one hereditament (that being the unit of assessment for rating purposes) or two. We first make some findings of fact, and then to explain why we regard this as a single hereditament in light of the authorities.

Findings of fact

18. First, we find that QPL is the lessee of the Unit and is in occupation of it.

19. In practical terms, the appellant runs two businesses from the Unit, and the impression we had when we visited was of a family-run retail enterprise with family making use of the whole building. But the legal position is different; the appellant has chosen to operate her businesses through limited companies and has arranged for QPL to take the lease of the Unit. Therefore QPL is in occupation of the Unit. The appellant has access to it as an officer of the company (although she rarely goes there), and as such is able to authorise others to access it, particularly Mr Dumare. But QPL is the occupier, and its lease prevents it from sharing or parting with possession of the Unit as a whole without the landlord's consent and prevents it from sharing of parting with possession of part of it at all.

20. Second, we find that QPL and QNP Toys are separate businesses. The fact that they are in common ownership and management does not change that; nor does the fact that there is evidence of some loan or subsidy from one to the other (seen in QNP Toys' bank statement). They are both retail businesses, but one is designing and marketing kitchen appliances while the other is selling imported toys. We have no difficulty in regarding them as separate businesses, and in finding that neither needs the other in order to function in practical terms; they are not operationally interdependent.

21. Third, we have no difficulty in finding that QNP Toys is in occupation of the warehouse; that is where it stores its stock when it has any. It is in occupation as a licensee of QPL; in so finding we do not place a great deal of weight on the "To whom it may concern" letter, it is just obvious on the ground that QNP Toys is in occupation and also that it does not have a lease and must be there by permission of QPL.

22. A further issue of fact is whether the two parts of the Unit are self-contained and independent of each other, as the appellant says and as the respondent denies. We find as a fact that the office and warehouse respectively are not self-contained, although they could (with some inconvenience) be made so. We do not think the shared postbox has any significance, nor the use of one or more shared mobile phone numbers. What is significant is that as things stand, the occupier of the office has to have access to the warehouse to attend to the utility meters and to the control panel for the alarm system and to comply with its covenants under the lease to maintain and decorate the property, and there is a

connecting door for that purpose. The occupier of the office also has access to the warehouse and uses the walk-in store cupboard where personal belongings are stored, and is free to use the kitchen (and conversely it is hard to see why the warehouse needs a kitchen). Access is most conveniently gained to either half of the Unit via the reception area. Mr Dumare's evidence was that temporary staff go round the back to the fire escape door, and Mr Ripley did not suggest to him that that was not true; but once the business is running again and there are regular deliveries and dispatches we do not think that that arrangement is realistic. There is no signage to direct staff round the back, and staff will want and need to use the access at the front close to where they park. There is no practical reason for them to go round the back and we do not believe that that arrangement could continue even if it has worked on an occasional basis in the past.

23. The two halves of the Unit could be made independent by providing a convenient separate access for the warehouse, perhaps some different partitioning so that the kitchen can be used with the office, separate metering for the utilities, independent security arrangements and – crucially – consent from the landlord for the lessee to part with possession of the warehouse. As things stand none of those arrangements is in place; physically this is one property shared by two businesses and legally QPL is in occupation and possession of the whole.

The law and its application to the facts

24. Non-domestic rates are a tax on property not on businesses, and the unit of taxation is the "hereditament" – a word that lawyers are saddled with despite their best efforts to use plain English and ordinary language. There is no useful statutory definition of a hereditament, and we have to look to case law to discern whether the Unit is one hereditament or two.

25. The issue that the Supreme Court had to decide in *Woolway (VO) v Mazars LLP* [2013] UKSC 53 was whether two different floors in a building, occupied by the same business, were two hereditaments or one. The two floors were independently accessed and neither needed the other in order to function. Their self-contained and independent identity meant that they were two hereditaments. At paragraph 5 Lord Sumption said this:

> "The question which arises in a case like this is a very simple one. Given that non-domestic rates are a tax on individual properties, what is the property in question? In principle, the fact that the same occupier holds two or more properties is irrelevant to the rateable status of any of them. He must pay rates separately on each. …
> 6. There are two principles on which these questions might be decided. One is geographical and depends simply on whether the premises said to constitute a hereditament constitute a single unit on a plan. The other is functional and depends on the use that is or might be made of it. The distinction was first applied in a series of rating cases in Scotland … These cases establish that the primary test is geographical, but that a functional test may in certain cases be relevant either to break up a geographical unit into several subjects for rating purposes or to unite geographically dispersed units …. By far the commonest application of the functional test is in derating cases. In these cases, the functional test serves to divide a single territorial block into different hereditaments where severable parts of it are used for quite different purposes. Thus a garage used in conjunction with a residence within the same

> curtilage will readily be treated as part of the same hereditament, whereas a factory within the same curtilage which is operated by the same occupier may not be. There are, however, rare cases in which function may also serve to aggregate geographically distinct subjects. It is with this latter question that the present appeal is concerned."

26. This appeal is not about that latter question but about the former: is the Unit "a single territorial block … where severable parts of it are used for quite different purposes", like a factory in the grounds of a residence, and therefore two hereditaments?

27. The primary test is geographical. In the present case the Unit was let as a single unit of occupation and appears to us to have been very obviously designed as such. We have found as a fact that the warehouse and office parts of it are not self-contained. The geographical test points to this being one hereditament, although it is not conclusive because, as we have found, the two halves could be separated.

28. We have found that QNP Toys is in occupation of the warehouse. Is it in rateable occupation?

29. Rateable occupation was defined in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344; there must be actual occupation, exclusive for the purposes of the possessor, which is of benefit to the possessor and is not transient. On that basis QNP Toys is in rateable occupation (since the requirement of "exclusive" occupation does not preclude another person being in occupation, it simply means that the occupier must be the only one occupying the property for its particular purposes).

30. But we have also found that QPL is in occupation of the whole Unit. The question therefore arises: which of the businesses is in paramount occupation so as to be the ratepayer?

31. That was the issue in *Cardtronics*, where the Supreme Court had to decide whether ATMs inside and outside supermarkets were separate hereditaments. It was held that although the ATMs were physically identifiable as hereditaments, nevertheless the retailer remained in rateable occupation. Lord Carnwath at paragraph 14 quoted Lord Herschell LC in *Hollywell Union and Halkyn Parish v Halkyn District Mines Drainage Co* [1895] AC 117 at 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."

32. So at this stage of the enquiry exclusive possession in the literal sense *is* important (contrast paragraph 29 above). And on the facts here, QNP Toys certainly does not have exclusive possession. It has no right to exclude QPL, and indeed QPL retains the right to require it to leave at any time (unrealistic as that may seem to the appellant; but these limited companies are separate legal persons whose ownership could change).

33. As Lord Neuberger put it at paragraph 49 of *Mazars*:

> "An office building let to and occupied by a single occupier would be a single hereditament, but if the freeholder let each floor of the building to a different occupying tenant, retaining the common parts for their common use then each floor would be a separate hereditament."

34. That is precisely what has *not* happened here. And while we agree with the appellant that separate leases of the two hereditaments might not be essential, in the absence of separate leases there would have to be in fact exclusive possession by QNP Toys, which is not the case here.

35. Equally important 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. The same analysis – with the opposite outcome – is seen in *Libra Textiles Ltd (t/a Boundary Mills Stores) v Roberts (VO)* [2020] UKUT 237 (LC). In *Ludgate House Ltd v Ricketts (VO)* [2020] EWCA Civ 1637 the question was whether property guardians, living in a multi-storey office building with obligations to assist with the security of the building, were in rateable occupation of their rooms or whether the ratepayer remained in rateable occupation of the whole property. The Court of Appeal (at paragraph 40) said this:

> "If there is more than one candidate, who is in rateable occupation depends on "the position *and rights* of the parties in respect of the premises in question". If those rights depend on a contract, that necessarily means that the relevant tribunal must examine the terms of the contract…"

36. Lewison LJ was quoting there the words of Lord Russell of Killowen in *Westminster Council v Southern Railway.* His words answer the appellant's contention that the lease of the Unit is irrelevant; on the contrary, the House of Lords in *Southern Railway* looked carefully at the rights retained over the shops by the railway company, and similarly in *Ludgate House* the terms of the written agreement under which which the guardians occupied their rooms were crucial; as Lewison LJ put it at paragraph 44, "The critical point was the terms on which the putative hereditament was held". In *Ludgate House* the guardians were obliged to change rooms when asked to do so; at paragraph 81 Lewison LJ said:

> "… it is difficult to think of a greater retention of general control over premises than the ability to require the occupier to vacate the premises without notice".

37. Here QNP Toys has no rights at all over the warehouse, It can be required to leave at any point; it is there as a licensee and has no control of warehouse. QPL remains in paramount occupation of the whole Unit.

Conclusion

38. The inevitable conclusion on this appeal is that the Unit is physically a single whole, not two self-contained parts, and also that QPL is in rateable occupation of the whole. The appeal is therefore dismissed.

Upper Tribunal Judge Elizabeth Cooke Mark Higgin FRICS FIRRV

15 July 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.