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FTB Annual Rating Seminar

13 March 2023

020 7353 8415 clerks@ftbchambers.co.uk **ftbchambers.co.uk**

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Acenden and fit-out

Cain Ormondroyd

Horatio Waller

Context

- Distinction between offices as generally let and as valued for rating
- A major issue in 2017 list
- Litigation inconclusive, many cases stayed


ASCOT
HOUSE
the north view group

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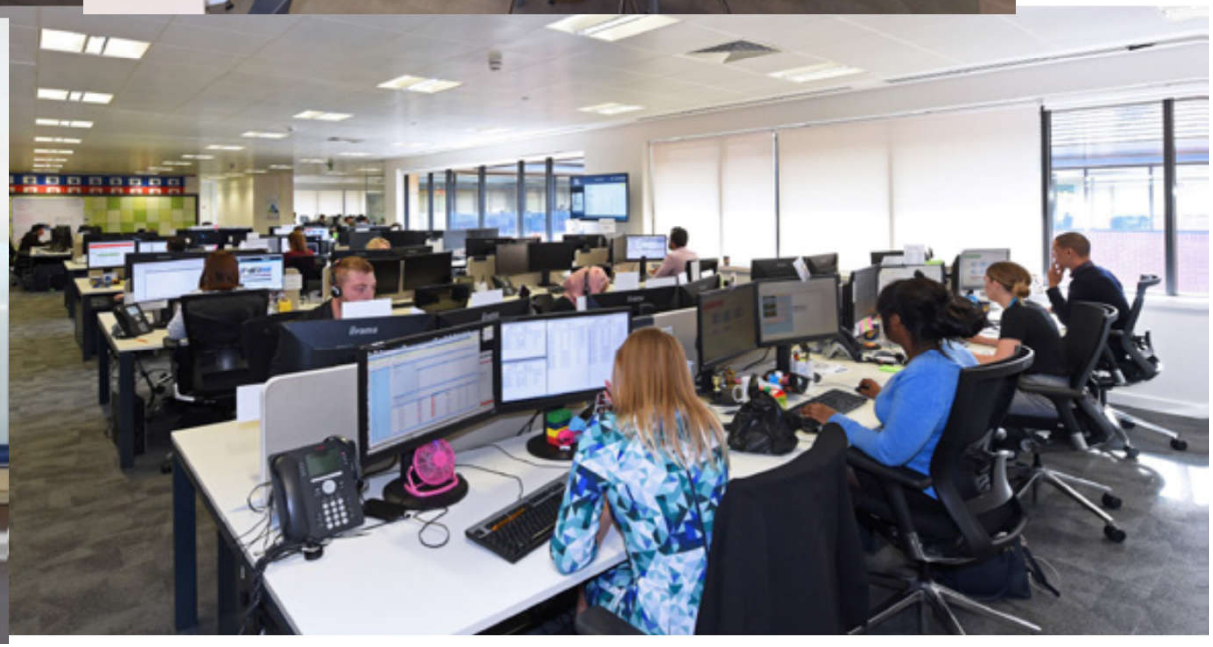

Issues

- Overarching issue: valuation of Ascot House including fit out works
- Does the statutory decapitalisation rate apply?

What was decided

- Office fit out works *do* add value
- No clear market evidence of how much
- The Tribunal is not obliged to use the SDR
- A spot figure taken for the value

Comment and implications

- Implications for the application of the SDR
- Is the decision correct on the SDR?
- Settlements on the fit-out issue
- The importance of valuer judgment

What was decided

- Office fit out works *do* add value
- No clear market evidence of how much
- The Tribunal is not *obliged* to use the SDR
- Effective rent calculated to the break
- A spot figure taken for the value

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Ludgate House

Mark Westmoreland Smith

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Facts

- Built in 1988.
- An office building of about 175,000 sq ft.
- The last tenants vacated the building in March 2015.
- On 18 June 2015 VPS contacted LH with a proposal to secure the Building against trespassers by arranging for its occupation by property guardians under licences.
- Recommended that 32 property guardians be installed to provide *"a robust level of protection."*
- LHL accepted the proposal.
- 4 property guardians moved into LH on 1 July 2015.
- The Agreement with VPS was formally entered into on 24 July 2015.
- Between 1 July 2015 and May 2017, LH was occupied by a property guardians, up to around 50.

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Facts (cont.)

- VPS not entitled to exclude LH from building or occupy it itself.
- VPS granted licences to property guardians in standard form.
- Property guardians had no right to exclusive occupation of any part of the LH and the licensee could be required to moved about the building.
- Clause 9 of the licence imposed obligations on the licensee.
- These included not sleeping overnight away from the building without consent for more than two nights in seven (clause 9.1) and not leaving the building unoccupied by at least one person (clause 9.3).
- The licensee was to report to VPS any person attempting to gain access to the building without permission, and was *"politely but firmly [to] challenge"* any such person *"to determine their identity and purpose"* (clause 9.7).

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Rating history

- 2010 Rating List as two separate hereditaments, the first identified as *"Ludgate House (inc part 2nd floor South)"*, with a rateable value of £3,870,000, the second as *"Pt second floor (North), Ludgate House"*, with a value of £327,000.
- September 2015 LH proposal to delete on the basis that, because of the presence of the Guardians, the use of the whole of the building was now domestic. Accepted as well founded by VO In November 2015 and the two hereditaments were deleted from the 2010 List.
- LBS inspected the building in January 2016 and concluded that it was essentially vacant. LBS made two proposals of its own, challenging the alterations made by the VO.
- The VO reconsidered its position and re-entered LH in the 2010 List as offices, with a rateable value of £3,390,000 by means of a unilateral notice issued on 31 May 2017.
- In response in August 2017, LH made two further proposals against the unilateral notice.
  - The first sought the deletion of the hereditament or, alternatively, that the rateable value attributed to the hereditament be reduced to £1, on the basis that the whole of the building was domestic property.
  - The second proposal challenged the effective date of the alteration and proposed that it be 24May 2017 (the actual date of the unilateral notice alteration).

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Issues

- (i) The Valuation Approach Issue: assuming that LH was a single composite hereditament on the material day, what is the proper approach to the valuation of the non-domestic part of the hereditament?

- (ii) The Valuation Figure Issue: again assuming that the building was a single composite hereditament on the material day, what is the correct figure for the valuation of the non-domestic part of the hereditament?

- (iii) The Effective Date Issue: what was the right effective date of the unilateral notice alteration? Was it 1 July 2015, as determined by the VTE Decision, or 24 May 2017?

- If the effective date was 24 May 2017 this was after the 2010 List was closed, with the consequence that the unilateral notice alteration would be ineffective and the position would revert back to the November 2015 Deletions.

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The valuation approach issue

- 3 sub-issues:
  - (1) Whether LH should be valued as wholly non-domestic, on the basis of the findings in the CoA decision?
  - (2) The second issue arises if LH is not wholly domestic and is a composite hereditament. On this hypothesis the question is whether one should treat the guardians (i) as *"intermingled"*; that is to say occupying units on all the floors of the building, as was in the fact the position by August 2015, or (ii) as having been *"consolidated"* by the tenant of the building into a single floor or floors, pursuant to its rights of relocation contained in the licences.
  - (3) How many guardians should be assumed? Should one assume the occupation of 4 property guardians, being the number of Guardians occupying units within the building on the material day or 32 property guardians, being the number of Guardians proposed by the VPS Proposal?

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Reality principle

- General principles
  - (1) The reality principle applies to the valuation exercise. There are two limbs to the reality principle; namely the physical state of the relevant hereditament and its use.
  - (2) So far as the first limb is concerned, the reality principle means that it must be assumed that the relevant hereditament is in the same physical state as it was on the material day, save for minor alterations
  - (3) So far as the second limb is concerned, the reality principle means that it must be assumed that the relevant hereditament can be occupied only for a purpose within the same mode or category of purpose as that for which it was occupied on the material day.

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Sub-issue 1: wholly non-domestic?

- Section 66(1) of the Local Government Finance Act 1988 provides property is domestic if it is used wholly for the purposes of living accommodation
- Distinction between use and purpose
- See *Global 100 Ltd v Jimenez* [2022] UKUT 50 (LC) [2022]

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Sub-issue 2: intermingled or consolidated?

- Paragraph 124:
  - *"It seems to us that the problem with Mr Forsdick's submissions occurs when the above analysis comes to be applied to the reality of the present case. As we have said, Mr Forsdick's argument involves the identification of the MCO of the Building, on the Material Day, as being use for a scheme of property guardianship, of the kind which was being unrolled on the Material Day and involving the same numbers as those envisaged in the VPS Proposal. This argument however, far from respecting the reality principle, seems to us to involve disregarding a significant chunk of the reality on the Material Day. Putting the matter another way, the argument seems to us to pick and choose the reality to be taken into account in the identification of the MCO."*

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Sub-issue 3: 4 or 32 guardians?

- Paragraph 137:
  - *"There is however a more important reason why Section 66(5) does not affect our analysis. If, as we have decided, the reality principle requires that account be taken of the temporary nature of the property guardian scheme which was being implemented on the Material Day, and if, as we have also decided, the reality principle requires that account be taken of terms of the VPS Agreement and the licences granted to the Guardians, it would have been open to a hypothetical tenant of the Building, just as it was open to LHL, either to terminate the property guardian scheme or to relocate the Guardians within the Building to best financial advantage. If therefore the correct identification of the MCO includes occupation or anticipated occupation of the Building by a particular number of property guardians on the Material Day, we do not accept that it is correct to assume that those property guardians would be distributed around the Building, or would remain distributed around the Building "*

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Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Overall conclusions on issue 1

- 1) The Building falls to be valued as a composite hereditament.
- 2) The Building does not fall to be valued as wholly non-domestic.
- 3) The MCO of the building should not be taken to be restricted to use of the Building for occupation by property guardians pursuant to a scheme of property guardianship.
- 4) The MCO of the Building is the use of the Building as an office building, subject to the temporary occupation of property guardians pursuant to a temporary scheme of property guardianship.
- 5) The physical state of LH was an office building.

Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Overall conclusions on issue 1

- 6) The domestic part of LH was limited to the four units occupied by the four Guardians who moved in on the material day.

- 7) The hypothetical tenant should be assumed to be taking the building as an office building, subject to the temporary use of the building for a property guardianship scheme. The assumed state of this property guardianship scheme, as at the material day, is that its implementation had not been completed, with only four property guardians having been granted licences and having moved in.

- (8) The hypothetical tenant has the same rights as existed in reality, pursuant to the VPS Agreement and the licences granted to the Guardians, to terminate the scheme or to consolidate the occupation of the property guardians into a particular part or parts of LH in order to make the most efficient use of the space within the Building.

Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Issue 3: the effective date issue

- This issue was whether the unilateral notice alteration could be brought within the terms of Regulation 14(7), with the consequence that the effective date becomes the day on which the unilateral notice alteration was actually made (24 May 2017).

- If so, this was after the 2010 List was closed, with the consequence that the unilateral notice alteration was ineffective

- Regulation 14(7) provides: "*(7) An alteration made to correct an inaccuracy (other than one which has arisen by reason of an error or default on the part of a ratepayer) — (a) in the list on the day it was compiled; or (b) which arose in the course of making a previous alteration in connection with a matter mentioned in any of paragraphs (2) to (5), which increases the rateable value shown in the list for the hereditament to which the inaccuracy relates, shall have effect from the day on which the alteration is made.*"

Ludgate House Limited v Andrew Ricketts (VO) and London Borough of Southwark [2023] UKUT 36 (LC) UTLC

Issue 3: the effective date issue (cont.)

- Paragraph 214: "*First, and looking at the matter from the point of view of the VO, we cannot accept that any error occurred in the present case of a kind comparable to the errors which were under consideration in the European case law to which we have been referred. We accept and find that, when the VO decided to make the November 2015 Alterations, the VO had neither seen the VPS Agreement nor had the benefit of the CA Decision. Knowledge of either or both of these matters would substantially have changed the legal landscape in which the VO made the decision to make the November 2015 Deletions. We also accept a point made by the Vice-President, at paragraph 59 of the VTE Decision, namely that it is in the nature of the statutory rating scheme that another interested party, in this instance Southwark, was entitled to make its own proposal in response to the November 2015 Deletions. In summary, we are inclined to agree with the Vice President that the present case is not one of state error, at least in the sense in which state error has been identified in the relevant European case law. It seems to us that process involving the November 2015 Alterations and their correction by the VON1 Alteration is more accurately characterised as the simple working of the statutory rating scheme, as opposed to a state error*"

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Issue 3: the effective date issue (cont.)

- Paragraph 215: "*Second, and looking at matters from the point of view of LHL, we cannot accept that LHL is in the position of an innocent ratepayer. The reality is that LHL sought to avoid its non- domestic rating liability for the Building by the implementation of a property guardianship scheme, on a very substantial scheme and in relation to a very substantial office building. Whether the scheme would work, and achieve the desired objective was very much up in the air. As with other tax avoidance schemes, it seems to us that LHL acted at its own risk.*"

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The R&E method

Richard Glover KC

AGENDA

(1) Outline of the Method

(2) Inputs to the divisible balance

(3) The divisible balance, the tenant's share & the rent

(4) What makes for appropriate subject-matter

(5) Socio-economic value

(6) Shortened methods

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OUTLINE OF THE METHOD

"… the whole subject-matter appears to be involved in so much difficulty and uncertainty, that we have taken much time in considering whether, notwithstanding these decisions, we could not place the rules as to the rating of these Companies on more intelligible and satisfactory principles, and which should be capable of uniform application. We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on this subject, and would at the same time be capable of being satisfactorily worked".

Blackburn J in *Sheffield United Gas Light Company v, Sheffield Overseers*

OUTLINE OF THE METHOD

"From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern".

Viscount Cave: *MWB v. Kingston*

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INPUTS TO THE DIVISIBLE BALANCE

"In our opinion, it is settled by the two cases, the *Kingston* case and the *Southern Rly Co* case … that the profits basis has to be calculated, not on what may happen in the future, but on the profits ascertained down to the latest period before the date of the rate, or, in this case, the preparation of the valuation list".

Barking Rating Authority v Central Electricity Board

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INPUTS TO THE DIVISIBLE BALANCE

"The receipts and expenditure method seeks to arrive at the annual rental value of premises by assessing the gross receipts which a prospective tenant would expect to achieve from a business carried on at those premises ..."

Hughes v. York Museums & Gallery Trust

INPUTS TO THE DIVISIBLE BALANCE

- Rent, not profit, = the measure
- Operator's skill vs. hereditament's attributes
- Principle vs. evidence

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THE DIVISIBLE BALANCE, THE TENANT'S SHARE & THE RENT

" … if the amount which the tenant would require in order to induce him to take and operate the hereditaments is properly ascertained and deducted from the total net receipts, the result is to divide the net receipts fairly and justly between the landlord and tenant, even though, in an extreme case, the landlord's share might be nothing at all".

Lord Hailsham *Railway Assessment Authority v. Southern Railway*

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THE DIVISIBLE BALANCE, THE TENANT'S SHARE & THE RENT

Striking a balance between landlord and tenant that acknowledges the risks involved in running this particular enterprise leads us to the conclusion that the tenant's share should be 75% of our divisible balance (£35,354), leaving £11,785 for rent.

Fryer v. Cox

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WHAT MAKES FOR APPROPRIATE SUBJECT-MATTER?

The thing that the Legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple as regards the mode in which they arrive at it… they are to arrive at that value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or any statute which has limited them as to the mode in which they shall arrive at it.

Lord Halsbury in *Mersey Docks & Harbour Board v. the Assessment Committee of Birkenhead*

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SOCIO-ECONOMIC VALUE

"The fundamental matter of principle in this case is whether there is a point in the scale of proved profits below which the actual figures cease to be the basis of assessment because they are clearly less than the true value to the tenant. It is my view that there is, and that it has been reached in this case".

Morecambe & Heysham BC v. Robinson

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SOCIO-ECONOMIC VALUE

"The conclusion I have come to is that the profits basis does not give the right answer. If the negotiations for a tenancy were conducted by reasonable people …, I cannot believe the council, the would-be tenant, would be able or indeed would even seriously seek to induce the landlord to accept a nil rent.

"I prefer to regard it not as a valuation in the strict sense but as an expression of a line of thought which might bring the 'higgling' parties together … On the whole of the evidence and in the light of the argument I think that the result of £225 is as near as anyone can get to the right answer. I accept it"

Bingley UDC v. Melville

SOCIO-ECONOMIC VALUE

The use of valuation judgment to assess the significance of factors such as socio-economic or cultural motivation, "a non-commercial aspect", affordability of rent, competing demands for the finite resources of a public authority is inescapable.

Neither expert considered alternative approaches to valuing by reference to trading potential, such as an overbid or a percentage of revenue … By not exploring such alternatives we think the … did not fully consider the value of the occupation to the hypothetical tenant

The Appellant did not suggest any method for expressing the valuation impact of socio-economic benefits on rental value, and we are not aware of any.

Hughes v. Exeter CC.

SOCIO-ECONOMIC VALUE

We remain stuck, two steps away from a rateable value, because the value of the socio-economic benefits generated by these three museums does not tell us their value to the hypothetical tenant; nor does it tell us anything about the rent that the hypothetical tenant would be willing to pay for the hereditament in order to obtain that value.

We doubt that those two steps are able to be taken. Certainly there is no methodology available at present to achieve either.

Accordingly the factor that is supposed, on the VO's case, to generate a different outcome for these appeals from the Tribunal's decision in Exeter Museums cannot do so.

Allen v. Tyne & Wear Archives and Museums

SHORTENED METHOD

This ‘method’ is in our view only appropriate after a rigorous analysis of the available rental evidence, or a significant number of assessments agreed on the full receipts and expenditure basis.

Allen v. Tyne & Wear Archives and Museums

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Round up of recent decisions

Hugh Flanagan

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SSE Plc v Jo Moore (VO) [2023] UKUT 24

Facts

- Correct RV of Keadby Power Station in Scunthorpe

- March 2013: power station ”placed into long term mothball”, generation ceases, works to mothball carried out over 5 months

- Nov 2015: power station de-mothballed and becomes operational

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SSE Plc v Jo Moore (VO) [2023] UKUT 24

Main issue

- Whether on material day had been a MCC requiring alteration to RV because mode or category of occupation became that of "mothballed power station"
- RVs: £5.34m v £534k.
- Application of para 2(7)(b) of Sch 6 1988 Act: "the mode or category of occupation of the hereditament"

Decision

- No MCC.
- "*A power station is a power station*".

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SSE Plc v Jo Moore (VO) [2023] UKUT 24

Reasoning 1

- Not argued that mothballed power station not hereditament, because incapable of rateable occupation (cf *Monk v Newbigin*). Rather put into suspended state.

- Mothballing works deliberately reversible, not preparatory for demolition or decommissioning, and with economic motive.

- Staff reduced from 52 to 18, but no less.

SSE Plc v Jo Moore (VO) [2023] UKUT 24

Reasoning 2

- UT stated following principles:
  - "*In determining MCO, it is the principal characteristics of the use to which regard can be had.*
  - *Shop, offices and factories are examples of categories of MCO.*
  - *Some uses may not fall within any such broad category, and are to be regarded as sui generis*."
- Fir Mill v Royton UDC (1960) RRC 171: *"a shop as a shop, but not as any particular kind of shop; a factory as a factory, but not any particular kind of factory"*
- *Williams (VO) v Scottish & Newcastle* [2001] EWCA Civ 185:
  - Para 2(7)(a) allows for "*minor alterations of a non-structural character*", e.g. fascias
  - Para 2(7)(b) "*does not assist ratepayer who leaves half of his business premises empty, or otherwise runs his business in a half-hearted or inefficient manner*"

SSE Plc v Jo Moore (VO) [2023] UKUT 24

Reasoning 3

- *Hughes v Exeter CC* 2020 UT: risk of ending up with "*highly specialised, relatively small groupings of property*". Rather should be looking for "*broad purpose*".

- Compare *Merlin Entertainments v Cox (VO)* 2018 UT - way business run didn't give rise to MCO under para 2(7)(d) (physically manifest)

- *Wigan FC v Cox (VO)* 2019 UT: relegation from Premiership to League One didn't change MCO. "*Football is football"*.

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FC Brown Steel Equipment v Hopkins (VO) [2022] UKUT 51

Issues

- Unit of assessment: whether two industrial properties divided by road by connected by substantial conveyor bridge are a single hereditament, or two hereditaments?
- Quantum of end allowance for merged hereditament: 7.5% vs 4%.

Facts

- Manufacturer of filing cabinets, amongst other office equipment
- Factory 41,000 sqm on one side of estate road
- Warehousing 11,000 sqm on other side
- Bridge spanning road, with mechanised conveyor for moving goods between buildings


Microplas
Caswell Rd
Google
Image capture: May 2018 © 2023 Google

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FC Brown Steel Equipment v Hopkins (VO) [2022] UKUT 51

Decision

- One hereditament, not two.
- End allowance 7.5% based on comparables.

Reasoning

- Geographical / cartographic test from *Woolway (VO) v Mazars* satisfied (functional test not argued) - including whether there was *"direct communication"*
- "*Means and extent of intercommunication between the different parts are critical*"
- "*A massive steel structure spanning the road*"
- Geographical and functional tests separate: bridge conveying manufactured items is a functional point that should not "*dilute the primary geographic test*"[47]. Focus on physical premises themselves, not use made of them.

FC Brown Steel Equipment v Hopkins (VO) [2022] UKUT 51

Ramifications

- Linking of two properties over road relatively common: industry, retail, schools, hospitals, motorway service areas
- ***Burn Stewart Distillers v Lanarkshire Valuation Board* 2001 Scot LT**: warehousing on one side of road, whisky bottling and distribution on other, connected by 600mm duct only under road for cabling = **two hereditaments**.
- ***Rootes Motors v Assessor for Renfrewshire* 1971 Scot LVAC**: car factory linked by conveyor to carry car shells = **one hereditament**.
- ***Harding and Clements v SST* 2017 UT**: two fields separate by road under which ran culvert carrying water pipe = **two hereditaments**.
- If two hereditaments, how attribute value to bridge? A bridge to nowhere, because only subject hereditament vacant and to let.

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Nelson Plant Hire v Bunyan (VO) [2022] UKUT 309

Issues

- First UT appeal since the introduction of the Check, Challenge, Appeal regime that has raised issues about scope of ratepayer's proposal
- Did challenge proposal to RV mean that ratepayer could not raise unit of assessment, despite that having been raised at check stage

Facts

- Waste transfer station
- 'Check' document argued hereditament should be split into two or more units
- 'Challenge' proposal only selected the ground that *"the rateable value in the rating list on 1 April 2017 was wrong"*

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Nelson Plant Hire v Bunyan (VO) [2022] UKUT 309

Decision

- Ratepayer unable to raise unit of assessment before VTE and UT when challenge only related to correct RV

Reasoning and ramifications

- Before amendment of 2009 Regs in 2017 very well established that jurisdiction of VTE (and on appeal UT) to determine appeals referred to it by the VO was limited by terms of original proposal: e.g. *Courtney v Murphy* 1998 LT
- Following the 2017 amendments, proposal to alter the list continues to define scope of appeal to VTE and UT
- Extent of disagreement between parties framed by VO's response to proposal recorded in reg. 13 decision notice

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Nelson Plant Hire v Bunyan (VO) [2022] UKUT 309

Reasoning and ramifications

- Not possible to read proposal stating RV wrong as challenging unit of assessment
- Notwithstanding UT well-established reluctance to take overly technical approach to meaning of a proposal: *Galgate Cricket Club v Doyle (VO)* 2001 LT and *Hughes (VO) v York Museums* 2017 UT.
- VO: check and challenge must be viewed in isolation from each other so documents and information provided at check must be excluded when considering meaning of proposal.
- UT: expressed doubts but did not reach decided view, because clear not possible to construe the proposal in question as encompassing unit of assessment issue.

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