Reflections on the relationship between law and rating practice.

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Themes

- How does the law shape rating practice and how does rating practice shape the law?
- Topical theme in the light of recent Supreme Court decisions

- Tension between
  - deference to the experts
  - Legal rigour seeking to mould the judgements of the expert practitioners

Example 1 – how to weigh evidence in valuation

The Lotus "hierarchy"

Lotus & Delta Ltd v Culverwell (VO) [1976] RA 141 at 153-4

…….is not a straightjacket or even a hierarchy

"These propositions provide guidance on the usefulness of different types of evidence but they should not be regarded as rules to be followed slavishly. It will be necessary to have regard to relevant evidence of all types, if available, but always with a clear focus on the statutory valuation hypothesis."

Lamb v Go Outdoors Ltd [2015] R.A. 475 at [39]

Example 2 – choice of valuation methods

- Hughes (Valuation Officer) v York Museums and Gallery Trust [2017] R.A. 302 at [124], [127], [128], [141]-[143], [184],

Practical guidance on how and when to use:-

- Shortened receipts method [128] "can be useful" "where consistent relationship can be demonstrated between the turnover of business of that type and the levels of profit they generate"
- Contractor's basis [184] "no justification in the case of historic buildings used as museums or visitor attractions for the assumption underlying the contractor's basis that notional costs of construction bear some consistent relationship to rental value. Such buildings are often, as the evidence demonstrates, inherently unprofitable yet would be very expensive to construct either in their original form or as a modern substitute"

Example 2 (continued)

- R&E [127] “the fact that the receipts and expenditure method suggests a nominal or nil rateable value is not a reason for rejecting its use and resorting to the contractor’s basis where it provides a reliable guide to the rent which would be offered for premises if let on the statutory hypothesis. On the contrary, in cases where premises cannot be occupied profitably, the receipts and expenditure method is often likely to be the better guide” (127)

Reflections on example 1 & 2

- Expert tribunal (with surveyor member)
- Shaping valuation practice by:-
  - Articulating approach
  - Correcting tendency to misapply previous guidance
  - Ensuring rigorous focus on purpose of methods rather than their mechanical application

Example 3 – valuation approach to a building undergoing refurbishment

- SJ&J Monk (A Firm) v Newbigin (Valuation Officer)
  - UT(LC) [2014] R.A. 195
  - CA [2015] 1 WLR 4817
  - SC [2017] 1 WLR 851

UT (LC) (Mr Trott) – [77] "the VOA's guidance and practice note is …a considered and informed commentary on the law which merits attention. But it should not be adopted if it is found to be mistaken. The Tribunal is not bound by it and it is not relevant to the construction of the statutory provisions".

[83] sense checks his conclusion against the position in the rating manual

Example 3 (continued)

- Court of Appeal [18]-[21], [36]
  - openly critical of content of rating manual
  - disregards practice because it decides that it proceeded on a mistaken approach as to the common law of repair

- Supreme Court – consciously re-instates established practice

[21]-[22] – reference to Baroness Farrington's expression of legislative intention for 1999 Act to "reinstate" old principle with minimum of disturbance to law and "valuation practice"

[31] – reference to "practice of valuation officer to treat property as a hereditament with a nominal value rather than to remove the property from the rating list";

[32] reject anti-abuse thesis "**Prior practice, which had been reflected in the non-statutory guidance in the Rating Manual produced by the Valuation Office, had been consistent with the approach which SJJM advocates. It was not suggested to this court that the administration of rates had not been effective in the past**"

Reflections on example 3

- SC and UT – determine approach with established practice firmly in mind
- CA disregarded practice and imposed intellectual rigour from landlord and tenant without any deference to the practice
- SC overturn because CA replacement approach is unworkable
- In SC historic survey of past practice assisted Court to see how CA approach was erroneous

Example 4 – boundary between domestic and non-domestic rates

Tully v Jorgensen (Valuation Officer) [2003] R.A. 233

[16] and [17] – broad approach to "purposes of living accommodation"; working from home did not constitute a "use going outside the ambit of use for the purpose of living accommodation"

Tribunal shaping rating practice with a focus on making it workable [22]

Example 4 (continued)

"There must be very large numbers of homes in the country in which those living there do some or all of their work, unvisited by employees or clients or business associates, in rooms that have not been structurally adapted, and without any outward indication that someone is working in the property. It would, I think, be a consequence of the VO's contentions that many such homes would be potentially rateable. In order to discover who is working at home and to what extent and in what accommodation would require investigation on a very considerable scale. Unless such investigations were carried out the incidence of rating in such circumstances would be haphazard, and injustice would arise as a result. With the approach that I have described above/, on the other hand, the problems involved in identifying rateable property would be much less. Where a business at the premises is advertised or if planning permission is sought for building operations or a business use the valuation office may well be alerted and can take steps accordingly. Where there are no such indications, the probability is, it seems to me, that, if work is being done there, it will be the sort of work that falls within the scope of use of the property for the purposes of living accommodation." [22]

Reflections on example 4

- Tangible example of the Tribunal shaping the correct approach to boundaries of rateability with an eye on how the system can work sensibly and fairly in practice

Example 5 – does practice help to resolve a hard edged legal question?

Gallagher (VO) v Church of Jesus Christ of Latter-Day Saints [2006] RA 1 (LT) at [32] and [49]

- Evidence given on how religious exemptions were being applied

"[r/p's expert] describe[d] the practice of valuation officers in their application of the exemption provisions of paragraph 11 and expressed the view that each of the buildings in the present case fell within the provisions. …. He drew attention to the fact that exemption had been given to a library housing religious texts and a local history collection adjacent to a cathedral and to an education centre for children visiting the same cathedral. He said that it had been the practice since before the 1988 Act to accord relief to seminaries and rabbinical colleges, and that relief was now given to them under paragraph 2(a). He said that relief was given to mosques under paragraph 11 even if they were reserved for male worshippers only."

Example 5 (continued)

- …..this was of no assistance in resolving question of what the correct legal approach should be

"while it is appropriate that I should be made aware of any potential wider effects my decision in this case may have (and I have had regard to the evidence about other premises with this in mind), whether any premises fall within the scope of the exemption must depend on the facts of the particular case, and it is not possible or appropriate for me to form a view on whether relief was rightly accorded in these cases. In any event, since what I have to do is to determine, on the basis of a proper construction of the provisions, the extent to which the subject hereditament attracts relief, it is of no assistance for this purpose to know what valuation officers have done elsewhere since relief may or may not have been correctly given. The statutory exemptions are there to be applied in the terms in which they have been enacted, neither restrictively nor generously. If on a proper construction of the provisions the facts do not support exemption, that is an end of the matter. It is for Parliament and not for valuation officers or tribunals to prescribe the circumstances in which relief from rates should be given. A valuation officer has no power to exercise generosity in favour of a ratepayer or class of ratepayer in relation to exemption any more than he has power to exercise such generosity when assessing or agreeing rateable values".

Reflections on case 5

- Practice does not win the legal argument if the Tribunal regards the practice as potentially wrong
- Strong discouragement of evidence as to practice
- But the answer is still shaped with an eye on the practical implications

[NB decision of LT was upheld in CA [2007] RA 1 and HL [2008] WLR 1852]

Example 6 – the long and winding road to Woolway and beyond

Gilbert v Hickinbottom [1956] 2 QB 40 at 48

DENNING L.J. [intervenes in argument to say] "I am concerned with what the proper direction in law should be. Lord Keith said that the functional test is of small weight; the tribunal in this case has attached the greatest weight to it."

But in his judgment at [50] says:

"Those cases commend themselves to my mind: and I confess that I find it very difficult to distinguish our present case from those on the facts; but there must be some distinction because the chairman of the Lands Tribunal had those cases well in mind; and he had the advantage of a view, which we have not. We can only reverse his decision if it was one to which he could not reasonably come. I am not prepared to go so far and I would therefore dismiss the appeal".

Example 6 (continued)

- Trunkfield (VO) v Camden LBC [2011] RA 1
  - Gilbert rules don't seem to fit properly
  - Emphasis on flexibility in other judgments
  - Wary of use of practice to find the answer

  "I would add that I derive no assistance from the evidence … about other office premises and how the VO has dealt with their assessments either as one or as more than one hereditament. The facts in each case will vary, and even if an examination of the facts were to show some inconsistency in what the VO had done I do not see how this could influence the Tribunal in determining the matter that it must determine within the principles established by the Court of Appeal…. I can see that these matters might be raised in discussions between the ratepayer's agent and the VO, but the pursuit of them in tribunal proceedings is unlikely to illuminate the issues or to be a proportionate use of the tribunal's time". [25]

Example 6 (continued)

Woolway [2012] UKUT 165 (LC) at [22], [23] and [29]

- looks at practice of treating adjoining floors as single hereditament
- Focuses on "somewhat unreal" distinction between that and second/sixth floor given that "communication between the floors has no practical significance"
- Distinctions do not "properly reflect the realities of occupation in a modern office block" [29]
- [30] – no need to change whole current list

Example 6 (continued)

Woolway (Valuation Officer) v Mazars LLP [2015] AC 1862 (SC)

- set out principled approach [12] + guidance that: "application of these principles cannot be a mere mechanical exercise" "these will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense"

Obiter comments about existing practice re adjoining floors

- Lord Sumption "not necessarily correct" (21)
- Lord Gill "unsound" (33); adjoining floors should be "separate hereditaments"
- Lord Neuberger (63) – adjoining floors should be separate hereditaments
- Lord Toulson – agrees with all 3

Example 6 (continued)

- Lone voice of caution - Lord Carnwath at [62]:

“treatment of contiguous floors in single occupation” “is not before us and I would prefer not to express any firm view. The Valuation Officer’s practice of treating such cases as single hereditaments, even if in part concessionary seems to me unobjectionable if it avoids narrow factual disputes about degrees of connection”.

Example 6 (continued)

- Lord Neuberger [58]

“there will be cases where the guidance given on this appeal will be difficult to apply with any confidence. However, it is hard to believe that we will be leaving the law of England and Wales on this topic in a less satisfactory state than it was as a result of Gilbert [1956] 2 QB 40”

But now – imminent reversal by parliament - Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Bill 2018

Reflections on example 6

- An unsatisfactory illustration of the relationship between rating practice and the law? [discuss]
- Not helped by the abdication of responsibility by the CA in 1956 [discuss]
- Reliance on analogy with practice created a legal error
- But the correction of error sweeps away “unobjectionable” [discuss] practice
- Created need to establish new practice with pre-emptive steer from Supreme Court
- Situation now resolved/complicated (?) by proposed partial legislative solution
- Key role for expert tribunals in resolving new questions and formulating workable boundaries

Example 7 – Iceland Foods Ltd v Berry (VO) [2018]

- Issue is meaning of “trade processes” within class 2 of the Valuation for Rating (Plant and Machinery) Regulations 2000
- VO succeeds in UT(LC) and CA with construction/linguistic argument
- But if right, how does it make sense of guidance in rating manual about air conditioning serving computer suites?
- And how does fit with the Wood Committee’s deliberations about the way that the regulations should work?
- Supreme Court come down very firmly in favour of continuity of practice as evidenced in the caselaw, rating manual and legislative background including Wood Committee
- If it ain’t broke; don’t fix it

Overall reflections

- Expert tribunal shapes practice with an eye on legal coherence and practical workability (examples 1, 2, 4 and 5)
- Least successful examples are where courts (without apparent experience in rating) impose legal strictures without sufficient consideration of practical impacts
- Hard cases are where most legally coherent answer will give rise to the need to re-create (rather than just tweak/refine) practice (eg Woolway adjoining floors)
- In Monk and Iceland, the SC has shown itself to be more sympathetic to continuity of well established practice; than construction arguments which seek to create a new approach.