

Who is in paramount control?

Galina Ward

15 April 2015

Paramount control

- Why does it matter?
- When does it matter?
- What does it mean?
- When might it be present?
- How can you tell?

Why does it matter?

Four ingredients of rateable occupation:

- (1) **actual** occupation
- (2) **exclusive** for the particular purposes of the possessor
- (3) of some value or **benefit** to the possessor
- (4) not for too **transient** a period

John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area [1949] 1 KB 344 at p350 (per Tucker LJ)

When does it matter?



...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...

Holywell Union & Halkyn Parish v Halkyn Drainage Company [1895] AC 117 per Lord Herschell LC at p126

Two (or more) occupiers

- Grant of right of drainage through a tunnel and watercourse and right to place works in tunnel and watercourse, and build more tunnels (Holywell Union):
“land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated”
- Right to use area of station concourse for bookstall, kiosk, advertising showcase, etc (Westminster CC v Southern Railway) [1936] AC 511:
“whether the premises in question have been so carved out of the railway hereditament...as to be capable of a separate assessment, or whether they have, though let out, been so let out as still to leave them in the occupation of the Railway Company”

Two possible occupiers?

John Laing at p351:

“Although at the outset this case was presented rather as one in which there were competing occupants, or there might be persons who could be regarded as competing occupants, and the question was whose was the paramount occupancy, I think the point is more accurately stated [as]: not whether there are competing occupants, but is there any real occupation by the appellants, or is not the true position that they are really in occupation on behalf of someone else...”

Two actual occupiers?

- Sports club in a power station – RWEnpower v Thompson (VO) RA/58/2005 – given right to use premises subject to infrequent user by power company
- Petrol station in a motorway service area – Esso Petroleum Company Ltd v Walker (VO) [2013] UKUT 052 (LC) – operated under an agency agreement

Which occupier is “exclusive”?



“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.”

Lord Russell in Southern Railway at p530

How much control does it take?



“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 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”

Lord Russell in Southern Railway at p532

What is the relevant purpose?



“...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.”

Wimborne DC v Brayne [1985] RA 234 per Lloyd LJ

Esso v Walker



- Para 82: *“Esso’s primary business interest is the selling of fuel...We find that Esso occupies the retained land for its purposes.”*
- Para 84: *“Roadchef performs the function under the agency agreement of arranging most of the day-to-day running of the fuel station...Therefore we find that Roadchef occupies the site for its purposes.”*
- Para 87/88: *“To what extent does Esso/Roadchef’s degree of control interfere substantially with the occupation of the premises by Roadchef/Esso for the purpose for which Roadchef/Esso occupies them?”*

What is (not) substantial interference?



- Nature and position subject to general manager's approval
- Employees under control of the general manager
- Requirement to conform to reasonable orders
- Control over who may be employed: *“no employee is to be retained, contrary to the decision of the general manager.”*
- Control over what is sold: *“a restrictive provision which may well find its place in the lease of business premises to a bookseller as to whose rateable occupatoin no shadow of doubt could exist.”*
- Control over time of access: *“a person may occupy part of a larger building, though he can only obtain access by permission of the general owner”*

Southern Railway (WHSmith kiosks – p536)

What is (not) substantial interference? (2)



- Control of user: *“a licence to use the land and premises described in the schedule as a depot for storing builders’ merchants’ material and no other purpose”*
- Control of operations: *“The licensees must not use the premises except for goods which have been or will be conveyed over the Company’s system”*
- Control of access: *“They and their servants are not to be on the premises or in the goods yard when the yard is not open for business save with the consent of the station-master or goods agent.”*

Southern Railway (Beckenham Junction – p547-548)

What is (not) substantial interference? (3)



- *“White could be, and indeed were, instructed by Brayne where to dig, where not to, and how much to take out”*

“a control over the performance of the contract, as in Laing, not an interference with White’s occupation.”
- *“To comply with the station’s insurance policy...they wished to ensure that only suitable persons could use the gym facilities. They did this through a system that required approval of the person...by the power station management”*

What might be substantial interference?



- Southern Railway: Reservation of “*free entrance and access to and over the said premises for all purposes and at all times*”
- Esso: detailed and comparatively strict control of supervision of petrol filling
- Requirement to stock some items and not others
- Requirement for staff to have specialist training
- Requirement for staff to wear badges
- Limited power to undertake alterations/ maintenance/repairs
- Reservation of power to come and go at will

How can you tell?



- VO v BRB (1972) Ryde's Rating Cases 123 per Buckley LJ at p155:
“Where there are no rival claims to occupancy...if, when the underlying facts have all been found, a question remains for decision whether, on those facts, A should be held to be in rateable occupation, I cannot myself see how this can be other than a question of law...If, when all the underlying facts have been found, a question still remains for decision which rival claimant should be held to be rateable because his occupation is paramount, the answer is, in a sense, a factual decision, viz., that having regard to all the relevant factual circumstances A's occupation is paramount and B's is subordinate.”

Fact or law?

- “...*must depend upon the facts in every case...*”
(Southern Railway)
- “...*the answer depends on the facts on the ground.*”
(Esso)

The facts on the ground

- “*Liability to rates is not a matter of title.*” (Lord McNaghten in Holywell Union at p127)
- “*I regard the forms of the documents under which they are “let out” as of small importance...*” (Lord Russell in Southern Railway at p532)
- “*...the use of the premises for company related meetings was very limited indeed...*” (RWEnpower at para 26)

Conclusions



- Identify the parties' purposes
- Identify the factors relevant to control
- Look to the substance, not the form
- Compare seriousness of interference to decided cases
- And construct your argument