

## Southern Railway and the Identification of Hereditaments

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### Identifying a separate rateable hereditament

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- Two questions –
  1. Is the unit capable of being a separate hereditament?
  2. Is the unit a separate rateable hereditament?

## The nature of the tax



- A tax on property, not a tax on persons or businesses
- Lands and heritages are physical subjects
- The geographical test recognises that
- The primary test is geographical, based on visual and cartographic unity: Woolway (VO) v Mazars LLP [2015] UKSC 53



## First question - relevance of use and occupation



Considered by –

SLT in Assessor for Lanarkshire v Clydesdale Bank plc [2005] RA 1

UT(LC) in Sainsburys and others v Sykes and others (VOs) [2017] UKUT 0138 (LC)



## Clydesdale Bank



- ATMs installed in convenience stores
  - Assessor's argument –  
A particular part of the floor can be identified. The floor is land and heritages. It has been given over to a particular use for a substantial period of time.
  - Rejected by SLT and unsound as it  
*does not take account of the inter-related questions of use and identity. The process of creating heritable units by reference to use inevitably makes that use the dominant characteristic of occupation.*
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## Upper Tribunal (Lands Chamber)



- In the context of ATMs it is only in the decision of the Lands Tribunal for Scotland in *Clydesdale* that the applicability of dicta in *Southern Railway* concerning concurrent occupation of self-contained buildings and structures rateable in their own right was considered. The Tribunal's point, with which we agree, was that the very different context of hereditaments comprising the sites of non-rateable machinery, capable of being moved around the shop floor, required a different approach. **The existence of separate hereditaments should not be assumed where no independently identifiable unit could be recognised without considering the nature of the occupancy.**
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## Approach of UT(LC) to first question



- Follow the geographical principle
- Is there anything to identify a unit of property BEFORE the machine is installed?
- Has the site been designed or adapted for the purpose of installing the machine?
- What are the site's identifiable physical characteristics?
- Has the site been fixed by agreement?
- Has a right been granted to occupy that particular site for the purpose of installing and operating the machine?

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## UT(LC) – approach in practice



- Clear distinction between –
  - (i) Indistinguishable shop floor space occupied by free standing machine – not capable of being separate rateable hereditament; and
  - (ii) Site within store which has been designed or adapted for the specific purpose of accommodation the machine – capable of being a separate rateable hereditament.

UT(LC) – that distinction is practical and appropriate to a tax on property.

## Second question

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- In a case where land capable of being a separate rateable hereditament is occupied by two persons, who is the rateable occupier?
  - Paramount and subordinate occupation
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## Ingredients of rateable occupation

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- *John Laing & Sons Ltd v Kingswood Assessment Committee* [1949] 1 KB 344, 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.”
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## Paramount and subordinate occupiers



- Halkyn District Mines Drainage Company v Holywell [1895] AC 117, 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.*

## Legal possession not essential



- Actual occupation in question must be “exclusive for the particular purposes of the possessor” but it is not necessary for the occupier to be the owner of a legal estate conferring a right of exclusive possession.
- Westminster Council v Southern Railway Company Ltd [1936] AC 511, 533: *the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.*

## How can concurrent occupation be exclusive?



Wimborne DC v Brayne Construction Ltd [1985] RA 234

*Another way of explaining the difficulty might be that 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.*

## How do you identify the paramount occupier?



- Westminster Council v Southern Railway Co Ltd [1936] AC511
- The landlord control principle (p530)

*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.*

## Applying the landlord-control principle



Southern Railway at page 532 -

*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.*

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## Scottish ATM cases – a test of purpose



- Clydesdale Bank – at page 21, the SLT referring to the test of control as a means of identifying which of two occupiers was to be regarded as paramount and said –

*... it is not always clear that this test can provide an answer where the supposed occupiers are not truly rivals but are both deriving a direct benefit from the same use of the subjects. We think that the question of control must be seen as essentially subordinate to the broad question of purpose.*

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## Central Scotland Assessor v Bank of Ireland



- Lands Valuation Appeals Court [2011] RA 195 at [15] –
- *In my opinion, the crucial difference in this case is that there is no direct link between the ATM site and the operation of the Sub Post Office. The ATM cannot reasonably be said to be one of the retail attractions provided in the Sub Post Office for its customers. Where an ATM is sited within a retail store, it is reasonable to infer that its primary purpose is to provide a facility for shoppers enabling them to access cash in-store in the course of shopping there. It is reasonable also to infer that few users will go to the store solely to obtain cash from the ATM.*

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## Upper Tribunal's approach in ATMs appeals



*Where a distinct space has been created to receive a machine and the question arises whether there are rival candidates for rateable occupation of that space, the Scottish cases have focussed on whether, objectively assessed, the dominant purpose of the arrangement is to provide a facility or “retail attraction” for the host’s customers, or whether that purpose is insufficiently connected to the host’s own business to enable the host’s occupation (if any) to be regarded as paramount.*

## Control and purpose - reconciliation?



UT(LC) at [167] –

*The [Scottish Lands] Tribunal's sole modification of the approach taken in Southern Railway concerned the value of "control" as a means of resolving the issue of paramount occupation. In this very different factual context, where "occupiers are not truly rivals but are both deriving a direct benefit from the same use of the subjects" it regarded "the question of control ... as essentially subordinate to the broad question of purpose".*

## What is purpose?



- *Wimborne District Council v Brayne Construction Co Ltd* [1985] RA 234, 239 –
- when considering the purpose of an activity it was relevant to consider "the object of the activity in question, rather than the motive behind the activity."

## Purpose should be objectively ascertainable



UT(LC) at [173] -

*We agree that the individual business decisions of retailers and their reasons for those decisions have very little to contribute to the determination of these appeals. The relevant purpose for which a site is being used cannot depend on the subjective intentions of the occupiers of the site (“the motive behind the activity” as Lloyd LJ put it [in Wimborne]), but must be objectively ascertainable.*

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## Consideration of purpose of occupation



UT(LC) -

- Purpose for which ATM has been installed.
- In the light of the decisions the parties make about the manner in which the space dedicated to ATMs will be used.
- What is the dominant/primary purpose of occupation?