

# The ATMs litigation – where are we now?

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## ATMs litigation – the basic issues

- What is the correct approach in law to rating the site of an automated teller machine (ATM) in a supermarket, shop or petrol filling station?
- The operator of the ATM and the operator of the shop or store are different persons.
- Are the sites in stores on which ATMs are positioned capable of being separate hereditaments?
- If so, are those sites in rateable occupation by the banks who operate them or by the store operators who permit their operation at the store?

## The basic facts

- 9 lead cases
- ATMs in large stores, small stores, PFS.
- Some external facing (holes in the wall), some internal.
- Some sited in purpose built secure rooms or housings in store.
- One free standing machine on undifferentiated floor space in store.
- ATMs installed and operated under terms of licences granted to ATM operators.

## The parties' basic contentions

- **Ratepayers contentions –**
  - (1) The site of an ATM in a shop, store or PFS is not capable of being a separate hereditament.
  - (2) In any event, such an ATM site remains in the rateable occupation of the operator of the shop, store or PFS as part of the host hereditament.
- **Valuation officers' contentions –**
  - (1) The site of an ATM in a shop, store or PFS is capable of being a separate hereditament.
  - (2) Such a site is in the rateable occupation of the ATM operator and is a separate rateable hereditament from the host shop or store.

## Issues for the Upper Tribunal

- **The hereditament question –**  
What is the correct approach to identifying a possible ATM site hereditament?
- **The rateable occupation question –**  
What is the correct approach to identifying the rateable occupier of an ATM site hereditament?
- [2017] UKUT 0138 (LC)

## Upper Tribunal Decision (1)

- **The hereditament question**

Apply the geographical test (Woolway v Mazars).

Key factors (#136) - design or adaptation of site for ATM in shop premises by creation of hole in external wall or construction of separate enclosed space to house the machine.

- identifiable unit of property clearly intended for a particular use.
- deliberate creation of distinct, specific space in fixed and apparently permanent location in host store premises.

## Upper Tribunal Decision (2)

- **The rateable occupation question**

Apply a modified approach to “general control” principle (*Westminster Council v Southern Railway*).

Key factors (#167) - occupiers (i.e. store operator and ATM operator) are not rivals as both derive direct benefit from use of ATM site.

- issue of paramount occupation resolved by broad question of purpose rather than question of general control.
- that modified “primary or dominant purpose” test supported by Scottish cases.

## Court of Appeal decision

- [2018] EWCA Civ 2472
- Two central issues [4] –
  - (1) Did the Upper Tribunal err in its approach to the identification of a hereditament?
  - (2) Did the Upper Tribunal err in its approach to the rateable occupation of the ATM sites?



## The hereditament question (1)

- Lindblom LJ at [50]-[58]
- The presence of a non-rateable machine may be taken in account for the purpose of deciding whether a separate hereditament exists.
- Physical occupation of a site by placing a machine upon it may lead to the formation of a separate hereditament.
- The site must be sufficiently defined as a unit of property by its own boundaries to meet the essential attribute of self-containment.
- Self-containment may be defined physically or by reference to a right of occupation.
- These are logical elements of the geographical test in Woolway.

## The hereditament question (2)

- The Tribunal approached the hereditament question correctly in accordance with the geographical test in Woolway – Lindblom LJ at [58].
- The Tribunal was entitled to conclude that the ATM sites which were deliberately designed or adapted to house an ATM were capable of being separate hereditaments from the host stores in which they were located – Lindblom LJ at [56]-[57].
- The Tribunal was entitled to conclude that the ATM site at Nottingham constituted a physically undifferentiated area of floor space within the host store which, in the absence of a right of occupation, lacked the necessary definition and permanence to be capable of being identified as a separate hereditament - Lindblom LJ at [56]-[57].

## The rateable occupation question (1)

- Lindblom LJ at [80]-[94]
- The relevant legal principles are well established, familiar and complete.
- A person in possession of premises who gives another possession of part of those premises remains in rateable occupation unless that other person has exclusive possession: Halkyn District Mines Drainage Co.
- Where persons occupy parts of a larger hereditament, if the owner (being also in occupation) retains to himself general control over the occupied parts, he remains in rateable occupation – the “landlord-control principle”: Westminster Council v Southern Railway.
- Who is in paramount occupation requires consideration of the actual occupiers’ respective rights and purposes in occupying the site: ibid.

## The rateable occupation question (2)

- The relevant question is whether the landlord has retained “general control” over the parts in shared occupation.
- The Scottish cases do not support a modified approach to the “general control” principle by importing a “primary or dominant purpose” test in order to determine the question who is in paramount occupation of an ATM site.
- The *Bank of Ireland* case turned on the conventional application of the principle of “general control” to the facts – the ATM operator was found to be in “independent uncontrolled occupation” of the ATM site.
- The Upper Tribunal erred in law in the present appeals by applying a “primary or dominant purpose” test to determine who was in rateable occupation of the ATM sites.

## The rateable occupation question (3)

- In these cases, on the facts accepted by the Tribunal
  - each ATM site was physically incorporated into the store premises.
  - each ATM site was functionally integrated into the operation of the store.
  - the store operator had given up neither possession nor actual occupation of the site on which the ATM was operated.
  - both the ATM operator and the store operator derived a direct benefit from using the site for the common purpose of providing ATM services to the public at the retail store.

## The rateable occupation question (4)

- Lindblom LJ at [88]
 

*“On a straightforward application of the ‘general control’ principle, in the light of the facts the Tribunal accepted, the correct answer seems to me to have been that the retailer, as ‘owner’, had in all these cases – both internal and external ATM sites – retained sufficient control of the site, in contractual, physical and functional terms, to be regarded as being in rateable occupation of it.”*
- None of the VOs’ alterations to the 2010 rating lists to enter the sites of ATMs in the lead cases as separate hereditaments was justified. [97]

## Implications...

- Where ATMs or vending machines rest on physically undifferentiated areas of floor space in shops/stores without the machine operator enjoying a right of occupation of that area of floorspace, the site in question is probably incapable of being a hereditament, applying the geographical test.
- Where ATMs or vending machines are operated in a shop or store by a person under a licence granted by the shop/store operator, the question whether the site on which the machine is operated is in separate rateable occupation falls to be determined in accordance with the 'general control' principle.
- Has the shop/store owner retained sufficient control of the site in contractual, physical and functional terms to be found to have retained general control?

**BUT...**

- The Valuation Officers have applied to the Supreme Court for permission to appeal.
- **WATCH THIS SPACE!**