Welcome to Landmark Chambers' Annual Rating Conference 2022

Thursday 10 November 2022

Landmark Chambers

Welcome and introduction

Tim Morshead KC

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Valuing social and socio-economic benefits – Where does recent case law lead?

David Forsdick KC

The Issue and where it has arisen

***The Issue**:* Premises serve a socio-economic purpose which justifies *public subsidy for what would otherwise be an unviable use*. No rent is actually paid and occupier (normally a public authority) contends that it could not and would not agree to pay any rent. How are the premises to be assessed for NDR?

Recently the answer to that question has been considered in two cases both concerning museums (following on from *York Museums (2017)*):

Hughes v. Exeter City Council ("RAMM") [2020] - R&E RV £nil

Allen v. Tyne & Wear Archives and Museums ("TWAM") [2022]: R&E RV £nil

What this talk will consider

Address the issue under following heads:

- What are social and socio-economic benefits?
- *How to measure them and assess to whom they accrue*
- *The case law – RAMM and TWAM*
- *The current position:*
    - *choice of valuation method*
    - *taking into account socio-economic benefits*
- *Possible future extension of the principle to other public buildings*

(1) Social and socio-economic benefits – what are they?

The sort of benefits we are talking about are:

(1) providing services to local residents such as cultural, educational, sporting and community facilities to serve a general public function and to benefit the public generally;

(2) promoting health and well being through cultural, sporting, educational activities and community engagement – providing discounts to encourage use to specific groups for wider social reasons;

(3) promoting economic activity by providing reasons to come into town;

(4) getting more tourists into an area and thus generating economic benefits for the area and businesses in it

(2) Social/ socio-economic benefits – key features

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The key features of these benefits (fundamental to the later analysis) are:

1. All non-commercial
2. They do not directly financially benefit the person providing the services – the benefits accrue to the public more generally but are paid for by the body providing the services
3. To secure them will often (indeed almost always) involve public subsidy - museums, libraries, theatres, leisure centres by the public body
4. The benefits are thus wide-spread but the burden is borne by the service provider *and thus the building occupier* (the ratepayer)
5. *Stark distinction with normal occupation* – where benefits of occupation accrue to the occupier and ratepayer.

Measuring the value of the benefits – two stages

TWAM makes it clear there are two stages:

(1) assessing the total socio-economic benefits

(2) Assessing what the occupier would pay for those benefits.

As to (1):

a. there are tried and tested methodologies for assessing such benefits;
b. customarily used by central and local government to assess the value for money of "public good" projects and to judge between them;
c. there are various models and competing models can be tested in XX (as in TWAM)
d. but the basic structure of translating socio-economic benefits into financial value is not controversial – so for present purposes assume can accurately measure the overall socio-economic benefits to the community

Measuring the value of the benefits – stage 2

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The second stage - working out what the public body occupier would pay in rent to secure those socio-economic benefits for its community - is far more difficult and controversial.

First, it is obviously not possible to assert that the occupier will pay the full value of the wide ranging socio-economic benefits which will accrue to others

Second, it is therefore necessary to find a way to assess what they will pay.

Third, various approaches have been tried and all have so far failed.

To explain this necessary to look at some principles about choice of valuation method and for that to look briefly at *RAMM.* TMKC will be addressing choice of valuation method in more detail later.

RAMM (1)

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Essential Facts

1. Exeter CC – small council; limited budget; competing demands;
2. Large LB museum with large collection. ECC had taken it over when charitable trust failed in C19th.
3. Grade II LB – expensive to maintain;
4. Ran at a very large annual deficit
5. Evidence that would not and could not extend subsidy further;
6. had recently had major investment partly funded by ECC but mainly by Heritage Lottery Fund
7. If R&E valuation approach agreed at £nil. If CB, many elements agreed but stand back and look at stage 5 not.

RAMM (2) - Valuation Method – CB as default?

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- Familiar Choice: rental (or settlement) evidence; R&E; CB as last resort
- Here no direct rental comparables or reliable settlement evidence
- Not occupied for profit – so VO said could not be R&E which could only apply to hereditaments occupied for profit and therefore had to be CB.
- However LC held that choice of valuation approach should be evidence led and not determined as a matter of principle (215). Real question was what evidential hook was there in the market for use of a particular valuation method

RAMM (3) Rejection of CB because not evidence led Adoption of R&E because reflected working of market

- In the case of museums there was no evidence that market valued such properties on CB basis.

- Therefore, the historic and widespread basic assumption that buildings occupied other than for profit for their social and socio-economic benefits had to be valued on a CB is wrong because that is not how the market values them. CB was therefore only to be used as a last resort if there was no evidence of the market adopting any other valuation approach.

- On the facts here, however, there was market evidence which showed that rents for museums were set by reference to their trading potential (an approach similar to R&E – even if that resulted in £nil) and not by reference to costs of construction.

- Where occupation was burdensome– LB, subsidised operation, little income, high costs, undertaken for public benefits - a £nil rent was customarily agreed in the market.

RAMM (4) – R&E even if result was £nil

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- But that led to a £nil rent. And would tend to always lead to a £nil rent for buildings occupied for their socio-economic value and requiring public subsidy.
- How then to reflect the value the occupier places on the socio-economic benefits – **the fundamental question and the fundamental dilemma**
- Council occupies building for the socio-economic benefits but by almost by definition R&E yields £nil.
- And no evidence of enhanced rental bids to reflect socio-economic benefits or non-profit motives. The evidence showed that landlords were willing to let burdensome buildings for £nil and that Councils and charities were not prepared to pay substantive rents to reflect socio-economic benefits and there was no competition for such buildings.

RAMM (5) –reflecting socio-economic value

VO refused to undertake an R&E because would always = £nil. Its use was wrong in principle, VO said, because it failed to reflect socio-economic benefits for which a council would pay rent to secure [220].

LC rejected that - socio-economic value *could be reflected* in an overbid or a share of receipts approach

That caused a problem because in *RAMM* VO had consistently refused to argue for anything other than a CB (even as a fallback) because it stuck to its "CB was the only permissible methodology" approach. There was thus no evidential basis for the Court to consider an overbid or share of profits approach [162/223]

But the LC in RAMM expressly left the door open to the VO to demonstrate that the council would pay a positive rent to secure the socio-economic benefits…

TWAM (1)

That brings us to TWAM. In TWAM (2022) VO sought to fill that gap and to value “socio-economic value” to the council occupiers to avoid the £nil result from an R&E – “assessing their socio economic value meaning their non-financial benefit to the public and their economic value to public authorities” [4].

All the museums were free to enter and ran a significant deficit [9/10] and would yield £nil on the R&E even assuming notional entry fees. Extensions to them had (relatively recently) been part funded by the local councils which was said by VO to show how much the councils valued them.

The buildings were owned and operated purely for socio-economic benefits to the community.

TWAM (2) – The financial value of the socio-econ benefits

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Evidence was given as to the financial value of the socio-economic benefits of the museums – contested but capable of showing major overall benefits to the community as a whole.

However, as in *RAMM [225],* there was a distinction between financially quantifiable benefits to the community and the benefits to the actual occupier. Those socio-economic benefits "may hold *some value for the occupier*"

The question was how to assess that value *to the occupier*

Various and wide-ranging arguments as to how that value might be assessed were raised – on the fundamental basis that "*valuation judgement* [could be applied] to assess whether the value of any relevant socio-economic benefit might give rise to a positive rateable value" [41].

TWAM (3) – the fundamental lacaune

The VO was thus seeking to *infer* value that the council's would pay – they had no positive market evidence that a provider of facilities for socio-economic benefits would pay a premium over the results of an R&E.

The VO sought to adopt a share of gross receipts approach but this was rejected as there was no evidential base for it [105].

The VO argued for a socio-economic uplift (or overbid) based on the evidence of the financial value of those benefits but:

"there is no methodology available to translate that social value to the public into value to the local authority itself. This is more than a theoretical point – it is fundamental to the rating hypothesis" [109]

The claim that there must be an "overbid" to secure the socio-economic benefits was not based on evidence. And see para 112/114.

Extending the Principle in RAMM and TWAM

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So the position now is that for burdensome historic (museum) buildings which rely on subsidy from Council's there is evidence that the R&E is the approach to setting rents in the market and that it will (almost always) yield £nil. There is no evidence to support use of CB and no justification for using it as a last resort. There is no route to translating socio-economic benefits to the community into some sort of uplift to the R&E.

Can this approach be extended to other subsidy supported public facilities provided for socio-economic reasons only? A £multi-billion question?

Yet to be tested but…

Limits of RAMM and Eastbourne/Sports England

In *RAMM,* LC was careful to limit its observations to historic museums and not to imply that its approach had any wider application e.g. for grant funded local authority leisure centres.

The VO in seeking PTA to CA in *RAMM* however claimed that the issue was fundamental to a wide range of public buildings and was worth £billions in RV.

There is case law to cover the following situations:

> (1) where a Council is under a statutory duty to provide specific quantum of buildings to meet needs then CB is appropriate (schools is obvious example. It has to provide enough spaces and so has no choice but to build its own or take equivalent space – hence the CB is appropriate);
>
> (2) Where a council has recently built a building, the CB is appropriate because the Council evidently felt the costs of construction were value for money.

Challenging those principles seems *a step too far*. But what about a less extreme case….

Possible Scenarios

A 1960s Leisure Centre/Library/ Community centre or hall/ Adult education facility/ LA theatre: excessively large and grand for current usage. Expensive to maintain. No statutory duty to provide that specific building so no obligation to have it at all. Poor usage because of better facilities elsewhere. Would not be built if was not already there. Kept open for pure socio-economic reasons for the immediate locality. Requiring major subsidy. No realistic prospect of LA being willing or able to provide it if it was not already there. No competition for it. Evidence that Council divests it to wholly owned company for free based on R&E type s.123 exercise and with a guaranteed subsidy.

Why would principle in RAMM *not apply to it?*

Scenarios (2)

Facility recently provided by lottery based on socio-economic benefits – uneconomic and uncommercial. No competition. No statutory duty. LA bid for it precisely because it could not justify providing it itself but the socio-economic benefits to the community justified the grant. Grant awarded because of those wider socio-economic benefits and precisely because the LA would not/could not fund it itself and because the building would not be of that value to the LA.

Those grants have historically been taken into account on the assumption that they represent *value to the occupier* equating socio-economic benefits to the community as value to the LA occupier

Is that approach sustainable post – RAMM and TWAM? What evidence is there that LA would pay any rent for such buildings? What evidence is there that a LA would pay any rent for such buildings based on costs of construction?

Scenario (3) – non-local authority situations

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Question raised in advance by an attendee. Take a situation where a former commercial building is vacant and no demand. *Telereal* would normally provide the answer to that - look at values for that mode or category of occupation of that form of building in the locality.

But what of a specialist class of hereditament - an unusual class of building - no market; no demand; no comparables. And where it is possible to prove no commercially motivated use could be made of it. Intrinsically burdensome building. Landowner would be liable for rates based on that specialist class. In position of LA? Forced subsidy?

All arguments for a site specific £nil valuation on the facts. Not sure the RAMM/TWAM logic impacts that situation.

Looking forward

- Following *RAMM* expectation of wide range of cases covering wide range of public sector buildings occupied for socio-economic purposes.
- So far that has not materialised.
- Partly explained by rates retention circularity and partly explained by many such buildings being transferred to charities and/or arms length companies
- But just walking around any town or city clearly large range of buildings which potentially fall into the *RAMM/TWAM* logic and which to my mind are difficult to distinguish from *RAMM/TWAM logic.*
- Huge value at stake - financial pressure on LAs likely to see this issue arise in far wider range of situations than to date.

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Valuation methodology and the choice of approach

Luke Wilcox

Topics to cover

- The selection of methods to value property – what the law says
- The role of the courts and tribunals in selecting methods
- Recent developments – R&E, CB and shortened
- Areas to watch in future …

Selection of methods

- Starting point – the statutory hypothesis
- Value to the occupier of its occupation of the hereditament
- Every method is a means of answering that question

- *Garton v Hunter,* Per Lord Denning MR:

“In my opinion the tribunal was wrong in limiting the inquiry to the actual rent and making adjustments to it. It should also have taken into account the estimates given by the opposing valuers on the "contractor's basis" and the "profits basis". From the sum of all the available material it should have come to an estimate of the sum which a hypothetical tenant would pay as rent for this caravan site.”

- *Hughes (VO) v Exeter CC,* per Holgate J:

“it also remains open to the Tribunal to attach such weight as it considers appropriate to both the R and E and the CB valuations advanced by the parties, and not simply one method. In that situation it would be for the Tribunal to determine the relative weight to attach to each method and the value it gives before arriving at a final judgment on rateable value.”

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- So …
  - Don’t have to use one method
  - Don’t have to apply the result of any one method!
  - Still rare in practice to see a “multiple methods” valuation

Choice of method – the role of the Court

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- Very limited – methodology is a matter of valuation judgment not law
- Courts will only intervene where a legal error exists
- *Hong Kong Electric v Commissioner for Rating and Valuation*:

"within each of these [valuation] methods … there are broad parameters. There is much elasticity in the whole exercise. It is beyond the range of function of a court of law to say which particular methodology is "proper"."

Choice of method – the role of the Tribunal

- Upper Tribunal's position is very different to that of a Court – Tribunal has valuation expertise which the Court doesn't, and is the final arbiter of matters of valuation judgment

- *Cardtronics UK Ltd v Sykes (VO)* per Lord Carnwath (para 4):

"it is to the Upper Tribunal's judgment that we must look first for the relevant findings of fact and their evaluation. To justify intervention at a higher level it is necessary to identify something more than a difference of evaluative assessment."

- But even then, need to take care not to apply UT valuation judgments as if they were precedents

- *Hughes v York Museums and Gallery Trust*, UT para 112:

"Ascertainment of the rent at which premises might reasonably be expected to let on the statutory assumptions is a question of fact, not one of law. The selection of the most appropriate technique to be employed in answering that question is a matter of valuation judgment rather than legal precedent."

Tribunal decisions – R&E vs CB

- The museums cases (so far):
  - *Hughes (VO) v York Museums and Gallery Trust*
  - *Hughes (VO) v Exeter CC* (the RAMM case)
  - *Allen (VO) v Tyne and Wear Archives and Museums*

R&E vs CB – key points

- CB is the true method of last resort – to be used if no rents and if R&E is inappropriate (*TWAG)*

- CB unsuitable where building is of historic interest, so that its value isn't replicable *(YMGT)*

- CB contra-indicated where rents exist, and the evidence shows the bids are based on profitability not cost *(RAMM)*

  – BUT be careful not to conflate rental bids with freehold bids …
  – AND remember the CB doesn't need an alternative to be a real-world possibility (*Monsanto*)

The shortened method

- Comparable valuation approach:
  - RV based on a % of gross receipts/FMT
  - % derived from comparable properties with rents or other valuations
- Two cases in the last year dealing with the shortened method

BNPPDS (trustees for Blackrock) v Ricketts (VO)

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- UT case about valuation approach to multi-storey car parks
- VO contended for shortened method
- Appellant for R&E

BNPPDS (trustees for Blackrock) v Ricketts (VO)

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- Held (para 38):

“The choice of valuation method was for [counsel for the appellant] an issue of principle. There was, he said, insufficient rental evidence to use the shortened method, and this position was exacerbated by the wide geographical spread of the available comparables. We agree with this proposition … We also agree that the shortened method necessarily diminishes the role of costs in operating the car park, or as [counsel for the appellant] puts it: "no reasonable commercial operator determines the true income potential of a site without reference to expenditure".”

BNPPDS (trustees for Blackrock) v Ricketts (VO)

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- Tribunal held that where there was insufficient evidence for a rentals valuation, then there was by definition insufficient evidence for a shortened method valuation either, because the latter is derived from the former

- Shortened method cannot take into account differences in operational costs

- *"distilling all of the attributes, trading prospects and locational aspects of a property into a single numeric factor requires a great deal of insight and could be prone to errors of judgement"* (para 49)

- Method only suitable after a rigorous analysis of a proper sample of rents

Fryer v Cox

- Upper Tribunal considered RV of a farm attraction
- By the UT, parties agreed R&E most suitable method
- But Rating Manual favoured shortened method for most farm attractions, and VO had relied on comps valued using the shortened method.

Fryer v Cox

- Held (para 82):

“We take the view that the use of the shortened method is ill-advised in the absence of rental evidence or full R & E valuations on which to base the selection of the appropriate percentage. We have already noted a lack of reliable rental evidence in this case and neither party has adduced any R & E valuations of comparable properties in support of their case. We therefore attach little weight to Mr Cox's comparables or to the use of the shortened method in this instance.”

Valuation methods – what does the future hold?

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- Issues likely to come up in the new list:
  - Viability and applicability of the shortened method
  - The role of the CB, and the shift towards the R&E method where no rental evidence exists
  - Judgments based on multiple methods
  - Museums, take 4 …

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Questions?

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Refreshment Break

We will begin again at 11.40

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Valuation update

Tim Mould KC

Recent Decisions

- *BNPPDS Limited (Blackrock) v Andrew Ricketts (VO)* [2022] UKUT 129 (LC)
- *Ballcroft Estates Limited v Mr D Virk (VO)* [2022] UKUT 153 (LC)
- *Joe and Valerie Fryer v Mr Wayne Cox (VO)* [2022] UKUT 0229 (LC)
- *Mr Justin Allen (VO) v Tyne and Wear Archives and Museums* [2022] UKUT 206 (LC)

BNPPDS Limited (Blackrock) v Ricketts (VO)

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- Car park forming part of shopping centre
- Issues
- Mode and category of occupation
- Valuation method: Full R&E or shortened method (% of gross receipts)
- Divisible balance – tenant’s share
- Material change of circumstances

BNPPDS Limited (Blackrock) v Ricketts (VO)

- Mode or category of occupation – see [17]-[35]
- UT followed the approach taken in Hughes (VO) v Exeter City Council [2020].
- *"…prefer to avoid too narrow a focus on the evidence, as the Tribunal did in Hughes. There is no justification for complicating the valuation process unnecessarily by creating ever narrower categories with attendant issues around evidence. Adjustments are likely to be required in the application of the evidence, but it should be well with the capabilities of the expert rating surveyor to make the necessary judgment. It follows that we regard the property as being in the same mode or category as all multi-storey car parks".* [35]

BNPPDS Limited (Blackrock) v Ricketts (VO)

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- Divisible balance and tenant's share – see [57]-[59]
- UT exercised its own expert judgment having regard to guidance at 5.46/5.47 of Rating Forum Note on R&E
- *"…neither expert can supply evidence to support their respective adopted percentages of divisible balance. In exercising our own judgment, we have regard to the matters identified by the Rating Forum's guidance as relevant to the division the parties would be likely to agree in the open market: profit, risk and return on the tenant's capital".* [59]

BNPPDS Limited (Blackrock) v Ricketts (VO)

- Material change of circumstances – see [60-[70]
- Changes in matters specified at paragraphs (a), (b), (d) and (e) in paragraph 2(7) of schedule 6 to the LGFA 1988
- Two periods of building works at the host shopping centre and a nearby shopping centre (Putney Exchange and Southside)
- Difficulty of identifying clean evidence of impact of the MCCs on rental value
- *"…rating assessments in Putney Exchange fell by 20% in value between 2008 and 2015. It is possible that some of the decline seen in the receipts at the property in the period 2015 and 2017 had its origin in worsening market conditions. Unfortunately neither party adduced any evidence from which we can deduce anything conclusive".* [68]

Ballcock Estates Limited v Virk (VO)

- Ground floor and basement of 4 storey former Marks and Spencer store in Kidderminster
- Main issue –

"The nub of the dispute concerns demand, and how that affects value. The appellant says that the effect of both Weavers Wharf and general market decline has been such that there is little if any demand from mainstream retailers for large town centre retail properties…properly analysed, the lease of the appeal building and that of a small number of comparable transactions, show that rental values are purely nominal. The valuation officer…says that…there is sufficient evidence of positive rents from comparable transactions to apply a positive rateable value to the appeal property". [8]

Ballcock Estates Limited v Virk (VO)

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- The Tribunal referred to *Hewitt v Telereal Trillium* [2019] UKSC 23 at [58] –

"…even in a 'saturated' market the rating hypothesis assumes a willing tenant, and by implication one who is sufficiently interested to enter into negotiations to agree a rent on the statutory basis. As to the level of that rent, there is no reason why, in the absence of other material evidence, it should not be assessed by reference to 'general demand' derived from 'occupation of other…. properties with similar characteristics'."

- At [52] –
- *"In this appeal, we do have a small number of nearby properties which have reasonably similar characteristics to the appeal property".*

Ballcock Estates Limited v Virk (VO)

- The Tribunal's conclusions following analysis of that evidence [64]-[68].
- *"…the evidence is patchy…"*
- *"It is entirely unsurprising that the parties cannot agree what the answer should be".*
- *"… no evidence of a letting that is on sufficiently conventional terms to not require adjustment of varying degrees of effort, to convert them to the statutory hypothesis…all three lettings involve significant inducements…But I am satisfied that there is evidence of positive rents being paid, even after these inducements and that…there was general demand for large stores".*

Joe and Valerie Fryer v Cox (VO)

- Seasonal farm attraction – Apple Jack's Adventure Farm and Spooky World
- R&E valuation agreed to be appropriate
- Shortened method (%of gross receipts) considered – see [77]-[82]
- Issues included AVD turnover, cost of sales, repairs, advertising and promotion allowances, business rates, costs of manager and division of divisible balance
- On business rates, the Tribunal included the actual rates payable at AVD and accounted for risk of alteration by the VO within the tenant's share; see [51]-[60]
- On divisible balance and tenant's share, the Tribunal again had regard to the Rating Forum guidance – see [68]-[74] & [87]

Allen (VO) v Tyne and Wear Archives and Museums

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- Art galleries and museums
- All operating at a deficit
- Main issue raised by VO at [98] –

"The crux of the VO's case is that the socio-economic value of the three museums is measurable and would inform the rental bid of the hypothetical tenant leading to a positive rateable value, which can be calculated as a percentage of gross receipts".

- VO relied upon economic evidence on the assessment of socio-economic value – the Total Economic Value [TEV] framework – and the "AIM toolkit" used by museums to estimate their economic impact on the local economy for grant funding applications – see [47]-[53].

Allen (VO) v Tyne and Wear Archives and Museums

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- The Tribunal's conclusions –
- Two difficulties with using the methods relied upon by the VO to calculate the rent which the hypothetical tenant would pay –
- A local authority funds its museum in order to generate socio-economic value, but there is no methodology available to translate that social value to the public into value to the local authority itself – see [109]
- There is no methodology available to translate the value to the local authority into willingness to pay any rent at all, let alone how much rent, on the part of the local authority – see [110]
- The socio-economic "overbid" assumption is evidentially suspect – see [110]

Allen (VO) v Tyne and Wear Archives and Museums

- *“We remain stuck, two steps away from 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”.*
- See [112] – [115].
- In the Tribunal’s view, that bridge is unlikely to be capable of being crossed.

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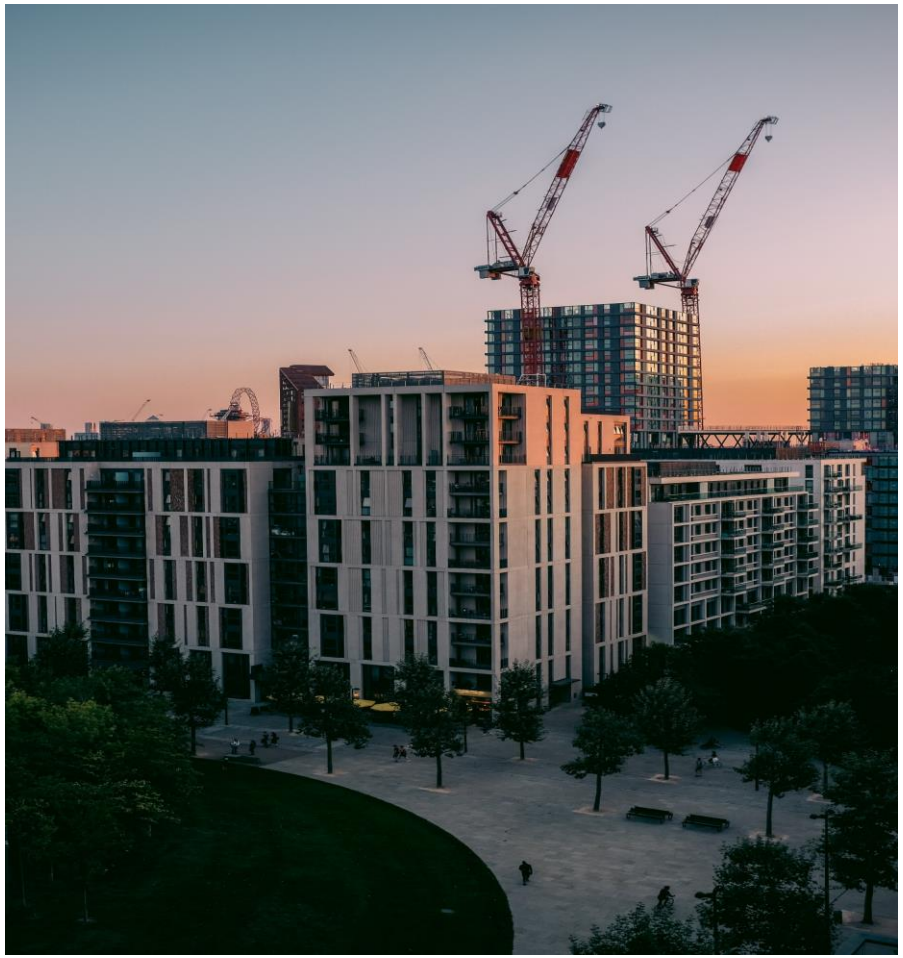
Completion notices – Procedure and Practice

Katharine Elliot

Completion Notices: Purpose

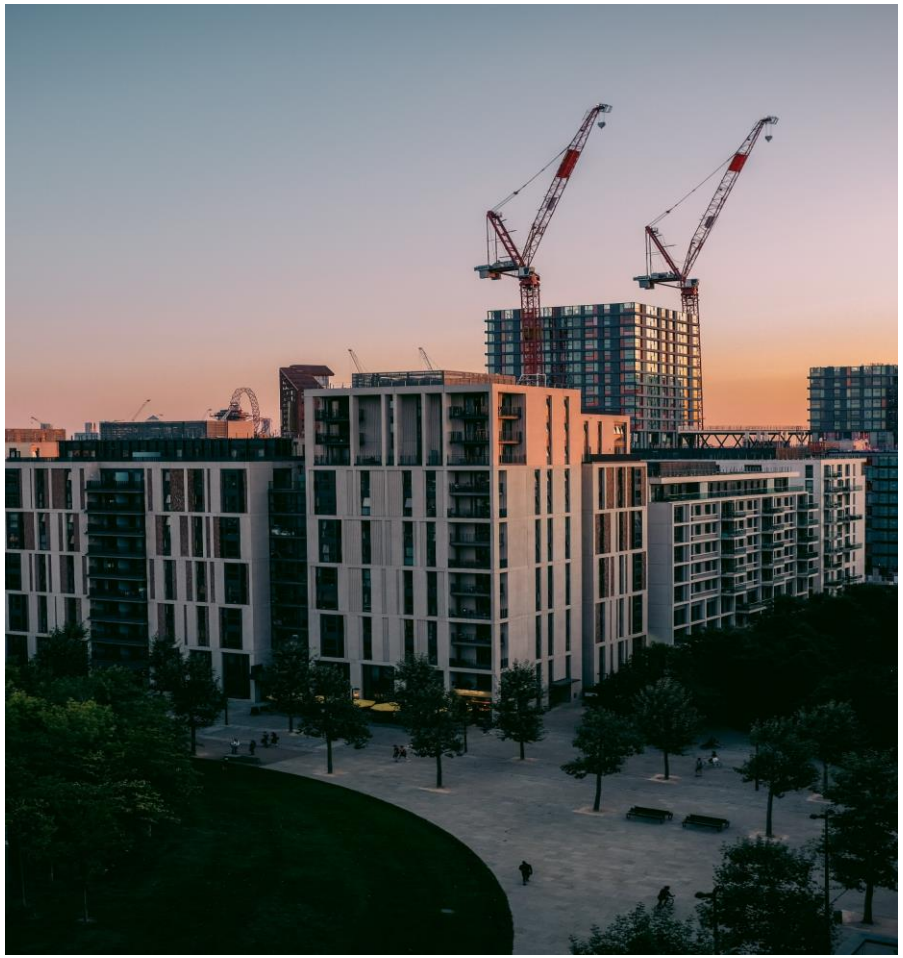


- Non-domestic rates levied on hereditaments
- Excludes unfinished / renovated buildings which cannot be occupied for the purpose for which designed

  Porter (VO) v Trustees of Gladman SIPPS [2011] UKUT 204 (LC)

- No scope for including "*nearly ready building*" on rating list save by following completion notice ("CN") procedure

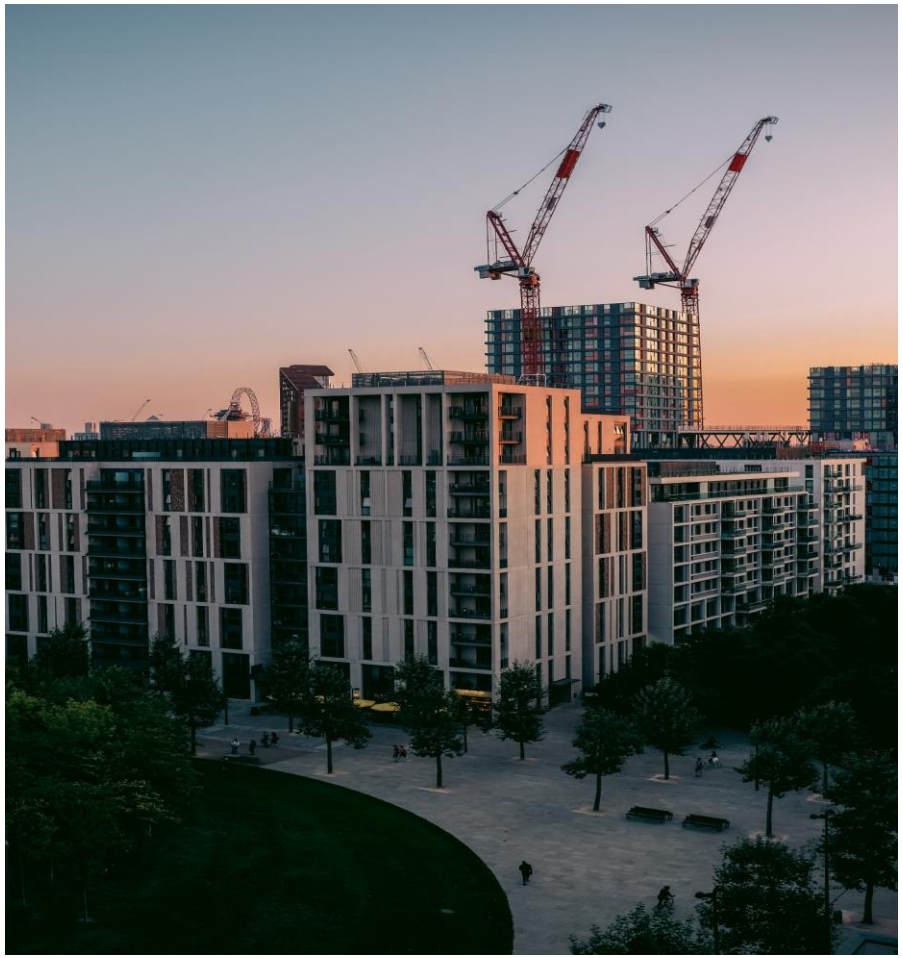
Completion Notices: Procedure



- S.46A & Sch 4A Local Government Finance Act 1988
- A deeming procedure

  (i.e., if building not completed on/before date in CN shall be treated as if completed for rating purposes)
- Allows "*factual*" and "*counterfactual*" entry on the list
- Applies to new buildings and to buildings removed from the list during renovation

Completion Notices: Procedure



- Billing Authority (“BA”) on notice that work remaining such that building can reasonably be expected to be completed in 3 months and serves CN on owner as soon as reasonably practicable

- May also serve in case of completed new build

- CN shall specify the building & proposed completion day/date
  - Not completed by service date: not later than 3 months from and including day of service
  - Completed by service date: day of service

Completion Notices: Procedure

- Service is an important consideration

  UKI (Kingsway) Ltd v Westminster CC [2018] UKSC 67

- Sch 4A, para 8 lists three possible modes of service ("*without prejudice to any other mode*…")

(1) Prepaid registered letter/recorded delivery to usual/last known place of abode or service address given

(2) [incorporated company/body] delivery to secretary/clerk at registered/principle office or sending as under option 1

(3) [name/address not ascertainable] addressing to "*owner*" and affixing to "*some conspicuous part of the building*"

Completion Notices: Procedure

- BA decided not to use one of the three modes under para 8, Sch 4A
- Delivered to third-party who forwarded notice on electronically to owner
- Appeal on basis that did not constitute valid service. UKSC held:
  (1) Has to be actual receipt of the notice + sufficient causal link with the actions of the BA
  (2) Uncertainty inherent in the legislation around service/completion date so more stringent test not appropriate
  (3) Electronic service valid for CN if a complete legible copy received by the owner

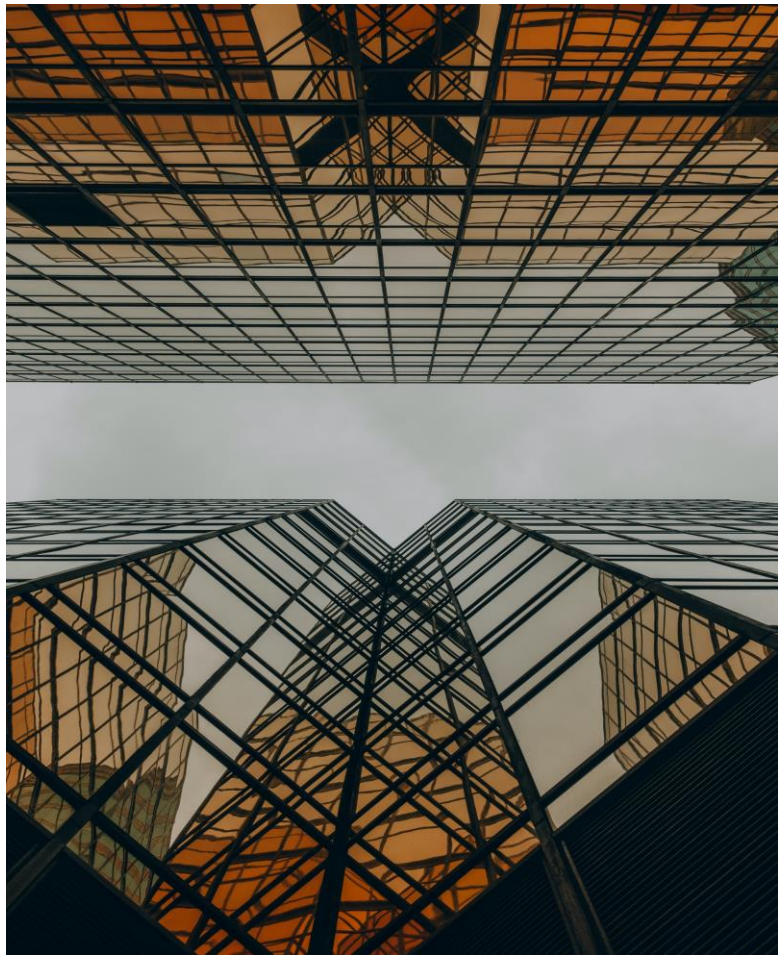
Hastie [1990] 1 WLR 1575

Completion Notices: Procedure

- BA to keep Valuation Officer (“VO”) informed (may direct not to serve)
- CN may withdraw notice / may agree a different completion date with the owner
- Right of appeal to the VT within 28 days of receipt on the ground that building to which notice relates has not been/cannot reasonably be expected to be completed by completion date
- Tribunal will determine completion date on successful appeal, otherwise original completion date applies

Validity & choosing the completion date (*Hermes Property Unit Trust v Roberts (VO)* [2021] UKUT 308 (LC))

- Can a CN specify a completion date which precedes the date of service?
- Incomplete buildings = para 2(2) Sch 4A ("*not later than 3 months from and including the day on which notice is served*")
- No provision for completion date preceding the date of service
- VTE held that "*substantial compliance*" was enough in the absence of prejudice

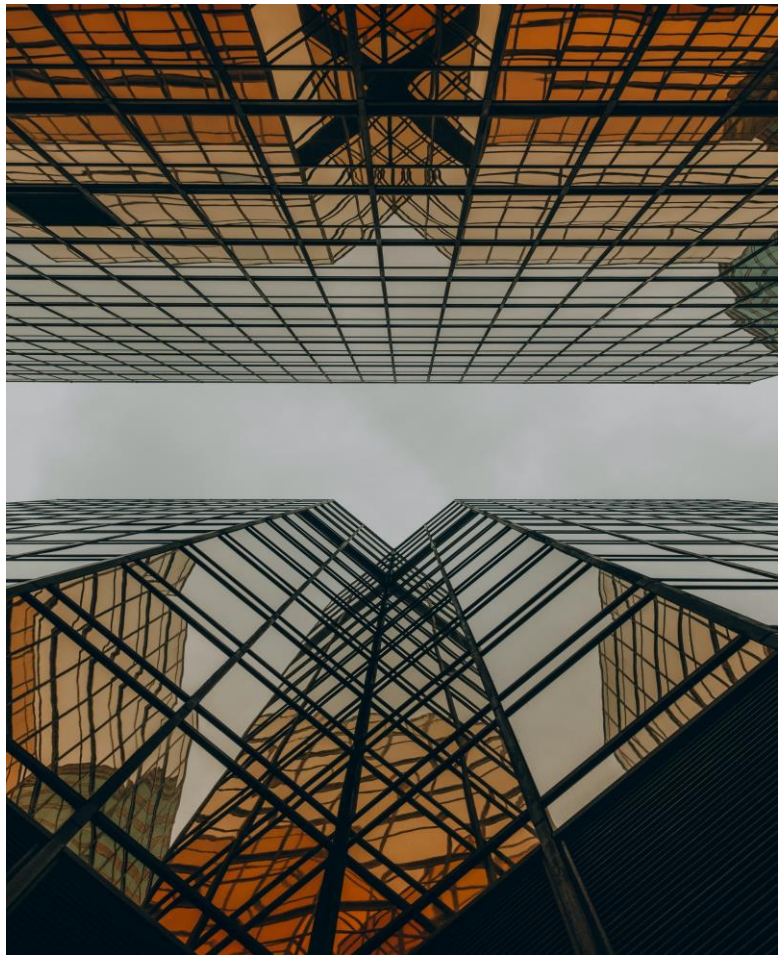


Validity & choosing the completion date (*Hermes Property Unit Trust v Roberts (VO)* [2021] UKUT 308 (LC))

- Appeal to UKUT successful on basis VTE erred in law in finding substantial compliance concept applied

- Contrary to approach of HC in *North Somerset DC v Honda Motor Ltd* [2010] RA 285 (approved by CoA in *SSHD v RM (Rwanda)* [2018] EWCA Civ 2770)

- Two questions:
  (1) Did Parliament intend total invalidity to result from failure to comply with statutory requirement?
  (2) If not automatic consequence, is substantial compliance enough in the circumstances of the case?

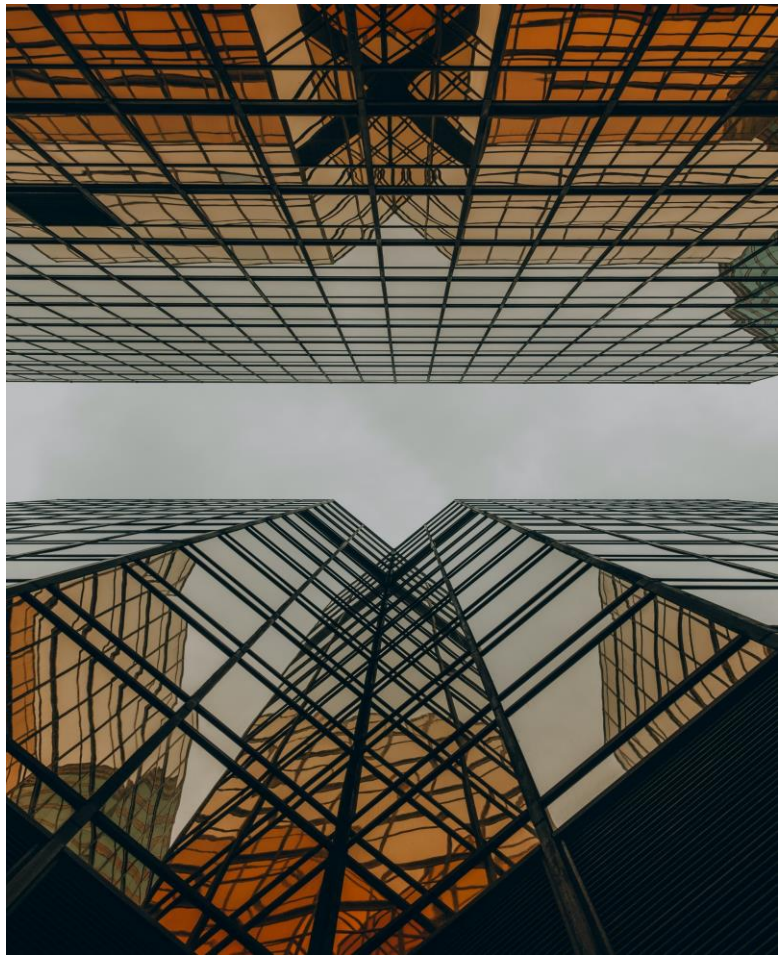


Validity & choosing the completion date (*Hermes Property Unit Trust v Roberts (VO)* [2021] UKUT 308 (LC))

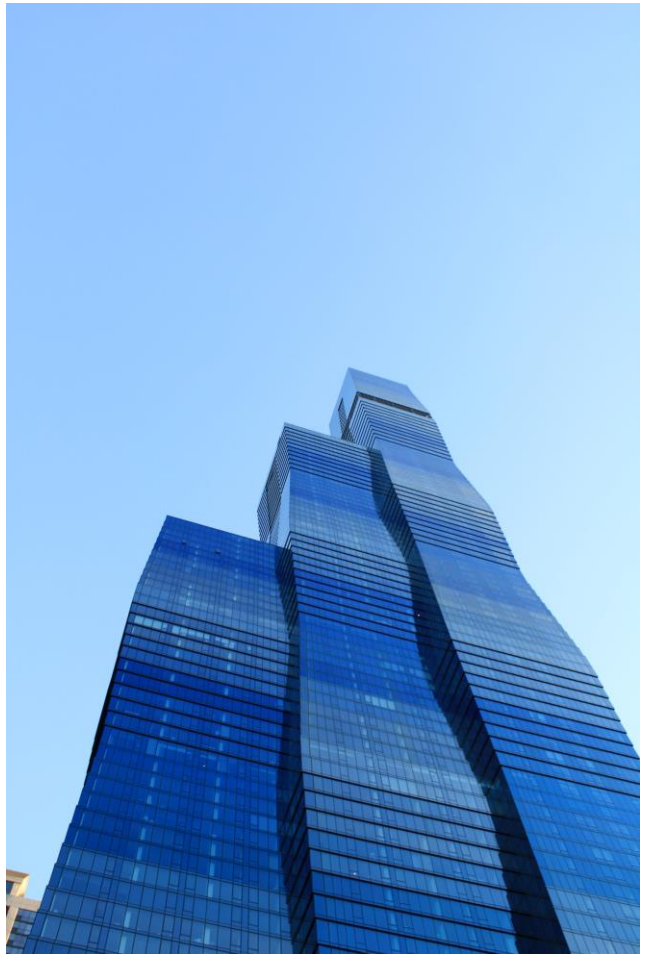
- CNs come within first *Honda* category (i.e., automatic invalidity) because to find otherwise would result in "*uncertainty*" and "*retrospectivity*"

- Some uncertainty inherent in service requirements for CNs (per *Kingsway*)

- However, allowing for substantial compliance with completion date requirement would go too far in context of creating counterfactual based liability to taxation and allowing this to be done retrospectively



Practice Tips



Landmark Chambers

Questions?

Landmark Chambers

Lunch

We will begin again at 13.30

Landmark Chambers

Afternoon sessions

Chaired by Dan Kolinsky KC

Landmark Chambers

Unit of assessment – update and recap

Admas Habteslasie

Structure of talk

- The statutory unit of assessment
- Distinct spaces: one hereditament or multiple hereditaments?
- Does part of an existing hereditament need to be entered in the list separately?
- Key points

The statutory unit of assessment: the hereditament

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- Section 41 of the Local Government Finance Act 1988 (LGFA 1988): valuation officer for a billing authority must compile and maintain a local non-domestic rating list for the authority's area, and

- Section 42 LGFA 1988: rating list must show each relevant non-domestic hereditament.

- *“hereditament” means property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list*

The statutory unit of assessment: the hereditament

- *"hereditament" means property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list*

- *"While, at least to some extent, that is a circular definition, it does contain the expression "unit of property", which carries with it the notion of a single piece of property, what in Scots law is called unum quid."* Lord Neuberger in ***Woolway v Mazars*** at [46]

Distinct spaces: a single hereditament or multiple hereditaments?

- Key case setting out broad principles is judgment of the Supreme Court in ***Woolway (VO) v Mazars*** [2015] UKSC 53. Overruled CoA in ***Gilbert v S Hickinbottom and Sons Ltd*** [1956] 2 QB 40.
- But NB the position in relation to contiguous properties that are not interconnected is governed by legislation subsequently introduced.
- In relation to two properties separated by a road, see decision of UT in ***FC Brown Steel Equipment Ltd v Karl Hopkins (VO)*** [2022] UKUT 51 (LC), which also contains a summary of the case law at [24] to [42].

Woolway (VO) v Mazars

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- Three broad principles to be applied when considering whether distinct places under common occupation form a single hereditament:
  1. Primary test: geographical, based on visual or cartographic unity.
  2. Functional test where the use of the one is necessary to the effectual enjoyment of the other.
  3. Question of whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the hereditament(s).

Applying the three principles = two tests

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- Therefore, two tests: **geographical** and **functional**
- Geographical test is primary, functional test is subordinate. You start by applying the geographical test
- If the geographical test points to two hereditaments rather than one, then you consider and apply the functional test per the second and third principles
- In broad terms, focus should be on physical characteristics of the property rather than business needs of/particular use by a particular occupier
- Application of principles is not mechanical – commonly call for exercise of factual and/or professional judgment

Contiguous properties (i)

- Per the Supreme Court in ***Mazars***:
  - Contiguous spaces will “normally” meet the geographical test, but contiguity is not decisive
  - According to SC, contiguous spaces which required passing through common parts/other property = strong indicator of separate hereditaments.
  - *“If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed.”*

Contiguous properties (ii)

- On the facts in ***Mazars***, non-contiguous floors in an office building occupied by same business under separate leases were held to be separate hereditaments.

- However, SC's reasoning indicated that contiguous floors (or horizontally contiguous units) would be separate hereditaments if they were not interconnected. This aspect of decision was reversed by *Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018*, to allow VO's practice of treating contiguous properties as single hereditaments to continue.

Contiguous properties (iii)

- What is contiguous?

  – Presence of a space or void within a wall or ceiling – still contiguous
  – Fire corridor – not contiguous

  (see ***Roberts (VO) v Backhouse Jones Ltd*** [2020] UKUT 38 (LC))

Properties separated by a public road

- ***FC Brown Steel Equipment Ltd v Karl Hopkins (VO)*** [2022] UKUT 51 (LC) Upper Tribunal (Martin Rodger KC and Mark Higgin FRICS) considered situation of land and buildings in single occupation but located on opposite sides of a public road and physically connected to each other by a bridge.

- Main business premises of Bisley Office Equipment in Newport, office goods manufacturer

FC Brown Steel Equipment Ltd v Hopkins

Landmark Chambers

- Property comprised:
  - Factory and premises on one side of road
  - Warehousing on other side of the road
  - Connected by a bridge (constructed by occupier) spanning road housing a fully mechanised conveyer belt for transporting finishing goods between the two buildings; included a maintenance walkway along whole length

- One or two hereditaments?
- Ratepayer contended one hereditament on basis of **geographical test** (not functional)

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FC Brown Steel Equipment Ltd v Hopkins

Landmark Chambers

- *"Enclosed within each of the towers at either end of the bridge is an elevator which connects to a conveyor stretching the length of the bridge which is used to transport palletised furniture from the production floor on the eastern side of Caswell Way to the warehouse floor on the western side."*

FC Brown Steel Equipment Ltd v Hopkins

Landmark Chambers

- UT concluded: three structures = one hereditament
- UT made the following points as to application of geographical test:
  - Properties were not self-contained – internally fully accessible
  - Cartographic unity – could be ringed round in a plan
  - Visually connected by bridge and shared colour scheme/branding; noted the *"striking visual impact"* of the bridge structure, *"serves to emphasise the unity of the two sites"*

FC Brown Steel Equipment Ltd v Hopkins

Landmark Chambers

- Passage of people between different parts of premises not necessary - connections for purposes of passage of goods/materials could suffice.
- Warned of conflating functional and geographical test. No special significance to the fact very thing being manufactured on the site was being transferred.
  - *"When answering the geographical question, it is important to focus on the physical premises themselves and not on the use made of them by a particular occupier"*
  - *"…how the bridge used in practice is less important than the substantial physical connection its creates between the two sites"*

Mazars: The functional test

Lord Sumption at [12]: *"This last point may commonly be tested by asking whether the two sections could reasonably be let separately."*

Lord Gill at [39] gives example from case law of *"a tourist attraction in a castle and the associated gift shop in the castle grounds"*

Mazars: The functional test

In ***Hughes (VO) v York Museums and Gallery Trust*** [2017] UKUT 200 (LC), UT applied functional test in relation to the Hospitium, a separate building in the grounds of Yorkshire Museum.

The Hospitium was a former medieval guest house which was partly used as an events venue.

The functional test

UT concluded it was part of museum hereditament notwithstanding sometime different use:

- Hospitium and gardens *"comprise a single historic landscape, within a defined boundary, of which the Museum itself also forms part"*
- *"The original purpose for which this building was constructed played an indispensable role in the life of the Abbey in providing hospitality to visitors."*
- *"The primary purpose for which it is now occupied is the Trust's purpose of its preservation as an historic building in an historic landscape. That is the same purpose as, or is sufficiently allied to, the purpose for which the Trust occupies the Museum itself and the remainder of the grounds …"*

Is there a (separate) hereditament?

- A related issue that can arise is whether part of a hereditament should be entered separately. Thus:
  - ATMs located in retail premises = yes; *"each site is more than just an indistinguishable space on the shop floor which happens to be occupied by an ATM; in each case the site has either been designed or adapted to accommodate such a machine";* but not a movable ATM (i.e. space occupied by it) ***Cardtronics UK Ltd and others v Sykes and others (VOs)*** [2020] UKSC 21
  - Public lavatories in an enclosed shopping centre available to users of the centre: separate entry, ***Hodgkinson (VO) v Strathclyde Regional Council Superannuation Fund*** [1996] R.A. 129.

Is there a (separate) hereditament?

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- Sometimes, an argument that another person is the occupier or paramount occupier can support an argument that there is no separate hereditament: in ***Borders v Cleghorn (VO)*** [2009] R.A. 76, coffee concessions to provide coffee in book shops were found not to be a separate hereditament because, as well as retailer being paramount, two uses were complementary and use was shared with no physical boundaries.

Unit of assessment – key points

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- The primary test for identifying the boundaries of a hereditament is the geographical test, based on visual or cartographic unity.
- If geographical test leads to conclusion there is more than one hereditament, functional test: Is use of one section necessary to the effectual enjoyment of the other? Could they be let separately?
- The tests to be applied separately and not intermixed
- The focus, under both tests, is on physical characteristics rather than particular needs of occupier.
- The tests are not mechanical – element of judgment.
- Where there are multiple rateable occupiers, issues of paramountcy may need to be resolved in order to identify the unit of assessment.

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Issues Relating to the Closure of the Rating List

Dan Kolinsky KC

What is happening?

- 2017 rating list (finally) ends on 31 March 2023
- First rating list to which check, challenge appeal (CCA) regime applies
- Regulations setting deadlines for proposals (aka challenges) under 2017 rating list expected imminently
- Past practice: no RP proposals after list end; VO gets an extra year
- Unknown at the moment precisely how this will be tailored to CCA regime (despite the promise of early visibility in the Interim Review of CCA (Feb 2020).

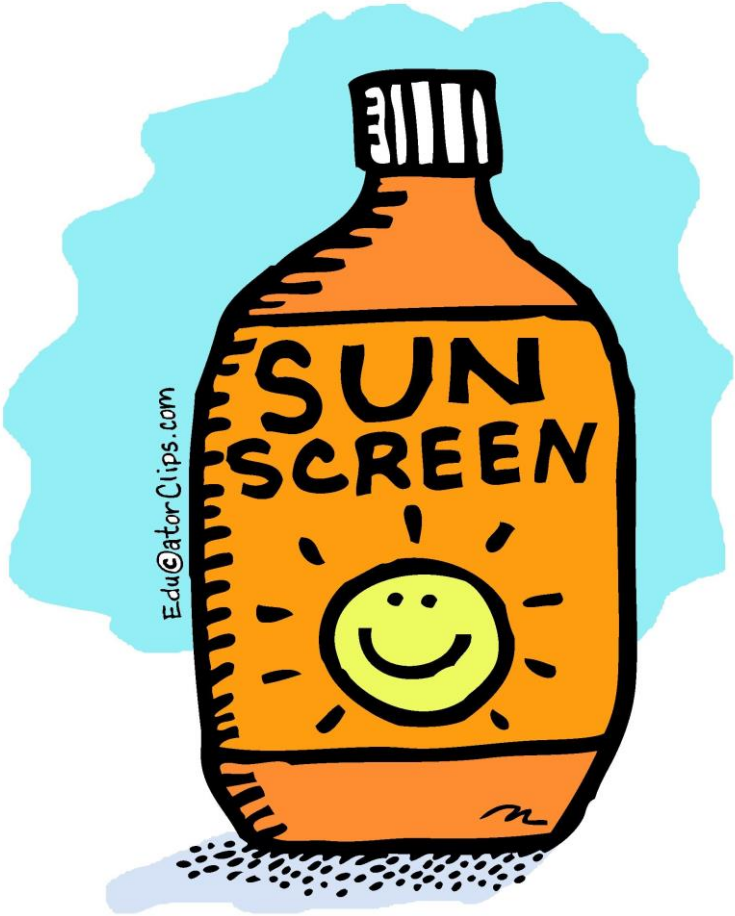
If I could offer you one piece of advice…….

- Get your checks in ……in plenty of time

Rules for checks in reg 4A – 4F of NDR (ALA) (E)

Regs 2009/2268 (as amended)

  - It is a 2-way exchange of information with VO
  - Important to see how rules will apply especially if some delay on the part of the VO



Thoughts on possible cut off points

- Reg 3 of 2009 Regs defines “confirmation” by reference to regulation 4C(1)(c)

- RP confirmation under Reg 4C is response to information provided by VO under reg 4B

- If confirmation used as step that must be completed before 31 March 2023 – what happens if delay/glitch in VO provision of information under reg 4B?

Exceptions to the general cut off point

- NB – certain time limits existing grounds for proposal (Reg 4(1)) apply from later date than end of list:

- (d) RV of V0 alteration is inaccurate

- (f) day of alteration is wrong;

- (e) inaccuracy shown by decision of VTE/UTLC/Court in relation to another hereditament.

Regs need to apply bespoke cut off for these provisions. It has generally been 6 months from triggering event. But what will need to happen by then?

The rest of my talk.....

- Has no basis more reliable than…… past experience
- 4 points:
  - Draft challenges/proposals carefully
  - May need to think through alternative scenarios
  - Anticipate anomalies
  - Check the backdoor

(1) Draft proposals/challenges carefully

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- Beware the **'era of technicalities'**

  – Proposals may be carefully construed (see **Hughes (VO) v York Museums and Gallery Trust)** [2017] UKUT 200 (LC) at [84] "unattractive technical point "raised – and then succeeds in part [109-110].

  – MCC proposals particularly problematic
    - Do the circumstances identified in the proposal cause the RV to be inaccurate?

    (see for example – **Patel v Jackson** (VO) [2019] RVR 232 at [22] and [28])

  – Inaccuracies may invalidate proposals (**Mayday Optical v Kendrick** (VO) [2013] UKT 548(LC)– (wrong rent invalidates proposal) - see now **Alam v Stoyles [**2018] UKUT 266 (LC) at para 24 which emphasises the question of validity depends on substantial compliance and prejudice

(2) Thinking through alternative scenarios

- Key case is: **Avison Young v Jackson** (VO) [2021] EWCA Civ 969

  – Approach to regulation 38(7) of VTE Regs 2009 – power of VTE to require an alteration to a rating list to be limited to the duration of the circumstances giving rise to the alteration.

  – Context is aftermath of Monk litigation and peculiarities of 2010 rating list closure arrangements

  – RV reduction (AY); deletion (Great Bear) for Monk works

Thinking through alternative scenarios (2)

- CA rejects narrow view of regulation 38(7) powers
  - in both cases it has **no difficulty in finding that the circumstances giving rise to the proposal had ceased to exist when the property was no longer incapable of beneficial occupation** (paras 48-54)

Purpose of reg 38(7)

is to enable the VTE to ensure that its order for alteration of the list has effect only for the duration of the circumstances which justify that alteration, but to give the VTE a discretion not to do so.

Present cases fall squarely within the scope of this power.

Thinking through alternative scenarios (3)

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- In both cases – effect of resulting entry was an inaccurate RV
- And no chance to propose alterations to it (as not a VO alteration which would trigger the chance to make a further proposal under reg 4(1)(d))
- By CA untroubled by this – see para 63

"In restricting the alteration to the entry…. in the list to the period for which the property was incapable of beneficial occupation, the VTE accurately reflected the duration of the circumstances which justified the alteration. **The inaccuracy in the list for the succeeding period was not caused by the VTE exercising its power under regulation 38(7): it was caused by the failure of either party to take the steps necessary to alter the list to reflect the change in rateable value of the hereditament as a result of the works in time**".

Thinking through alternative scenarios (4)

- **So the ratepayer may now need to think through all of the changes that might need to be made and make a number of proposals when the list is closing**
- **How realistic is this?**

Thinking through alternatives (5)

- Ricketts (VO) Cyxtera [2022] RA 22 (UTLC)
  - Part of property (631) held to be not capable of beneficial occupation as not practically complete (on date VO purported to alter list)
  - Post Avison Young debate about whether VO can use regulation 38(7) to secure list entry takes effect from point where part of the hereditament capable of beneficial occupation
  - Tribunal declined to exercise discretion
  - Fact specific decision due to: -
    - Lack of properly articulated and consistent case (not pleaded)
    - Lack of valuation evidence
    - Tribunal inclined to accept could have been jurisdiction if properly articulated but "*we decline to use our expertise to indulge in guesswork*" [74]

Thinking through alternatives (6)

- Overall reflections
  - RPs need to be vigilant about issues that might arise **where there is a dynamic situation** close to the end of the list
  - Danger arises where entries only catch up with events in the VTE (after closure of list) rather than through VON alterations (which give rise to a further opportunity to make a proposal)
  - Reg 38(7) as used by CA in AY/GB shifts onus on ratepayer to be proactive (ask: might I be left without a remedy if the VO does not make an alteration within the life of the list?)
  - But Cyxtera also stresses that VO has to be anticipate the basis of any proposed reliance on reg 38(7) in tribunal proceedings

(3) Anticipate anomalies

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National Car Parks Ltd v Baird (VO)[2004] R.A. 245.

- Alteration by agreement at time when effective date prescribed by regulations was no earlier than 1/2/92

- But law change meant that by time alteration made so that effective date was 1/4/90 (disadvantageous to RP)

- VO required to give effect to law as it applies at the date of alteration

- JR by RP fails - there was no general expectation that the valuation officer would alter the list at any particular time and he was bound to apply the law as it was at the time of the alteration.

[No legal expectation that you can continue to benefit from favourable rules]

(4) Check the Backdoor

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Womersley (VO) v Hart District Council and Rushmoor District Council [2008] RA 279

- Proposals made under reg 4 (4) of the Non Domestic Rating (Alteration of Lists and Appeals) Regulations 1993
- Where “a ratepayer is of the opinion by reason of… (a) decision of a valuation tribunal…the rateable value was wrong” [time for proposal is 6 months from decision]
- held proposal valid because there was a casual link between the previous decision of a valuation tribunal referred to in the proposal and the formation of the ratepayers’ opinion that the rateable values of the subject hereditaments were incorrect, since the ratepayers’ valuer could only responsibly form the opinion that the values shown in the list for the subject hereditaments were wrong if he had a valid basis for contending (Rather than merely grounds for suspecting) that these values should be set at figures which did not follow the tone of the list, and that basis was provided by the previous valuation tribunal decision.

Check the backdoor (2)

- Quite a wide concept
  - Did RP actually form the view ?(subjective)
  - On a credible basis? (objective)

- Drafting of Reg 4(1)(e) has been simplified since then – but on either wording this is potentially quite an important exception to the headline list closure rules.

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- But trust me on the ……

“GET YOUR CHECKS IN……..”

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Provision of information: The current regime and proposed changes

Galina Ward KC and Kate Traynor

Check, Challenge, Appeal System

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- The CCA system was introduced in April 2017, by amendments to the Non-Domestic Rating (Alteration of Lists and Appeal) (England) Regulations 2009, and has three core stages:
  - The **Check** stage:
  - The **Challenge** stage:
  - The **Appeal** stage
- CCA aimed to address issues with the previous system and provide more timely and efficient outcome.
- Now itself subject to “fundamental review” – final report published with Budget in October 2021.

Current position

- Paragraph 5 of Schedule 9 to the Local Government Finance 1988 ("the 1988 Act") provides that a VO may serve a notice requesting the owner or occupier of a hereditament to supply information:

  - which is **specified** in the notice; and

  - Which the VO reasonably believes will assist in carrying out his functions under Part III of the 1988 Act.

  The person on whom notice is served must supply the information in the form and manner specified in the notice.

Request for Information

- What the VOA might request:
  - Trading receipts for the last three financial years or since the occupation of the premises commenced.
  - Any rent received from letting other parts of the property.
  - Details of any lease or tenancy agreement.
  - Does the rent include trade fixtures and fittings, plant machinery, furniture

'Reasonably believes will assist'

- Is there a limit on what might be requested?

- *Watney Mann Ltd v Langley* [1966] 1 Q.B. 457: “reasonably required” means “reasonably necessary” not “reasonably demanded”

- *Bournemouth & West Hampshire Water plc v Central Valuation Officer* [2008] RVR 102: request for information relating to repair, maintenance and renewal costs

Penalties for Non-Compliance

- Paragraph 5A of Schedule 9 of the 1988 Act

- Failure to provide the information within 56 days, a £100 penalty.

- VO must then serve penalty notice setting out the £100 penalty and:
  - Further £100 penalty if fail to comply within 21 days of penalty notice; and
  - £20 per day for each day the failure continues

- Penalties under the above are capped at the **higher** of £500 or the rateable value of the hereditament for which the notice was served.

What is changing?

- The Government has set out details proposals for the implementation of more frequent revaluations and other changes to the system. These changes can be divided into three parts:
  - “Duty to Notify”: the provision of information by ratepayers and property owners.
  - Compliance provisions in respect of these information requirements.
  - Changes to the business rates appeal system.

Duty to Notify the VOA

- New legal duty will be created for ratepayers to update the VOA each time circumstances change.

- **Key points:**

  - Duty will apply to the occupier (premises occupied), or owner (if unoccupied).

  - Ratepayers' required to make an annual online declaration.

  - The VOA will retain existing power under paragraph 5 of Schedule 9 to the Local Government Finance Act 1988, which will primarily be used by the VOA to request cost information from properties valued on the contractor's basis.

Provision of Information: What is required?

- Ratepayers will be required to provide:
  - Information about the property characteristics and any changes made to it.
  - Information about the tenancy, including the use of the property.
  - Trade and accounts information (where relevant to the valuation).
  - Costs information (where relevant to the valuation).

Administrative Burden

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- Significant administrative and costly burden:
  - 30 days to notify the VOA of any occupation, lease or property change.
  - 30 days to provide cost information following receipt of the request from the VOA.
- It will be important to ensure that Ratepayers:
  - Obtain a full technical survey of your property
  - Summarise the changes made to your building, with their associated costs
  - Compile a file of rent/lease/ownership details, including up to date rental information.

Compliance Provisions

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- A new compliance regime will be introduced to ensure ratepayers comply with the new legal duty to notify, to be rolled out after introduction of new duties. It will include:

  – Penalties for non-compliance, including provision of false information as well as failure to comply;

  – Annual confirmation requirement;

  – Entry to the appeals system and new transparency provisions will be conditional on compliance with duties.

Mandatory Provision: Lease Information

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- This measure would require all property occupiers to proactively provide their lease details and other supporting information.

- What might be requested?
  - Details regarding turnover, receipts and expenditure.
  - Lease terms, the current rent and what it includes.
  - The dates of rent reviews.

- Mandatory information is a pre-requisite for increased transparency.

Compliance Provisions: Reminders

- Ratepayers may be liable for a penalty for each instance where they fail to notify the VOA of relevant information.

- After, the initial 30 calendar from the notifiable event, if there is no evidence of compliance:
  - Electronic Reminder and warning, 28 days to comply
  - Electronic warning letter, 28 days to comply
  - Duty continues not to be complied with, another electronic warning letter, 28 days to comply
  - Non-compliance, penalty notice issued

Compliance Provisions: Penalties

- **Failing to provide property changes:**
  - Based on 2% of the rateable value change, for lease changes up to £900 plus £60 per day until compliance
- **Providing false information:**
  - 500 plus 3% of the rateable value difference.

Extensions, Reviews, Appeals and Remittances

- Extend timescales: limited circumstances, need compelling reasons such as medical emergency or bereavement.

- Review of penalty decision before moving to the appeal stage.

- VOA will have the discretion to remit in full any penalty imposed for failure to comply or provision of false information, whether or not an appeal has been lodged or tribunal judgment made.

What else is changing?

- The removal of the current “Check” stage.
- The imposition of a three-month window to lodge Challenges
- Increased transparency

'Improvements' to CCA

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- The new Duty to Notify requirement would perform the same function, ensuring that property details held are correct and agreed upon before proceeding to Challenge.

- Reduce the window for making Challenges to 3-months from the beginning of the list.

- The aim of reducing the window:
  - Allow the VOA to take a more structured approach to process Challenges.
  - Allow the VOA to group together the Challenges on similar properties
  - Deal with Challenged as joint batches

- In cases where a new occupier takes over a property after the initial 3-month window, the new occupier will still retain the ability to make a Challenge within 3 months of the start of their occupancy.

Greater transparency on valuation

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- Increased transparency would be phased in behind the new duties, with more detailed information disclosed at each phase:

  - **Phase 1:** release of improved guidance covering rating principles and class-specific valuation approach, ensuring guidance is accessible and ratepayer-friendly.

  - **Phase 2:** making available fuller analysis of rental evidence used to set an RV for property, such as analysed price per m2, and an explanation of how the evidence has been used to arrive at the rateable value.

Aims of the proposed changes

- The package of measures aims to deliver a range of benefits for ratepayers:
  - Ensuring that ratepayers are provided with a more accurate valuation.
  - Delivering greater transparency for ratepayers on their valuation.
  - Making the CCA process simpler and quicker
  - Ensuring the majority of Challenges received can be dealt with within the life of the list.
  - Providing ratepayers with assurance.

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Questions?

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Refreshment Break

We will begin again at 15.30

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Judicial review in rating cases

Tim Morshead KC

What is judicial review?

v.

Some of the grounds of judicial review

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Supervisory jurisdiction: law, not merits.

Illegality, irrationality, procedural impropriety: *per* Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 410.

Unfairness amounting to an abuse of power: *e.g. R v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681: categories of unfairness not closed.

E.g., where a public body's "decision" is vitiated by:

- Error of law
- Taking into account irrelevant factors / omitting relevant factors
- Improper purpose
- "Wednesbury" irrationality
- Departure from principles of natural justice, procedural fairness and substantive unfairness: so unfair as to amount to an abuse of power

The available remedies

The old “prerogative” writs, mainly:

- Habeas corpus (produce it)
- Quo warranto (justify it)
- Prohibition (stop it)
- Mandamus (do it)
- Certiorari (explain it/ undo it)

v.

Now statutory:

- Senior Courts Act 1981, s31: quashing order, mandatory order, prohibiting order, declaration, injunction, potentially damages.
- CPR Part 54 (a hybrid version of Parts 7 and 8).

The forum

High Court: inherent jurisdiction → s31 SCA 1981

Upper Tribunal:

- s15 Tribunals, Courts & Enforcement Act 2007
- First-tier and Upper Tribunal (Chambers) Order 2010/2655, esp Arts 10, 12, 14, 18
- Lands Chamber (Art 12): jr of “decisions” of (eg) VTE.

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Examples of limiting factors

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- Grounds: high threshold

- Requirement of permission

- S31(2A), SCA 1981:

"The High Court— (a) must refuse to grant relief on an application for judicial review, and (b) may not make an award under subsection (4) [damages] on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. (2B)The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest"

- Alternative remedies

Rating cases in the Crown Office List / Administrative Court

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Where the rating regime contains no right of appeal:

E.g.,

- whether billing authority entitled not to issue non-domestic rate demands to two claimants on the basis that it was not satisfied that they were in rateable occupation of licensed premises: *K Pub Trading Ltd v Cardiff City and County Council* [2021] EWHC 3011 (Admin); [2022] RVR 176
- billing authority's decision to withhold business rates relief / extend a grant: admitted error but no likelihood of different outcome: *R ota Bien Limited v. Milton Keynes Council* [2021] EWHC 3003
- billing authority's decision to deny refund on basis of alleged exemption: *R ota SSHSC for Public Health England v. Harlow DC* [2021] 4 WLR 65
- ancillary to appeal by way of case stated from magistrates' court: *R ota Preservation and Promotion of the Arts Ltd v. Birmingham CC* [2020] EWHC 2435

Rating cases in the Crown Office List / Administrative Court, continued

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Others:

Alleged delay and discrimination did not involve unfairness amounting to an abuse of power or otherwise vitiate the VO's decision to make a downwards alteration of RV, late in the life of the list, which under the transitional relief provisions had the effect of increasing the overall rates payable by the ratepayer: *R ota Corus UK Ltd v. VOA* [2001] EWHC Admin 1108; [2002] RA 1.

A failure to identify in the Non Domestic Rating List which parts of a building said to be a composite hereditament were alleged to be non domestic property, did not invalidate the relevant entries in the list: *R ota Curzon Berkeley Ltd v Bliss (Valuation Officer)* [2001] EWHC Admin 1130; [2002] R.A. 45. On alternative remedy, the judge (Mr Goudie QC sitting as a deputy High Court judge) said: "72. I regard the Administrative Court, rather than the Valuation Tribunal, as having been the appropriate forum for determination of the legal and constitutional issue as to whether or not words should be implied into a taxing statute."

JR a remedy of last resort; use the statutory proposals / appeal procedure: *R ota Tameside MBC v. Grace (VO)* [2013] EWHC 450 (Admin); [2013] RVR 95 esp paras 20–24.

Exactly what can a VTE order, on an appeal against a completion notice? *Reeves (VO) v. VTE* [2015] EWHC 973

Emergencies

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Interim relief

American Cyanamid with extra protections on account of the public interest at stake in judicial review matters.

R ota S&S Consulting v. HMRC [2021] EWHC 3174; [2021] STC 121.

Problems with the “proposed”, i.e. draft, 2023 list

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Draft list provisions: Local Government Finance Act 1988, section 41(5):

“**41 Local rating lists.**

(1)In accordance with this Part the valuation officer for a **[**F1billing authority**]** shall compile, and then maintain, lists for the authority (to be called its local non-domestic rating lists).

(2)A list must be compiled on 1 April 1990 and on 1 April in every fifth year afterwards**[**F2, subject to subsection (2A)**]**.

(2A)In the case of a billing authority in England—

(a)subsection (2) does not require a list to be compiled on 1 April 2015 and on 1 April in every fifth year afterwards, and

(b)a list must instead be compiled on 1 April 2017, on 1 April 2023 and on 1 April in every fifth year afterwards.

(3)A list shall come into force on the day on which it is compiled and shall remain in force until the next one is compiled

(4)Before a list is compiled the valuation officer must take such steps as are reasonably practicable to ensure that it is accurately compiled on 1 April concerned.

(5)Not later than 31 December preceding a day on which a list is to be compiled the valuation officer shall send to the authority a copy of the list he proposes (on the information then before him) to compile.

(6)As soon as is reasonably practicable after receiving the copy the authority shall deposit it at its principal office and take such steps as it thinks most suitable for giving notice of it.

(6A)As soon as is reasonably practicable after compiling a list the valuation officer shall send a copy of it to the authority.

(6B)As soon as is reasonably practicable after receiving the copy the authority shall deposit it at its principal office.

…”

Right of appeal / to make proposals: grounds available under the 2009 Regulations limited to entries in the list: cannot propose against / appeal from the draft list sent out under s41(5).

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Panel discussion

Judicial review rating cases

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Thank you for listening

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