UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – HEREDITAMENT – whether adjacent office suites separated by a fire corridor were to be treated as contiguous and entered as a single hereditament - section 64(3ZD), Local Government Finance Act 1988 - Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN: **RICHIE ROBERTS (VALUATION OFFICER)**

Appellant

and

BACKHOUSE JONES LIMITED

Respondent

Re: The Printworks,
Ribble Valley Enterprise Park,
Clitheroe

The Deputy Chamber President

4 February 2020
Royal Courts of Justice

Alistair Mills, instructed by HMRC Solicitors, for the appellant
The respondent was not represented and did not attend

The following cases are referred to in this decision:

Harding v Clements v Secretary of State for Transport [2017] RA 271

Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd [2016] 1 WLR 275

Woolway (VO) v Mazars LLP [2015] UKSC 53

Introduction

1. Before the decision of the Supreme Court in *Woolway (VO) v Mazars LLP* [2015] UKSC 53 it was the usual practice of the Valuation Office Agency when compiling the non-domestic rating list to enter contiguous units of property occupied by the same ratepayer as if they were a single hereditament. *Mazars* disrupted that practice and clarified the law in a way which required that separate but contiguous units, albeit in the same occupation, be entered in the list as separate hereditaments.

2. The former practice was both practical and convenient for ratepayers and valuation officers and, in order to reinstate it (in England at least), Parliament enacted the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018. The 2018 Act amended section 64 of the Local Government Finance Act 1988 with retrospective effect from 1 April 2010 (section 1(2), 2018 Act).

3. The issue in this appeal concerns the meaning of section 64 in its amended form.

4. Specifically, the issue is whether two office suites, in the occupation of the same ratepayer, which would be contiguous but for a communal fire escape corridor which separates them, should be entered in the non-domestic rating list as a single hereditament.

5. At the hearing of the appeal the appellant valuation officer was represented by Mr Alistair Mills. The respondent ratepayer did not participate in the hearing, although a statement of case and brief evidence had been filed on its behalf.

6. Although the appeal raises an important point of principle which the appellant is anxious to have resolved, its financial value to the respondent is very modest. At the request of the respondent the Tribunal therefore made an order under rule 10(7) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to the effect that no order for costs incurred in the appeal after the date of the order would be made against the respondent.

Woolway v Mazars

7. The unit of assessment for non-domestic rates is the "hereditament". Despite its importance in rating, Parliament has not attempted a definition of that expression and has left the task to judges. Thus, section 64(1) of the Local Government Finance Act 1988 defines a hereditament as anything which would before the passing of that Act have been a hereditament for the purposes of section 115(1) of the General Rate Act 1967. That 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 result, as Lord Sumption JSC explained in *Woolway v Mazars* at [1] is that "the meaning of "hereditament" is left to be elucidated by the courts in accordance with the principles underlying the rating Acts."

8. *Woolway v Mazars* concerned office premises occupied by a firm of chartered accountants on the second and sixth floors of an eight-storey office block. The ratepayer proposed that

its two floors should be entered in the non-domestic rating list as a single hereditament. Although, as Lord Sumption recorded at [3], the ordinary practice of the VOA was to enter different parts of an office building occupied by the same occupier as a single hereditament if they were contiguous, but as separate hereditaments if they were not, the VTE ruled that the two floors should be merged as a single entry, and both the Lands Tribunal and the Court of Appeal agreed.

9. The question for the Supreme Court was whether a hereditament should be identified by purely geographical factors, depending simply on whether the premises said to be a hereditament constituted a single unit on a plan, or whether functional considerations should also come into play. Rating cases in Scotland established that the primary test was geographical, but that a functional test could be relevant in certain circumstances. Lord Sumption (with whom the other members of the Court all agreed) summarised the principles which emerged from the Scottish cases at [12]. He endorsed and explained the use of a geographical test as the primary means of identifying a hereditament, subject to limited exceptions, as follows:

> "First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second Bank of Scotland case illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are 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. Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately. Third, the question 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 subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties."

10. At [47] Lord Neuberger PSC explained that normally "a hereditament is a self-contained piece of property (i.e. property all parts of which are physically accessible from all other parts, without having to go onto other property), and a self-contained piece of property is a single hereditament." At [56]-[57] he considered that the courts below had been in error in assuming that two self-contained floors in common occupation in the same building should be treated as a single hereditament if they were at consecutive levels, and in reasoning from that assumption that it would be artificial and unfair to treat discontiguous floors differently.

That would only normally be the case if they ceased to be self-contained because an internal means of access, such as a staircase, was created. In that context Lord Neuberger made a point about the complexity of modern buildings which is material to this appeal:

> "Furthermore, closer consideration suggests that, particularly in modern buildings, two consecutive floors are not actually contiguous to each other: there will often be a void between them, which contains servicing equipment and is in the possession and occupation of the landlord of the building. Absent a communicating internal staircase or lift, passing through the void, two consecutive floors in the same building would be physically separated in much the same way as two non-consecutive floors."

Section 64 in its amended form

11. As the brief concurring remarks of Lord Carnwath JSC in *Woolway v Mazars* at [62] reflect, the practice of treating contiguous floors in single occupation as single hereditaments was convenient and had previously been thought unobjectionable. In the 2017 Autumn Budget the Chancellor of the Exchequer therefore announced that the government would legislate to reinstate the practice. A public consultation followed in December 2017 entitled "Business rates in multi-occupied properties: reinstating the practice of the Valuation Officer Agency prior to the decision of the Supreme Court in Woolway (VO) v Mazars."

12. The proposal in the draft Bill which accompanied the consultation was to revert to the practice of treating contiguous units as single hereditaments. It was favourably received but, as explained at paragraph 8 of the government's April 2018 response, some consultees felt the draft Bill was insufficiently clear in one respect:

> "There were 8 respondents who were concerned that service voids within walls or between floors or ceilings might mean hereditaments would not be considered to be contiguous. Respondents felt this did not reflect the previous practice of the Valuation Office Agency. In light of these concerns, the Government has amended the Bill to make it clear that spaces in walls or ceilings do not prevent two properties in the same occupation being considered contiguous."

13. The Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 inserted section 64(3ZA)-(3ZD) into the 1988 Act.

14. Section 64(3ZA) provides that two or more hereditaments (whether in the same building or otherwise) are to be treated as one hereditament where three conditions are satisfied: the hereditaments must be occupied by the same person; they must meet the "contiguity condition" in section 64(3ZC); and none of the hereditaments must be used for a purpose which is wholly different from the purpose for which any of the other hereditaments is used.

15. By section 64(3ZC) the contiguity condition is satisfied if:

(a) at least two of the hereditaments are contiguous, and

(b) where not all of the hereditaments are contiguous with each other—

(i) one or more of the other hereditaments is contiguous with one or more of the hereditaments falling within paragraph (a), and

(ii) each of the remaining hereditaments (if any) is contiguous with at least one hereditament that falls within sub-paragraph (i) or this sub-paragraph.

16. The basic principle is therefore apparent. Two contiguous hereditaments occupied by the same person for purposes which are not "wholly different" will be treated as one. Other hereditaments contiguous with at least one of those two, and satisfying the same occupation and purpose conditions, will also be treated as part of the same single hereditament.

17. But what is meant by "contiguous"? Section 64(3ZD) provides the answer:

> (3ZD) For the purposes of subsection (3ZC) two hereditaments are contiguous if—
>
> (a) some or all of a wall, fence or other means of enclosure of one hereditament forms all or part of a wall, fence or other means of enclosure of the other hereditament, or
>
> (b) the hereditaments are on consecutive storeys of a building and some or all of the floor of one hereditament lies directly above all or part of the ceiling of the other hereditament,
>
> and hereditaments occupied or owned by the same person are not prevented from being contiguous under paragraph (a) or (b) merely because there is a space between them that is not occupied or owned by that person.

18. I will refer to the last three lines of section 64(3ZD) as the "space proviso".

19. Mr Alistair Mills, who appeared on behalf of the Valuation Officer, explained in his helpful submissions that subsection (3ZD)(a) is concerned with contiguity in the horizontal plane, while subsection (3ZD)(b) deals with the vertical plane. In the horizontal plane units will be contiguous if they share all or part of a common wall, fence or other means of enclosure. If all or part of a wall enclosing one hereditament forms part of a wall enclosing another hereditament, the two will be contiguous. In the vertical plane the same will be true of hereditaments on consecutive floors if some or all of the floor of one lies directly above all or part of the ceiling of the other.

20. The treatment of contiguous units which are unoccupied is dealt with by section 64(3ZC). These will be treated as a single hereditament if they are owned by the same person and certain conditions are met. Those provisions are not relevant to this appeal, other than to explain the reference in section 64(3ZD) to hereditaments "occupied *or owned* by the same person".

The facts

21. The office suites in question in the appeal are on the first floor of The Printworks, a modern multi-let office building on the Ribble Valley Enterprise Park, near Clitheroe. In 2007 the respondent took a lease of Suite 8-9, which has a floor area of about 337 m^2. In 2009 it took another lease, this time of Suite 10, with about a further 400 m^2 of space. The two suites surround the central common area of the building on three sides. On the fourth side a separate office suite, Suite 11, was occupied by another business at the relevant time.

22. The secondary means of escape from the first floor in the event of a fire is by means of a corridor running from the central common area of the building to an external door, from which a staircase leads to the ground. The fire corridor divides Suite 8-9 from Suite 10. It is not demised to the respondent, or any other tenant, and remains in the occupation of the landlord.

23. The corridor is more than 10 metres long and is 1.32 metres wide. No access is available to it from either of the adjoining office suites, except via the common parts of the building. Signage on the door from the common parts identifies it as an emergency exit only, while at the other end of the corridor an alarm is triggered by opening the external door.

The proceedings

24. The respondent's two office suites were entered in the 2010 compiled list as separate hereditaments, with Suite 8-9 having a rateable value of £38,500 and Suite 10 a rateable value of £46,750, both with effect from 1 April 2010.

25. On 19 August 2014 the respondent submitted a proposal to the valuation officer that Suite 8-9 should be merged as one assessment with Suite 10 with effect from 1 July 2014. The valuation officer did not consider the proposal to be well-founded and remitted it to the Valuation Tribunal for England as an appeal.

26. By a decision given on 25 April 2019, the VTE allowed the respondent's appeal and determined that the assessments for Suite 8-9 and Suite 10 should be merged into one for which a rateable value of £80,000 was to be entered with effect from 1 July 2014 (no explanation was given why that date was chosen).

27. The VTE's decision demonstrates that the question whether adjoining premises should be treated as a single hereditament, rather than as two, is not simply a matter of administrative convenience, but may also have valuation consequences. The valuation officer's valuation scheme for the Ribble Valley Enterprise Park provides a discount for larger units, by applying a lower main space rate to larger units of occupation than to smaller units in the same building.

28. The VTE's conclusion that the two office suites should be treated as a single hereditament was based on what I have referred to as the "space proviso", the final words of section 64(3ZD), which direct that "hereditaments occupied or owned by the same person are not

prevented from being contiguous under paragraph (a) or (b) merely because there is a space between them that is not occupied or owned by that person." The VTE explained its reasoning in paragraph 20 of its decision:

> "It was accepted that the 'space' between the Suite 10 and Suite 8 and 9 was a fire corridor; had there been no requirement for the fire corridor, then there would have been total interconnection between the two suites. The panel held that the fire corridor fell within the definition of the term 'space', which in accordance with the 2018 Act, did not prevent the two suites from being contiguous."

29. The valuation officer now appeals against the VTE's decision to merge the two entries.

The appeal

30. There is no doubt that, applying the law as explained in *Woolway v Mazars*, Suite 8-9 and Suite 10 are separate hereditaments. They are self-contained units of property which lack any direct interconnection. They are not functionally dependent on one another (as demonstrated by the fact that they did not come into the occupation of a single occupier until 2009).

31. It does not appear to have occurred to anyone when the 2010 list was compiled that the two suites should benefit from the pre-*Woolway v Mazars* convention that adjacent hereditaments in common occupation should be the subject of a single entry.

32. On behalf of the Valuation Officer Mr Mills submitted that, properly interpreted, a "space" for the purposes of section 64(3ZD) meant a space within a wall, fence or other means of enclosure, or a space between stories (not itself constituting a storey). Having regard to the statutory language and the legislative history of the new provision that submission is clearly correct.

33. Mr Mills suggested in his skeleton argument that the appeal concerned the meaning of the word "space" in section 64(3ZD). While that is true up to a point, it is important not to focus too closely on one word. The appeal is really about the meaning of the subsection as a whole, and the space proviso cannot be understood in isolation. Out of context the reference to "space" is puzzling and uninformative, immediately inviting further questions: how much space, or what sort of space? Is a lift lobby, or an atrium in a multi-occupied building with individual units of occupation arranged around it, a "space" for this purpose, so that suites on opposites side of a building might satisfy the test of contiguity?

34. In the context of subsection (3ZD), the space proviso is intended to deal with the status of two hereditaments which would be contiguous with each other in the required sense, whether horizontally or vertically, but for the fact that there is a "space" between them that is not occupied or owned by the same person. The choice of the neutral word "space", rather than a word conveying a more immediate impression of what is intended such as "void" or "premises", may have been made because of the variety of hereditaments to which the proviso might potentially apply. The subsection defines what is meant by contiguous not

only in the context of vertical and horizontal divisions within buildings, but with hereditaments separated by walls, fences and "other means of enclosure".

35. A wall which separates two units of occupation may be solid, or, especially having regard to modern design and building practices, it may be more complex, with a void or compartment separating external skins on either side. In the case of a solid wall it can readily be said that the same wall encloses the premises on either side of it. The same statement could not be made with confidence about a wall which contains a void or service compartment within.

36. In the context of rating occupation is important in defining the unit of assessment. On normal principles the fact that such a void or compartment in a wall or floor may not be in the occupation of the person occupying the rooms on either side, and may be used by the building owner to house conduits and service installations, would arguably be enough to justify the conclusion that premises so separated were not contiguous within the meaning of Section 64(3ZD)(a) or (b). They are not enclosed by the same wall, but by two walls with a void between them; or the floor of one is not "directly" above the ceiling of the other, but is above a service void below which lies the ceiling. The clear purpose of the space proviso is to deal with that uncertain situation, and to confirm that the presence of such a space or void or gap does not prevent otherwise contiguous hereditaments from being treated as one.

37. It is clear from the structure of the subsection that the space proviso is not intended to be an alternative to the conditions in paragraphs (a) or (b), but is provided to clarify or qualify their application. The direction that two spaces are "not prevented from being contiguous … merely because" they are separated by a space simply allows one difficulty to be overlooked in cases where the qualifying condition would otherwise be met. To be contiguous two hereditaments must therefore satisfy the requirements of either paragraph (a) or paragraph (b), but those requirements will not be prevented from being satisfied by the presence of a space between the hereditaments which is not in the same occupation. Once it is recognised that the requirement of separation by the same wall, or by a common floor and ceiling, remains an essential characteristic of contiguity, it becomes clear that the space to which the proviso refers is a space within the wall or ceiling, forming part of the same enclosing structure which surrounds both hereditaments.

38. Consideration of the admissible background material provides strong support for this construction of the section 64(3ZD) proviso. Government consultation papers, and draft bills can be referred to as an aid to the interpretation of legislation (as Gloster LJ confirmed in the Court of Appeal in *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2016] 1 WLR 275 at [55]).

39. The title of the consultation clearly identified the limited purpose of the draft Bill which became the 2018 Act, namely to reinstate the practice in relation to multi-occupied properties as it had been before the decision in Woolway v Mazars. The draft Bill itself was in a rudimentary form, with what became subsection (3ZD) referring only to premises being contiguous (on the horizontal plane) where "some or all of a wall of one hereditament forms all or part of a wall of the other hereditament". The space proviso was not included, nor was the reference to fences or other means of enclosure.

40. There is nothing in the government's response to the consultation to suggest that the legislative purpose changed in any relevant respect. The consultation highlighted the need to resolve the uncertainty caused by the features of modern buildings described by Lord Neuberger in *Woolway v Mazars* (see [13] above), namely the presence of service voids between floors. Paragraph 8 of the consultation response (see [15] above) includes a very clear statement which can be taken to reflect the purpose of adding the space proviso to the text of the draft Bill: "the Government has amended the Bill to make it clear that *spaces in walls or ceilings* do not prevent two properties in the same occupation being considered contiguous" (emphasis added).

41. Applying section 64(3ZD)(a), two occupied hereditaments on the same floor will be contiguous if some or all of a wall of one forms all or part of a wall of the other. The "space" proviso means that the basic requirement that the two units must at some point be on opposite sides of the same common wall will not be defeated merely because there is a space within the wall between the hereditaments which the occupier of the hereditaments does not occupy.

42. Are those requirements satisfied in this case? Clearly they are not. No part of any wall of Suite 8-9 forms any part of a wall of Suite 10. The space proviso does not assist. It is not the presence of the corridor between the two suites which prevents them being contiguous under paragraph (a), it is the fact that they are not separated by a common wall. As Mr Mills put it, the fire corridor between the two hereditaments is not a space within a wall, it is a space between two walls, neither of which encloses both hereditaments.

43. If the space proviso was interpreted as applying to the fire corridor in this case the consequences would be unpredictable and potentially wide ranging, going far beyond the pre-*Woolway v Mazars* practice regarding contiguous units. It would be difficult to draw a principled line between hereditaments separated by an empty corridor and others separated by space more intensively used. Why would two office suites on the same floor, but separated by a third office suite in the occupation of another tenant, not be treated as contiguous and thus as a single hereditament? Floors within the same building which were not consecutive might be treated in the same way, as might functionally distinct buildings separated by a road but in common occupation. There is no reason to think that the reinstatement of the previous practice was intended to be accompanied by such extensive changes.

44. Finally, the respondent's statement of case and evidence relied on two particular features of the building which it claimed were relevant to the contiguity condition.

45. The first feature was that the wall into which the fire door opening into the corridor was inserted was also a wall part of which enclosed Suite 8-9 and part of which enclosed Suite 10; the same could be said of the exterior wall of the building. That wall also spanned the space above the door. This was said to make the two units contiguous in the sense described in section 64(3ZD). I do not agree. No part of the wall in which the fire door is inserted encloses both suites. It is not enough that, at different points along its length the same wall encloses each suite. Some or all of the means of enclosure of one hereditament must form

a means of enclosure of the other hereditament, and that requirement is not satisfied in this case.

46. The other feature relied on by the respondent was the presence of service pipes above the ceiling of the fire corridor, which were said to link the two units. There was no evidence that there are services above the corridor, but assuming that there are, I do not think they are of significance in this appeal. An office is no less self-contained because conduits run between it and other self-contained offices in the same building (it is quite likely that common service pipes and conduits connected consecutive floors of the building in *Woolway v Mazars* but neither Lord Neuberger, who specifically dealt with service voids, nor any other member of the Court, mentioned such interconnection as a matter of potential significance. In *Harding v Clements v Secretary of State for Transport* [2017] RA 271 the Tribunal (Sir David Holgate, President, and PD McCrea FRICS) did not accept that two fields separated by a road but connected by ducts running under the road, one of which contained a water pipe, formed a single geographic unit.

47. For these reasons I allow the valuation officer's appeal and direct that the entries in the 2010 list removed as a result of the VTE's decision be reinstated.

Martin Rodger QC
Deputy Chamber President

10 February 2020