UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – HEREDITAMENT – office building occupied by "property guardians" while awaiting redevelopment – each having own allocated room with overspill space and use of shared facilities – whether a single composite hereditament – appeal allowed

IN THE MATTER OF AN APPEAL FROM THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

LUDGATE HOUSE LIMITED

Appellant

and

(1) ANDREW RICKETTS (VALUATION OFFICER)
(2) LONDON BOROUGH OF SOUTHWARK

Respondents

Re: Ludgate House,
245 Blackfriars Road
London SE1 8NW

Martin Rodger QC, Deputy Chamber President and Mr P D McCrea FRICS
Royal Courts of Justice
on
23-25 July 2019

David Forsdick QC and *Luke Wilcox* for the appellant
Mark Westmoreland Smith for the first respondent
Richard Clayton QC and *Faisel Sadiq* for the second respondent

The following cases are referred to in this decision:

AG Securities v Vaughan [1990] 1 AC 417

Brook (VO) v Greggs [1991] RA 61

Cardtronics Europe Ltd v Sykes (VO) [2019] 1 WLR 2281

John Laing & Sons Ltd v Kingswood Assessment Committee [1949] 1 KB 344

Lamb & Shirley Ltd v Bliss (VO) [2001] EWCA Civ 562

London County Council v Wilkins [1956] 3 All ER 38

Public Safety Charitable Trust v Milton Keynes Council [2013] RA 275

Re Heilbuth [1999] RA 109

South Kesteven DC v Digital Pipeline Ltd [2016] 1 WLR 2971

Westminster Council v Southern Railway Company Ltd [1936] AC 511

Wimborne District Council v Brayne Construction Ltd [1985] RA 234

Woolway (VO) v Mazars [2015] AC 1862

Introduction

1. Until its demolition in 2018 Ludgate House was an office building of 173,633 sq ft at the southern end of Blackfriars Bridge in the London Borough of Southwark. Built in 1988 and formerly the home of Express Newspapers, its last tenants vacated the building in March 2015. Between 1 July 2015 and May 2017, it was occupied by a number of licensees under arrangements made between the owner of the building, Ludgate House Ltd (LHL), and a property services company called VPS (UK) Ltd, (VPS) which specialises in the supply of "property guardians".

2. A property guardian is a private individual who, usually with others, occupies vacant premises as their residence under a temporary contractual licence until the building owner requires it for redevelopment. The arrangement provides the guardian with accommodation at a lower cost than in the conventional residential letting market, it provides the supplier with a fee for making the arrangements, and it provides the building owner with some protection against squatters and, more significantly, with the prospect of mitigating liability for non-domestic rates.

3. On 5 July 2018 the Valuation Tribunal for England (Ms Fiona Dickie, Vice President) dismissed appeals by LHL against the Valuation Officer's refusal to act on two proposals it had made to alter the 2010 non-domestic rating list in light of the guardianship arrangements. LHL now appeals against that decision.

4. The main issue in the appeal concerns the effect of the arrangements implemented at Ludgate House from 1 July 2015 on the status of the appellant as the rateable occupier of the whole building.

The legal framework

5. There was no significant dispute between the parties on the relevant principles of the law of rating.

Domestic and non-domestic property

6. As a general proposition, property in England and Wales must be entered either in a rating list for non-domestic rating purposes or in a valuation list for Council Tax purposes.

7. The combined effect of section 3(1)(b) of the Local Government Finance Act 1992 ("the 1992 Act") and sections 42, 64 and 66 of the Local Government Finance Act 1988 ("the 1988 Act") is that property will be domestic property and liable to Council Tax if it is "used wholly for the purposes of living accommodation". Otherwise, unless exempt, it will be non-domestic property and liable to be assessed for non-domestic rates.

8. The test of liability for one or other form of taxation is therefore concerned with how the property is used, not with how it is physically configured or designed.

9. Property may be "wholly" used for a particular purpose even if not all of it is so used: *Public Safety Charitable Trust v Milton Keynes Council* [2013] RA 275, *per* Sales J at [37]; *South Kesteven DC v Digital Pipeline Ltd* [2016] 1 WLR 2971, *per* Elias LJ at [25].

10. Property which is not in use is domestic property "if it appears that when next in use it will be domestic" (section 66(5), 1988 Act).

The hereditament

11. The unit of property to be entered in the non-domestic rating list is the hereditament, an expression defined by section 65(1) of the 1988 Act by reference to section 115 of the General Rate Act 1967, which provides:

> "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."

12. A building may contain more than one hereditament. The number of hereditaments in any given building will depend on its physical configuration, the uses to which it is put, and the manner in which it is occupied.

13. In *Woolway (VO) v Mazars* [2015] AC 1862, Lord Sumption JSC explained at paras 6 and 12 that the primary test for identifying a hereditament "is geographical and depends simply on whether the premises said to constitute a hereditament constitute a single unit on a plan". A functional test may also be relevant in certain cases either to break up a geographical unit into several hereditaments where severable parts of it are used for quite different purposes, or to unite geographically dispersed units where the use of the one is necessary to the effectual enjoyment of the other.

14. At para 49 of his concurring judgment, Lord Neuberger PSC emphasised the role that occupation plays in defining the hereditament:

> "… it can be seen that the occupation of premises can in some circumstances serve to control their status as one or more hereditaments. An office building let to and occupied by a single occupier would be a single hereditament, but if the freeholder let each floor of the building to a different occupying tenant, retaining the common parts for their common use, then each floor would be a separate hereditament."

Composite hereditaments

15. Where a hereditament is partly used for domestic purposes, and partly used for non-domestic purposes, it is a "composite hereditament" (section 64(8)-(9), 1988 Act). A composite hereditament is required to be shown in both the rating list and the Council Tax valuation list.

16. Property will only be entered in the rating list as a composite hereditament if, notwithstanding its mixed domestic and non-domestic use, it is nevertheless a single hereditament. Examples of composite hereditaments include live-work units, owner-occupied flats above shops, and public houses with resident landlords where the same person is in rateable occupation of the whole property for both non-domestic and domestic purposes.

17. The rateable value to be entered in the rating list for a composite hereditament is an amount equal to the rent, assessed on the usual rating valuation assumptions, which "would reasonably be attributable to the non-domestic use of property" (para 2(1A) of Sch 6, 1988 Act). The proper application of that direction was a matter of dispute in this appeal, but we need not dwell on it at this point.

Rateable occupation

18. Although extended in certain circumstances to vacant property, in principle non-domestic rates are a tax on the occupation of property and are payable by the person in rateable occupation.

19. Section 65(2) of the 1988 Act provides that whether a hereditament is occupied, and who is the occupier, is to be determined under the rules which would have applied under the General Rate Act 1967. Those judge-made rules were identified by Tucker LJ in *John Laing & Sons Ltd v Kingswood Assessment Committee* [1949] 1 KB 344, 350:

> "… there are four necessary ingredients in rateable occupation …. First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period."

20. Provided the occupation in question satisfies those four requirements it is not necessary for it to be founded on any particular legal right or status. In *Westminster Council v Southern Railway Company Ltd* [1936] AC 511, at 533 Lord Russell of Killowen stated that principle: "the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."

21. The requirement that, to be rateable, the relevant occupation must be "exclusive for the particular purposes of the possessor", does not require that the occupier be the only occupier. Only one person may be in rateable occupation of a hereditament at any one time, but in practice there may be more than one person in actual occupation.

22. Where more than one person is in actual occupation, the rateable occupier is the person whose occupation of the hereditament is "paramount". The leading authority is *Westminster Council v Southern Railway* which concerned the rateable occupancy of premises at Victoria Station, including newsagents' kiosks and display cabinets. Lord Russell explained how the rateable occupier was to be identified in cases where more than one person has rights of occupation over the same premises:

> "The question in every case must be one of fact—namely, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate, but who is in paramount occupation of the particular premises in question."

23. Lord Russell gave, as an example of paramount occupation, the relationship between a householder and his lodger, referring to the "landlord-control principle". The application of the principle has recently been analysed by Lindblom LJ in *Cardtronics Europe Ltd v Sykes (VO)* [2019] 1 WLR 2281, which concerned the rateable occupation of the sites of ATM machines in supermarkets:

> "84 The basis of the "landlord-control principle", as described in *Westminster Council v Southern Railway Co* [1936] AC 511, is the concept of the owner of the premises retaining sufficient control of the part of the premises occupied by another party, as well as by himself, to be treated as being in rateable occupation of that part. The degree of control required is not absolute. Lord Russell referred, at p 530, to "general control" over the occupied parts, which is plainly not the same thing as total control. If the landlord retains "no control", he will not be treated as being in rateable occupation: p 530. Lord Wright MR referred, at p 561, to the landlord retaining "control for purposes of his business of the whole house". Throughout the reasoning in both speeches the theme of "control" prevails. How much control is required will, of course, differ from one case to the next. As Lord Russell said, at p 532, this will always depend on the particular facts of the case in hand. In every case "the degree of the control must be examined". It seems clear, however, that if less than total control can suffice, it will be possible, in a case of concurrent occupation by two occupiers, for both to retain a degree of autonomy in their occupation without the owner of the premises being deprived of "general control"."

24. Identification of the relevant "purpose" in order to ascertain whether occupation is "exclusive for the particular purposes of the possessor", and capable of being rateable, can give rise to difficulties. The correct approach was explained by the Court of Appeal in *Wimborne District Council v Brayne Construction Ltd* [1985] RA 234. In *Wimborne* a site had been excavated to make ponds for use as a fish farm. The owner of the site had engaged Brayne to carry out the works, and Brayne sub-contracted the excavation of the ponds to White's. The terms of the contract between Brayne and White's gave White's the exclusive right to excavate the gravel for the fish ponds, and to sell it on for a profit. The issue was whether Brayne remained in rateable occupation.

25. The Court of Appeal stressed that what had to be identified was the *purpose* of White's occupation, not its motive. Lloyd LJ said:

> "… one has to be wary in this context, as in almost every other context, of the word "purpose". Here the Crown Court was using it in what I believe to be the correct sense, namely, the object of the activity in question, rather than the motive behind the activity. Mr Glover put it epigrammatically when he said that "purpose" in this context means what a man does rather than why he does it."

26. Sir George Waller explained that, in the context of the test for paramountcy, it was the particular purpose of White's in taking occupation which mattered:

> "So far as White's were concerned, while no doubt the ultimate objective was to enable Brayne's to complete the construction of the ponds, the particular purposes of White's were the excavation of gravel."

27. White's occupation for its particular purpose was exclusive – no other person was entitled to, or did in fact, excavate the gravel. Its occupation was also different from that of an ordinary contractor, who would not generally be in rateable occupation, because an ordinary contractor gets nothing from its work other than its profit under the contract, but here White's also took the gravel and was entitled to sell it as its own. That justified the conclusion that White's was in occupation for its own particular purpose, and it occupation was therefore rateable. It did not matter that another purpose of White's occupation was the fulfilment of its contract with Brayne, as Lloyd LJ explained:

> "My answer to the question whether the same activity can have more than one purpose would be "yes". I can see no good reason why not. Is there then any good reason why the secondary purpose of an activity should not be capable of giving rise to rateable occupation? Again, I can see none. … The fact that one of the purposes does not give rise to rateable occupation does not mean that the other may not do so."

28. To be rateable, occupation must not be too transient. But a licensee can satisfy the requirements of rateable occupation even where the licence is for a short period or determinable summarily. In *London County Council v Wilkins* [1956] 3 All ER 38, 48 Radcliffe LJ suggested that occupation may be "permanent" provided it is continuous rather than intermittent and said that "it is well settled that a tenant at will has an occupation that is sufficiently permanent to carry rateability".

29. Nor is it necessarily determinative against a licensee being in rateable occupation that access to the premises is controlled by the licensor. The shops and kiosks at Victoria Station were found to be separately rateable hereditaments in *Southern Railway* although the gates of the station were locked overnight, the lease and licence agreements reserved rights of entry to the railway company, and the occupiers agreed to comply with bylaws and regulations made by the company.

30. In each case the existence of a separate hereditament and the identity of the person in rateable occupation are questions of fact. We were referred to two specific examples to illustrate the application of the *John Laing* considerations in practice.

31. In *Brook (VO) v Greggs* [1991] RA 61, individual market stalls in a market hall, most occupied under licences terminable at will, were separate hereditaments. The market hall itself was under the control of the local authority, and stall holders could not gain access when it was closed.

32. In *Re Heilbuth* [1999] RA 109, self-contained workshops and business starter units in a business centre, occupied under monthly licenses, were again in the rateable occupation of each unit holder. Access to the centre as a whole was controlled by the operator and the occupiers of each unit were required to provide duplicate keys for their unit to the operator.

The relevant facts

33. At the hearing of the appeal oral evidence was given by Mr Devinda Jayawardene, a regional manager for VPS, Mr Clive Riding, a consultant for Native Land Ltd which acts on behalf of LHL in connection with the development of Ludgate House, and Mrs Julie Drewett, a senior revenues officer for the London Borough of Southwark. We were also invited to read witness statements prepared by Ms Alice Howard, Mr Gareth Breacher and Ms Angela Martin, each of whom had lived at Ludgate House as licensees of VPS but none of whom was available to be cross examined.

34. Despite the number of witnesses the relevant facts were largely agreed. Our understanding of the arrangements on the ground was enhanced by a large number of photographs which we were shown of the building while in the occupation of the guardians.

35. It is agreed that the material day for the purpose of the appeal was 1 July 2015.

36. Ludgate House stood on the South Bank between Blackfriars Road and Blackfriars Station. It comprised ground and lower ground floors with nine upper storeys. The upper floors were each of about 1765m^2, although the eighth was a little smaller and the ninth smaller still.

37. The lower ground floor housed plant and machinery rooms and other space ancillary to a large office building. The ground floor included a reception area and a café with kitchen. The first to seventh floors provided open plan office space with only limited partitioning; more cellular offices and less open plan space was provided on the eighth floor, while the smaller ninth floor was almost entirely partitioned into individual offices and board rooms.

38. LHL acquired the freehold in 2010, subject to a lease to commercial tenants. In 2013 planning permission was granted for a comprehensive redevelopment of the building together with the adjoining Sampson House to create a large, mixed use office, residential and retail complex. The lease expired and the tenants vacated in March 2015.

39. On 18 June 2015, before demolition work had begun, VPS contacted LHL with a proposal to secure the building against trespassers by arranging for occupation by property guardians under licences granted by VPS. It was recommended that 32 guardians be installed to provide "a robust level of protection". LHL accepted the proposal and on 24 July an agreement was entered into, although by that time the parties had already begun to implement it.

40. The relevant terms of the agreement between LHL and VPS provided that no relationship of landlord and tenant was created between them, and that VPS was not entitled to exclude LHL from the building (clauses 2.7.1, 2.7.2). Nor was VPS to be LHL's agent for any purpose. VPS was not entitled to occupy the building itself, and the rights of occupation to be granted by it were to be in the form of licences rather than tenancies (2.4.2). The agreement was terminable on 30 days' notice, at the end of which the building was to be vacant. LHL was to pay a fee for the services provided by VPS, but this was reduced by £200 per week for each licensee who took up occupation of the building.

41. The terms of the licences to be granted by VPS to the individuals wishing to live at Ludgate House were in a standard form. No example of an executed licence was available, but we were shown the form used by VPS at that time.

42. The licence was clearly drafted with two objectives. The first and most prominent was to make it impossible for the licensees to claim statutory security of tenure as tenants; the second was to guarantee a residential presence in the building at all times to maximise the chances of achieving rates mitigation and to ensure that any squatter who took up occupation without permission could be arrested for the criminal office of squatting in a residential building contrary to section 144, Legal Aid, Sentencing and Punishment of Offenders Act 2012.

43. The area over which the licensee was granted rights was referred to as the "living space". This was defined as the area designated as available for occupation from time to time, which could be varied by VPS (clauses 1.1.4, 3.4) but in practice the living space extended to the whole of the building excluding the plant rooms. The agreement conferred the right to occupy the living space and to share it with others granted the same right (3.1). It was specifically recorded that the licensee had no right to exclusive occupation of any part of the living space (4.1) and the licensee could be required to move to a different room. In practice, however, as Mr Jaywardene explained, before each licence was signed the licensee would be shown the building and would choose which room they wished to occupy. All those permitted to occupy the building were entitled to share the whole of the living space and they were to agree amongst themselves how it was to be shared, but the express expectation was that each would have a room of their own.

44. Clause 8 contained a series of restrictions. Smoking, the use of heaters, permitting others to stay overnight, having more than two guests at any one time, changing locks, or causing nuisance or annoyance to others were all prescribed in much the same way as in most rented accommodation.

45. Clause 9 imposed obligations on the licensee. These included not sleeping overnight away from Ludgate House without consent for more than two nights in seven (clause 9.1) and not leaving the building unoccupied by at least one person (9.3). The licensee was to report to VPS any person attempting to gain access to the building without permission, and was "politely but firmly [to] challenge" any such person "to determine their identity and purpose" (9.7).

46. The first VPS licensees moved into the building on these terms on the material day, 1 July 2015. Four individuals arrived on that day, and each chose a specific room on the second, eighth or ninth floors. Each paid a licence fee of about £500 a month.

47. No works had been carried out by VPS before the first licensees moved in and the building remained configured for office use with limited shower and kitchen facilities. Additional facilities were added in the next eight to ten weeks. Four shower pods were installed in the washrooms on the second, fourth, seventh and eighth floors. Cookers were added to some of the existing office kitchens, and on the fourth and eighth floors areas were set aside for use as kitchens with portable kitchen units, washing machines, sinks and cookers.

48. VPS did not obtain planning permission for the residential use of the building, nor did it apply for a licence to operate a house in multiple occupation. Southwark was aware of the mode of occupation of the building as a result of an inspection carried out by its officers in January 2016 and it did not raise planning or licensing as an issue. Although Mr Forsdick suggested otherwise, we are satisfied that Ludgate House became an HMO once the licensees moved in, as it then satisfied the standard test in section 254(2), Housing Act 2004. It is a criminal offence to be in control of an unlicensed HMO (s.72, 2004 Act).

49. A greater number of licensees than the 32 originally agreed on moved into the building, and by 17 August 2015 46 individuals had taken up occupation, each with their own separate licence. Although the terms of the licences permitted each licensee to occupy almost the whole of the building as their living space they also provided for each to be allocated, or to select, a specific room. This was done in practice, although in a few cases licensees occupied a less well-defined part of one of the open plan floors. A record was kept of the rooms in which each individual resided and the licence emphasised the importance of VPS being informed if anyone chose to move to a different room. Where a separate room was allocated to an individual, that room had a lockable door for which the licensee was provided with a key, enabling them to keep it secure while they were absent.

50. Photographs show that each occupied room had the name of the resident on a card or notice fixed to the door. These name cards were not home-made items produced by the licensees themselves, but were pre-printed with the VPS logo and the words “Guardian Room” with space for a name and room number to be filled in.

51. The photographs also show parts of the open plan space separated by furniture or fabric to identify the living space of those residents who did not have their own rooms.

52. As well as having their own designated rooms or living area, each licensee made use of the communal toilets, showers and kitchens.

53. The pattern of occupation established by 17 August 2015 had at least one licensee on each floor of the building. On five of the floors there was only one licensee, on two floors there were two, and on each of the second and fourth floors there were seven. On the floors with the greatest number of cellular offices the population was highest, with 12 people living on the eighth floor and 11 on the ninth.

54. VPS's only presence in the building was by its security guards, one of whom was on duty at the entrance at all times. It was not clear from the evidence whether the main entrance to the building was always open, or whether it was locked with the licensees each having a key, but the only evidence of the security guard controlling access by the licensees was on the first day, 1 July 2015, when the initial group of four was admitted to the building.

55. Although the terms of the standard license provided for VPS to be entitled to require a licensee to move from one room to another, this rarely happened in practice. The only requests or instructions to move of which there is any record were given in October 2016 when two individuals were asked to relocate from the ground and lower ground floors to enable sufficient work to be done to enable it to be said that LHL's planning permission had been implemented. In each case the licensee moved without objection, and in May 2017 all of the licensees moved out when required to do so. Although licensees were entitled to move to a different room, provided they identified it to VPS, there was no evidence that this happened on any significant scale and most licensees remained in the room they have chosen, or had allocated to them, throughout the period of their occupation.

56. The records we were shown suggested that the population of licensees was stable, with most (including the first four settlers) being in occupation for most of the 22 months of the agreement between VPS and LHL. Typically, the licensees were employed and the building was their only home, or at least their only home in London where they worked. Some were couples but most were individuals. No licensee gave oral evidence but the witness statements signed by three of them gave a first-hand description of the arrangements.

57. Alice Howard, a paediatric nurse, lived at Ludgate House from July 2015 until May 2017. Her husband joined her in January 2016. They occupied two rooms allocated to them by VPS, numbers 22a and 22b on the seventh floor, one of which they used as a bedroom and the other as a private living and dining area. The rooms were lockable and they kept valuable possessions there. For most of their period of occupation they used a communal kitchen on the same floor, and an adjacent room as a larder and store for cooking utensils. They used showers on different floors at different times, and washing machines supplied by other licensees. They also made use of the communal areas, including by erecting an eight-person tent for use as a spare room when friends or family came to stay. They enjoyed the lively social life of the building, which featured parties, gym sessions and film nights.

58. John Breacher, a pastry chef, also lived in the building from July 2015 until May 2017. For all but the last month of this time he lived in two rooms on the ground floor, where he shared a communal kitchen with the security guards.

59. Angela Martin worked locally in a managerial role, and moved to Ludgate House in December 2015, remaining until May 2017. She was allocated room 11 on the ninth floor, where she slept, and made use of the communal kitchen and washing facilities on the same floor. Because of the number of people living on the ninth floor there was limited communal space, but the lift lobby area was used collectively for storage.

60. The photographs of Ludgate House taken during the licensees' occupation corroborate these witness statements and show that licensees who occupied their own separate rooms also

made use of the open plan office floors, either for the storage of their belongings or as part of their living space. Gym equipment, table tennis and pool tables, desks, tables, chairs, lamps, washing lines, boxes, bags and other items can all be seen in the open areas. Most of the photographs are of the communal space, with only a few showing inside individual rooms. Ms Drewitt explained that during her visit in January 2016 she had been trying to take photographs showing the extent of the unoccupied space. She had also entered rooms where residents were present and confirmed that they contained beds, tables, desks and chairs, but she had not taken photographs out of respect for the privacy of the occupiers.

61. It was put to Mr Jaywardene, and he agreed, that it was not possible to identify the boundaries of each licensee's occupation. That clearly did not mean, however, that it was not possible to identify the individual rooms occupied by the four licensees present on 1 July, or those who arrived by 17 August and chose to take a specific room rather than live in the open plan space. The parties agree which individual rooms were allocated and occupied by specific licensees as their own private space. What is not possible to identify with any precision is the full extent of the additional space, outside their own room, which any licensee made use of for storage or recreation.

The rating and procedural history

62. At the start of the period under consideration the building appeared in the 2010 Rating List as two separate hereditaments, the first identified as "Ludgate House (inc part 2nd floor South)", with a rateable value of £3,870,000, the second as "Pt second floor (North), Ludgate House", with a value of £327,000. The separate entries reflected the presence of two separate occupiers of parts of the building before it was vacated in March 2015.

63. On 9 September 2015, LHL made proposals seeking the deletion of these entries from the list, on the basis that the use of the whole of the building was now domestic.

64. On 27 November 2015, having inspected the building two days earlier, the valuation officer accepted LHL's proposals as well founded, and deleted the two hereditaments with effect from 25 June 2015 (for the larger hereditament) and 3 December 2015 (for the smaller hereditament). Possibly because of the lapse of time before this decision was made, the original proposal was formally referred to the VTE as an appeal by LHL.

65. Following the deletion of the building from the non-domestic rating list, each floor of the Property was entered in the valuation list as a separate dwelling for Council Tax purposes.

66. The second respondent, the London Borough of Southwark, is the local billing authority for Ludgate House. When it became aware of the deletion it carried out its own inspection on 11 January 2016 and formed the view that the building was "essentially vacant". The inspection was undertaken with the knowledge and cooperation of LHL.

67. On 29 February 2016 Southwark made two proposals of its own, challenging the alterations made by the valuation officer and seeking the re-instatement of the entries for Ludgate House as they had appeared in the non-domestic rating list before the valuation officer's decision

of 27 November 2015, or alternatively to create a new entry covering the whole building and recording it as a composite hereditament.

68. LHL became aware of Southwark's proposals in March 2016 and its solicitors raised objections.

69. Although there had been no change in the relevant facts since the decision of 27 November 2015, the valuation officer initially sought to resolve Southwark's proposals by agreement. It was suggested that Ludgate House be entered in the list on the basis that parts were domestic (the eighth, ninth and part of the sixth floors) with the remainder as non-domestic offices. Southwark accepted that position, but LHL was not prepared to agree. It accepted that the eighth, ninth and part of the sixth floors were domestic and therefore subject to Council Tax, but it did not agree that the remainder of the building was non-domestic.

70. As a result of LHL's resistance to the valuation officer's suggested compromise, no alteration could be made to the list under regulation 12(2) nor could the valuation officer give effect to Southwark's proposals, which therefore became the subject of two appeals to the VTE. In August 2016 LHL applied to be joined and was admitted as an interested party to Southwark's appeals.

71. While these appeals were continuing, the valuation officer decided to enter part of Ludgate House (being all but the first and second floors) in the 2010 list as offices with effect from 25 June 2015, with a rateable value of £3,390,000. This change was effected by a unilateral notice issued on 31 May 2017.

72. The valuation officer subsequently had second thoughts about the exclusion of the first and second floors from the new entry. He informed LHL's agent that their omission was a "description error". On 16 August 2017 the error was corrected by a second unilateral notice entering the whole building in the 2010 list with effect from 25 June 2015 as a composite hereditament having a rateable value of £3,390,000, with the first and second floors being recorded as domestic property.

73. On 24 August 2017, LHL made two proposals against the first of the valuation officer's unilateral notices. The first sought the deletion of the hereditament or, alternatively, that the rateable value attributed to it be reduced to £1, in each case on the basis that the whole of the building was domestic property. The second proposal challenged the effective date of the alteration and proposed that it be 24 May 2017. These proposals were not accepted by the valuation officer who referred them to the VTE as further appeals. The same occurred to a fourth and final proposal made by LHL on 27 September 2017 which proposed that Ludgate House should be shown in the list as more than one entry.

74. Thus, six proposals concerning Ludgate House, two by Southwark and four by LHL, were before the VTE. On 5 October 2017, the VTE directed that the appeals be consolidated.

75. By the time the appeals came on for hearing before the VTE the parties had agreed a unit rate of £320/m^2 as the rateable value of such parts of the building as were to properly to appear in the 2010 list as non-domestic property.

The VTE's decision

76. The VTE's decision of 5 July 2018 records the observations of the Vice President on her inspection of Ludgate House on 12 October 2017. By that time all of the licensees had left the building and stripping out had commenced. Nevertheless, the work was not so far advanced as to prevent her from forming a clear impression, which she recorded as follows:

> "Access was obtained to part of the areas where guardians had lived, including the basement, the first floor and one of the open plan floors. Notwithstanding the extent of the stripped out state, I found the inspection was useful in assisting me in putting the extent of the guardians' occupation in the physical context of the building. I gained an impression of the vast scale of the floors and the enormity of the open space, and the extent of that unadapted office space which would in practice have been unused by the number of guardians in occupation.

The Vice President concluded that Ludgate House was still an office block, and that the presence of showers and cookers did not detract from that.

77. The basis of the VTE's decision turned on its conclusions on the issue of rateable occupation, which were recorded in paragraphs 37 and 38, as follows:

> "37. In the case of Ludgate House I am satisfied that whilst the guardians were physically present, their occupation was heavily restricted and under the control of, and on behalf of, LHL. It is clear to me that LHL, not the guardians, was in fact in paramount occupation of the whole of Ludgate House as a single hereditament. Though VPS were not agents for the purpose of contractual relations, that does not mean that LHL can avoid the actuality of being in control of these premises.
>
> 38. The true position is that the guardians are in occupation on behalf of LHL. The question is one of fact and it is clear to me, with regard to the position and rights of the parties, that the occupation of LHL is paramount. VPS are specifically engaged to provide security services, and grant licences in order to do that, but are not given possession or occupation of the premises, and the guardians are not granted exclusive occupation of any part, nor is the extent of areas that may be occupied clearly defined. As such LHL are in possession of the whole building. There are no smaller separate hereditaments which are readily ascertainable either from the agreements or the evidence. In the circumstances I conclude that LHL is in rateable occupation of the whole of Ludgate House as a single hereditament."

78. At paragraph 47 the VTE also concluded that neither the whole of Ludgate House nor any part of it could be said to be used "wholly for the purposes of living accommodation". It could not, therefore, be either a domestic hereditament or a composite hereditament. While

similar guardianship schemes had been accepted in the past by the VOA and billing authorities as effective for rates mitigation, LHL had applied the approach "to a non-domestic building on a vast scale". That scale, and the nature of the occupational licences, "tipped the scale far away from LHL".

79. The VTE therefore concluded that Ludgate House was a wholly non-domestic building with effect from 1 July 2015. LHL's appeals were successful only to the extent of allowing a minor adjustment to the effective date of the alteration effected by the valuation officer's first unilateral notice (which was changed from 25 June 2015 to 1 July 2015).

The appeal

80. The first and most important issue in the appeal concerns the identification of the correct number of hereditaments at Ludgate House on 1 July 2015. The VTE concluded that LHL was in possession of the whole building and that no smaller, separate hereditaments could be identified either from the agreements or the evidence. The parties agreed that if that conclusion was wrong, and there had been more than one hereditament on the material day, the valuation officer's second unilateral notice, entering the whole building in the 2010 list as a composite hereditament with effect from 25 June 2015, was itself erroneous and the entry should be deleted.

81. If the proper conclusion is that the building was a composite hereditament on the material day, the second issue concerns the proper approach to the valuation of the non-domestic part of that hereditament. This was the issue to which the expert evidence was largely devoted.

82. Finally, if the building was correctly entered in the list as a composite hereditament, an issue arises as to the effective date of that entry. The appellant contended that regulation 14(7) of the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 2009 should be construed so that the effective date was 24 May 2017, rather than 25 June 2015. Since the appellant's suggested date was after the closure of the 2010 list, if its contention is correct it would mean that the entry should not have been made at all and the building should have remained outside the list by reason of the deletion made by the valuation officer in response to LHL's original proposal.

One hereditament or more?

83. The critical question on this issue is whether, on the material day, the four licensees who were the first settlers in the building occupied one or more separate hereditaments of which they, and not LHL, were the rateable occupiers. There are two related aspects of this question, the first concerning the identification of distinct units of occupation, and the second addressing the four characteristics of rateable occupation in relation to any such units.

84. We agree with the submission made by Mr Clayton QC on behalf of Southwark, reflecting the approach taken by the VTE itself, that the answer to these questions turns on the particular facts of this case. We were referred to examples of other buildings in which guardianship schemes had been accepted by valuation officers as justifying alterations to the list, including the deletion of entire buildings or the reduction of rateable values to a nominal sum. The circumstances of those hereditaments, most of which were buildings on a relatively modest

scale, are not in issue in this appeal and they create no precedent which either we, or a valuation officer considering a different case, are bound to follow.

85. The licenses granted in this case to the first four settlers permitted each of them to share the whole of the living space with every other person granted the same rights. The agreements were modelled on a flat sharing arrangement considered by the House of Lords in *AG Securities v Vaughan* [1990] 1 AC 417, by which individuals were each separately granted licences to share the whole of a flat with up to three others who would be granted the same right. This arrangement was held not to grant exclusive possession of any part of the flat to any individual or of the whole flat to them collectively. In the absence of a grant of exclusive possession no tenancy was created and the occupiers were not entitled to statutory security of tenure. The occupiers agreed between themselves who would occupy which room.

86. The standard licence agreement used by VPS referred to the *AG Securities* decision on its first page, and described itself as a licence "for non-exclusive shared occupation of premises at …" with space for completion of an address. The draftsman no doubt intended that the address inserted would be that of the building (to replicate the arrangement in *AG Securities).* In reality, Mr Jayawardene told us, the practice was to fill in the number of a specific room on a particular floor (which rather misses the point of the House of Lords' decision).

87. Whether the licence agreements succeeded in preventing the occupiers from acquiring statutory security of tenure is not determinative of the question whether, for rating purposes, the arrangements involved the creation of separate hereditaments. That question does not depend on the existence of a particular relationship between the occupier and the owner of the property; as Lord Russell explained in *Southern Railway, "*it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement." Nor does it depend on the subjective intention of the parties to the licences, or LHL. The legal rights of occupation conferred on the licensees are a relevant consideration, but more important is the manner in which the arrangements were operated in practice, and the quality of the occupation actually enjoyed by the licensees. Mr Westmoreland Smith agreed that this was the correct approach.

88. A note at the start of the licence reassures the licensee that although the extent of the living space might change from time to time "it is expected there will always be at least one room for each individual". The same expectation is repeated in clause 3.1. The obligations on each licensee to inform VPS of which room they used as their "sleeping space", and to "move to a different room" on request, and the acknowledgement in clause 11.1 of receipt of "a key to one of the rooms in the property" are to the same effect. Whether these provisions took effect as representations or contractual obligations does not matter, but they are an important feature of the arrangement and VPS would have been acting inconsistently with them if it had allowed more individuals to occupy the building than the number of separate rooms available for them to occupy.

89. Whatever the licence may have said about each licensee being entitled to share the whole of the living space, and whatever the contractual effect of the expectation that each would have their own separate room, it is clear that most individuals, including the first four settlers, had their own private living space from which all others were excluded. This was consistent with the wishes and expectations of VPS, as the terms of the licence demonstrate. But, as implemented,

the arrangements differed in some respects from the documented position. Rather than the occupiers agreeing amongst themselves who would occupy which space, in practice rooms were allocated by VPS. Perhaps the clearest demonstration that VPS intended individuals to have their own private space were the printed cards on each door, branded with the VPS logo, to be completed by filling in a name and room number.

90. We are satisfied that the *Mazars* geographical test is satisfied in the case of the first four licensees. It is agreed that each occupied a specific room, the location of which was shown to us on a plan, neatly edge in red. We were initially drawn to the argument that, because of the overspill into the communal areas, no unit of space could be definitively identified as being occupied by an individual, as the boundaries were too fluid and imprecise. On reflection, however, that point is unsound. In the case of each of the first four licensees, and most of the subsequent incomers, the individual room which they occupied was never in doubt, and it was kept under lock and key by them and recorded in the official VPS register as theirs. The fact that the occupier also made use of additional space, less precisely defined and less private, does not diminish the control they enjoyed over their core living space.

91. Mr Westmoreland Smith stressed that the licensees also had the right to use communal facilities, including washing and cooking facilities, without which it would not have been possible for them to reside in the building. That is true, but it does not compromise the identification of the space which each occupied as their own and in practice did not share. A domestic hereditament need not contain all of the attributes of a separate dwelling for the occupier to be liable to Council Tax (specific statutory provisions in the Chargeable Dwellings Order are required to aggregate the separate rooms in an HMO to create a single hereditament even where cooking and washing facilities are shared); a shop or café in a shopping mall is not prevented from being a separate hereditament because it has permission to display goods or place tables and chairs for customers in the public area of the mall outside the shop; and an office unit in a building in multiple occupation is not prevented from being a separate hereditament by the availability of communal washrooms, or lifts, or a café in the reception area.

92. Mr Forsdick drew a non-domestic analogy with serviced offices, where each tenant has their own dedicated core space while being entitled to make use of communal facilities and open plan areas shared with other occupiers. That seems to us to be an apt analogy. We were shown the Valuation Office Agency's own Rating Manual which recognises that individual serviced office suites will usually be capable of being separate hereditaments.

93. We are satisfied that the individuals arriving after the material day who opted for wider open plan spaces on the undivided floors were an exception to the general pattern. More importantly, they were not present on the material day, which is critical to the efficacy of the valuation officer's notices altering the 2010 rating list. If the occupation of the building had taken the form of individuals camping out in the middle or at the undivided ends of the floor plate, with nothing to segregate or define any unit of occupation as theirs, apart perhaps from some items of furniture or fabric hangings, we would have agreed with the VTE that no smaller separate hereditaments would have been readily ascertainable. But that is not the arrangement contemplated by the licence agreements or demonstrated by the evidence and the agreed facts before us.

94. Although the Vice President had the advantage of visiting the building, which we have not, she did so after the licensees had vacated. She was not given access to the most highly partitioned floors, the eighth and ninth, on which two of the first four licensees took up residence on 1 July 2015; nor do the parties appear at that stage to have agreed that four separate rooms were allocated to the first settlers on the material day. This appeal is a rehearing, to be determined on the agreed facts and the evidence adduced before us.

95. We are therefore satisfied that on 1 July 2015 there were four sufficiently distinct units of occupation capable of being recognised as separate hereditaments, namely rooms 30a and 31 on the second floor, 16 on the eighth floor, and 4 on the ninth floor. The next question is whether, as the VTE concluded, LHL was in rateable occupation of those rooms.

96. The Vice President was obviously influenced in her conclusion by the "vast scale of the floors and the enormity of the open space" she observed. Southwark's inspectors formed a similar impression, describing the building as "essentially vacant". There is no express reference in the VTE's decision to the occupation by licensees being too small to be legally significant (the *de minimis* principle). Nor was there in Mr Westmoreland Smith's submissions on behalf of the valuation officer. Nevertheless, the VTE's conclusion that "the enormity" of the building was one of the matters which "tipped the scales" has a distinct flavour of that principle. Mr Clayton also stressed the enormity of the unoccupied space in his closing submissions. It is important, therefore, not to lose sight of the focus of the inquiry as to who has control and whose occupation is paramount and whose subservient; at this stage the focus must be on the separate space said to amount to a hereditament in its own right, and not on the larger space of which it forms part. As Lord Russell emphasised in *Southern Railway:* "the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises". It follows from our conclusion that separate units of occupation could be identified at Ludgate House, that the relevant question is not who was in paramount occupation of the building on 1 July 2015, but who was in paramount occupation of the four individual rooms on the second, eighth and ninth floors.

97. The first of the necessary ingredients of rateable occupation is that there must be actual occupation. That requirement is clearly satisfied. The four individual licensees were physically present and occupied the rooms they selected on 1 July 2015 for the next 22 months. It is true, as Mr Clayton pointed out, that there is no specific evidence from those individuals confirming their presence, but the fact that they moved in on that date is agreed and the occupancy record maintained by VPS is agreed between the parties to be accurate in that respect. We are satisfied that actual occupation is established by the agreed facts and by the photographic and documentary evidence taken as a whole.

98. The VTE considered that the licensees were not in actual occupation, but were in occupation on behalf of LHL. We disagree. The licensees were in no contractual relationship with LHL, they provided no service to it, other than as a by-product of their residence, and they could not be removed from the building except on notice given by VPS.

99. To be rateable, occupation must be "exclusive for the particular purposes of the possessor". There was a debate about the purpose for which the licensees were in occupation, it being suggested by the respondents that it was as much for the security of the building and the

discouragement of squatters as it was for their own residential purposes. Just as the contractor, White's, purpose in occupying the site in *Wimborne* was its own purpose of extracting gravel, rather than its employer's purpose of creating fish ponds, it is the licensee's purpose which is important.

100. We have no doubt that from the perspective of the licensees themselves the purpose of their occupation was to provide themselves with somewhere to live. Their occupation for that purpose was exclusive as no other person was entitled to use the individual rooms allocated to each licensee the space for the same or any other purpose. The clearest demonstration of the exclusivity of their occupation is the provision of a key to each licensee for their own room. It is true that in order to secure accommodation the licensees entered into agreements which obliged them to remain physically present in the building on a daily basis, and limited their absences. But those obligations were in no sense inconsistent with their residential use of the building, nor were the other terms of the licenses. It is certainly unusual to see an obligation to challenge intruders included in a contract for the occupation of residential property, but a residential occupier would expect to do the same out of self-interest rather than obligation.

101. The occupation of the individual rooms was obviously of benefit to the licensees, and it was not transient, but endured for a period of 22 months. In summary, therefore, all four of the markers of rateable occupation was exhibited by the licensees.

102. The respondents nevertheless submitted that because LHL had purposes of its own in arranging for the occupation of the building by the licensees, namely promoting the security of the building and mitigating its rates liability, and because the licensees were obliged by contract to further those purposes by their presence, the building was not "used wholly for the purposes of living accommodation" and therefore it was, or included, non-domestic property. We accept that the building as a whole was not wholly used for the purposes of living accommodation, but we do not agree that the individual rooms occupied by the licensees had any separate or concurrent use other than as living accommodation. The motive of rates mitigation was not a purpose of anyone's occupation (although it may have been a consequence of it). The presence of an employee providing security or caretaking is not beneficial occupation by the employer, and even less so is that of a licensee providing no other service than, merely by their presence, ensuring that squatters can be more effectively removed by others.

103. The respondents also submitted that LHL was in paramount occupation of the building. Mr Clayton suggested that its general control of the building meant that there was no need to consider whether there was more than one hereditament, and that the appellant's reliance n *Mazars* was misconceived. That is clearly not the case, as *Southern Railway* demonstrates. No doubt the railway company was in general control of Victoria Station, including by keeping it locked overnight denying access to the shop keepers, but that did not prevent the shops and kiosks from being in the rateable occupation of those same shopkeepers.

104. There is no evidence from which general control by LHL of the individual rooms can be discerned. LHL had no presence in the rooms, and no need to enter them. The licensees had keys to their rooms and while the security guard or some other member of VPS's staff also had copies there is no suggestion that they ever entered uninvited. The licences could not be terminated except by four weeks' notice given by VPS, and after termination any attempt by

LHL to recover possession of the building otherwise than by proceedings in court would not have been lawful by reason of section 3(2B), Protection from Eviction Act 1977. The right to require relocation to a different room was an additional draftsman's device to prevent the occupier claiming to have a tenancy and was not utilised in practice, other than in in the two exceptional cases where there was a good practical reason to do so.

105. VPS controlled access to the building and was not entitled to keep LHL out, but there are numerous examples of such control being insufficient to render the owner's occupation of premises paramount (*Southern Railway, Brook v Greggs, Re Heilbuth).* There is also some limited evidence of VPS exercising a degree of control over the use of the common parts (Ms Howard was eventually told to remove the tent she had erected to provide private space for her guests). None of these examples undermine the exclusivity of the occupation by the licensees of their individual rooms.

106. We are therefore satisfied not only that the licensees' individual rooms were separate hereditaments, but that the rateable occupier of each of those hereditaments was not LHL, but was the individual licensee whose temporary home it was. The rooms were used wholly for the purpose of living accommodation and the licensees were therefore not liable for non-domestic rates, but for Council Tax. Ludgate House was not a composite hereditament, because there was no single rateable occupier of the domestic and non-domestic space.

107. The parties agreed before the commencement of the appeal that if there was more than one hereditament at Ludgate House the valuation officer's unilateral notices, each of which was on the basis that there was a single composite hereditament, cannot be supported and the appeal must be allowed. The 2010 non-domestic rating list should therefore be restored to the state it was in before the unilateral notices, omitting Ludgate House from the list altogether.

Other issues

108. The parties argued a great many other issues which it is no longer necessary for us to determine.

109. If we had been persuaded that the building was a composite hereditament interesting valuation questions would have arisen. There was disagreement over whether the building should be valued on the assumption that the licensees were scattered throughout the premises, or consolidated on two floors (the premise of the second unilateral notice). The two critical assumptions are that on the material day the building is vacant and to let, and that the incoming tenant wishes to occupy it in a manner consistent with the mode or category of occupation existing in reality. The actual mode of occupation was that of an office building in the temporary occupation of residential licensees pending being put to some new use. Mr Forsdick suggested that since the mode of occupation of the hereditament is fixed by reference to the facts as they were on the material day, the hypothetical tenant is stuck with the residential licensees in the same locations as then existed. We think that approach pays too little heed to the assumption that the building is vacant and too much deference to the manner in which the actual occupier (LHL for this purpose) managed its own business.

110. Our inclination is that, if such a building is to be assumed to be of interest to a new tenant willing to pay an office rent, but who for some reason also wished to accommodate "office guardians", the incomer would make maximum use of the right to allocate space in the manner most convenient to it. Just as the hypothetical tenant is not assumed to mimic the business arrangements of the actual tenant and need not, for example, conduct a newspaper business, so the same tenant may distribute the licensees around the building to suit its own purpose. The highest bidder is likely to be one who would dispense with the residential occupiers within a short period of time, to enable the most efficient use of the space. If that is not a permissible assumption (which we refrain from deciding), flexibility was the essence of the mode of occupation at the material day, and there should be no need to assume any particular pattern of occupation tied to the actual pattern.

111. It was suggested by Mr Forsdick that, although there were only four licensees on the material day, it should be assumed that the non-domestic parts of the building (for the purpose of valuing it as a composite hereditament) were as extensive as they became in reality by the end of August 2015, with 46 individuals in occupation. This was said to be on the basis of the direction in section 66(5), 1988 Act that "property not in use is domestic property if it appears that when next in use it will be domestic". Relying on the terms agreed in principle between LHL and VPS before 1 July 2015, Mr Forsdick submitted that it then appeared that, when next in use, the unoccupied parts of Ludgate House would be home to 32 licensees. Having concluded that the building comprised five hereditaments on the material day, and the 2010 list now being closed, there is no need to determine this question. We are inclined to think that Mr Forsdick's construction of section 66(5) pays too little attention to the appearance of the vacant building, which would be that of a conventional office building with no visible evidence of suitability for residential use.

112. Mr Forsdick also invited us to make new law in the interpretation of regulation 14(7), applying a previously unrecognised principle of "state error" to limit the effective date of changes to the 2010 list to the date of the valuation officer's unilateral notice. The principle (derived from the jurisprudence of the European Court of Human Rights on Article 1 of the 1st Protocol to the Convention) was said to prevent the state, in the guise of the valuation officer, from remedying its own error, namely the decision of November 2015 to remove Ludgate House from the rating list altogether, in such a way as to cause irremediable prejudice to LHL. Mr Clayton denied the existence of any such principle (at least in the field of taxation, where the margin of appreciation available to the state is practically unlimited) and submitted that the appellant's submission was contrary to the decision of the Court of Appeal in *Lamb & Shirley Ltd v Bliss (VO)* [2001] EWCA Civ 562.

113. Interesting though the parties' detailed submissions were, and significant though Mr Forsdick's approach may be in the field of rating, there is no need for us to reach any conclusion on the "state error" debate and good reasons why we should not to do so, leaving it instead to be considered in a context where the facts give rise to a real issue.

Disposal

114. For these reasons we allow the appeal and direct the valuation officer to delete the Ludgate House composite hereditament from the 2010 list with effect from 25 June 2015 thereby restoring the list to its state before the first of his unilateral notices.

115. This decision is final on all matters other than costs. If an appropriate order cannot be agreed the parties may make submissions in writing on costs and a letter containing further directions accompanies this decision.

Martin Rodger QC Deputy Chamber President	Peter McCrea FRICS Member

18 September 2019