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FTB Rating Law Update

4 March 2021

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The cost of ‘fit out’ works

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The problem

- Rating hypothesis requires valuation of actual hereditament *rebus sic stantibus*
- Rental evidence derived from market
- Tenant may commonly do works resulting in change to rateable hereditament
- Rental evidence therefore not related to actual hereditaments
- How to bridge the gap?

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The first question

Do the tenant's works add value?

"not all expenditure by the tenant necessarily improves the value of the landlord's hereditament in the market, vacant and to let. To the extent that it does not, then clearly there is no increase in the [rateable] value"

Edma (Jewellers) Ltd v Moore (VO) [1975] RA 343

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The second question

How much value do the works add?

- % addition for tenant's works (cf rent review): 2, 5, 10%
- Adjust rent by reference to (part of) rent free period: 1-3 months
- CB valuation of specific enhancements (air con)
  - *Dorothy Perkins Retail Ltd v Casey (VO)* [1994] RA 391 at p415
  - *Berry (VO) v Iceland Foods Ltd* [2015] RA 201 at [100]-[101]

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Notes from the front line 1

Corkish (VO) v Butterworth Laboratories Ltd (RA/40/2019)

- List valuations defended by retrospective additions to rent for tenant's works
- Tenant's works reflected personal preferences as to layout, decoration, specification
- VO sought to argue must add value to tenant, therefore to hereditament
- Failed in VTE
- Appeal to UT withdrawn at Statement of Case stage

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Notes from the front line 2

Debenhams Stores (ongoing)

- Department stores let in unfinished state (not rateable)
- Very extensive tenant's works
- Large landlord contributions paid to tenant
- VO : considers cost of tenant's works when adjusting rent
- Ratepayer: that is a CB valuation and statutory decap rate must be used

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A structured approach

- Do the works change the rateable hereditament?
- Do the works add value?
- Can that value be identified from rental evidence?
  - Generally
  - By adjustment of the rent for the subject
- Is a CB valuation of the works appropriate?
- Is there a conventional market/rating adjustment for the works that can be applied?

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Rating Webinar
4 March 2021

Setting Aside Liability Orders

Horatio Waller

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Introduction

- What are liability orders (LOs)? Enforceable judgments from a magistrates' court made against ratepayers / council tax payers ('tax payer') where they fail to pay rates or council tax demanded.
- LOs can be set aside upon an application made by tax payer in specified and limited circumstances
- The talk today will cover:
  - A recap on the process of applying for an LO;
  - A recap on the conditions for setting an LO aside;
  - Two recent cases where insolvency proceedings were underway, on the back of LOs, and the tax payer was attempting to both 1) set aside the LOs and 2) annul a bankruptcy order.

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Liability Order application

- Jurisdiction to make LOs arises where the process set out in regulations is satisfied
- The Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 ('1989 Regs') and the Council Tax (Administration and Enforcement) Regulations 1992 ('1992 Regs')
- Typically involves the billing authority serving a demand notice, and then a final reminder. Upon instigation of the proceedings, the magistrates court will issue a summons.
- The tax payer should receive the summons and then have the opportunity to attend the magistrates' court in order to contest the LO.

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Challenging an LO

- A LO can be appealed by way of case-stated (s111 Magistrates' Court Act 1980) or challenged in judicial review.
- Either of these processes should be used where the LO was made after a contested hearing.
- However, tax payers frequently claim not to have been aware of the final hearing, or even that proceedings have been instigated, and do not attend.
- In these circumstances, the appropriate forum to challenge an LO is to apply to the magistrates' court to set it aside.
- Not subject to the CPR including the time limits to which case-stated appeals and JR are subject. New evidence is admissible and the procedure is informal and inexpensive.

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The conditions for setting aside

- The conditions for setting aside an Order, as confirmed by the Administrative Court in *R (Brighton & Hove City Council) v. Brighton & Hove Justices and & Michael Hamdan* [2004] EWHC 1800 (Admin) are:

1. There must be a genuine and arguable dispute as to the Defendant's liability to the Order in question:
    1. I.e. not the rateable occupier, or entitled to relief, or arguments around identification of hereditament in the list.
2. The Order must have been made as a result of a substantial procedural error, defect or mishap;
    1. I.e. Summons was not properly served, or it was not received.
3. The application to the Magistrates for the Order to be set aside must be made promptly after a Defendant learns that it has been made or has notice that an order may have been made.

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Insolvency / Bankruptcy situations

- The LO ordered is deemed a debt upon which bankruptcy / winding up proceedings can be commenced under the Insolvency Act 1986 : 1992 Regs, Reg 49 and 1989 Regs, Reg 18.
- Two recent cases in the High Court: attempts to set aside the LOs after bankruptcy orders were obtained.
- The taxpayer disputed the tax and maintained that they were not aware either of the LO proceedings or the bankruptcy proceedings until after they had been made bankrupt.
- As with LO proceedings, jurisdiction to make a bankruptcy order arises where the procedural requirements including service of statutory demands / petitions for bankruptcy are satisfied.
- Additional complexity because of the application of insolvency law.

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Yang v Official Receiver

- Following designation of a rental property as HMO, council tax demands sent to owner.
- Following non-payment, LOs were obtained.
- Billing authority served statutory demand for payment.
- Petition for bankruptcy and bankruptcy order entered.
- Y maintained she became aware of the bankruptcy only in 2011, 5 years after the demands served, and the property ought not to have been designated an HMO and she ought not to be liable.
- Y settled the LOs whilst also making a proposal for the rooms within the property to be separately listed which was eventually accepted on appeal by the Valuation Tribunal in 2012.
- Council tax refunded.

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Yang v Official Receiver

- Y subsequently applied to annul or alternatively rescind her bankruptcy (respectively under s282 and 375(1) of the IA 1986).
- Held: bankruptcy rescinded but not annulled.
- This mattered to Y because rescission merely terminates the bankruptcy whereas annulment would treat it as having never been made.
- Can be a very significant difference. For example, the bankruptcy details would be removed from the insolvency register so credit rating unaffected.
- Argued on appeal that the bankruptcy order should have been annulled on the basis that it 'ought not to have been made'. Appeals refused in the High Court [2013] RVR 274 and Court of Appeal [2018] Ch 178.

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Yang v Official Receiver

- LJ Gloster handed down guidance in the CoA at [55]
- A LO is deemed a debt which can ground a petition for bankruptcy.
- The bankruptcy court cannot look behind the LOs 'except in the event of fraud or some miscarriage of justice' [55].
- Where liability is contested, it is appropriate for the petition to be adjourned to enable the rate payer to appeal or apply to set aside the LO (para 23).
- If the LO is set aside after bankruptcy that does not mean the order 'ought not to have been made'. It was only on there being set aside that the debt ceased to exist [55].

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Lambert v Forest of Dean DC

- Applicant served demands for rates and council tax for various properties.
- Several LOs obtained.
- Bankruptcy petition made and a bankruptcy order was granted.
- L maintained he only became aware of bankruptcy and LOs in 2016, 4 years after first demand issued.
- Application to set aside the LOs was made. Several hearings took place. At the final hearing L was not present, and the application was refused.
- Applied to annul the bankruptcy.

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Lambert v Forest of Dean DC

- First annulment application dismissed for breach of court directions.
- Second application dismissed by ICC Judge Mullen in the High Court [2019] EWHC 1763 (Ch).
- Following *Yang,* Judge Mullen held that the Court could not look behind the LOs unless and until they are set aside. Permission to appeal refused.

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Lambert v Forest of Dean DC

- In 2019, L made a second application to magistrates court to set aside the LOs.
- February 2020 - application refused because it was identical to the 2017 application which had previously been adjudicated upon and refused.
- Appeal by way of case stated refused by Griffiths J [2020] EWHC 2854 (Admin).
- As the 2019 set aside application was identical to that made in 2017, the Judge held that the matter was *res judicata.*
- In any case, L as an undischarged bankrupt had no standing to apply to set aside LOs and thus the set aside applications were an abuse of process.
- Following bankruptcy, a bankrupt's estate including his right to instigate proceedings such as setting aside the LOs vests in the trustee in bankruptcy: s306 IA 1986 and *Munday v Hilburn* [2014] EWHC 4496.

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Comments

- The bankruptcy court cannot look behind the LOs.
- Thus the only avenue open to the ratepayer to challenge the LOs is to apply to set them aside or (if available) to apply to appeal or for judicial review of the decision to grant the LOs.
- Absent fraud or collusion, only have one opportunity to set aside LOs.
- Onus is on the ratepayer to contest the bankruptcy petition, and request an adjournment of bankruptcy hearing to enable them to apply to set aside LOs.
- Need permission from trustee in bankruptcy to set LOs aside in mags, otherwise abuse of process and on that basis alone the application can be refused.
- If only discover the proceedings after the bankruptcy order, will not be able to annul the bankruptcy even if the LOs are set aside and you were not aware of the LO proceedings or the bankruptcy proceedings.

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Woolway v Mazars & The Repeal of the Stair Case Tax
Where are we now?

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4th March 2021

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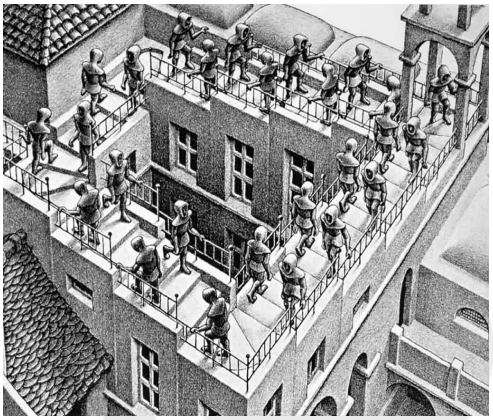
Outline

Woolway v Mazars

What was it about?
What did it decide?

The Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 (the Act)



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What was it about?

- Mr Woolway (VO) entered the two floors occupied by Mazars in the same office block (floors two and six) as two separate hereditaments on the 2005 ratings list. Mazars disputed the decision. Mazars succeeded before the **Valuation Tribunal** which concluded that the two floors should be considered as one unit for the purpose of the rating list as a result of their "essential functional link" as floors occupied by the same tenant within the same office block.

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It seemed to decide…

Mr Woolway appealed to the **Upper Tribunal**, arguing that, as the floors were not adjoining, there was no contiguity. The UT dismissed the appeal, applying the case of ***Gilbert (VO) v S Hickinbottom & Sons Ltd*** [1956] 2 QB 40 and ruling that a "common sense" approach should be applied to the notion of contiguity. In using a common sense approach, the two floors were judged sufficiently connected to be considered a single unit.

The CA also dismissed Mr Wollway's appeal concluding that geographical and physical proximity tests established in the case of ***Gilbert*** should be applied flexibly and that the fact that the floors were connected through common parts of the building was evidence enough of a geographical and physical connection.

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But in the Supreme Court

Allowed appeal holding ***Gilbert*** to be "plainly an unsatisfactory decision." Lord Sumption amalgamated tests used in various Scottish cases, to come up with a three staged approach comprised of the key principles of:

(1) Geography: "visual or cartographic unity".
(2) Functionality: "is one necessary for the enjoyment of the other?
(3) Enjoyment: where premises consisted of two self-contained pieces of property, exceptional facts were needed to be able to treat the two as a single hereditament.

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Consequences

Property adjoining each other, but did not intercommunicate directly with each other, were to be treated as more than one hereditament. Examples of this included adjoining office floors where the communication between the floors was by a common staircase – hence the press dubbing it the "staircase tax".

The Valuation Office Agency (VOA) began investigation 70,000 properties that comprised a single hereditament for business rates purposes and many of these were split into more than one hereditament.

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- For some with more than one floor in the same building saw their business rates rose significantly and backdated to 2015.
- Businesses with an open market rental value of less than £51,000, multiplied the value (for 2017-18) by 0.466 to determine the size of your business rate. For businesses with a higher value, you multiplied it by 0.479.
- Some businesses that were eligible for Small Business Rate Relief, but which saw their property split into parts following the Mazars judgment, may have lost the relief because they now had two or more rateable units.

- https://commonslibrary.parliament.uk/flights-of-fancy-the-truth-about-the-staircase-tax

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Government Reaction

Autumn Budget 2017

"I've also listened to businesses affected by the so-called 'staircase tax'. We will change the law to ensure that where a business has been impacted by the Supreme Court ruling it can have its original bill reinstated if it chooses, and backdated."

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"With this legislation, the Government is not intending to make any reforms to the business rates systems other than to reinstate previous practice in accordance with government policy."

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694644/Hereditaments_occupied_or_owned_by_the_same_person_factsheet.pdf

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Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018.

The Act effectively reverses the "staircase tax" and a large part of the decision in ***Woolway v Mazars***

In summary, one rating assessment will generally now be applied to neighbouring floors or units occupied by the same business, provided:

- they are "contiguous"; and
- they are not used for wholly different purposes.

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- Premises are contiguous with each other if they share at least part of a common boundary (e.g. a wall or fence), or if they are on consecutive floors and at least part of the floor of one unit lies directly above at least part of the ceiling of the other unit.
- Premises might still be contiguous even where there is a space between them that is owned or occupied by another person, for example the ceiling void between two floors.
- These changes were retrospective back to financial years beginning on or after 1 April 2010. The Act allowed the Minister to make regulations that will allow ratepayers whose hereditaments have been split to apply to the VOA to have hereditaments treated together. Affected businesses able to request a recalculation of any valuations made since that date.

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Regulations:-Non-Domestic Rating (Alteration of Lists) and Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England)

Regulations 2018 (SI 2018/1193)

Act also allows such applications to be retrospective to 1 April 2010, where appropriate, so this provision will apply to the previous 2010 Rating List as well as to future lists.

Part 2 provides for a new ground of proposal to alter a valuation list where two or more hereditaments should be shown as one hereditament as a result of amendments made to the Local Government Finance Act 1988 by the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 s.1 providing for circumstances where two or more hereditaments are to be treated as one hereditament for the purposes of non-domestic rating.

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Further reading

Get in on the Act: Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 by LGA

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Thank You

GREG

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Ludgate House in the Court of Appeal:

London Borough of Southwark v Ludgate House and Andrew Ricketts (Valuation Officer) [2020] EWCA Civ 1637

Mark Westmoreland Smith

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Introduction

- (1) Guardian Schemes
- (2) Facts
- (3) VTE
- (4) UT
- (5) Court of Appeal
- (6) Conclusions

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(1) Guardian Schemes

- Empty properties: (1) no rent; (2) rates; and (3) security
- Property guardian schemes may be a way to address these issues
- Arrangement between property owner and third-party provider
- For guardians: cheap rent; and central locations
- For owner: security and residential use potentially allowing deletion from rating list

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(2) Facts

- Large office building next to the river in Blackfriars
- 11 floors, c.175,000 sq ft
- LHL entered into contract with VPS, a property guardian provider
- Agreement was to provide 32 property guardians
- On material day 4 had moved in
- No works carried out to accommodate the guardians until after the material day

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(2) Facts (cont.)

- Guardians' licence said: no exclusive possession; they could not be away more than 2 nights in 7; they had to challenge unannounced trespassers
- After about 6 weeks, there were 46 guardians
- Each had own their room but occupation spilled beyond the room

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(3) VTE

- VTE: "*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.*"

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(4) UT

- Key finding: the Guardians' rooms passed the *Mazars* geographic test in that, although the occupation of guardians went beyond the room itself, a red line could be drawn around the room at the centre of the occupation
- In the result, the question was who was in rateable occupation of the individual rooms
- UT held it was the Guardians: they met the *Laing* tests:

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(4) UT (cont.)

- (i) actual
- (ii) exclusive: they were not in occupation on behalf of LHL. They did not have a contractual relationship with LHL and provided no service to it. They occupied for their own purpose – to have somewhere to live
- (iii) beneficial
- (iv) not too transient

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(5) CoA

- Lord Justice Lewison
- Legal background, paragraphs 22-67
- Analysis, paragraphs 70-85
- Key theme: the importance of contractual provisions in determining who is in rateable occupation
- Key findings:
  - Guardians were providing a service to LHL

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(5) CoA (cont.)

- Key findings (cont.):
  - The purposes of the guardian and VPS/LHL were complementary and mutually reinforcing. The purpose of the guardians in living in the building was "to facilitate" VPS's operation of providing property guardianship services to LHL
  - Terms of the licence were inconsistent with exclusive occupation

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(5) CoA (cont.)

- Key findings (cont.):
  - LHL had not given up possession, its agreement with VPS made that clear
  - LHL had retained at least *contractual* control over the building
  - UT wrong to confine itself to looking for evidence of the exercise of contractual rights as opposed to their effect if exercised

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(6) Conclusions

- The end of guardian schemes as effective rates mitigation?
- Appeal to Supreme Court

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