Non Domestic Rating appeal; Computer Centre and Premises; proposal challenging VO alteration; new hereditament; deletion of assessment sought; functional connection; rebus sic stantibus; Woolway (VO) v Mazars [2015] UKSC 53; appeal dismissed.

RE: EPH04-01 Level 5, Global Switch House, Nutmeg Lane, London E1 8EU

APPEAL NUMBER: 590027660203/538N10

BETWEEN:	Capgemini UK Plc	Appellant
	and	
	Mr Andrew Ricketts (Valuation Officer)	Respondent

BEFORE: Mr A. V. Clark (Vice President sitting alone)

CLERK; David Slater (Deputy Registrar)

ON: Monday 26 April 2021

APPEARANCES:

Mr Cain Ormondroyd from Francis Taylor Building Chambers (Appellant's Counsel)

Mr Christopher Waud (Appellant's expert witness)

Mr Hugh Flanagan from Francis Taylor Building Chambers (Respondent's Counsel)

Mr Michael Williams (Respondent's expert witness)

Summary of decision

1. The appeal property forms a separate hereditament and therefore the appeal is dismissed.

Introduction

2. The appeal property is situated within the London Borough of Tower Hamlets on Nutmeg Lane which is accessed off East India Dock Road. It is on the periphery of the Canary Wharf and Docklands development and is part of an area of data centres including Telehouse North that predominantly serve the financial services industry. It has good access east to west via East India Dock Road, as well as to the North and South via the A12 and Blackwell Tunnel

3. This appeal arose from a proposal served on the Valuation Officer on 6 September 2016. At the date of the proposal, the appeal property was described in the Rating List as a Computer Centre and Premises with an assessment of £292,500 Rateable Value with effect from 1 April 2010. The proposal sought a deletion of the entry. It also sought to reverse the effect of the Valuation Officer's list alteration of 21 March 2016 when the Respondent entered the appeal property into the Rating List as a new hereditament. The proposal was therefore made in accordance with regulation 4 (1) (d) and (h) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009.

4. The material day and the effective date, if the Appellant's proposed alteration was upheld, for this appeal was 1 April 2010.

5. Mr Waud appeared on behalf of the Appellant as an expert witness. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), Mr Waud advised the Tribunal that he was instructed under a conditional fee arrangement.

6. Mr Waud declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and he would comply with this as well as the requirements of his professional body (RICS) regardless of whether or not the evidence supported his client's case.

7. I accepted this expert witness evidence on the above basis as the appeal was not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations and was allowable due to the

Tribunal's rules on admissibility of evidence (regulation 17(2)(a) where the Tribunal can admit evidence whether or not it would be admissible in a civil trial in England).

8. I, therefore, considered the "expert" evidence and attached such weight to it as I saw fit.

9. The President of the Valuation Tribunal for England (VTE) is required to make sure arrangements are in place and make such statements and Directions so as to ensure that business before the Tribunal is conducted in accordance with The Local Government Finance Act 1988, Schedule 11, Part 1, paragraph A17(1) and The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. By virtue of Part 2 regulation (5) (arrangement for appeals) and regulation (6)(3)(g) (appeal management powers) the VTE may determine the form of any hearing.

10. Therefore, in pursuance of Regulation (6)(3)(g) the VTE has incorporated "remote hearings" as part of that definition and for the time being as the default option until it is safe to return to normal working. The Tribunal's Consolidated Practice Statement has been amended to reflect this.

11. This is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the submissions presented by Counsel were fully considered by me before coming to a decision. Consequently, the absence of a reference to any statement should not be construed as it having been overlooked.

History of assessment

12. Global Switch House was built in 2003. It was a purpose built property that provided flexible IT space over 11 data floors (or levels) from the ground to the tenth floor. It was in multiple occupation and provided a very secure environment for its occupiers.

13. The appeal property was part of the 5th Level (formerly erroneously referred to as the 3rd Floor) and that level was split into what was described as Phases 1, 2 and 3 (all of which were at some time occupied by Capgemini UK Limited).

14. In the compiled 2010 Rating List Phases 1 and 2 formed a single entry of £337,500 RV (described as South Part 3rd Floor, Global Switch House). The appeal property (which is Phrase 3) did not appear in the compiled 2010 Rating List.

15. Following an inspection by the Valuation Officer the 2010 Rating List was altered on 21st March 2016 so as to reflect the situation as he then saw it.

16. The entry of £337,500 in respect of South Part 3rd Floor was removed from the List and replaced by two separate entries of £184,000 RV and £189,000 RV. These being in respect of Phases 1 and 2 respectively and described as EPH01-01, Level 5 Global Switch House and EPH02-01, Level 5 Global Switch House. The changes were with effect from 7th December 2015 reflecting the fact that Phase 1 was no longer occupied by Capgemini UK Plc from that date.

17. The Valuation Officer had observed during his 2016 inspection of Global Switch House that Phase 3 was occupied by Capgemini UK Plc and so he introduced it into the 2010 Rating List with effect from 1st April 2010 at a rateable value of £292,500. That entry being described as EPH04-01, Level 5 Global Switch House.

18. It was that entry the Appellant sought to have deleted from the Rating List on the basis that Phase 3 was not capable of being a separate entry in the Rating List.

Agreed facts

19. The entire building was assessed based upon a base rate of £160 per m², which was not in dispute, nor were the measured areas of 1,156 m², 1,185.6 m² and 1,832 m² respectively for Phases 1, 2 and 3.

20. The Appellant occupied Phases 1, 2 and 3 under separate lease agreements. Phase 1 was contiguous to Phase 2 but the latter was physically separated from Phase 3 by a communal corridor. Phase 2 afforded Multi client normal security level for clients that did not require additional security whilst Phase 3 comprised 3 computer halls which provided the additional security that HMRC and other Government departments required.

21. The Appellant took up occupation of Phase 1 initially and then acquired Phase 2. Unfortunately, Mr Waud was unable to assist me with the exact dates when the respective leases commenced or when the respective Phases were first occupied. The Appellant acquired Phase 3 in 2007. On the material day, it was not disputed that the Appellant was in occupation of Phases 1, 2 and 3. It ceased to occupy the building (Phases 1, 2 and 3) on 7 December 2015 having removed all its secure cabling.

22. At the time of the occupation, Phases 2 and 3 were linked via fibre optic cables which had a huge data carrying capacity, the equivalent of providing broadband services to a small town. The cables were protected by armour plating. Phase 3 had no connection to the outside world. Raw data came into the building via a 'meet me room' and the data was transferred via a cable and a riser that led to under the floor of Phase 1. Data received would then be passed to Phase 2. Data was then transferred to Phase 3 via Phase 2 for processing. As and when required the processed data was sent back to Phase 2 for transmission to the outside world.

23. Global Switch House provided high security flexible IT space giving prospective tenants the ability to create their own bespoke environments. Cabling could be run under raised floors or above lowered ceilings.

24. Although tenants within the building had no control over the voids below the floor or above the ceiling, they were entitled to run cables through provided they complied with the building's cable management policy. The landlord's on-site maintenance team could be called upon for assistance, if required.

25. The fitting out costs to install cabling to connect Phases 2 and 3 amounted to some £30,750.

26. Phase 3 had three computer data halls. Although data transfer, processing and storage was automated, some human interface was required to install, renew, repair or replace data servers.

27. What went on, in terms of data processing, on level 5 was no different to what was happening on other floor levels. It was a multiple occupied building and unlike level 5, some of the other floors had several occupiers.

28. The Phases on each level had access to multiple telecommunication providers, diverse cable entry points and access to 'meet me rooms'. These rooms allow telecommunications companies highly secure purpose built areas to house their network infrastructure in order to connect with a host of companies and organisations within the data centres.

Issue

29. The main issue in dispute was whether the appeal property comprised a separate hereditament which warranted a separate entry in the rating list. If I decided in the Appellant's favour that it did not, the Valuation Officer argued that the entry should be merged with what the Appellant referred to as Phase 2 (EPH02-01). The Deputy Registrar gave advice in open Tribunal that the Tribunal had no jurisdiction to consider a merger, given the scope of the proposal. Although Mr Ormondroyd agreed with the Deputy Registrar, Mr Flanagan made submissions challenging Mr Slater's advice. However, if I found that Phase 3 was a separate hereditament, the case would begin and end there.

30. With regard to the substantive issue, the respective Counsel were in agreement that if the fit out cost of installing cabling to connect Phases 2 and 3 was considered major works as opposed to minor alterations, which could be taken into consideration when valuing *rebus sic stantibus*, Phase 3 could not form a separate hereditament.

Submissions

31. Mr Ormondroyd presented the Appellant's legal arguments and called Mr Waud as expert witness. For the Respondent, Mr Flanagan presented the legal arguments and called Mr Williams as expert witness.

32. All legal arguments, expert witness statements and other evidence was included in a single paginated bundle. A number of authorities were also referred to by the parties and these were contained within a separate single paginated bundle.

33. I found the expert witness testimony of Messrs Waud and Williams of limited assistance because neither of them were IT experts, both being chartered surveyors who specialised in rating matters. In addition, because of the high security levels within the building both of them only had access to level 5 and therefore were unable to inform me of the layout on other floors of the building. Furthermore, when being cross examined by the opposite party's Counsel both strayed somewhat in to advocacy by responding to questions using phrases like I contend or I would argue. Such responses are not compatible with giving evidence purely as an expert witness.

Decision and reasons

34. A hereditament is defined in section 64 (1) of the Local Government Finance Act 1988 as anything which would before the passing of the Act have been a hereditament for the purposes of section 115 (1) of the General Rate Act 1967. This means a 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.

35. The leading authority on the identification of a hereditament was the Supreme Court's judgment in *Woolway (VO) v Mazars* [2015] UKSC 53. Although the parties had referred me to 23 other authorities, I decided that this judgment would be my starting point. Most of the other authorities that were referred to me pre-dated *Mazars* and although it was not argued that some of the earlier cases were wrongly decided, I think it was fair to say that the Supreme Court re-defined the concept of a hereditament. Two of the authorities cited before me were referred to in *Mazars* being *Burn Stewart Distillers Plc v Assessor for Lanarkshire Valuation Joint Board* [2001] RA 110 and *Trunkfield (VO) v London Borough of Camden* [2001] RA 1.

36. Both parties believed that *Mazars* supported their respective arguments. In *Mazars*, two objective tests were identified. The main one was the geographical

test but if that test was not met, it was still possible for two units occupied by the same occupier to be merged if a functional test was met.

37. In paragraph 11 of the Supreme Court's judgment, Lord Sumption cited *Burn Stewart* with approval as follows:

> "More recently, in Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board [2001] RA 110, the Lands Tribunal for Scotland held that premises under common occupation but situated on opposite sides of a main road constituted two hereditaments. The tribunal observed, at pp 140-141:
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> > "We consider that the emphasis on the geographical test is an aspect of recognition that lands and heritages are physical subjects. The underlying purpose is to provide a proper basis for a tax on property, not a tax on persons or businesses. Where the subjects share characteristics of function which, in a robust practical sense, support the use of a single term to describe the physical subjects, they can be treated as one unit. … On the other hand, we are satisfied that the fact that certain heritable subjects function together as one business will, by itself, be insufficient to demonstrate that they are to be regarded as a unum quid in any physical sense. A "business" is not a concept based on physical or heritable factors. Entry in the roll is based on identification of heritable subjects. The fact that one business may need to occupy two separate physical subjects does not change the character of the subjects. It is clear that undue emphasis on a business connection as evidence of functional connection between subjects could lead to a distinction for rating purposes between a business whose operating units were in close proximity and those whose operating units were, perhaps only slightly, more remote. There is no basis in legislation for such a distinction. We see no basis in fairness for it. We are not persuaded that there is a consistent practice which would lead to that result. If there is, we see no need to follow it. … In the present case there is a clear physical separation of the two subjects. They each have a clear curtilage and these curtilages are separated by a public road and pavements. … Although, in a sense, little different from the

interposition of a public road, the fact that the ratepayers do not have exclusive occupation of the land which provides their access to that public road and the intermittent presence at their gate of large, slow-moving vehicles belonging to another occupier, tends to enhance the impression of separation of the two subjects. A test based on appearance and impression may properly be treated as part of the geographical test. The two subjects have no unifying visual characteristics. There is nothing to indicate that they are operated together, far less that the physical presence of one is essential to the function of the other. … Their physical characteristic as two distinct subjects is supported by the consideration that there is no real doubt that the subjects could be let separately."

38. He then went on to say in paragraph 12:

> "I derive from these decisions three broad principles relevant to cases like this one where the question is whether distinct spaces under common occupation form a single hereditament. 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. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it."

39. In paragraphs 47 to 51, Lord Neuberger stated:

> "47. Normally at any rate, both as a matter of ordinary legal language and as a matter of judicial observation, a hereditament is a self-contained piece of property (ie 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. As the Scottish Lands Tribunal said in Burn Stewart Distillers plc v Lanarkshire Valuation Joint Board [2001] RA 110, 140, "the emphasis on the geographical test is an aspect of recognition that lands and heritages are physical subjects". Thus, two separate self-contained buildings, even if sharing a common wall, would not be expected to be a single hereditament but two hereditaments. And a building no part of which was self-contained would be expected to be a single hereditament.
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> 48. At first sight, it might appear that whether certain premises constitute one hereditament or two hereditaments should not depend on how those premises are occupied. To quote again from Burn Stewart, "[a] 'business' is not a concept based on physical or heritable factors" (p 141). Of course, occupation is traditionally a central issue in rating law, but at least primarily for the purpose of determining who, if anyone, is in rateable occupation. On the face of it, however, it may be thought that there should

be no logical connection between the identification of the boundaries or extent of a hereditament and the identification of the rateable occupier of that hereditament.

49. Nonetheless, on further reflection, 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. Furthermore, it is well established that premises are not merely liable to have their rateable value assessed, but also to have their status as a hereditament assessed, by reference to the machinery, plant and other structures which have been placed in or on them, whether by the occupier or someone else, sometimes even if the structure retains its character as a chattel – see per Lord Radcliffe in London County Council v Wilkins (Valuation Officer) [1957] AC 362, 378.

50. The problem thrown up by this appeal is how far what I have described as the normal position in para 47 above, ie what Lord Gill has called the geographical test, should be modified by a particular occupational arrangement. In my view, that question should, if possible, be answered in a way which is not only principled, but which is as clear and practical as possible. That is because Valuation Officers and others concerned with rating are entitled to expect to know what approach to adopt when such an issue arises, and the approach should be one which is tolerably easy to apply. However, as is not unusual, clarity and practicality are to some extent in conflict, and, unsurprisingly in the complex and multi-faceted world of land and buildings, there cannot be complete certainty.

51. Where premises consist of two self-contained pieces of property, it would, in my view, require relatively exceptional facts before they could be treated as a single hereditament. The mere fact that each property may have the same occupier should, at least normally, make no difference. As Lord Keith said in Glasgow University v Assessor for Glasgow 1952 SC 504, 509, "[i]n the ordinary case … the question whether separate

buildings, or parts of buildings, should be entered in the Roll as unum quid falls to be decided primarily from the geographical standpoint".

40. I am not persuaded by the Appellant that Phases 2 and 3 passed the cartographic or geographical test. Mr Ormondroyd argued that the geographical test was satisfied by the connection of fibre optic cables with massive data carrying capacity for which the Appellant had exclusive possession. It was submitted that the continual flow of data between Phases 2 and 3 and back again meant that there was continuity of processes. Whilst it was accepted that the cables ran under or over the communal corridor that separated the two Phases, the Appellant argued that the way they operated meant that it was similar in character to Virgin Media assessments. Virgin media moved data through fibre optic cables over long distances under ground not owned by it and yet the cables and the buildings were treated as one assessment. The Appellant did, however, concede that if the appeal property was an office instead of a computer centre Phase 3 could not be merged with Phase 2, as it would fail the geographical test.

41. Mr Ormondroyd contended that a number of authorities pre-*Mazars* supported the Appellant's argument and he referred to paragraph 17 of the Lands Tribunal's judgment in *Slough Heat and Power v Thompson (VO)* [2009] RA 1, in support:

> "17. In a case such as the present it is in my view a good working rule for a tribunal to start off by seeking to apply to the facts of the case Denning LJ's general rules. Often the result, where the first rule applies, will be obvious. If it is not, a judgment will have to be formed on what is a question of fact and degree having regard to the particular features of the case that appear to be significant. Here, applying Denning LJ's first general rule, since both pipeline and power station are in the same occupation, the first question is whether the pipeline is contiguous to the property comprising the power station and the network of electricity and steam lines that emanate from it. It obviously is. Not only does this pipeline enter the curtilage of the power station itself and connect to the oil storage tank but for the whole of its length it runs alongside steam pipelines that are part of the power station hereditament and it is in contact with them for part of its length; and there is also an electric trace heating system inside the oil pipeline for the whole of its length which is

fed with power from electricity supply cubicles situated along its route. Mr Morshead suggested that it was relevant to consider the degree of contiguity. I accept that in some cases it may be, and the BP Llandarcy case shows its potential relevance in relation to pipelines. Here, however, it is plain that the degree of contiguity is considerable, and the contention on behalf of the valuation officer that the pipeline is not contiguous or should not be treated as being contiguous is in my judgment simply unarguable."

42. On behalf of the Respondent, Mr Flanagan argued that Phase 3 was geographically distinct from Phase 2, they were non-contiguous and were separated by a corridor over which the Appellant had no control. Phase 3 was a self-contained single piece of property and therefore the Valuation Officer was correct to treat it as a separate hereditament. The existence of fibre optic cabling linking the two was insufficient to pass the geographical test. There was no intercommunication between the two for human beings.

43. Mr Flanagan contended that the Appellant was wrong to rely on Virgin Media assessments for comparable purposes, since the buildings in those assessments formed such a small part of the assessment(s) and were very much ancillary.

44. In support of the Respondent's case Mr Flanagan referred me to a number of authorities where courts or Tribunals had consistently rejected the argument that pipes, cables or conduits that ran between two units justified a merger into a single hereditament.

45. Although Mr Ormondroyd with great skill and advocacy tried to persuade me otherwise, I could not see how Phase 2 and Phase 3 with a corridor separating the two could pass the geographical test. It was agreed that there was no intercommunication between the two for human beings and that the two units did not touch at any point. Both were self-contained. Whilst I accepted that a computer centre was a different mode or category of occupation from an office, the mere linkage of the two Phases by fibre optic cables housed within voids underneath the corridor floor or above its ceiling appeared tenuous in the extreme. There was thus no visible connection unless the raised floor or the lowered ceiling was opened up for inspection. In the *Slough Heat and Power* case the pipeline that connected to the power station was a separate hereditament. In

the case under consideration, the fibre optic cabling formed no part of either hereditament.

46. There have been two recent authorities post *Mazars* which support the Respondent's argument. In paragraph 46 of the Upper Tribunal's judgment in *Ritchie Roberts (VO) v Backhouse Jones Limited* [2020] UKUT 0038 (LC), the Deputy Chamber President, Martin Rodger QC stated:

> "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. Having regard to the above judgment, although it was not argued by the Appellant, the linking of the two units by cables would not have resulted in the two being treated as one hereditament having regard to the amendment of Part 3 of the Local Government Finance Act 1988 by The Rating (Properties in Common Occupation) and Council Tax (Empty Dwellings) Act 2018.

48. In the earlier authority, *Jon Harding and Sarah Clements v Secretary of State for Transport* referred to in the *Backhouse Jones* judgment, the Upper Tribunal stated in paragraph 58:

> "The geographical test is based on visual or cartographic unity or direct communication between the premises under consideration. "

and this was explored further in paragraphs 74 to 76:

> "74. We accept that in the present case there is a degree of contiguity whereas in Mazars there was none at all. However, we do not consider that the contiguity of ownership beneath the surface of the highway and the narrow width of the highway go towards satisfying the geographical test. These arguments could be replicated in many similar situations, but they fail to accord with the principles laid down in Mazars. As Lord Sumption pointed out, "unity is not simply a question of contiguity". If adjoining houses in a terrace do not intercommunicate and so access from one to another has to be gained via the other property, such as a public street, of which the common occupier of the houses is not in exclusive possession, this is a strong indication that they are separate hereditaments. That is the position in the present case. In order to gain access between the two plots the claimants have to cross a public highway. By definition, they do not have exclusive possession of that area of land which separates the two plots.
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> 75. The claimants then rely in the three ducts which they have laid in a culvert in the subsoil beneath the Lane and which connects plots 1 and 2. Two of the ducts are not in use, but one contains a water pipe which provides mains water from the metered supply on plot 1 to the water trough inside plot 2 for the horses kept there to drink from. Mr Morshead QC submitted that the water pipe sufficed to provide direct communication between the two plots and satisfy the geographical test.
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> 76. On the facts of this case we do not agree. As Mr Whale (on behalf of the Respondent) pointed out, the "direct communication" described in paragraph 12 of Mazars was a doorway or a staircase inserted into a boundary wall, or in other words a passage which would have enabled humans to pass from one property to another. We are not persuaded that the examples given in that decision were necessarily intended to delimit the type of link which might satisfy the geographical test. They may have been influenced by the nature of the properties and the land use under consideration. But this point has not been fully argued before us and must

await another case. For present purposes we need only say that we do not accept that the ducts and the water supply in this case amount to a significant connection for the 0.838 ha area of land on plot 1 to be treated as a single geographical unit with the 2.095 ha area of land on plot 2 from which it is separated by Yartlet Lane. Instead, the water supply is a factor to be considered when applying the functional test."

49. In view of the foregoing, I upheld Mr Flanagan's argument that if the existence of fibre optic cables linking two separate self-contained units that were separated by a road or, in this case, a corridor, satisfied the geographical test it would drive a coach and horses through the law as it was commonly understood following *Mazars.* In my judgment, there had to be visible intercommunication between the two and within which human beings could access one unit from the other. A mere cable network linking the two, regardless of its data carrying capacity, simply could not qualify. There had to be a purposive adaptation linking the two, a bridge, tunnel or stairwell that was openly visible and within which people can travel through. If an Appellant could simply rely on two self-contained units being linked by cables, a skilled Advocate may argue that virtually anything could qualify to be merged, even if the two subject units were more remote from another than the distance of a road or in this case a corridor.

50. In the event that I found the two sections, Phase 2 and Phase 3, geographically distinct, the Appellant's alternative argument was that the two parts were functionally interdependent. This was because without Phase 2, Phase 3 would have been unable to access raw data from the outside world. Consequently, without the cable connection to Phase 2, the appeal property could not function as a data processing facility.

51. Mr Ormondroyd mindful that each Phase was subject to a separate lease agreement argued that the number of lettings could not be determinative.

52. The Appellant relied on a number of authorities where two hereditaments were considered to be operating as one and therefore could be merged because the occupation of one was functionally essential to the other. Those included *Butterley & Company v Tasker (VO)* [1961] 1 W.L.R 300; *English Clays Lovering Pochin & Co v Davis (VO)* [1996] RA475; *Rootes Motors (Scotland) Limited v*

Assessor for Renfrewshire [1971] S.L.T. 67; *Coventry & Solihull Waste Disposal Company Limited v Anthony Russell (VO)* [1998] WL 1042649; and *Slough Heat and Power v Thompson (VO)* [2009] RA 1.

53. Mr Ormondroyd argued that I should not distinguish industrial processes from IT processes. Moreover, he contended that the Appellant's case was stronger, as the two units were operated as a single processing unit. The installation of the fibre optic cabling linking Phases 2 and 3 at a cost of some £30,750 meant that it would offend *rebus* if the existence of the cabling was disregarded. The cost of the cabling equated to more than 10% of the appeal property's rateable value and therefore in his opinion was not *de minimis.*

54. Mr Ormondroyd argued that the Appellant's case met the test alluded to by Lord Neuberger in *Mazars* that two hereditaments could be merged into one if relatively exceptional facts were in play. In paragraphs 52 to 53 of the Supreme Court's judgment, Lord Neuberger explained as follows;

> 52. However, it is possible to conceive of facts which would justify a different conclusion. Thus, if one property could not sensibly be occupied or let other than together with the other property, I think that the two properties could, and indeed normally should, be properly treated as a single hereditament. As Lord Keith went on to say in *Glasgow University* at p 510, quoting Lord Trayner in *Bank of Scotland v Assessor for Edinburgh* (1890) 17 R 839, 843, for two separate properties to be treated as a single hereditament, it is not enough that one of the properties is "a convenience· or accessory" for the other: it would have to be "impossible or difficult to let them separately". Strict necessity is not the test. As Lord Sumption says, his three tests set out in para 12 (with which I agree) have to be applied with professional common sense to the facts of each case.
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> 53. A golf course, a shipyard, a distillery or a factory which is, in each case, divided by a public road could properly be treated as a single hereditament. These are all examples given in the decision of the Lands Tribunal for Scotland in *Burn Stewart Distillers plc v Assessors for Lanarkshire Valuation Joint Board* [2001] RA 110, where it was rightly said that, while "the fact that certain heritable subjects

function together as one business will, by itself, be insufficient to demonstrate that they are to be regarded as a *unum quid* in any physical sense", "[i]t is impossible to lay down clear rules which will apply in all cases". The Lands Tribunal also suggested that, while "physical separation of subjects" would normally prevent them from being a single hereditament (to use the English expression), "[w]here the subjects share characteristics of function which, in a robust practical sense, support the use of a single term to describe the physical subjects, they can be treated as one unit" (p 141). That is well illustrated by the unreported 1982 Scottish case of *Lothian Regional Council v Assessor for Lothian Region* whose effect is summarised in these terms in *Armour on Valuation for Rating* (looseleaf, August 2014 ed), para 10-05:

> "[I]t was held to be competent for the assessor to make a single composite entry in the roll in respect of 923 bus shelters maintained by the appellants throughout the region, where the work involved in making separate entries would have been very onerous and unnecessary, there being no suggestion of any prejudice suffered by the appellants as a result."

55. On behalf of the Respondent, Mr Flanagan argued that the functional test was not met. In *Mazars* Lord Sumption in paragraph 12, referred to previously, stated that for the test to be met the use of one had to be necessary for the effectual use of the other. As Phases 1, 2 and 3 had been let separately from different dates, this was another indicator that the test was not met. He also argued that the type of exceptional facts as described by Lord Neuberger were absent from this case.

56. Mr Flanagan did not accept that the installation of the fibre optic cabling was a major alteration, since voids within the raised floor and suspended ceiling allowed cabling to be put in. When the Appellant vacated the building, it removed its cables and therefore when it was vacant and to let it did not have the cables linking the two.

57. Whilst the Respondent did not challenge the cost of the cabling installation, Mr Flanagan argued that the cost was miniscule when considered alongside the

combined rental value and the total fit out costs which were estimated to be in excess of £4 million. Even if the cabling cost was considered solely against the rateable value, it had to be remembered it was a one off cost and as Mr Williams had suggested the cost should be amortized over the length of the lease.

58. Having considered the submissions of Counsel, I came to the conclusion that the functional test was not met.

59. In my opinion the Appellant's case was undermined because Phases 1, 2 and 3 were subject to separate lease agreements which were entered into on different dates. Although Mr Waud was unable to assist me with the dates when the various Phases were occupied by the Appellant, it was a fact that for some period of time Phases 1 and 2 were occupied at a time when Phase 3 was either vacant or occupied by another company. Looking at the appeal from that standpoint, I found it difficult to accept that the occupation of one Phase was necessary for the effectual enjoyment of the other. The evidence was that they could be let separately, one of the tests identified in the *Mazars* case to determine separate hereditaments.

60. The installation of the cables could not in any way be considered major alterations. The cabling formed no part of the hereditament. However, as explained by the Court of Appeal's judgment in *Williams (VO) v Scottish & Newcastle Retail Ltd and Allied Domecq* [2001] EWCA Civ 185 there were occasions when minor alterations cannot be disregarded when valuing in accordance with *rebus.* This was explained in paragraphs 74 and 75 of the judgment:

> 74. Turning to the first limb of the rule, I consider that the Lands Tribunal was clearly right, following *Fir Mill*, to allow for the possibility of minor alterations in the hereditament on the occasion of its hypothetical letting. The absurdity of any other view appears vividly from the circumstances of these appeals, with numerous very well-known retail chains seeking to establish their identities and brand loyalties by
> distinctive fascias and fittings installed in uniform, featureless units. The first limb cannot be applied so rigidly as to prevent (for instance) Burger

King being considered as a possible bidder in competition with McDonalds (which occupies a large unit just opposite the City Fayre/City Duck).

75.Mr Holgate criticised the test of "minor" alterations as being imprecise, which indeed it is. But the Lands Tribunal was in my view right to prefer it to drawing the line at a suggested distinction between structural and non-structural alterations, which would be even less satisfactory. On the Lands Tribunal's formulation both limbs do raise issues of fact and degree which will in the first place be matters for negotiation between the valuation officer and the ratepayer's surveyor. If the valuation officer and the surveyor cannot agree, they will be issues of secondary fact for the appropriate tribunal.

61. In my judgment the installation of the cabling was too minor to warrant consideration, as it had no bearing on *rebus.* Whoever occupied Phase 3 would install their own cabling. Whilst the cost of installation was £30,750 it had to be viewed as a one off capital cost. The cost should, therefore, be amortized over the length of the Appellant's lease. Therefore I rejected the Appellant's argument that the cost of the cabling installation exceeded 10% of the rateable value. In my judgment it would have been nowhere near that figure.

62. The *Mazars* judgment was a watershed moment in the world of rating. For two separate self-contained units, separated by communal space to be considered as one hereditament a much higher bar had to be reached before they can be considered functionally essential to one another, in comparison to what had been the law as previously understood. The rating world has therefore moved on from the days when a ratepayer could argue that two geographically separate properties occupied for the same purpose comprised a single hereditament. Where two units are geographically separate, even if only by the width of a corridor as in this case, the functional connection must be so strong that one cannot be occupied without the other. This was not the case here as Phase 2 could have been occupied without Phase 3 and vice versa.

63. Finally, the landlord's letting brochure advertised the accommodation within Global Switch House as flexible IT space. It would seem that there would have been no difficulty in another tenant occupying Phase 3 and connecting to the

outside world. To necessitate this all that would have been required was cabling being installed to connect with a ‘meet me room’, thus confirming my decision.

64. The appeal was therefore dismissed.

Date: 6 May 2021

Appeal number: 590027660203/538N10

A V Clark
Vice President