THE VALUATION TRIBUNAL FOR ENGLAND

Summary of Decision: 2017 Rating List; office and premises; merger request for two assessments into one; Woolway v Mazars [2015] UKSC 53; *The Rating (Property in Common Occupation) and Council Tax Empty Dwellings Act 2018*; *Roberts (Valuation Officer) v Blackhouse Jones Ltd* [2020] UKUT 38 (LC); *appeal dismissed.*

RE: Ground Floor, Sunningdale 13 Colonial Way, Watford WD24 4WH
Turnberry, The Belfry, 13 Colonial Way, Watford WD24 4WH

APPEAL NO: CHG100126737

BETWEEN:	Emis Group Plc	Appellant
	and	
	Mrs J Moore (Valuation Officer)	Respondent

BEFORE: Mr K Ford (Senior Member) and Mr M Nwosu

CLERK: Mrs R James IRRV (Hons)

REMOTE HEARING ON: Thursday 3 December 2020

APPEARANCES: Mr M Clayton of Altus Group (on behalf of the Appellant)
Mr T Barraclough (Respondent's representative)

Summary of decision

1. Appeal dismissed. The two separate entries remained in the Rating List, with effect from 1 April 2017.

Introduction

2. The appellant's Challenge to the Valuation Officer (VO) was made on 22 March 2019. The appeal to this Tribunal was made on 14 September 2020, following the VO's Decision Notice of 27 August 2020, in respect of the appeal property (hereditament). The material date in this appeal is 1 April 2017.

3. The appeal requested the merger of two existing entries into one, with effect from 1 April 2017. The two separate hereditaments were:

a) Turnberry, The Belfry, 13 Colonial Way; office and premises at £93,500 Rateable Value (RV), with effect from 1 April 2017; and
b) Ground Floor Sunningdale 13 Colonial Way; office and premises at £68,000 RV, with effect from 1 April 2017.

4. Ground Floor Offices, Sunningdale were modern purpose-built offices forming part of a development of five similar buildings set within an attractive landscaped site. The offices were located on Colonial Way close to Stephenson Way (A4008), which linked Junction 5 of the M1 to Watford town centre.

5. The two buildings were occupied by the same occupier and formed two separate hereditaments. Both existing offices were valued at an unadjusted main space rate of £130.00/m^2. The appellant's representative was requesting a merger of the two exiting entries, with merged assessment being valued at £110.00/m^2, plus 5% to reflect the presence of fire protection, in line with comparable properties.

6. On 27 November 2020, prior to the tribunal hearing, the VO emailed the tribunal office a submission of further evidence following agreement by both parties. That further evidence comprised leases of the two buildings in question. The appellant's representative also requested permission to refer to a recent alteration to an assessment of a comparable property; 62-68 High Street, Houghton Regis, Dunstable, Bedfordshire. As both parties were in agreement that the additional evidence should be presented, the panel allowed it to be admitted.

7. 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 and 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.

8. 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.

9. Mr Clayton was appearing on behalf of the appellant as both advocate and expert witness. Therefore, it was important to ascertain whether a success related fee was involved and if so whether its existence was compatible with his obligations to the tribunal as an expert. This question was raised in view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC).

10. Mr Clayton explained that Altus Group was representing the appellant in this appeal on a contingency fee basis. However, he declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and he will comply with this as well as the requirements of his professional body regardless of whether or not the evidence supports his client's case.

11. The panel have accepted this expert witness evidence on the above basis as the appeal is not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE

functions – general) of the Procedure regulations and is 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). The panel therefore considered the "expert" evidence and attached such weight to it as it saw fit.

12. This is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the evidence presented was fully considered by the panel when coming to its decision. Consequently, the absence of a reference to any statement, or item of evidence, should not be construed as it having been overlooked.

Issue

13. The issue in dispute concerned how many units of assessment were present at the appeal property.

Evidence and submissions

14. In a statement which accompanied the Challenge, together with his oral presentation at the hearing, Mr Clayton gave several reasons as to why he believed that the two existing assessments should be merged into one, which included:

i) The appellant had been in occupation of the two buildings for five years plus. The two buildings were within the same curtilage and were contiguous. The buildings were previously unable to be merged due to the Supreme Court judgment of *Woolway v Mazars* [2015] UKSC 53.

ii) Now that *Mazars* had been reversed as a result of the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018, which came into force from 1 November 2018, the two assessments need to be merged for the 2017 Rating List.

iii) There was no pathway for pedestrians to use between the buildings; the area between the two buildings was used for car parking only. That car parking was within the demise of the tenancy and therefore created a link between the two assessments. Accordingly, this was sufficient to merge the two assessments.

iv) Reference was made to a recent alteration of the Rating List where the assessments placed on 62-68 High Street had been merged to form one unit of assessment. The situation at the appeal property was very similar to 62-68 High Street, with two buildings and car parking in between.

v) The correct unadjusted main space rate for the size banding for the two buildings was £110.00/m^2, plus 5% uplift, in line with comparable properties within the same valuation scheme. This resulted in an assessment of £137,018, which had been rounded down to £137,000, with effect from 1 April 2017.

vi) In support of a merger and the suggested unadjusted main space rate, the appellant's representative provided several layout plans detailing the two buildings in question, a schedule of comparable properties, plus supporting legal arguments and caselaw that may be relied upon.

vii) To summarise, Mr Clayton sought a merger of the two existing assessments into one with a valuation of £137,000 RV, with effect from 1 April 2017. He emphasised that the car parking spaces between the two buildings were in the appellant's exclusive occupation.

15. In the VO's Challenge case decision notice, it was stated that having considered the issues raised in the Challenge, the VO disagreed with the proposed list alteration. The statutory definition of rateable value was referred to. In oral presentation at the hearing and within the decision notice, it was also explained that:

i) The two assessments were situated in two separate detached buildings. The buildings have their own walls. The exterior walls of the building were excluded from the respective leases.

ii) There was a surfaced area between the two walls of the separate buildings which was controlled by a third party and not wholly controlled by the appellant.

iii) One of the leases detailed a car parking space within the area in question; however, it was noted that the car parking space was not contiguous with either building in any case as there was a pavement between the car parking and the buildings.

iv) It was contended that there was a right of way across the passageway in question; the VO did not accept that the area was in the exclusive occupation of the appellant.

v) The lease plan clearly showed that the external hard-surfaced passageway did not wholly fall within the demise of either lease. The VO do not consider the appellant to be in paramount control of this passageway as it did not fall within the demise of either lease nor was there any evidence that the appellant exercised any control over the area to prevent access by other users of the business park.

vi) The VO differentiated the appeal property's situation to that of 62-68 High Street, in which the car park and the buildings were enclosed within gates preventing pedestrian and vehicular access.

vii) Schedule 1 to the lease of Ground Floor Sunningdale stated that excluded from the demise was the whole of the airspace above the premises, together with all load bearing and exterior walls.

viii) In support of the existing two assessments, the VO had included a copy of the amended s64 Local Government Finance Act 1988. Reference was also made to the Upper Tribunal judgment of *Roberts (Valuation Officer) v Blackhouse Jones Ltd* [2020] UKUT 38 (LC), which considered the meaning of the 'space proviso' within s64 (3ZD) of the LGFA 1988.

ix) To summarise, the VO explained that the two assessments were separate hereditaments under s64(1) of the LGFA 1988 as there was no interconnection between the two buildings (*Woolway v Mazars*); an issue which was not in dispute. S64 (3ZA) to (3ZD) did not apply in this case as the hard-surfaced passageway was not within the demise of the same occupiers and was not considered to be within the paramount control of the same occupiers. The passageway separating the two buildings did not fall within the 'space' proviso as outlined in *Roberts v Blackhouse Jones Ltd*. Accordingly, the VO was of the opinion that the two existing assessments were correct and should not be merged. However, if the panel were to merge the two assessments, the VO considered the correct value would be £130,000 RV, which reflected an unadjusted main space rate of £110/m^2, plus 5% to reflect fire protection.

Decision and reasons

16. The panel noted that in essence, what had to be determined was whether the two current separate assessments should be assessed as one hereditament or as two individual properties. If it was determined that the two assessments should be merged, the panel then had to determine the correct level of value for that merged property. If merged it was agreed that the property should be valued at an unadjusted main space rate of £110/m^2, with a 5% uplift to reflect the presence of fire protection. The appellant's representative agreed with the VO's value of £130,000 RV for the merged premises.

17. As at the material date of 1 April 2017, Ground Floor Sunningdale, 13 Colonial Way and Turnberry, The Belfry, 13 Colonial Way had been in the same rateable occupation of the Emis Group. Ground Floor Sunningdale and Turnberry were separate detached office buildings that were located adjacent to each other with a small passageway separating the two buildings.

18. The panel acknowledged that the effect of the Supreme Court's judgment of *Woolway* v *Mazars* meant that Ground Floor Sunningdale and Turnberry would constitute separate hereditaments as they were separate detached buildings with no intercommunication between the two. The fact that the office buildings were physically separated by the passageway would have been fatal to the ratepayer's case for a merger prior to the *Mazars* reversal legislation. The Rating (Property in Common Occupation) and Council Tax Empty Dwellings Act 2018 (2018 Act) was intended to reverse the impact of the Supreme Court's decision, so that where two properties were occupied by the same person, or company, and were contiguous, provided they were not used for entirely different purposes, they should now be valued as a single assessment. In order to be considered contiguous, some or all of the wall or means of enclosure of one must form part of a wall or means of enclosure to the other, or if on consecutive storeys of the same building some or all of the floor of one must lie directly over the ceiling of the other.

19. The panel had regard to the following section of the 2018 Act:

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

20. The panel found that the two buildings in question were detached; as such no part of a wall, fence or enclosure formed part of a wall, fence or enclosure of the other building. The panel acknowledged that Ground Floor Sunningdale and Turnberry were divided by a passageway. The VO contended that the position of the passageway was fatal to the

ratepayer's case as this formed landlord's common parts with a right of way through the passageway.

21. The panel drew its attention to the above statutory provisions in the 2018 Act, in particular the following legislative wording:

> 'and hereditaments occupied or owned by the same person are not prevented from being contiguous under paragraph (a) or (b) merely because there is a *space* between them that is not occupied or owned by that person'.

22. The issue of 'space' had been considered in a recent Upper Tribunal judgment; *Roberts (VO) v Backhouse Jones Ltd* . The *Backhouse Jones* case considered whether two office suites in the occupation of the same ratepayer, which would be contiguous but for a communal fire escape corridor that separated them, should be entered in the non-domestic rating list as a single hereditament. This case considered what it called the 'space proviso' within s64(3ZD). At paragraph 37, it stated:

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

23. Having considered the *Backhouse Jones* case and in particular paragraph 37, the panel did not consider that the passageway fell within the definition of the space proviso, which was solely intended to cover a void or service compartment between two walls or ceilings and floors on adjacent levels.

24. However, the panel acknowledge that the appellant's representative had not suggested that the passageway did fall within the 'space proviso', rather that the passageway, or car parking spaces as referred to by the appellant's representative, was in the exclusive control of the appellant. The appellant's representative stated that the appellant had exclusive occupation of the area in question, which comprised three car parking spaces. The car parking spaces were situated one behind the other, a such the rear cars would be blocked in by those in front.

25. On this point, the panel had regard to paragraph 9 of the *Backhouse Jones* case, which referred back to the Supreme Court judgment on *Mazars*:

> '9. The question for the Supreme Court was whether a hereditament should be identified by purely geographical factors, depending simply on whether the premises said to be a hereditament constituted a single unit on a plan, or whether functional considerations should also come into play. Rating cases in Scotland established that the primary test was geographical, but that a functional test could be relevant in

certain circumstances. Lord Sumption (with whom the other members of the Court all agreed) summarised the principles which emerged from the Scottish case as [12]. He endorsed and explained the use of a geographical test as the primary means of identifying a hereditament, subject to limited exceptions, as follows:

> Firstly, 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 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 of whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the 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".

26. After having regard to the leases provided, the panel noted that there was one parking space highlighted in the area in question detailed on a plan accompanying the lease for Turnberry. There was no accompanying plan for the lease for Ground Floor Sunningdale. The panel also noted that on a plan provided by the appellant's representative, he had marked out in green three car parking spaces in the area in question. To the side of the spaces was an unmarked area, which the VO had taken to be a right of way.

27. In appeals of this nature the burden of proof rested on the appellant. In the appeal before it, whilst there was no evidence to demonstrate that there was a right of way through the passageway, the panel had not been provided with any evidence to confirm that the passageway was in the exclusive occupation of the appellant.

28. The panel determined that the appellant could occupy one of the buildings without the need to occupy the other; there was no effectual enjoyment between the two properties. There was no interconnection between the two office buildings and the buildings were separated by a passageway. Whilst the panel accepted that the area was used as a car park; it had not been satisfied that the area in question was in the exclusive occupation of the appellant.

29. Accordingly, the panel determined that the two separate hereditaments were correctly separately assessed. Therefore, the appeal was dismissed.

APPEAL NO: CHG100126737
Date: 10 December 2020