THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 Rating List appeal; Local Government Finance Act 1988; advertising right and premises; proposals sought a deletion of assessments; advertising rights let out or reserved; separate hereditament; appeals dismissed.

RE: (1) JC Decaux Advertising Board at Tesco Stores Ltd, High Street, Baldock SG7 6AZ
(2) Digital Advertising Right at Tesco (Site No. 230651.00021), Greenwell Road, Newton Aycliffe DL5 4DJ
(3) JC Decaux digital ad right at Tesco, Featherstall Road North, Oldham OL9 6BW
(4) Digital Ad Right at Tesco, Tavistock Road, Launceston PL15 9HG
(5) Advertising Right at Tesco, Kilncroft Lane, Wilmslow SK9 3PB
(6) Ad Right 2445 Outside Tesco Stores, Croydon Road, Beckenham BR3 4AA

APPEAL NUMBERS: CHG100948177, CHG100949165, CHG100948457, CHG100948610, CHG100949040 and CHG100949094

BETWEEN: JC Decaux UK Ltd — Appellant

and

Dawn Bunyan and Others (Valuation Officers) — Respondents

PANEL: Miss AC Griffiths (Presiding Senior Member)
Mrs H Newman-Newing (Senior Member)

CLERK: Ms N Shepherd IRRV Hons

REMOTE HEARING 1: Tuesday 23 January 2024

APPEARANCES: Mr R Wackett, of Montagu Evans on behalf of the Appellant as advocate and expert witness
Mr C Royle, on behalf of the Respondent as advocate

Mr A Crawford, on behalf of the Respondent as expert witness
Mr C Cole, on behalf of the Respondent as expert witness
Mr R Lydiatt, on behalf of the Respondent as expert witness
Mr P Hunter, on behalf of the Respondent as expert witness

Summary of decision

1. JC Decaux Advertising Board at Tesco Stores Ltd, High Street, Baldock SG7 6AZ - appeal dismissed. The panel found that the advertising site was a separate hereditament, and as such should not be removed from the rating list.

2. Digital Advertising Right at Tesco (Site No. 230651.00021), Greenwell Road, Newton Aycliffe DL5 4DJ – appeal dismissed. The panel found that the advertising site was a separate hereditament, and as such should not be removed from the rating list.

3. JC Decaux digital ad right at Tesco, Featherstall Road North, Oldham OL9 6BW – appeal dismissed. The panel found that the advertising site was a separate hereditament, and as such should not be removed from the rating list.

4. Digital Ad Right at Tesco, Tavistock Road, Launceston PL15 9HG – appeal dismissed. The panel found that the advertising site was a separate hereditament, and as such should not be removed from the rating list.

5. Advertising Right at Tesco, Kilncroft Lane, Wilmslow SK9 3PB – appeal dismissed. The panel found that the advertising site was a separate hereditament, and as such should not be removed from the rating list.

6. Ad Right 2445 Outside Tesco Stores, Croydon Road, Beckenham BR3 4AA - appeal dismissed. The panel found that the advertising site was a separate hereditament, and as such should not be removed from the rating list.

Introduction

7. These appeals have been brought in respect of the following:

   i) JC Decaux Advertising Board at Tesco Stores Ltd, High Street, Baldock; advertising right and premises- £7,500 Rateable Value, with effect from 14 August 2017.

   ii) Digital Advertising Right at Tesco (Site No. 230651.00021), Greenwell Road, Newton Aycliffe; advertising right and premises- £7,500 Rateable Value, with effect from 1 April 2017.

iii) JC Decaux digital ad right at Tesco, Featherstall Road North, Oldham; advertising right and premises- £7,500 Rateable Value, with effect from 1 April 2017.

iv) Digital Ad Right at Tesco, Tavistock Road, Launceston; advertising right and premises- £7,500 Rateable Value, with effect from 1 April 2017.

v) Advertising Right at Tesco, Kilncroft Lane, Wilmslow; advertising right and premises- £7,500 Rateable Value, with effect from 1 April 2017.

vi) Ad Right 2445 Outside Tesco Stores, Croydon Road, Beckenham; advertising right and premises- £7,500 Rateable Value, with effect from 1 June 2019.

8. The appeal process began with challenges made by the appellant on 9 March 2023 and 10 March 2023, seeking a deletion of the compiled list assessments. After considering the proposals and evidence submitted during the challenge period, the VO decided that the proposals were not well founded and refused to delete the assessments. Subsequently, the appellant's representative appealed the VO's decisions to the tribunal under Regulation 13A of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009.

9. The appeal hereditaments were six-sheet digital free-standing advertising rights operated by JC Decaux, situated outside Tesco Supermarkets.

10. As Mr Wackett appeared on behalf of the appellant as both advocate and expert witness and in view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), he confirmed that he was aware that in giving his evidence his duty was to the Tribunal and that he would comply with this as well as the requirements of his professional body. Furthermore, he confirmed that he was not instructed under a conditional fee arrangement or any other success related fee.

11. This hearing was held remotely via Microsoft Teams.

12. This document is not and does not purport to be a full verbatim record of proceedings.

Issue

13. The issue in dispute was whether the appeal hereditaments should be deleted from the 2017 rating list.

Evidence and submissions

14. The evidence comprised all of the information and documents which had been disclosed and exchanged as part of the challenge process.

15. The parties also made reference to a number of previous judgments, which included; *Holywell Union Assessors v Halkyn* [1895] AC 117 5, *John Laing & Sons v Kingswood Assessment Committee* [1949] 1 KB 344, *Westminster City Council v Southern Railway Company* [1936] AC 511, *Cardtronics Europe Ltd v Sykes (VO)* [2020] 1 WLR 2184, *Esso Petroleum Company v Walker* (VO) [2013] UKUT 052, *Woolway (VO) v Mazars LLP* [2015] AC 1862 and *Ludgate House Ltd v Ricketts* (VO) [2021] 1 WLR 1750.

16. A copy of the Tribunal decision pertaining to CHG100796377 and CHG100706379 was also included within the evidence bundle.

Relevant Law

17. The relevant law was contained in sections 64 and 65 of the Local Government Finance Act 1988 (the "1988 Act"), which was as follows:

64 Hereditaments

(1) A hereditament is anything which, by virtue of the definition of hereditament in section 115(1) of the 1967 Act, would have been a hereditament for the purposes of that Act had this Act not been passed.

(2) In addition, a right is a hereditament if it is a right to use any land for the purpose of exhibiting advertisements and—

(a) the right is let out or reserved to any person other than the occupier of the land, or

(b) where the land is not occupied for any other purpose, the right is let out or reserved to any person other than the owner of the land.

(2A)…….

(3) The Secretary of State may make regulations providing that in prescribed cases—

(a) anything which would (apart from the regulations) be one hereditament shall be treated as more than one hereditament;

(b) anything which would (apart from the regulations) be more than one hereditament shall be treated as one hereditament.

65 Owners and occupiers

(1) The owner of a hereditament or land is the person entitled to possession of it.

(2) Whether a hereditament or land is occupied, and who is the occupier, shall be determined by reference to the rules which would have applied for the purposes of the 1967 Act had this Act not been passed (ignoring any express statutory rules such as those in sections 24 and 46A of that Act).

(3) Subsections (1) and (2) above shall have effect subject to the following provisions of this section.

(4) Regulations under section 64(3) above may include rules for ascertaining—

(a) whether the different hereditaments or the one hereditament (as the case may be) shall be treated as occupied or unoccupied;

(b) who shall be treated as the owner or occupier of the different hereditaments or the one hereditament (as the case may be).

(5) A hereditament which is not in use shall be treated as unoccupied if (apart from this subsection) it would be treated as occupied by reason only of there being kept in or on the hereditament plant, machinery or equipment—

(a) which was used in or on the hereditament when it was last in use, or

(b) which is intended for use in or on the hereditament.

(6) A hereditament shall be treated as unoccupied if (apart from this subsection) it would be treated as occupied by reason only of—

(a) the use of it for the holding of public meetings in furtherance of a person's candidature at a parliamentary or local government election, or

(b) if it is a house, the use of a room in it by a returning officer for the purpose of taking the poll in a parliamentary or local government election.

(7) In subsection (6) above “returning officer” shall be construed in accordance with section 24 or 35 of the Representation of the People Act 1983 (as the case may be).

(8) A right which is a hereditament by virtue of section 64(2) above shall be treated as occupied by the person for the time being entitled to the right.

(8A) In a case where—

(a) land consisting of a hereditament is used (permanently or temporarily) for the exhibition of advertisements or for the erection of a structure used for the exhibition of advertisements,

(b) section 64(2) above does not apply, and

(c) apart from this subsection, the hereditament is not occupied, the hereditament shall be treated as occupied by the person permitting it to be so used or, if that person cannot be ascertained, its owner.

(9) . . .

Decision and reasons

18. The panel was required to determine whether the advertising rights formed part of the Tesco Store or formed separate hereditaments that should be shown in the rating list.

19. On behalf of the appellant, Mr Wackett contended that the advertising rights should not be separately rated as there was no exclusive reservation. He submitted that the advertising sites were situated within the car park of Tesco, and were therefore on its land, and the contract in place between Tesco and the appellant was one in which provision of a service was provided by the appellant as a contractor to Tesco, the dominant host. The control exerted by Tesco was such, it could not be considered that there was a letting or reservation at the site used for advertising and therefore that there was no right.

20. Mr Wackett drew parallels with the decision in *Cardtronics*. In *Cardtronics* the Supreme Court determined that sites for Automatic Teller Machines (cash points) which were effectively holes in a wall were not separately rateable from the host store. Although the retailers did not interfere with the operations of its banking arm, the Supreme Court held that the landlord/lodger principle as expressed in *Halkyn* was relevant. Mr Wackett submitted that this was similar as the landlord/lodger principle which existed between Tesco and the appellant. In the subject case JC Decaux did not interfere with Tesco's occupation. There was however, provision for interference from Tesco, giving them greater utilisation and powers over what could be advertised. Furthermore, whilst cash machines and advertising were of completely separate uses, in *Cardtonics* and the subject case both were used to promote the host store and to attract customers and retail to it.

21. Mr Royle contended that the position differed to that of *Cardtronics*, due to the provisions of Sections 64(2) and 65(8) of the 1988 Act. These provisions meant that the advertising site was treated as being occupied by the person to whom the right is let out or reserved, therefore it was not necessary to apply the principles of normal rating, as discussed in *Cardtronics* in order to identify the occupier. He contended that the existence of a separate hereditament did not depend upon the space used for advertising being in separate rateable occupation to the host according to the application of the principles developed in case law. Rather, it premised upon the land in question remaining in occupation of the host but the right to use the same land for exhibiting advertisements being let out or reserved to another person, in this instance the appellant.

22. The panel was aware that advertising rights are incorporeal, meaning that advertising sites were often located on land within the control of another. Therefore, it attached little weight to the fact that the advertising sites were located on the land of Tesco. It also considered that the normal rules of rateable occupation do not apply, with issues relating to paramountcy not engaged because of the deeming provision of section 65(8) which makes the person entitled to the right the rateable occupier. As such, it needed to determine whether there was a right let out or reserved to the appellant.

23. Mr Wackett referred to Tribunal decisions CHG100796377 and CHG100706379, which related to the deletion of advertising rights at Victoria Station. These appeals had been allowed with the panel determining that the advertising rights formed part of the railway hereditament. Mr Wackett directed the panel to paragraph 23 of this decision in which it stated that the VO's representative:

"was, however, prepared to concede that in theory it was conceivable that a host could have purported to have granted a right but retained such extensive control that the grant of any right was negated for the purposes of section 64 (2)."

Mr Wackett contended that this was the case in the agreement between the appellant and Tesco, with the control exercised by Tesco being such that no right existed, and section 64(2) did not apply.

24. The panel therefore considered the agreement provided between Tesco and JC Decaux and to whether it consider that this demonstrated that the control exerted by Tesco was such that the right to let out or reserve was negated.

25. The panel noted that the agreement did clearly show that there was some form of control exercised by Tesco. The agreement specified that the advertising site could not be utilised to show adverts from the direct competitors of Tesco. However, the panel considered this to be to be a reasonable condition and could understand that Tesco would not want the sites, situated on its land, used to promote its main rivals or conflict with its retail purposes.

26. Mr Wackett also made reference to the fact that the appellant did not have exclusive rights to advertise at the sites, with a clause in the agreement meaning that 16% of the advertising time was shared with Dunhumby Ltd, a Tesco owned company. As well as reserving this capacity to itself, Tesco was also able to override this allocation on notice. Mr Royle submitted that this had been taken into account in the assessment, with the RV being reduced from £9000, the recommended rate for six-sheet digital free standing advertising rights, to £7500, to reflect that the appellant only had 84% of the advertising time.

27. The panel had regard to clause 6.3 of the agreement, which referred to the issue of whether Dunhumby required over the allocated 16% for advertising

time. Whilst this clause did give them the right to this, the panel noted a six-month notice period had to be given to the appellant in respect of this change and the appellant would also charge the market rate for any additional space required. The panel considered this to be different to CHG100796377 and CHG100706379, in that in these cases Network Rail could interrupt the advertising at any point with no notice and with no fee incurred.

28. The panel had regard to the fact that the agreement also stipulated that the installation and maintenance of the equipment and the management of the operations was one that the appellant was responsible for. The panel noted that in CHG100796377 and CHG100706379 the relevant Network Rail staff also managed the operations of equipment, being given electronic access to the advertising media systems, and having been trained and provided with login details for this purpose. During questions Mr Wackett submitted that Tesco staff did not have any access to the advertising boards and did not receive any training in how to operate or utilise them.

29. Considering the agreement as a whole, the panel determined that whilst it did indicate that there was an element of control exercised by Tesco, this was reasonable and was what was to be expected given that the advertising rights were situated on Tesco land. However, it did not consider that this control was such as to negate any right to reservation or let out, as in CHG100796377 and CHG100706379. The agreement was obviously one that was of benefit to both parties, and which had a provision of service to further the retail of the Tesco store outside which the advertising sites were located. Furthermore, an allowance had been applied to the RV of the advertising sites to reflect the 16% allocation for advertising required by Dunhumby Ltd.

30. The panel ultimately found that even if the normal rules of rateability did apply, that the agreement did not indicate that Tesco were in paramount control. The panel considered that the agreement clearly evidenced that the advertising rights were let out to the appellant and as such the provisions of Section 64(2) applied.

31. Having regard to the evidence and submissions of both parties and the relevant legislation, the panel therefore found that the advertising sites were let out to the appellant, and as such were hereditaments. In view of the foregoing, the panel dismissed the appeals.

Date: 22 February 2024

Appeal Numbers: CHG100948177, CHG100949165, CHG100948457, CHG100948610, CHG100949040 and CHG10094909

Right of Appeal

Any party who is aggrieved by the Tribunal's decision, and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this decision notice.