THE VALUATION TRIBUNAL FOR ENGLAND

Summary of Decision: *Non-domestic rating appeal; curtilage, hereditament, split assessment, Woolway v. Mazars [2015] UKSC 53, actual occupation, store, unit of assessment, appeal allowed.*

Re: Store First Barnsley, Ashroyd Business Park, Ashroyds Way, Hoyland, Barnsley, S74 9SB

APPEAL NOs: 440523731554/257N10
440527579408/537N10

BETWEEN: **Store First Limited** (Appellant)

and

Jo Moore
(Valuation Officer) (Respondent)

BEFORE: Mr G Garland (President)

SITTING AT: Hepworth House, 2 Trafford Court, Doncaster DN1 1PN and 120 Leman Street, London E1 8EU

ON: 7 June 2017 and 13 July 2017

APPEARANCES:

Mr Daniel Kolinsky QC for the Appellant

Mr John Slater (Director Store First) and Mr Toby Whittaker (founder Store First) provided witness statements and appeared at the hearing.

Mr Cain Ormondroyd for the Respondent

Ms Elizabeth Mellors and Mr Simon White (employees VOA) provided witness statements and appeared at the hearing.

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1. My interim decision is that the appeal is allowed.

2. The hereditament in the rating list is to be split into a number of hereditaments and values which will, if possible, be agreed between the parties, as well as the effective dates. If they are unable to agree this within two months the matter will be listed for a further hearing unless an appeal is made to the Upper Tribunal.

Introduction

3. The two proposals address the same issue of whether the appellants' self-storage facility should be entered in the Rating List as one hereditament or 1,891 hereditaments (or less) at different material days (15 May 2013 and 12 May 2016).

Case Law

4. The following cases amongst others were cited by the parties. The most relevant to my decision are conveniently within the decisions below:

   Woolway (Valuation Officer) v. *Mazars LLP* [2015] UKSC 53

   John Laing & Son Limited v. *Assessment Committee for Kingswood Assessment Area and Others* [1949] 1 KB 344

The Business model

5. Mr Whittaker of Store First Limited (SFL) advised me that Store First (SF) do not operate a standard storage warehouse model where a single entity controls the whole warehouse and enters into storage contracts of various lengths directly with end users. He told me it was set up to allow individuals and companies to purchase individual units (pods) within the warehouse for investment purposes.

6. The model works (and I believe there are at least six other facilities which all follow the same process) in the following way:

    a. SF acquire or build a large warehouse which is then fitted out as self-storage units and common parts;

    b. The individual units are sold by granting long leases for a premium to investors (individuals or companies known as unit owners or investors) for a term of 249 years and 11 months (in the case of the appeal property), this is significant as part of the arrangement unlike the short term rental model means that the leaseholder of a unit has overriding rights to exclude ;

    c. On the granting of the long leases all of the unit owners are offered an option to lease their pods back for a period of six years with break options at years two and four. In respect of the appeal property, 517 pods were purchased by Berkley Berk through a sales agent with strict instructions <u>never</u> to be let out and therefore no lease back agreement was put in place;

    d. In all cases where a long lease was granted, SF exercised the break clause after two years. At the end of this period Store First gave each unit owner an opportunity to allow Pay Store Limited (an associate company of SF) to manage and promote the letting of the individual pods. In order for this to occur the unit owner should sign a landlord letting management agreement (LLMA). Pay Store retain a proportion of any letting fee received from the end user. The incentive to the unit owner is that if they sign up to this there are no service charges or ground rents payable when the pods are not occupied.

7. Under questioning from the respondent, SF witnesses conceded that not all unit owners had signed an LLMA when the pod was let. However, in respect of pods owned by SIPPs (Self Investment Personal Pension) there were oral agreements in place that the pods could be let before an LLMA was signed as sometimes it took many months for the pension fund investors to complete all the paperwork. The only exception was the 517 pods where no written or oral agreement was in place (as they were not to be let) and if such a pod was let in error the end user would be moved as soon as the mistake was identified. It would appear from the evidence provided that on two or three occasions a pod may have been initially let where SF had no responsibility to do so.

Finding of Fact

8. I was provided with copies of Land Registry entries for specific pods for a number of the investors, title deeds, six year subleases, LLMAs and licence agreements. I have no doubt that the unit owner or investor of each pod has a lease for the term of 249 years and 11 months from date of purchase, although a sublease may have been granted at the material days to SF in respect of one or more pods.

Decision and Reasons

9. In order to identify the hereditament all parties have initially referred me to the Supreme Court decision in *Woolway (Valuation Officer)* v. *Mazars*. Lord Sumption JSC sets out at paragraph 4 of his decision the statutory test for a hereditament and the challenge for courts and tribunals:

> *4. "Hereditament" is a somewhat archaic conveyancing term which as a matter of ordinary legal terminology refers to any species of real property which would descend upon intestacy to the heirs at law: see section 205(1)(ix) of the Law of Property Act 1925. In a conveyance, there is no problem about its bounds. They will be identified by the deed. But notwithstanding more than four centuries of experience, the question how a hereditament is to be identified for rating purposes remains in important respects unclear. Section 64(1) of the Local*

Government Finance Act 1988 defines a hereditament 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. That 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." The result, in the absence of further statutory definition, is that the meaning of "hereditament" is left to be elucidated by the courts in accordance with the principles underlying the rating Acts.

10. It was not disputed between the parties that there was either one hereditament or up to 1890 hereditaments (pods) together with at least one additional hereditament occupied by SF in respect of the communal areas (a specific number was initially given to me but by conclusion of the hearing I believed the parties would wish to consider whether one or more pods in the same ownership could be treated as a single hereditament).

11. The question in the appeal before me was a relatively simple one, 'who was in occupation of the hereditament (being the facility) at both material days?' It was agreed that if SF were in occupation of all the facility then the geographical test identified by Lord Sumption in *Mazars* came in to play (see paragraph 12 of the decision) and there was only one hereditament. However, if at least one pod was in separate occupation then the appeal was successful and the parties proposed that I issued an interim decision on the point and they would attempt to agree the number of hereditaments and value of each one.

12. There was one curious issue about the occupation of the pods in this case. I understood that it was accepted in rating that for the purposes of these cases once a storage unit is open for business it is considered that the pods are occupied, even though they may not be (in the case the appeal hereditament there was only a 7% occupancy level). It was also agreed that the occupier was the provider of the pod and not the end user, although I understood this concept had never properly been tested before a tribunal or court but based

on the principle of a lodger not being liable for rates but the owner of the establishment.

13. It seems to me that the real point in issue is a very narrow one. Is SF in paramount occupation of the whole building, or in other words the 1890 individual units(pods) on the site or is it the case that there is multi occupation in that because of the particular way the leasehold arrangements persist, the individual owners are by the fact that they enjoy the right to quiet enjoyment? An alternative way of considering this case is testing whether the individual owners are free to deal with the property as they see fit without regard to the wishes of SF and therefore each individual unit forms a separate hereditament plus one additional hereditament which comprises of the common parts and corridors through which an owner/leaseholder can access his particular unit.

14. Grateful as I was for the helpful provision of a considerable bundle of authorities I am satisfied that the appeals can be safely disposed of with reference to the two main cases cited above and within this decision.

15. I heard clear evidence from Mr Whittaker that there were 517 pods which the SIPPs had made clear were not to be let. This was the case at both material days. It would appear that possibly two of those pods were let to end users in error but once identified the end users were moved. I did not find this anomaly significant. It was quite apparent to me that control and ownership of those pods remained with the SIPPs. The 'quiet enjoyment' or undisturbed use of each of those pods remained with them.

16. Counsel for the respondent with great skill and flair tried to convince me that as the SIPPs had never taken physical occupation of each pod then they could not be in occupation. There was however a flaw in that argument and I cannot accept his submissions.

17. The principle case in respect of the ingredients for rateable occupation tend to be cited in rating matters from the case of *John Laing*:

> *"Mr Rowe has said that there are four necessary ingredients in rateable occupation, and I do not think there is any controversy with regard to*

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

18. In this case there has never been any actual occupation of the vast majority of these pods (which respondent's counsel stated supported his client's case). As Mr Ormondroyd stated "If there was no physical occupation how could the unit owners possibly be in occupation for rating purposes?" Mr Kolinsky pointed out to me such a proposition provides a ridiculous test in rating terms. To support his contention he explained that if a four floor building was owned and occupied on three floors by 'A' but he let the fourth floor to 'B' who had not yet occupied, based on Mr Ormondroyd's test, 'A' would be the 'occupier' of all four floors. This is clearly wrong.

19. Rating appears to base the hereditament test around occupation of the hereditament. In this appeal both parties accept that either one or a number of hereditaments are in existence. I do not need to test whether each pod is a hereditament in its own right. The question for me is: are all the pods in the same, single occupation (of one occupier) to meet the test in *Mazars*? The answer quite simply is that they are not. There are 500+ pods in no-one's occupation although I must take account of the accepted industry standard of a pod being available to let is one that is classed as being occupied. Who is the occupier of those 500 then? To answer that proposition, I believe the question is 'who is capable of occupation of each of those pods?' The answer is clearly the SIPPs and not SF as they have taken a view that their units are not to be let or sublet and therefore they are not available to SF to use as part of the wider letting operation at the site. Whilst other owners/leaseholders may take advantage of the rather novel business model of SF, each owner/leaseholder cannot be forced to participate in the scheme and could if they so wish just "sit" on the unit one presumes until such time as the capital value made it worthwhile to deal in. If that is right then SF are not in paramount occupation of the one site and

as such any suggestion that they may be is frustrated by any other unit/pod leaseholder who chooses to leave his unit(s) empty. This is in stark contrast to the more orthodox storage unit model where individual units are let on a much more transient basis where the arrangements involve rental of units for short periods from a landlord who has control over the whole site. This is not the case at this SF location and therefore in my view it must be the case that there is more than one hereditament and the appellants arguments must succeed. That, in my opinion answers the test and resolves the question before me.

20. There is supporting evidence from another SF site that uses the same model to confirm my view. Evidence was provided by the appellant's of the Trafford Park Storage Warehouse where Mr D Lloyd owns a number of pods and lets them out himself to end users. I was also advised that Mr Lloyd has sold at least one of his pod leases to another investor. This evidence supports the view that control of each pod remains with the investor at the Barnsley site.

21. Furthermore, it would appear to me that at any time an investor could cancel the LLMA and take control of the pod themselves which again tends to undermine the proposition that there is one occupation by SF.

22. The only concerns I have over this view are the practices that occurred at the appeal facility. It is quite clear that SF did not follow its own lease conditions with the investors in respect of the 500 odd units/pods as service charges and ground rents were never charged to the SIPs. Furthermore, pods were let by SF on occasions without six year leases or LLMAs being in place, although it was inferred that in the vast majority of cases either an oral agreement was assumed to be in place or that an LLMA would subsequently be signed. Whilst it questions the credibility of the management of the facility, I do not believe it provides sufficient evidence to undermine the demise in the lease or the novel way the

property is held with all the rights to quiet enjoyment to the exclusion of all others.

23. Mr Ormondroyd also argued that the pods not being available for letting were not identified as such in promotional advertising or indeed clearly marked as such if you visited the facility, which I am sure was the case. But from the evidence given by the appellant's witnesses, Store First's own database should not allow one of those pods to be let as they had no authority to do so. Clearly, SF did not have a material legal ownership of individual units, nor did it have the control of how the units might be used unless or until a leaseholder chose to give permission by one of the methods such as subletting to SF.

24. One final point Mr Ormondroyd submitted was that there was a degree of convenience, simplicity and certainty for the Valuation Officer, the Billing Authority and indeed the owners in taking the approach he promoted. In support he quoted Lord Carnwarth:

"*The Valuation Officer's practice of treating such cases as single hereditaments, even if in part concessionary, seems to me unobjectionable if it avoids narrow factual disputes about degrees of connection*."

25. I do not accept the relevance of this extract of the decision in respect of the case before me. Both parties accept that there are either a number of hereditaments or one. I have found that some are in separate occupation. The question put to the Supreme Court was whether hereditaments in the same occupation should be treated as one. To treat the reasoning of Lord Carnwarth as relevant to this appeal would defeat all of the Supreme Court's reasoning and decision and undermine them. The only recent case I am aware of where separate and distinct occupiers could be merged into one hereditament was the Upper Tribunal's decision in respect of '*ATMs*' [2017] UKUT 138 (LC) which has been appealed. However, I can clearly distinguish that case from this one, as it concerned

identifying the hereditament, whereas in this case there is no argument as to whether each pod is capable of being a hereditament in its own right (I should note here the Registrar clarified at the hearing that neither party considered the ATM decision relevant).

26. In conclusion I do not need to answer the question as to who is in control of all the other pods at this juncture (although I may need to in respect of identifying the number of hereditaments if the parties are unable to agree) and in closing Mr Kolinsky stated that any dispute about the rateable occupier of each hereditament was outside my Tribunal's jurisdiction.

27. Whilst I appreciate from the standpoint of administrative convenience the respondent would much prefer that only one hereditament existed at this site as it would make the valuation process simpler and much more convenient that can only be possible if SF were in occupation and control of the whole undivided premises which in my opinion they are not.

Order

As a result of this interim decision the Valuation Officer is required to alter the Rating List in respect of the appeal hereditament within two weeks of the parties agreeing the number of hereditaments and rateable values. If they are unable to agree the effective dates, values and number of hereditaments then they must contact the Tribunal two months from the date of issue of this interim decision so that I may make further arrangements for the disposal of these appeals.

Mr G Garland

President

Mr J Bestow

Registrar

9 August 2017