Neutral Citation Number: [2020] EWHC 659 (Admin)

Appeal No. M19Q060
Case No. F01MA669

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Date: 19 March 2021

Before :
MR JUSTICE FORDHAM

- -

Between :

JONATHAN DOYLE	**Appellants**
DAVID LUCUS	
JAMES ANDREWS	
PAUL WEBSTER	
- and -	
MR RICHIE ROBERTS (LISTING OFFICER)	**Respondent**

- -
- -

Jonathan Doyle in person for the **Appellants**
Cain Ormondroyd (instructed by HMRC Solicitor) for the **Respondent**

Hearing date: 5th March 2021

- -

Approved Judgment

MR JUSTICE FORDHAM :

Introduction

1. This case is about whether living accommodation, involving no 'business' element, can constitute a chargeable "dwelling" for the purposes of liability to council tax under Part 1 of the Local Government Finance Act 1992 ("the 1992 Act"). The case came before me as an appeal on a question of law pursuant to regulation 43(1) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, arising out of unsuccessful appeals to a Valuation Tribunal pursuant to section 24 of the 1992 Act. The Appellants' properties are in Liverpool and Leigh (Lancashire). They accept that those properties constitute "domestic property" as defined by sections 66 of the Local Government Finance Act 1988 ("the 1988 Act"), being property "used wholly for the purposes of living accommodation". Each of the Appellants applied for deletion from the council tax list, contending that their property is not a "dwelling" as defined in section 3(2) of the 1992 Act. The Respondent refused to accept the proposed deletions. The Appellants appealed to the Valuation Tribunal, where their appeals were heard together and were dismissed. Their arguments in those, and in these, appeals were presented by the First Appellant, Mr Doyle. It is common ground that these appeals raise "a question of law" for the purposes of regulation 43(1). The question is: who has the correct answer to that question?

A 'Combination' Remote Hearing

2. The mode of hearing was a remote hearing, combining Microsoft Teams (video) in parallel with a BT conference call (audio). The Appellants' preference had been for an in-person hearing but a direction was made for a remote hearing (with liberty to apply which, in the event, was not invoked). I am quite satisfied that the remote hearing involved no prejudice to the interests of either party and permitted a full, fair and public oral hearing. I am satisfied that a remote hearing was justified as necessary and appropriate during the pandemic. It eliminated any risk to any person from having to travel to a court room, or having to be present in one. The open justice principle was secured. The hearing and its start time were published in the Court's cause list, together with an email address usable by any member of the press or public who wished to observe the public hearing. The combination remote hearing was unusual but very effective. The early part of the hearing, by Teams-only, was a little stop-start because of occasional audio delay in picking up Mr Doyle's microphone. That difficulty was resolved. My clerk Jessica Turner circulated to all participants BT conference call dial-in details. Everyone switched off the Teams audio and microphones and we had clear and uninterrupted video (Teams) and audio (BT), both of which were recorded. I heard submissions in exactly the same way that I would have done had we all been present in the court room. The hearing worked well.

The 1967 Act

3. Three statutes feature in the legal analysis. The first is the General Rate Act 1967 ("the 1967 Act"). The 1967 Act required (section 2) local rating authorities to levy general rates (section 5) on the occupiers of property (section 16). An occupier was liable to be assessed to rates in respect of the hereditament or hereditaments comprising that property, according to the rateable value of that hereditament or hereditaments (section 16), with rateable value being ascertained using a mechanism which included a

hypothetical rent evaluation (section 19(3)). Valuation lists recorded hereditaments in the rating area and their assessed rateable value (section 67(2)). The definition of "hereditament" in section 115(1) of the 1967 Act was as follows:

> ***"hereditament" means 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***

Certain properties were statutorily excluded from liability to be rated or included in any valuation list: an example being agricultural premises (section 26). A reduction of rates was applicable in the case of a "dwelling-house" or "mixed hereditament" (section 48(1)). Certain terms, such as "hereditament", "dwelling-house" and "valuation list", were defined (section 115(1)). A statutory mechanism (Schedule 13) operated for determining whether any hereditament or premises was used wholly for the purposes of a private dwelling or private dwellings (Schedule 13 paragraph 1). The 1967 Act was repealed by Schedule 13 of the 1988 Act, but the concept of "hereditament" from section 115 (1) of the 1967 Act was subsequently retained as an operative concept: under section 64 (1) of the 1988 Act and under section 3(2) (a) of the 1992 Act.

The 1988 Act

4. The second relevant statute is the 1988 Act, whose provisions took effect from 1 April 1990. The 1988 Act introduced community charge (Part 1) and non-domestic rates ("NDR") (Part 3). Community charge was subsequently abolished by the 1992 Act with effect from 1 April 1993 (1992 Act section 100); NDR remain applicable to the present day.

   i) Under Part 1 of the 1988 Act (community charge), charging authorities were required to levy a personal community charge on any adult individual resident in the area (section 2) and a standard community charge on any freehold owner of a domestic property in the authority's area (section 3(1)(c)). For the purposes of the standard community charge, "domestic property" was a building or self-contained part of the building "used wholly for the purposes of living accommodation" (section 4(4)). Certain designated dwellings were the subject of a collective community charge (section 5). Community charges registers were required to contain names and addresses of those subject to the various categories of community charge (section 6).

   ii) Under Part 3 of the 1988 Act (NDR), valuation officers for billing authorities were, and still are, required to maintain local non-domestic rating lists (section 41). Central valuation officers are required to maintain central non-domestic rating lists (section 52). Liability to NDR, recorded in a local or central list, applies in the case of a "relevant non-domestic hereditament" (section 42(1)(b)) and section 53(1)). The term "hereditament" means "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" (section 64(1)). What is a "non-domestic" hereditament turns on whether it is, to any extent, "domestic" property. If a hereditament consists "entirely of property which is not domestic" then it is a "non-domestic" hereditament (section 64(8)(a)). If a hereditament is one "part only of [which] consists of domestic property" then it is a "composite hereditament", which is treated as a species of "non-domestic" hereditament (section 64(9) and section 64(8)(b)).

Property is "domestic" (section 66(1)(a)) if "it is used wholly for the purposes of living accommodation" (along with certain ancillary property such as yards, garages and private storage: section 66(1)(b)-(d)). Local and central rating lists identify relevant non-domestic hereditaments to which NDR apply (sections 42 and 53). NDR are calculated by reference to a valuation methodology (Schedule 6) including a hypothetical rent evaluation (Schedule 6 paragraph 2(1)). Certain properties are statutorily exempt from local NDR (section 51 and Schedule 5): an example being agricultural premises (Schedule 5 paragraphs 1-3).

The 1992 Act

5. The third relevant statute is the 1992 Act. The 1992 Act abolished community charge with effect from 1 April 1993 (section 100). It introduced council tax, requiring billing authorities to levy council tax in respect of "dwellings" situated in their local area (section 1(1)). In order for a property to qualify as a dwelling, to which council tax applies, three conditions must be met. Those three conditions are found in section 3(2)(a) to (c), as follows:

> ***Subject to the following provisions of this section, a dwelling is any property which –***
>
> ***(a) by virtue of the definition of hereditaments in section 115 (1) of the [1967 Act], would have been a hereditament for the purposes of that Act if that Act remained in force; and***
>
> ***(b) is not for the time being shown or required to be shown in a local or a central non-domestic rating list in force at that time; and***
>
> ***(c) is not for the time being exempt from local non-domestic rating for the purposes of part 3 of the [1988 Act]***
>
> ***and in applying paragraphs (b) and (c) above no account shall be taken of any rules as to Crown exemption.***

A listing officer for a billing authority has to compile and maintain a valuation list (section 22), recording dwellings and applicable valuation bands (section 23), relevant valuations having been conducted (section 21). Composite hereditaments are brought within council tax (unless they qualify for that status solely as an ancillary building such as a shed): section 3(3). Council tax rates apply with a statutory discount (section 11) in certain circumstances (Schedule 1), such as residence in care homes (Schedule 1 paragraph 7).

Authorities

6. Four cases were cited in argument on this appeal. Allchurch v Assessment Committee and Guardians of Hendon Union [1891] 2 QB 436 (9 July 1891), where the Court of Appeal held that rating liability of occupants of parts of a house depended on what parts they each occupied not whether the house was structurally sub-divided. RGM Properties Ltd v Speight [2011] EWHC 2125 (Admin) (13 June 2011), where Langstaff J held that the valuation tribunal had reasonably (and fairly) concluded that four converted Whitehaven flats were "capable of occupation" and thus liable for council tax. Reeves v Northrop [2013] EWCA Civ 362 [2013] 1 WLR 2869 (17 April 2013), where the Court of Appeal held that the Valuation Tribunal had unreasonably deleted for council tax listing purposes a tug boat moored in Barnstaple and exclusively

occupied – with a sufficiently permanent character – by Mr Northrop. Woolway v Mazars LLP [2015] UKSC 53 [2015] AC 1862 (29 July 2015), where the Supreme Court held that the valuation tribunal (and Upper Tribunal on appeal) were not entitled to treat as a single hereditament, for the purposes of NDR, the second and sixth floors of a Tower Hamlets office block.

The Business Thesis

7. The Appellants' case is as follows. They say that, on the legally correct interpretation of section 3(2) of the 1992 Act (paragraph 5 above) read with section 115(1) ("hereditament") of the 1967 Act (paragraph 3 above), living accommodation can only be a "dwelling" for the purposes of council tax if there is a 'business' element. They say that, properly understood: "council tax is a secondary form of business rates"; that "dwellings" in section 3 of the 1992 Act "are non-domestic"; and that "council tax is a secondary form of non-domestic rates applied to living accommodation when provided under business or commercial circumstances". Accordingly, they say, "dwellings" as defined in section 3 of the 1992 Act "are non-domestic properties". That is the essential argument. I will call this argument "the Business Thesis".

8. I have set out above the three conditions in section 3(2) of the 1992 Act for "dwelling" subject to council tax. The Appellants accept – as Mr Doyle made clear in his oral submissions – that the second condition (section 3(2)(b)) serves to 'subtract' from council tax "dwelling" any property which is the subject of NDR; and that the third condition (section 3(2)(c)) then serves to 'subtract' from council tax "dwelling" any property which would be the subject of NDR but which is NDR-exempt (such as agricultural property). In other words, both of the 'subtractions' concern non-domestic property: NDR-rateable (section 3(2)(a)) and NDR-exempt (section 3(2)(c)). What really matters is this. What is the class of property falling within the 'inclusive' first condition (section 3(2)(a)), from which those two 'subtractions' then take place? The Business Thesis involves the contention that the net cast by the 'inclusive' first condition (section 3(2)(a)) – properly interpreted – is itself limited to property in respect of which there is some 'business' element.

9. One obvious challenge for the Business Thesis is this. If section 3(2)(a) only includes property with a 'business' element, what sorts of property would this 'include', which would not then immediately be 'subtracted' by the second and third conditions (sections 3(2)(b), (c)). After all, Parliament can hardly have intended council tax "dwelling" to be an empty set. What properties populate it, on the Appellants' case, and attract council tax? Mr Doyle was able to give me three examples of classes of property which – on the Appellants' case – would fall within the 'business' interpretation included within the first condition (section 3(2)(a)), but would survive the subtraction of properties which are NDR-rateable (second condition: section 3(2)(b)) or NDR-exempt (third condition: section 3(2)(c)). The first example was a residential property used for the purposes of living accommodation but which also serves as the business address for a limited company, a category illustrated by reference to examples from company information publicly accessible at Companies House, expressly confirmed by the listing officer as being classed as domestic in council tax valuation lists and not appearing in any NDR local or central list. The second example was a class of cases including a care home, described in Schedule 1 paragraph 7 of the 1992 Act for the purpose of discounted council tax rate (section 11 of the 1992 Act) – together with any other Schedule 1 example – where there is living accommodation but an underlying

'business' element. The third example was living accommodation – such as a flat or a house – which is being rented from a private landlord, and thus involves a 'business' element. All three of these examples, says Mr Doyle, demonstrate that there are 'business' element categories of living accommodation, attracting council tax under section 3(2)(a), which are neither NDR-rateable (section 3(2)(b)) nor NDR-exempt (section 3(2)(c)). They illustrate, he submits, the proper and limited interpretation of the 'business' scope of section 3(2)(a).

10. On the Business Thesis, section 3 is all – and only – about property with a 'business' element. That is true of all property falling within section 3(2)(a), including all property subtracted by virtue of section 3(2)(b) or (c). It is also true of properties which attract council tax by virtue of being a "composite hereditament" pursuant to section 3(3). An example discussed at the hearing before me was a property consisting of a shop together with living accommodation (the shopkeeper living 'above the shop'). The composite hereditament has a 'business' element, because it retains its statutory characterisation as "non-domestic", pursuant to section 64(9) and section 64(8)(b) of the 1988 Act. All of these, says Mr Doyle, are properties involving a 'business' element, because council tax is applicable only to properties with a 'business' element.

Arguments Supporting the Business Thesis

11. The Appellants' grounds of appeal and skeleton argument marshalled the arguments in support of the Business Thesis by reference to four closely-overlapping heads, namely: 'flawed case law'; 'domestic property' (section 66 of the 1992 Act); 'hereditament' (section 115(1) of the 1967 Act); and 'case law'. The essence, as I saw it, of the arguments advanced in writing and orally on behalf of the Appellants emphasised five key points. I will seek to encapsulate them here.

12. The first key point made in support of the Business Thesis was this. In designing the 1992 Act and the reach of council tax, Parliament did not adopt, as the controlling definition of "dwelling" (section 3 of the 1992 Act), the statutory definition of "domestic property" found in section 66(1)(a) of the 1988 Act. That definition was readily to hand. Parliament clearly had in mind Part 3 of the 1988 Act, in which section 66 is found, in designing section 3 of the 1992 Act. Indeed, Part 3 of the 1988 Act is expressly referenced in section 3(2)(c); and section 66 itself is expressly referenced in section 3(3)(b). It would have been very easy for Parliament to use "domestic property" as defined in section 66 of the 1988 Act for the definition of "dwelling". Parliament did not do so. It is wrong to treat Parliament as though it had done so. Parliament took a different, deliberate course. It adopted the would-be "hereditament" from section 115(1) of the 1967 Act. That concept of "hereditament" is not an all-embracing one. For example, a tenancy would not be a hereditament, since it would not pass on death (this was a point illustrated by Mr Doyle from a discussion on the Rating (Former Agricultural Premises and Shops) Bill 2001, and by reference to Woolway at paragraph 4). The correct focus, in the proper construction of section 3(2)(a), is on (what Mr Doyle called) "the correct body of words" from section 115(1) of the 1967 Act, namely: "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".

13. The second key point made in support of the Business Thesis was this. On the correct interpretation of the 1967 Act, the meaning of "hereditament" under section 115(1) was not a broad concept. It did not extend to a 'conventional dwelling-house': a house

which is privately owned and used solely as living accommodation. The correct, narrower focus of the 1967 Act concept of "hereditament" – excluding a conventional dwelling house – is reflected in two features of that Act.

i) The first feature is the approach to "dwelling-house" in section 115(1) and Schedule 13. In section 115(1), Parliament defined "dwelling-house" as a term which "means a hereditament which, in accordance with Schedule 13 to this Act, is used wholly for the purposes of a private dwelling or private dwellings". Schedule 13 of the 1967 Act is therefore the controlling mechanism for answering this question: when is a "dwelling-house" a rateable hereditament? Schedule 13 to the 1967 Act makes provision for a number of specific types of hereditaments, such as: a hereditament used for the letting of rooms (Schedule 13 paragraph 2(1)); and a hereditament consisting of land used as a site for movable dwellings (Schedule 13 paragraph 3). But no paragraph within Schedule 13 describes a 'conventional dwelling-house': privately owned and used as living accommodation. It follows that such a property was never a "dwelling-house" (Schedule 13), was never a "dwelling house" which was a "hereditament" (section 115(1)), and was therefore never a "hereditament".

ii) The second feature of the 1967 Act reflecting the narrower focus is the hypothetical rent mechanism for assessing rateable values by reference to rent (e.g. section 19(3)). That mechanism was in place because Parliament was concerned to address accommodation leased from a private landlord, but with an assessment mechanism which considered the objectively suitable rent rather than the actually agreed rent.

In the light of these features of the 1967 Act, "hereditament" under section 115(1) never covered a 'conventional dwelling-house': a privately-owned dwelling-house occupied for the purposes of living accommodation but with no 'business' element. In those circumstances, when Parliament in section 3(2)(a) of the 1992 Act used the 1967 Act section 115(1) concept of "hereditament", Parliament was deliberately maintaining a 'business' concept present in the legislation since the enactment of the 1967 Act itself.

14. The third key point made in support of the Business Thesis was this. Whether or not the original 1967 Act concept of "hereditament" included a standard dwelling-house used for the purposes of living accommodation without any 'business' element, that concept in section 115(1) of the 1967 Act (used in section 3(2)(a) of the 1992 Act) was one involving a clearly expressed and necessary link to rating-liability and capability of being shown as a unit of property in a valuation list. The key words in section 115(1) are "which is or may become liable to a rate" and "which is, or would fall to be, shown as a separate item in the valuation list". By virtue of the 1988 Act, the concepts of a 'rate', 'liability to a rate', and a 'valuation list', had all been retained but only in the context of 'business' property. These concepts were all found within Part 3 of the 1988 Act, regulating NDR. They were not concepts found within Part 1 of the 1988 Act, where Parliament had dealt with community charge. So, the concept of "hereditament" continued, by reference to section 115(1) of the 1967 Act, within the 1988 Act, but only in the 'business' context. The relevant definitional section (1988 Act section 64) appeared only within Part 3 of the 1988 Act, not the Act as a whole. Rather in the same way that it is a taxi, rather than a car, that may be licensable as a cab, so it was 'business' property rather than property as a whole that had become, in principle, liable to a rate and capable of appearing in a valuation list. By virtue of the 1988 Act, from 1 April

1990, a 'domestic hereditament' could not exist. Accordingly, the terms "rate" and "domestic property" were terms which "became oil and water after the introduction of the 1988 Act". Parliament knew this in 1992. When Parliament in section 3(2)(a) used the concept of what "would have been a hereditament for the purposes of [the 1967] Act if that Act remained in force", it meant a rateable hereditament in light of the 'business gateway' which had been found in Part 3 of the 1988 Act. Property which, in terms of the language of section 115(1) ("hereditament"), "is … liable to a rate" and "is… shown as a separate item in the valuation list" fell within section 3(2)(a) of the 1992 Act and was then subtracted under section 3(2)(b). Importantly, property which, in terms of the further language of section 115(1) ("hereditament"), "may become liable to a rate" and "would fall to be shown as a separate item in the valuation list", is that class of 'business' property falling within section 3(2)(a) and not then subtracted under section 3(2)(b), including 'business' property not subtracted by section 3(2)(c). This is referring to property which could, as 'business' property, in principle be liable to a rate and be capable of being shown in a valuation list.

15. The fourth key point made in support of the Business Thesis was this. The 'business' focus of "hereditament", as applicable in section 3(2) of the 1992 Act, links to two further features of the 1992 Act. The first feature is the inclusion within council tax of "composite hereditament", by virtue of section 3(3) of the 1992 Act. Importantly, although a composite hereditament involves part of the property being domestic property, used for the purposes of living accommodation, Parliament continues to characterise a composite hereditament as "non-domestic" (1988 Act section 64(8)(b) and section 64(9)). That fits alongside the 'business' nature of council tax under the Business Thesis. The second feature is the fact that council tax was described in the long title to the 1992 Act as "a new tax". Nowhere in the 1992 Act did Parliament describe or characterise council tax as a replacement for community charge. The absence of any such description fits with the true and 'business' nature of council tax, properly interpreted and understood.

16. The fifth key point made in support of the Business Thesis was this. Although no decided case since the enactment of the 1992 Act has recognised the Business Thesis, and although decided cases may appear to have assumed that "dwelling" in section 3 of the 1992 Act extends to a property solely used for the purposes of living accommodation, with no 'business' element, there is no binding decided case which stands in the way of this Court accepting the Business Thesis as the correct interpretation of section 3. No Court has previously considered, still less rejected, the Business Thesis. Although the tug boat occupied as accommodation in Reeves was treated as falling within the statutory definition of "dwelling", the true ratio of that case turns on the fact that access to the boat's mooring was through a business park (see [2013] 1 WLR 2867 at 2868G, 2869E-F and 2873F–G). That means, properly understood, Reeves was in fact a case of a composite hereditament. The Court of Appeal's description (paragraphs 5-6) of section 66 of the 1988 Act (domestic property) as relevant to section 3(2) of the 1992 Act was not necessary to the ultimate decision in that case, or alternatively was mistaken. The Business Thesis argument rises for the first time in the present case and should be decided by this Court on its legal merits.

Analysis

17. I cannot accept the Business Thesis. In my judgment, it is plainly wrong in law. I will explain why. The starting-point is this. Mr Doyle is quite right to identify as the "correct body of words" the definition of "hereditament" found in section 115(1) of the 1967 Act. That is: "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". Parliament carried that concept of "hereditament" through into the council tax regime of the 1992 Act (section 3(2)(a)), just as it had carried that concept of "hereditament" through into the NDR regime in Part 3 of the 1988 Act (section 64(1)). It is also true to say "hereditament" is not an all-embracing concept. As Mr Doyle rightly points out, it would not extend to a lease which cannot descend on intestacy to heirs at law (see Woolway paragraph 4). On the other hand, as Mr Ormondroyd points out, "hereditament" would, in principle, extend to a unit of property occupied as living accommodation under that very same lease. As he also points out, the meaning of "hereditament" in section 115(1) of the 1967 Act only takes one so far: the meaning of "hereditament" has to some extent been "left to be elucidated by the courts in accordance with the principles underlying the rating Acts" (Lord Sumption in Woolway at paragraph 4). The essential concept is concerned to identify a "unit of property" which is, in principle, rateable and includable within a valuation list.

18. It is wrong to say that under the 1967 Act a conventional dwelling – a privately-owned house or flat, occupied for the purposes of living accommodation and without a 'business' element – fell outside the scope of section 115(1) ("hereditament"). Such a property could clearly be a unit of property liable to a rate and includable within a valuation list. There is nothing in the 1967 Act which indicates that the "general rate" provisions of that Act were limited to a 'business' context. Nothing in that Act supports the contention – with its very curious and anomalous consequences – that a flat or house would constitute a rateable hereditament if rented from a private landlord who is the freehold owner, but not if occupied by a private freehold owner. Nothing in the 1967 Act statutory mechanism for positing a hypothetical rent, for the purposes of rateable valuation, supports the conclusion that Parliament was interested only in privately rented property. The 'hypothetical rent' mechanism was plainly an objective and even-handed basis of arriving at a fair valuation for all units of property capable of being liable to a "general rate". Moreover, Parliament was clear that a "dwelling-house" was a species of "hereditament". Section 115(1) defined "dwelling-house" as "a hereditament". The mechanism in Schedule 13 to the 1967 Act was not, and did not purport to be, an exhaustive description of all properties capable of being a "dwelling-house" for the purposes of the definition of "dwelling-house" within the 1967 Act. Schedule 13 was dealing with special or marginal cases – such as the letting of rooms and land used for movable dwellings – to identify whether and when there was a "dwelling-house" in relation to those scenarios. Where the paragraphs of Schedule 13 were engaged, the method of Schedule 13 operated to answer the question whether there was a "dwelling-house". There was no need for Schedule 13 to provide a 'method' in the case of a 'conventional dwelling-house': a standard, privately-owned house used for the purposes of living accommodation. That would fall within the primary definition being "a hereditament… used wholly for the purposes of a private dwelling or private dwellings", a conclusion involving no conflict with – and therefore being fully "in accordance with" – Schedule 13. Moreover, even if Schedule 13 had operated under the 1967 Act as an exclusive repository for every 1967 Act "dwelling-house", that would

still not have been answering this question: when is a house a 1967 Act "hereditament"? Rather, it would have been answering the question: when is a 1967 Act "hereditament" eligible for general rating relief (under section 48) because it is a "dwelling-house"? A house which did not qualify for general rating relief thereby fell outside the ambit for that relief; it did not thereby fall outside the ambit of hereditament. The Appellants' properties in the present case would plainly fall within the broad ambit of "hereditament" as defined in section 115(1) of the 1967 Act. It follows that they fall within the same broad ambit as deployed in section 3(2)(a) of the 1992 Act, since section 3(2)(a) reaches back to the 1967 Act. That is the end of it.

19. The Appellants' invocation of the 'business' gateway, found within Part 3 of the 1988 Act, cannot withstand scrutiny. The short answer is that, in section 3(2)(a) of the 1992 Act Parliament reached back to the 1967 Act; it did not reference the 1988 Act. But the Appellants' reliance on the 1988 Act 'gateway' does not work, for other reasons.

    i) First, the concept of "hereditament" – even in Part 3 of the 1988 Act – is not a narrowed, 'business' definition. Instead, the concept of "hereditament" in Part 2 of the 1988 Act is the 1967 Act broad concept: see section 64(1) of the 1988 Act. The narrowed 'business' gateway in Part 3 is not a narrower meaning of "hereditament", but rather a sub-category: "relevant non-domestic hereditament" (section 42(1)(b) of the 1988 Act). That was a subspecies of hereditament, attracting NDR unless the subject of an NDR exemption. That means that, even under Part 3 of the 1988 Act, "hereditament' would include a domestic property used wholly for the purposes of living accommodation: that would be a domestic hereditament. Parliament was applying NDR only to a "relevant non-domestic hereditament" (section 42(1)(b) and see Schedule 6 paragraph 2(1)). The answer to this question – is a conventional private dwelling house used solely for the purposes of living accommodation a hereditament as that term is used in Part 3 of the 1988 Act? – would be 'yes'. The answer to this question – why does a conventional private dwelling house used solely for the purposes of living accommodation not attract NDR? – would be 'because, although it is a hereditament, it is not a non-domestic hereditament'.

    ii) Secondly, the narrowed 'business' gateway which – in the Appellant's language – meant that 'a rateable domestic hereditament did not exist under Part 3 of the 1988 Act' was "relevant non-domestic hereditament". That was the operating engine under Part 3. As Mr Ormondroyd rightly points out, there was and is within the 1988 Act no alternative 'business' concept. To invoke the 'business' gateway introduced by Part 3 of the 1988 Act is thus self-defeating as a basis for giving section 3(2) its proper scope. For, just as soon as the 'business' "hereditaments" have been shepherded within section 3(2)(a) – by reference to the 'gateway' reflected in the 1988 Act – they all then immediately depart through the subtracting effect of section 3(2)(b) and (c). Ultimately, the Appellants can only give meaningful scope to section 3(2) by disavowing the 'gateway' found in Part 3 of the 1988 Act, on which they rely.

20. Turning to the 1992 Act, what Parliament was doing in section 3(2) was as follows. First, it was taking the broad concept of "hereditament" from the general rating provisions of the 1967 Act – including a domestic hereditament – capable as a unit of property of being liable to a rate and being shown in a valuation list (section 3(2)(a)). Secondly, it was then 'subtracting' those "relevant non-domestic hereditaments" which,

under Part 3 of the 1988 Act: (i) attract NDR (section 3(2)(b)); or (ii) would attract NDR but for their exempt status (section 3(2)(c)). The category most obviously left following those subtractions from that broad 1967 Act concept would constitute "domestic property", seen in section 66 of the 1988 Act. That is the consequence of the fact that Parliament used "domestic property" (section 66 of the 1988 Act) as the delineating concept for identifying relevant "non-domestic" hereditaments: section 64(8)(a) of the 1988 Act. It therefore identifies what is not being subtracted. In those circumstances, it makes sense to emphasise hereditaments covered by section 66 of the 1988 Act as being those covered by section 3(2). That is because they will be part of the broad definition of hereditament (section 3(2)(a)) not subsequently subtracted. That was the point being made by the Court of Appeal in Reeves (at paragraphs 5 and 6).

21. This analysis, which reflects the essence of the submissions put forward by Mr Ormondroyd, makes sense and everything falls into place. It makes sense of the adoption by Parliament of the "new" council tax (1992 Act long title), at the same time as abolishing (1992 Act section 400) the community charge which had until then applied to units of property used for the purposes of living accommodation, with no 'business' element. It means that Parliament did not introduce the patent anomaly (and indeed arbitrariness) of, for example: (a) imposing council tax where a flat or house is rented from a private landlord, but (b) leaving free from any council tax an equivalent flat or house when occupied by a freehold owner (on whom ultra vires demands have been served for nearly three decades). It means that the Courts (and lawyers) in the council tax case-law since the 1992 Act, including cases like RGM and Reeves, have straightforwardly and correctly understood the statutory scheme; they have not missed the very dramatic narrowing of the statutory scheme which the Business Thesis entails. As to Reeves, there is no support in the analysis in that case for the adoption of a 'composite hereditament' approach which would, startlingly, have included the nearby business park through which access to the Crown-owned towpath was obtained.

22. Mr Doyle is quite right that his 3 'business element' examples fall within the scope of council tax under section 3(2) of the 1992 Act. But they do not do so because of their 'business' element. It is not because council tax is a secondary form of business tax. It is because council tax applies to hereditaments within the broad 1967 Act definition which neither attract NDR nor are exempt from it. So, council tax may arise in a context which can broadly be described as having a 'business' element. The relevant 'business' parameters of the NDR regime will answer the two relevant 'subtraction' questions: is the hereditament shown or required to be shown (section 3(2)(b)) in an NDR list?; or is it NDR-exempt (section 3(2)(c)) as a hereditament described in Schedule 5 to the 1988 Act (agricultural premises and so on)?

23. As Mr Ormondroyd rightly pointed out, a unit of property used wholly for the purposes of living accommodation attracts council tax by reference to that use. It is true of a house which is not used as a business address for companies house. It can be true of Mr Doyle's example of a house which is listed as a business address for companies house. It is true of a unit of property within a care home, where a discounted level of council tax may be applicable (1992 Act section 11 and Schedule 1 paragraph 7). It is true of a flat or house which is rented from a private landlord. But it is also true of such a flat or house with an owner-occupier. They can all be hereditaments. If, on the other hand, the position is that some part of a hereditament is not domestic property, because of the way it is used, then the rules relating to "composite hereditaments" will apply. That

could be that case in the context of a house used partly for business purposes, or for part of a care home. It will be the case in the context of the example of the flat 'above the shop'. A composite hereditament will attract both NDR and council tax – as Mr Doyle accepted – at rates which are referable to the relevant part and the relevant mixed-use.

Conclusion

24. It follows, for all these reasons, that the Valuation Tribunal was correct in law when it said, in its concluding paragraph: "The panel is satisfied that section 3 (2) of the 1992 Act is applicable, as each of the appeal properties would have been a hereditament for the purposes of the General Rate Act 1967, are not non-domestic properties required to be shown in a local or central non-domestic waiting list, and they are not exempt from local non-domestic rating". The Respondent was correct in law in the approach to "dwelling" in section 3 of the 1992 Act, when refusing the proposals to delete the Appellants' properties from the council tax list. Council tax is applicable to a unit of property such as a house or flat which, without a 'business' element, is domestic property used wholly for the purposes of living accommodation. The arguments of the Appellants to the contrary fail, as do their appeals.

Costs

25. The Respondent sought his costs of these appeals, inviting the Court summarily to assess the costs, asking for the full amount of £11,147.90 set out in an electronically-certified costs schedule. In essence, the Respondent submitted that he was the successful party and in principle should have his costs. He also relied on a letter (without prejudice save as to costs) dated 10 February 2021, offering to accept by 24 February 2021 withdrawal of the appeals on payment of £6,000 towards costs, and warning the Appellants that if the offer were not accepted and the Respondent prevailed he would seek costs in full, on an indemnity basis after 25 February 2021. Mr Doyle submitted that costs should be refused, in essence because (i) appeals to the Valuation Tribunal are intended to be free and without costs (ii) the appeals to this Court raised issues of broad national significance (iii) Parliament has not authorised the Respondent to apply for costs (iv) since Government Legal Departments are underwritten by the taxpayer no costs have actually been incurred and a costs order would breach the indemnity principle and (v) the alleged costs were not reasonably incurred and not representative of true hourly rates. In my judgment, it is right in principle, just and proportionate that I make an order that the Appellants pay the Respondent's costs, for which they will be jointly and severally liable, and that I summarily assess them. I am entirely satisfied that the schedule contains true and claimable costs, with proper hourly rates. The costs relate to the appeal to this Court, engaging the costs jurisdiction of this Court. They do not relate to the proceedings before the Valuation Tribunal. Public underwriting of a legal department is not in principle, nor in this particular case, a good reason to refuse or reduce costs; nor is the nature of the issues raised. The letter reinforces the appropriateness of recovery, on a fuller basis after 25 February 2021. But it is unjustified to order (and inconsistent with the terms of the letter to seek) indemnity costs prior to 25 February 2021, and the majority of items in the schedule pre-date 25 February 2021. Although this is a broad-brush exercise (in the face of polarised submissions) I am satisfied that it is just and proportionate to assess the costs at £8,000.

19.3.21