Neutral Citation Number: [2025] EWHC 255 (Admin)

Case No: AC-2024-LON-002328

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM THE VALUATION TRIBUNAL FOR ENGLAND

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2025

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

MICHAEL STANUSZEK	**Appellant**
- and -	
DAWN BUNYAN (LISTING OFFICER) (No.2)	**Respondent**

- -
- -

Andrew Carter (instructed by **Streathers Highgate LLP**) for the **Appellant**
Luke Wilcox (instructed by **His Majesty's Revenue and Customs**) for the **Respondent**

Hearing dates: 29 January 2025

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Approved Judgment

This judgment was handed down remotely at 10am on Friday 7 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SAINI

Mr Justice Saini:

This judgment is in 7 main parts as follows:

I.	Overview:	paras.[1]-[9].
II.	The Facts:	para.[10].
III.	Legal Framework:	paras.[11]-[28].
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VI.	Other Decisions:	paras.[50]-[52]
VII.	Conclusion:	paras.[53].

I. Overview

1. This is *round two* in an appeal about Council Tax. The appeal concerns the units of assessment for Council Tax purposes of a house in multiple occupation ("HMO") in which each bedroom is separately let to a single tenant, with the tenants sharing the common parts. This is a common situation in the modern rental market. The relevant 'dwellings' make up a property in Twyford Abbey Road, Park Royal, London NW10 7HG ("the House"). A diagram depicting the layout of the Rooms within the House appears below at [10].

2. The Appellant landlord and freeholder says that the House as a whole should be assessed as a single dwelling. The Listing Officer ("the LO") does not agree. She contends that, when the law is properly understood and applied, the House comprises six dwellings - one for each of the six rooms ("the Rooms") contained within the property and, accordingly, the Rooms fall to be assessed as individual dwellings.

3. The Appellant appealed the LO's assessment. In a decision dated 14 April 2023 ("the Original Decision"), the Valuation Tribunal for England ("the VTE") agreed with the LO and dismissed the Appellant's appeal. The Appellant appealed the Original Decision to the High Court. That appeal was *round one* of the dispute.

4. In a judgment dated 14 November 2023, [2023] EWHC 3275 (Admin) ("the Judgment"), Henshaw J determined that the VTE had not applied the correct legal principles in reaching the Original Decision. Henshaw J explained his reason for this conclusion at [41]:

> "…the VTE in the present case, in paragraphs 11- 12 and 26 of its decision, conflated the test for rateable occupation and the question of whether each unit was a separate hereditament. Further, it drew support in paragraph 28 from a case, *James v Williams*, where the question of whether separate hereditaments *prima facie* existed (subject to the exercise of the statutory discretion) appears not to have been in dispute. In declining to apply *Mazars*, the VTE in my view overlooked the fact that *Mazars* was, at least in part, setting out or restating principles of general application".

5. Henshaw J however did not decide the issue in dispute in the appeal before me but remitted the matter to the VTE for a fresh determination. The VTE (Frazer Stuart, Vice President, sitting alone) made a fresh determination on 4 June 2024. The Vice President reached the same conclusion as the original tribunal: [2024] VTE VT00012402 (CVAD) ("the New Decision"). He found that the Rooms were separate hereditaments and that, whilst their tenancies existed, the tenants were in rateable occupation of their respective rooms. So, he agreed with the LO, and dismissed the appeal.

6. The Appellant now appeals against the New Decision. Mr Andrew Carter, Counsel for the Appellant, who also appeared below and before Henshaw J, in his well-structured submissions argued that the New Decision was vitiated by errors on the following three main grounds. First, the VTE improperly exercised a "review" as opposed to a "merits" assessment of the LO's decision. Second, that the VTE misapplied the "functional" test for the identification of a hereditament. Thirdly, basing himself on a number of sub-grounds, Mr Carter argued that the VTE failed properly to apply the legal tests identified in the Judgment of Henshaw J.

7. For the Respondent, Mr Luke Wilcox, who also appeared below and before Henshaw J, made persuasive submissions that when the law is correctly applied, these grounds have no merit. Mr Wilcox supported the New Decision as a faithful application of well-established legal principles on agreed facts. He also referred me to a number of decisions by the VTE in other cases where he submitted that the VTE, in its capacity as the "expert tribunal" on these matters, has applied the geographical and functional tests to HMOs on a number of occasions; and in each case has found that the individual bedrooms did form discrete dwellings.

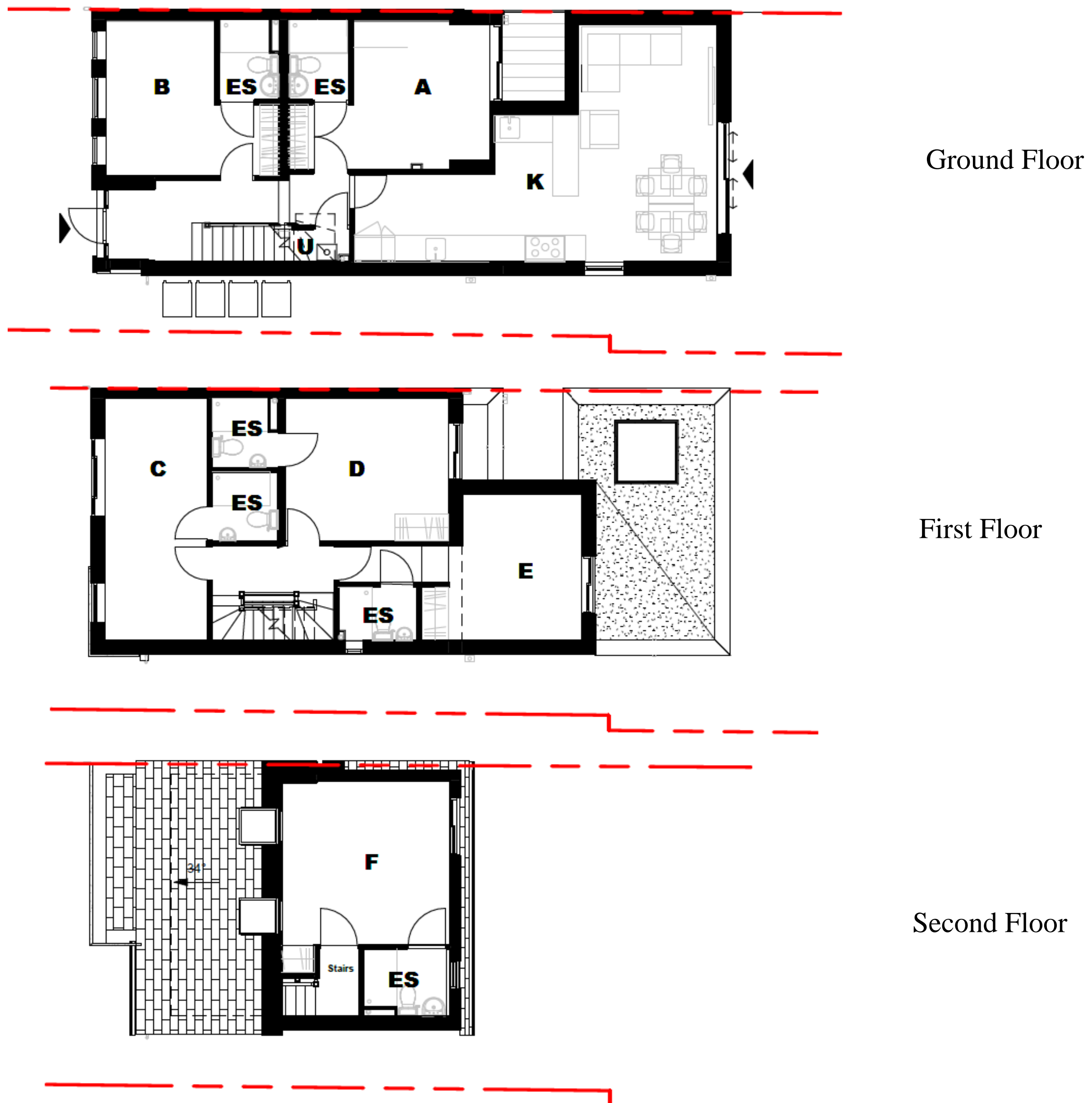
8. Mr Carter and Mr Wilcox were in agreement that they wished to avoid a *round three* in this dispute. They agreed that were I to find any error in the New Decision, I should not remit the matter to the VTE but should decide the issues myself. Given that the central facts are not in dispute and the wide-ranging arguments made to me (as well as the interests of finality), I agreed to this course. With that in mind, I propose to take the slightly unusual course of first considering the facts and the law to come to my own conclusion on the hereditament issue. There is also caselaw which post-dates the New Decision and which is relevant to the issues. If I come to the same conclusion as the Vice President then the appeal must be dismissed. I will however also separately address Mr Carter's complaints under his grounds in Section IV of this judgment.

9. Henshaw J comprehensively set out the relevant legal framework in the Judgment. The Vice President took the legal principles from this: see New Decision [11]. I gratefully adopt Henshaw J's identification of the core legislation, and principal cases, and will accordingly provide a more abbreviated summary of the framework in my judgment. I will begin with the agreed facts.

II. The Facts

10. The essential facts fall within a small compass and can be summarised as follows. The House is a six-bedroom semi-detached property. The Applicant landlord has been the owner of the freehold since 9 October 2017. Each of the Rooms contains an ensuite

bathroom with a shower and a toilet. The Rooms each have a lockable door and are let out to a separate tenant on an assured shorthold tenancy ("AST"): see the Judgment at [6] for the terms of the AST. In addition to their exclusive use of their individual Rooms, each of the tenants also enjoys a licence to use the common areas of the House on a shared basis. Those common areas included communal living, dining and kitchen areas. The diagram below illustrates the configuration of the House over its 3 floors, the 6 separate bedrooms (A-F) and their ensuite bathrooms (ES), and on the ground floor the shared utility area (U) and shared kitchen (K).



III. Legal Framework

11. The legislative provisions concerning Council Tax are in the Local Government Finance Act 1992 ("the 1992 Act"), and its associated secondary legislation. Council Tax was introduced on 1 April 1993 to replace the community charge (commonly known as the "poll tax"), and the community charge had itself replaced domestic rates as the primary local government tax on residential property. The 1992 Act draws heavily on this rating heritage, and it is common ground that many of its key concepts are derived directly from rating law.

12. The 1992 Act provides for "certain local authorities to levy and collect a new tax, to be called council tax". The unit of property against which Council Tax liability arises is the "dwelling". In this regard, Section 1(1) of the 1992 Act provides as follows:

> "1 Council tax in respect of dwellings.
>
> (1) As regards the financial year beginning in 1993 and subsequent financial years, each billing authority shall, in accordance with this Part, levy and collect a tax, to be called council tax, which shall be payable in respect of dwellings situated in its area."

13. A "dwelling" is defined in Section 3 of the 1992 Act which provides:

> "3 Meaning of "dwelling".
>
> (1) This section has effect for determining what is a dwelling for the purposes of this Part.
>
> (2) Subject to the following provisions of this section, a dwelling is any property which—
>
> (a) by virtue of the definition of hereditament in section 115(1) of the General Rate Act 1967, 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 III of the Local Government Finance Act 1988 ("the 1988 Act");
>
> and in applying paragraphs (b) and (c) above no account shall be taken of any rules as to Crown exemption".

14. Section 115(1) of the General Rate Act 1967 ('the 1967 Act'), referred to in sub- section 3(2) of the 1992 Act above, provides:

> "'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".

15. In short, a dwelling is a hereditament (as that term is understood in rating law) which is not required to be assessed for Non-Domestic Rates ("NDR"). NDR is concerned with non-domestic property, and hereditaments are not required to be assessed for NDR if they are domestic (which is itself defined as property which is wholly used for the purposes of living accommodation). A dwelling, therefore, is a domestic hereditament. There is no requirement for a "dwelling", in this sense, actually to be capable of providing self-contained independent living. If the space is in separate occupation, capable of physical definition, and used wholly for the purposes of living accommodation, then it meets the test of being a dwelling. There is no dispute before me that the whole of the House is domestic. Thus the sole issue is the number of hereditaments which are comprised in the House, applying relevant rating principles.

Identifying the "hereditament" in rating law

16. The leading modern authority on the identification of the hereditament is <u>Woolway (VO) v Mazars</u> [2015] AC 1862 ("<u>Mazars</u>"). In summary, that case dealt with how different storeys under common rateable occupation in the same block were to be dealt with in the rating list for the purposes of non-domestic rating. As explained by Lord Sumption at [1], historically, local authority rates were payable in respect of the "rateable occupation" of hereditaments, and that continues to shape the law in this area. The core concepts underlying the assessment of rates are that they are a tax on property and the "hereditament" is the unit of assessment. At [4], Lord Sumption observed that "Hereditament" is an 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. He then referred to the definition within section 115(1) as the statutory definition, and the fact that absent further definition, the meaning was left to be elucidated by the courts.

17. Lord Sumption then explained at [5]-[6] (my emphasis added):

> "5. The question which arises <u>in a case like this</u> is a very simple one. Given that non-domestic rates are a tax on individual properties, what is the property in question? In principle, the fact that <u>the same occupier holds two or more properties</u> is irrelevant to the rateable status of any of them. He must pay rates separately on each. If the law is to be rational and consistent, the circumstances in which a continuous territorial block is to be treated as several separate properties or in which geographically separate properties are to be treated as one for rating purposes, must be determined according to some ascertainable and defensible principle.
>
> 6. There are two principles on which these questions might be decided. One is geographical and depends simply on whether the premises said to constitute a hereditament constitute a single unit

> on a plan. The other is functional and depends on the use that is or might be made of it. The distinction was first applied in a series of rating cases in Scotland, where the question was essentially the same as the one which arises on this appeal, namely whether property should be assessed for local rates as a number of distinct heritable subjects or as unum quid ("one thing"). These cases establish that the primary test is geographical, but that a functional test may in certain cases be relevant either to break up a geographical unit into several subjects for rating purposes or to unite geographically dispersed units in unum quid. By far the commonest application of the functional test is in de-rating cases. In these cases, the functional test serves to divide a single territorial block into different hereditaments where severable parts of it are used for quite different purposes. Thus, a garage used in conjunction with a residence within the same curtilage will readily be treated as part of the same hereditament, whereas a factory within the same curtilage which is operated by the same occupier may not be. There are, however, rare cases in which function may also serve to aggregate geographically distinct subjects. It is with this latter question that the present appeal is concerned."

18. Having considered the older authorities, Lord Sumption identified the governing principles at [12] (again, with my underlined emphasis):

> "12. I derive from these decisions three broad principles relevant to cases like this one <u>where the question is whether distinct spaces under common occupation</u> form a single hereditament. First, the primary test is, as I have said, geographical. It is based on visual or cartographic unity. Contiguous spaces will normally possess this characteristic, but unity is not simply a question of contiguity, as the second Bank of Scotland case 18 R 936 illustrates. If adjoining houses in a terrace or vertically contiguous units in an office block do not intercommunicate and can be accessed only via other property (such as a public street or the common parts of the building) of which the common occupier is not in exclusive possession, this will be a strong indication that they are separate hereditaments. If direct communication were to be established, by piercing a door or a staircase, the occupier would usually be said to create a new and larger hereditament in place of the two which previously existed. Secondly, where in accordance with this principle two spaces are geographically distinct, a functional test may nevertheless enable them to be treated as a single hereditament, but only where the use of the one is necessary to the effectual enjoyment of the other. This last point may commonly be tested by asking whether the two sections could reasonably be let separately.

> Thirdly, the question whether the use of one section is necessary to the effectual enjoyment of the other depends not on the business needs of the ratepayer but on the objectively ascertainable character of the subjects. The application of these principles cannot be a mere mechanical exercise. They will commonly call for a factual judgment on the part of the valuer and the exercise of a large measure of professional common sense. But in my opinion they correctly summarise the relevant law. They are also rationally founded on the nature of a tax on individual properties. If the functional test were to be applied in any other than the limited category of cases envisaged in the second and third principles, a subject (or in English terms a hereditament) would fall to be identified not by reference to the physical characteristics of the property, but by reference to the business needs of a particular occupier and the use which, for his own purposes, he chose to make of it."

19. As I have emphasised in my underlining above, Lord Sumption expressly identified these principles as relevant to identifying the number of hereditaments which exist in cases of common [rateable] occupation. That is, instances where all of the property in question has the same occupier. Where the property in question does not have the same occupier, as in the case of the Rooms in this appeal, then the principles operate differently.

20. In subsequent rating cases, the role of Mazars in non-common occupation cases, such as the appeal before me, has focused on identifying whether or not an area of land (described in the cases as a "putative hereditament") is capable of being a hereditament at all, by reference to the geographical criteria identified in Mazars. As Mr Wilcox argued, that point can be illustrated by two authorities which he took me to in some detail. The second of those cases post-dates the New Decision.

Cardtronics

21. The first case is Cardtronics UK Ltd v Sykes (VO) [2020] 1 WLR 2184 (SC), which concerned the sites of ATM cash machines in supermarkets and convenience stores. In answering that question, the Supreme Court asked itself two questions:
    (1) Whether the sites of the ATMs were "*capable of identification as separate hereditaments*" at [28]. I note that the issue was expressed in terms of capability of separation. The resolution of the first issue turned on considerations which, in Mazars terminology, were purely geographical: the question was whether or not the space in question was capable of sufficient definition. At [38], Lord Carnwath agreed with the Court of Appeal that the Upper Tribunal's assessment of this issue was "*faithful to the tests in [Mazars]*", and [58] of the Court of Appeal's judgment ([2019] 1 WLR 2281) expressly approached the capability issue by reference to the geographical test. It is significant that at no point did the Court of Appeal, or the Supreme Court, identify any role at all for the functional test in addressing this issue. That was so notwithstanding that the close connection between the purpose of the ATM and the purpose of the host store formed

a central component of the second issue. The functional test was simply not relevant to the capability question in a non-common occupation context.

(2) The second question was whether, if the ATM sites were capable of being separate hereditaments (which they were), the ATM sites were occupied by the host retailer or by the bank which provided the ATM. That issue was dispositive of the question of whether or not the sites were in fact separate hereditaments: the Court held that the host retailers were in rateable occupation of the sites, and in consequence the sites were not separate hereditaments. Had the banks been found to have been in rateable occupation, then the ATM sites would have been separate hereditaments, by virtue of the fact that they were separately occupied from the remainder of the store. I will return to this point below.

22. The second decision is Prosser KC v Ricketts (VO) [2024] 4 WLR 95 ("Prosser"), a decision of the Upper Tribunal (Lands Chamber). This post-dates the decision under appeal before me. The Prosser case concerned a barristers' chambers, and whether or not each barrister's individual room was a separate hereditament, or if the chambers as a whole formed a single hereditament. There is clear similarity between the matter in issue in Prosser and the appeal before me. The Upper Tribunal's treatment of, and approach to, the "capability" question was as follows:

> "44. The leading authority on the identification of a hereditament is the decision of the Supreme Court in [Mazars] which concerned the proper treatment of geographically distinct units with a common occupier (which is not an issue in this appeal). Lord Sumption JSC (at para 12), identified the primary test as "based on visual or cartographic unity" and as "geographical", (ie "whether the premises said to be a hereditament constitute a single unit on a plan", at para 6). Lord Neuberger of Abbotsbury PSC also explained, at para 47, that: "Normally at any rate … a hereditament is a self-contained piece of property (ie property all parts of which are physically accessible from all other parts, without having to go onto other property), and a self-contained piece of property is a single hereditament."
>
> 45. It is unnecessary to refer in any greater detail to the principles by which a hereditament is identified, as it is agreed that the Rooms occupied by individual Members are capable of being separate hereditaments. Someone entering one of the Rooms and closing the door would find themselves in a self-contained space which could be depicted on a plan. The appeal turns on a different issue, namely the identity of the person who, in law, is the occupier of those Rooms. Viewed as a whole, the Appeal Premises are also self-contained (all parts being accessible without leaving the premises). If, for rating purposes, they are occupied by the same person, it is not disputed that the Appeal Premises would also be capable of being a separate hereditament."

23. As in Cardtronics, I note that: (a) the "capability" question was resolved without any reference to the functional test, which was simply not engaged in such a scenario, and (b) once it was found that the putative hereditaments (i.e. the individual barristers' rooms) were capable of being separate hereditaments, the question of whether or not they were in fact separate hereditaments turned on whether they were separately occupied.

24. I accept Mr Wilcox's core submission that the reason why separate occupation is decisive of the issue of separate assessment in cases of this nature is because, as a matter of rating law, it is legally impossible for a single hereditament to contain discrete parts which are occupied by different persons. See [18] and [29] of the Judgment, where Henshaw J set out two of the numerous authorities which establish this point, including Re Briant Colour Printing [1977] 1 WLR 942 (CA). That is why in neither Cardtronics, nor Prosser was any consideration given to whether or not the properties could be assessed as a single large hereditament even if the smaller parts were found to be in separate occupation to the other parts (the same point can be made about another case I was taken to, Westminster City Council and Kent Valuation Committee v Southern Railway Co Ltd [1936] AC 511 ("Southern Railway")). I accept Mr Wilcox's submission that such an approach would be so contrary to established principle that the specialist rating courts and experienced judges in those cases did not feel it necessary even to address it. Henshaw J did not dispute that principle. Nor (contrary to the Appellant's suggestion in Mr Carter's skeleton) did Henshaw J find that a hereditament was capable of containing discrete areas in separate occupations.

25. As to what "occupation" means in the context of rating law, the leading authority is J S Laing v Kingswood Assessment Committee [1949] 1 KB 344. As explained by Tucker LJ at 350:

> "there are four necessary ingredients in rateable occupation … 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."

26. That statement was endorsed by Lord Carnwath in Cardtronics at [13]. In the Judgment, Henshaw J recorded (but did not comment on) the Appellant's submission that satisfying the Laing criteria did not mean that a person was in rateable occupation: see [45].

The High Court's approach to VTE decisions

27. Before explaining my own conclusion, I should deal with the Court's role. In a Council Tax appeal of the nature before me, the High Court may confirm, vary, set aside, revoke or remit the decision or order, and may make any order the VTE could have made: Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, reg 43. In Rahmdun v VTE [2015] RVR 89, Haddon-Cave J set out the principles which govern the consideration by the High Court of appeals of this nature: [26]. Of particular relevance is the seventh principle:

> "Where the case is concerned with an appeal from a specialist Tribunal, particular deference is to be given to such tribunals, for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker. Those tribunals are alone the judges of the facts. Their decisions should be respected unless it is quite clear they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

28. It was in recognition of that principle that Henshaw J remitted the case to the VTE. That was to enable the VTE, as the specialist expert tribunal, to assess how the layout of the House and the hereditament structure within it interacted with the general "landscape" of the Council Tax treatment of HMOs: Judgment at [49]. In this regard, it is notable that the Vice President's decision in the case before me is consistent with a large number of other VTE decisions as to the treatment of similarly configured properties. A selection of those cases was presented by the LO to the Vice President in argument below. I will return to those at the end of this judgment.

IV. Analysis

29. I will address Mr Carter's distinct challenges below, but based on the governing legal principles and the facts before me, there was no error in the Vice President's approach or conclusion. Having been taken by Counsel to the agreed facts and the law, I respectfully conclude that the Vice President's decision was clearly correct.

30. I can summarise my reasons in 5 points as follows:

    (a) First, each individual Room is capable of being a discrete hereditament, as it is capable of physical definition by virtue of its four walls and lockable door.
    (b) Second, each of the individual Rooms has its own separate rateable occupier, i.e. the individual tenant who resides in the Room and has the benefit of the AST for the Room. No other person makes any actual use of, or has any physical presence in, the Room, including the other residents in the House or the Appellant himself. No other person has any right to enter the Room, let alone on an exclusive basis, including the other residents of the House or the Appellant himself.
    (c) Third, each Room is thus capable of definition as a hereditament, and is in discrete rateable occupation.
    (d) Fourth, on the established principles in Cardtronics and the other authorities cited above, each Room is thus a discrete hereditament.
    (e) Fifth, the fact that each tenant needs to use the common parts to access their room and makes use of a shared social and kitchen area is not relevant.

31. These points are reflected in the core reasoning of the Vice President which is wholly consistent with Cardtronics and the later case of Prosser.

32. As he did below, before me Mr Carter focussed on establishing that the whole House is a single hereditament. That argument however runs up against the rule against discrete parts of a hereditament having separate rateable occupiers. It is hard to see how his argument can be correct unless it can be shown that the whole House has a common occupier or body of joint occupiers sharing identical rights over all parts of the House. There is, however, no such person on the agreed facts, because the Rooms are separately tenanted. Mr Carter does not contend that the ASTs are shams or otherwise ineffective to pass exclusive possession of the individual Rooms to their individual residents. Where a person actually makes use of a space pursuant to a right of exclusive possession, then that person is in exclusive occupation for rating purposes. Indeed, I agree with Mr Wilcox that it is hard to think of a clearer example of an exclusive occupier of a space than a tenant exercising a right of immediate possession.

33. Further, the Appellant himself cannot be in rateable occupation of the House. I did not understand Mr Carter to dispute this. In any event, there is no evidence to suggest that the Appellant has any physical presence in or makes any use of the House at all, let alone the individual Rooms. The Appellant obviously has no exclusive occupation of the individual Rooms. Such a claim would be contrary to the essence of the ASTs.

34. In short, the answer to this appeal may be found in an observation of Lord Neuberger in Mazars at [49], that "…the occupation of premises can in some circumstances serve to control their status as one or more hereditaments. An office building let to and occupied by a single occupier would be a single hereditament, but if the freeholder let each floor of the building to a different occupying tenant, retaining the common parts for their common use, then each floor would be a separate hereditament". One can readily read a Room in the House as being a "floor" referred to by Lord Neuberger. As Lord Carnwath explained in Cardtronics at [15], after citing Southern Railway, "…although it may be convenient for the purpose of analysis to separate the issues of hereditament and occupation, they are in truth linked".

35. I turn then to the three grounds of challenge. I will take them in the way they were numbered in the skeleton argument, although Ground 2 was taken first orally and was the main focus of submissions from Mr Carter.

V. The Grounds

Ground 1: the VTE's approach to the putative hereditament

36. Under his first ground, Mr Carter argued that the VTE erroneously carried out a "review" of the LO's decisions, rather than a fresh assessment of the merits of the appeal. The point is academic given my own decision that the Vice President's conclusion was correct. However, the point in any event has no merit. It rests on a misreading of the New Decision. The New Decision identified at [20] that the parties agreed that the correct starting point was to identify the putative hereditaments for assessment. The Vice President recorded the parties' respective cases: the Appellant contended that the starting point should be to assess the House as a whole (as he does before me), whereas the LO contended that the starting point was each individual Room. Having recorded those submissions, the Vice President said at [22] that the correct starting point was that indicated by the LO, on the basis that this approach was consistent with that of the Supreme Court in Cardtronics. In my judgment, it is plain that the Vice President was not carrying out a mere "review" of the LO's decision, in

the public law sense. Rather, he considered the parties' competing positions, and concluded on the facts that the LO's position was correct. That is precisely what was required of the VTE on the remittal.

37. Further, I would respectfully add that the Vice President was in any event clearly correct to adopt the approach he did. Where issues arise as to whether or not a smaller hereditament is to be carved out of a larger one, then the analytical focus is properly on whether or not the smaller hereditament is capable of separate assessment – that was the approach adopted in Cardtronics. Mr Wilcox was right to submit that it is also consistent with the approach of the House of Lords in Southern Railway in which Lord Russell of Killowen emphasised that, in cases where a dispute arises as to whether or not a discrete area of a larger property is so occupied as to have become a separate hereditament, the analytical focus is on the smaller rather than the larger unit (p. 529). In any event, this procedural complaint ground goes nowhere because it was found that the House itself was also capable of being a hereditament. As explained by the Vice President at [21]:

> "There was no dispute that the putative hereditaments satisfied the geographic test as set out by the Supreme Court in *Mazars.* The property as a whole clearly did. As for the individual rooms, each could be ringed on a plan and access to each and every one was via common parts. Mr Carter, as I said, did not dispute this but his argument was that my starting point should be to look at the whole of the house instead as it was up to the tribunal to decide for itself what the putative hereditament was".

38. Finally under this ground, Mr Carter argued that, in considering the capability of the Rooms for separate identification, the Vice President had in some undefined fashion raised the threshold which the Appellant had to meet in order to succeed in its appeal. I reject that argument. The Vice President did nothing more than follow the two-stage approach mandated by the Supreme Court (Cardtronics) in such instances, and asking himself: (a) whether a sub-part of a property is capable of being separately assessed, and (b) if it is so capable, whether it in fact should be separately assessed. It is axiomatic that an area of space which is incapable of sufficient definition cannot be separately assessed however it is occupied. That is why the Vice President observed at [22] that the result of such a finding would have been the deletion of the Rooms from the Valuation List.

39. Nor, contrary to Mr Carter's submissions, did the Vice President "side-step" the assessment of the occupational pattern of the House. He undertook precisely such an exercise at [29] of the New Decision, finding that each individual resident was in rateable occupation of his or her own Room, and that the tenants together shared the occupation of the common parts.

Ground 2: the functional test

40. This was the core point pursued in oral submissions for the Appellant. The essence of Mr Carter's argument under this ground was that the functional test could cause the House to be a single dwelling. This submission is based on a misunderstanding of what

the Vice President found. His analysis of the Mazars approach was, properly, directed to the question of whether the Rooms and/or the House were capable of being discrete hereditaments. For the reasons I have given above, that is the nature of the exercise which the law mandates as the starting point in cases of this nature. Having found that the House and the Rooms were each capable of being separate hereditaments, the role of the functional test was over, and the appeal then turned on whether they were separately occupied.

41. Mr Carter contended that the functional test is relevant because the Rooms are incapable of being let separately from the common parts of the House. As the Vice President noted at [27], however, as a matter of fact the Rooms are separately let both from one another and from the common parts – each individual tenant has a tenancy of his Room only, and a licence to share the common parts of the House. It is true that the Rooms require access to (for example) kitchen facilities to be lived in; but it is common for a hereditament to be dependent for its use on space which is outside of the hereditament itself, as the Vice President noted at [28]. As I observed during submissions, an office floor in a multi-let office building cannot be occupied without access to staff toilets and kitchen facilities, and those facilities are commonly found in the shared parts of the building. Yet the common parts remain outside of the hereditament by virtue of the common rights which exist over them (see Mazars at [12] where Lord Sumption explains this point). The position is identical in this appeal.

42. Again, the error in the Appellant's case is that he seeks to apply the functional test so as to unite in a single hereditament a series of areas which are let to different persons on different ASTs, so that the single hereditament would contain discrete parts with discrete rateable occupiers. That is legally impermissible.

43. Overall, I am satisfied that the Vice President's approach to the functional test and its relevance to the present case was correct. In this regard, he explained as follows:

> "26. It appeared to me that Mr Carter was trying to use the functional test in reverse to persuade me that the rooms were incapable of being separate hereditaments as only the house as a whole was capable of passing the test. However, my understanding of the relevant tests was that the primary test was geographic and if the putative hereditament passed that test, the secondary test was unnecessary. It was only necessary to consider the functional test, if a merger of assessment was sought and it was not possible to unify them under the geographic test. This being the case, regard could be made to the secondary functional test.
>
> 27. In the case under consideration, the common parts were disregarded for valuation purposes and had no separate band entry. Each of the six rooms, that were let to tenants, met the geographic test. Therefore, Mr Carter's argument that I should apply the functional test was a distraction… In Mazars, Lord Sumption stated that whether the functional test was met could be tested by asking if the two sections could reasonably be let separately. In the case under consideration, the rooms had been separately let. The common parts had not been let but the

> occupiers of the rooms had access and the right to use the common parts.
>
> 28. I accepted Mr Carter's point that the occupiers of the rooms had to have access and to be able to use the facilities in the common parts as the rooms, although described by the Listing Officer as Flats, were considerably smaller than one bedroom studio flats. However, there were numerous examples, as enunciated by Mr Wilcox in his submissions, where occupiers of other property types needed access of common parts, in order to make use of essential facilities which were not contained within their hereditament. For instances, shops within a shopping mall or office suites within an office building.
>
> 29. Having determined that the individual rooms that had been let to tenants were putative hereditaments, I then focussed on who was in rateable occupation. There were two potential candidates, the individual tenant(s) or the Appellant landlord. All of the rooms had been let out on an Assured Shorthold Tenancy basis with a fixed term of twelve months. I was satisfied that, whilst their respective tenancies endured, each tenant was in rateable occupation of their room. They were in actual occupation, that occupation was beneficial to them as they needed somewhere to reside, they had the exclusive use of the room and given the term of the agreement, which was twelve months, it could not be said that their occupation was for too transient a period...".

Ground 3: the relevance of exclusive possession

44. Mr Carter made a number (6) of sub-points under this ground. I will briefly address each in turn.

45. First, it was argued that that the only reasonable conclusion open to the Vice President was that each tenant occupied both his/her individual Room and the common parts of the House. At the risk of repetition, that argument rests on a misunderstanding of what occupation means in this context. The word "occupation" as it is used in rating has four ingredients, per <u>J S Laing</u> (cited above at [25]). One of those ingredients is exclusivity, and a shared right of use is not occupation for rating purposes, because shared occupation is not exclusive occupation. Each tenant is in exclusive occupation of his/her individual Room. He/she is not in exclusive occupation of the common parts, because those parts are shared with the other residents of the House. That is true whether or not the tenants as a body have a joint tenancy of the common parts (in which case the individual tenant of any given Room would be different to the tenant of the common parts), or simply a licence to use them. The Vice President was however right to find that the tenants' rights over the common parts were in the nature of a licence not a tenancy, and indeed I note that the Appellant himself asserted that the tenants' rights over the common parts was pursuant to a licence for shared use in his statement of case

to the VTE. The first limb of the Appellant's ground thus rests on a misunderstanding of what occupation means in this context.

46. Secondly, Mr Carter argued that it is "absurd" to suggest that the common parts could be let separately from the Rooms. As submitted by Mr Wilcox, the Appellant's case runs up against the facts: the individual Rooms are in fact let separately from the common parts. Even if the Appellant is right that the tenants as a body have a tenancy over the common parts, the tenant of the common parts (i.e. the body of residents jointly) would be different to the tenant of any given Room, and thus separately let. Further, the Appellant suggests that there would be no value in a residual hereditament comprising only the common parts of the House. Even if that were true, it is equally true of the common parts of a multi-storey, multi-let office building. Yet it has never been suggested that that makes the individual floors incapable of being separate hereditaments.

47. Thirdly, the Appellant argues that his correct analysis would result in the common parts being contained in more than one hereditament, which is an unavoidable problem. But it is only a problem if the Appellant's erroneous approach to occupation (which disregards the critical element of exclusivity) is adopted. On the LO's and the Vice President's approach, the common parts do not form part of any of the six dwellings in the list, which is consistent with the approach taken by the LO to the residual parts of domestic properties occupied in this manner. The Appellant is thus relying on a problem of his own making.

48. Fourthly, Mr Carter relied on the Council Tax (Liability for Owners Regulations) 1992 to establish that the Appellant may be in occupation despite having no physical presence in the House and despite having no right of access to the Rooms. In my judgment, those regulations have no effect on the identification of the rateable occupier of premises, and have no bearing on the identification of the dwelling either (as demonstrated by the fact that the regulations are made under s. 8 of the 1992 Act, and not under s. 3 – see the preamble to the regulations). They are concerned with assigning liability to someone other than the occupier in certain circumstances, not with changing the rules of occupation. Yet it is the rules of occupation that are relevant to the identification of the hereditament. Who actually pays is irrelevant.

49. Fifth, Mr Carter argued that the criteria for rateable occupation do not prevent the whole House being a single hereditament. If by that he means that a hereditament can contain areas with different rateable occupiers, then his case is contrary to Re Briant.

50. Finally, although not referred to in his oral submissions, Mr Carter relied in his skeleton on Newbigin (VO) v Monk [2017] 1 WLR 851 to suggest that a property that is capable of being occupied as a whole is a single hereditament. That is a strange argument: the office building in Mazars was capable of being occupied as a whole (it could have been let to a single tenant as many office buildings are), yet that did not alter the Supreme Court's conclusion that the individual floors there were separate hereditaments. Monk was concerned with the entirely different question of whether or not buildings which are undergoing redevelopment are capable of being hereditaments at all. That often turns on whether or not the property is capable of beneficial occupation during the currency of the works; but nothing in Monk addresses the number of hereditaments within a building which is so capable. Monk does not assist on the issues in this appeal.

VI. Other Decisions

51. For completeness, I record that the VTE, in its capacity as the expert tribunal on these matters, has applied the Mazar geographical and functional tests to HMOs on a number of other occasions, and in each case has found that the individual bedrooms did form discrete dwellings. The relevant decisions are as follows:

    (a) *JL v Bunyan (LO)* (VT00014840) (9 February 2024) concerned an HMO with a communal kitchen and (for some of the residents) communal toilets, with each tenant occupying his room under an assured shorthold tenancy and with each room having a lockable door. The VTE found that each tenant's room satisfied the geographical test and was in separate rateable occupation of its occupying tenant, and as such was a discrete hereditament.
    (b) *AD v Hitchings (LO)* (VT00018705) (16 February 2024), in which the tenants of the rooms shared communal kitchen facilities, had individual ASTs of their rooms, and had lockable doors for their rooms. Again, each of the rooms was a separate hereditament applying the geographical and functional tests, and by virtue of the individual tenants' ASTs for their rooms.
    (c) *Bewley Millward Ltd v Hitchings (LO)* (VT00018864) (29 February 2024), the geographical and functional tests were passed for individual rooms let on ASTs and with lockable doors, and where there were shared communal facilities.
    (d) *JZ v Bunyan (LO)* (VT00017319) (13 March 2024) concerned an HMO with shared kitchen facilities, and common parts occupied by the residents on a shared basis, with each tenant occupying his own room on an AST and with each room having a lockable door. The rooms each passed both the geographical and functional tests and were thus separate hereditaments. The panel recognised that even after the decision in the Judgment, the concept of the hereditament remained inextricably bound up with that of rateable occupation.
    (e) *EA v Bunyan (LO)* (VT00019030) (14 March 2024) concerned a property in which the individual tenants shared not only the kitchen facilities in the house, but shared the toilet as well. Each room was let to a separate tenant on a separate AST. None of the tenants had to pass through another person's room or rateable occupation to gain access to their rooms, and so their rooms passed the geographical test. Each tenant was able to enjoy his room without reliance on any other tenant and solely occupied the room, so that the functional test was passed as well.

52. Mr Carter argued that some of these cases were wrongly decided through a misapplication of the functional test (essentially his submission in this appeal, which I have rejected). His client also sought to rely on some older cases (that is, before Henshaw J's decision) which were presented to me in a summary form. This judgment is not the place to have a debate about other decisions but I note that the identification of the dwelling was not in issue in any of those cases. I was also informed by Mr Wilcox that all of the houses in these decisions are shown as single dwellings because they had been aggregated by the relevant listing officer pursuant to the discretion in art 4 of the Chargeable Dwellings Order.

VII. Conclusion

53. The appeal is dismissed. The Vice President was right in the New Decision for the reasons he gave.