Neutral Citation Number: [2020] EWHC 647 (QB)

Case No: NOE06 MA 369
Appeal Ref: M19Q142

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE MANCHESTER
ON APPEAL FROM THE COUNTY COURT AT MANCHESTER (HHJ BIRD)

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 18/03/2020

Before :

MR JUSTICE SAINI

- -

Between :

ATOS IT SERVICES LIMITED	**Respondent/ Claimant**
- and –	
FYLDE BOROUGH COUNCIL	**Appellant/ Defendant**

- -
- -

Jennifer Thelen (instructed by **Head of Governance, Fylde Borough Council**) for the **Appellant**
Cain Ormondroyd (instructed by **WHN Solicitors Limited**) for the **Respondent**

Hearing date: 12 March 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE SAINI

MR JUSTICE SAINI:

This judgment is divided into 9 parts as follows:

I. Overview - paras [1-9]
II. The Facts - paras [10-22]
III. Statutory Framework and Caselaw - paras [23-68]
IV. Conclusion on the Main Issue of Law - paras [69-75]
V. Ground 1 - paras [76-86]
VI. Ground 2 - paras [87-90]
VII. Ground 3 - paras [91-93]
VIII. Ground 4 - paras [94-103]
IX. Disposal - para [104].

I. Overview

1. This is an appeal against an Order made on 1 August 2019 by His Honour Judge Bird ("the Judge"), sitting in the County Court at Manchester. The main question decided by the Judge was a pure issue of law. It concerns the liability, if any, of a person for non-domestic (that is, business) rates in circumstances where the person said to be liable does not occupy the entirety of the unit of property (or, "the hereditament") identified in the relevant rating list.

2. In outline, the Judge held for the detailed reasons set out in his judgment dated 31 July 2019 ("the Judgment"), that in considering whether a person occupies a hereditament for the purposes of the material rating legislation, the hereditament must be considered as a single, indivisible "unit". The Judge concluded that a person is only in rateable occupation if he occupies the "unit" (as a whole) and, accordingly, on the facts before him (partial occupation of the unit), there was no liability at all for the rates.

3. The Judge's Order was made in CPR Part 8 proceedings issued on 23 November 2019 in the County Court at Manchester by Atos IT Services Limited ("Atos"), the Claimant below (the Respondent on appeal). By that claim, Atos sought a repayment of payment of £164,159.78 ("the Disputed Sum") in respect of rates which it paid under protest to the Defendant (the Appellant on appeal), Fylde Borough Council ("the Council").

4. Liability for such rates was disputed by Atos on the basis that parts of the hereditament in the rating list were leased and occupied by other companies during the relevant period. Accordingly, argued Atos, it was not in exclusive occupation of the hereditament shown in the list for that period, and therefore not in rateable occupation of it.

5. The Council did not accept that this was an arguable claim and applied for summary judgment and for an order striking out the claim. It argued that the remedy for Atos was to seek an amendment of the description of the hereditament in the rating list, and that the Council was obliged in law to collect the Disputed Sum.

6. For the reasons set out in the Judgment, the Judge dismissed the Council's applications. He held that there was an overpayment which in principle should be returned to Atos pursuant to a statutory right. The Judge also gave directions for the trial of the issue as

to whether the Council could resist repayment under general principles governing the law restitution.

7. The Judge essentially accepted the submissions of Atos. The Council argues before me that he was wrong in law to do so. It argues that the Judge misconstrued the material legislative provisions, and failed to apply well-established authority. Atos seeks to uphold the Judge's decision for the reasons he gave in the Judgment but has advanced certain supplemental submissions. Atos says that the Judge acted wholly in accordance with precedent and that it is the Council which seeks a departure from the recent case law.

8. Each side accuses the other of inviting a radical departure from what is claimed to be the orthodox position in the world of rating law. I am grateful to both Counsel for their high quality, focussed and concise oral and written submissions.

9. As I explain below, I consider that the main issue raised in the appeal is relatively straightforward and is capable of resolution applying well-established principles. In my judgment, the Judge was right to dismiss the Council's applications for summary judgment and striking-out, and to hold that Atos was (in principle) entitled to repayment of the Disputed Sum.

II. The Facts

10. There was no material dispute of fact before the Judge and my summary of the facts below is taken from the Judgment. I have however added to the Judge's factual summary certain additional and uncontroversial evidence in the documents before me.

11. As stated above, the Part 8 claim related to non-domestic rates (commonly referred to as "business rates") paid by Atos to the Appellant Council in respect of the period 7 October 2016 to 31 March 2017 (I will refer to this as "the Relevant Period").

12. Atos has since 7 October 2016 held a head lease of Serco House (latterly known as Ribble House), Ballam Road, Lytham St Annes, Lancashire FY8 4LE ("Serco House").

13. Various parts of Serco House were let to, and occupied by, subtenants throughout the Relevant Period.

14. These subtenants included the following entities:

    a) Inenco Group Limited ("Inenco") leased and occupied the First, Second and Third Floors of Block E, including 129 parking spaces, pursuant to an underlease dated 17 April 2014;

    b) Guardian Companies Services Limited and Guardian Linked Life Assurance Limited (together "Guardian") leased, and one or both of them occupied, the First Floor of Block D, pursuant to an underlease dated 5 November 2015;

c) Guardian also leased and occupied the Second, Third and Fourth Floors of Block D and 120 parking spaces pursuant to an underlease dated 24 October 2012;

d) Aegon UK plc ("Aegon") leased and occupied Part Ground Floor (known as Block F) together with 42 parking spaces, pursuant to an underlease dated 5 November 2012.

15. With effect from 1 April 2015 and until 31 March 2017, Serco House was shown in the rating list maintained by the Valuation Officer under a series of entries, as follows:

a) 'Serco House' at £685,000 RV;

b) 'GRE 2nd Flr Block D Serco House' at £46,500 RV;

c) 'GRE 3rd Flr Block D Serco House' at £44,250 RV;

d) 'GRE 4th Flr Block D Serco House' at £44,250 RV;

e) 'Inenco, 1st Flr Block E Serco House' at £56,500 RV;

f) 'Inenco, 2nd Flr Bock E Serco House' at £56,500 RV;

g) 'Inenco, 3rd Flr Block E Serco House' at £56,500 RV;

h) 'Aegon, Gr Flr Blocks F & G Serco House' at £97,500 RV.

16. The summary valuation of the 'Serco House' hereditament (to which I will refer as "the Main Hereditament", adopting the Appellant Council's definition) published on the Valuation Office Agency's website justified the rateable value of £685,000. It is important to note that it included a line entry for the 1st floor of block D (which was let to Guardian, as set out above) and included 449 parking spaces. 126 of these parking spaces were demised to Inenco, 120 were demised to Guardian and 42 were demised to Aegon. Together, these items accounted for some £68,000 of the rateable value of the Main Hereditament. The evidence before me is that they are not accounted for in any of the descriptions (or associated valuations) of other hereditaments shown in the list.

17. The Main Hereditament as shown in the rating list thus included the 1st floor of block D and the 288 parking spaces demised to Inenco, Guardian and Aegon. It is common ground that these parts are <u>not</u> occupied by Atos.

18. The Appellant Council is the billing authority for the rating area within which Serco House is situated.

19. By emails dated 31 October 2016 and 21 November 2016 Atos' agents informed the Council that other parties were in occupation of parts of the Main Hereditament. Atos stated that (until such time as the list was modified so as to exclude those parts of the Main Hereditament not in its occupation) it was not liable to pay rates in respect of the Main Hereditament.

20. On or around 15 February 2017 the Council served a demand notice upon Atos. This related to the Main Hereditament and required payment of sums in respect of Atos' claimed liability for non-domestic rates for the Main Hereditament for the period 7 October 2016 to 1 April 2017. Atos' liability for the Main Hereditament for this period was said to be £164,159.78.

21. Atos paid the Disputed Sum to the Council on 3 April 2017.

22. In due course, on 15 June 2018, Atos demanded a repayment of the Disputed Sum. The Council did not repay the Disputed Sum and it made no response to Atos' pre-action protocol letter of 16 October 2018. That led to the present Part 8 claim which the Appellant Council applied to dismiss by way of Part 24 summary judgment and/or striking out under CPR 3.7.

III. Statutory Framework and Caselaw

23. Non-domestic or business rates are a tax on the occupation and ownership of property. A form of taxation of this nature has existed in various forms since the Poor Relief Act 1601. Over the last 150 years or so there have been a number of cases which are central to the issues in the appeal. Those cases have principally arisen in the context of disputes concerning the issuance or execution of distress warrants and the concept of "rateable occupation".

24. I will need to review that case law in some detail because it is at the core of this appeal and is relied upon by both parties. In particular, the Appellant Council relies strongly upon what it calls the "Headlam principle" (referring to the case Manchester Overseers v Headlam (1888) 21 QBD 96, as explained and later applied in Camden LBC v Herwald [1978] 1 QB 626). I will begin however with the current statutory framework.

25. The principal relevant statute which governs the claim is the Local Government Finance Act 1988 ("LGFA 1988"). In broad terms, the system of rating which it seeks to implement divides responsibilities between central and local government.

26. Central government, through the Valuation Office Agency of HMRC, is required to maintain a list of all relevant taxable property in a particular local government area. This is the "local non-domestic rating list" referred to in s41(1). I will refer to this as "the list". The list is generally renewed every five years, but the 2010 list (to which this appeal relates) was, I understand, preserved in existence for a further two years, to 2017.

27. As to local government, a billing authority (in this case, the Appellant Council) is responsible for administering the collection of the tax. This involves identifying which party is liable to pay the tax and taking steps to collect the tax that is due. By schedule 9 para 6(1) LGFA 1988, "[i]f in the course of the exercise of its functions any information comes to the notice of a billing authority which leads it to suppose that a list requires alteration it shall be the authority's duty to inform the valuation officer who has the duty to maintain the list."

28. By s42(1), the list must show each "hereditament" which fulfils certain conditions (e.g. it is not to show hereditaments which are domestic or which are entirely exempt from non-domestic rating). The "hereditament" is the unit of taxable property.

29. The list must show a "rateable value" (essentially, the annual letting value) for each hereditament: s42(4). It must also show such information as is prescribed: s42(5). That information includes "a description of the hereditament" and "its address": Non-Domestic Rating (Miscellaneous Provisions) Regulations 1989, reg 2. The list does not contain any indication as to who is liable to pay the rates in respect of a particular hereditament (specifically, it says nothing about who the "ratepayer in occupation" is for s43(1(a) purposes: see paragraph [31] below). That is a matter for the billing authority's decision and assessment.

30. LGFA 1988 s55 provides for the establishment of a procedure whereby the contents of the list may be challenged by a ratepayer. For the 2010 and subsequent lists this has been set out in the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009. These regulations allow for the making of a 'proposal' challenging the accuracy of the information in the list.

31. As the list does not identify who is liable to pay rates in respect of a hereditament, or who is in occupation of a hereditament, there is no ability to make a proposal challenging liability to rates or occupation of a hereditament.

32. The legal liability to pay rates is imposed by S43 LGFA 1988 (in force with effect from 5 March 1992). That provision, and its application, is at the core of the appeal. It provides as follows:

> "(1) A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year—
>
> (a) on the day the ratepayer is in occupation of all or part of the hereditament, and
>
> (b) the hereditament is shown for the day in a local non-domestic rating list in force for the year."

33. S64 defines "hereditament" by reference to the definition set out in section 115(1) of the General Rate Act 1967: "…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."

34. Like the Judge at paragraph 30 of the Judgment, I would observe that (at first blush) one might think that once it is established that a person is in occupation of "part" of the hereditament/unit (as Atos is in this case) that suffices under s43 to establish liability to pay rates for the whole unit. The Appellant Council confirmed to me however that it does not rely upon that argument, so I say no more about it.

35. One needs to consider in more detail what is embraced by the concept of "occupation" within s43(1)(a). LGFA 1988 s65(2) provides that: "Whether a hereditament or land is occupied, and who is the occupier, shall be determined by reference to the rules which would have applied for the purposes of the 1967 Act had this Act not been passed

(ignoring any express statutory rules such as those in sections 24 and 46A of that Act)". It was common ground before me that the relevant rules are the common law rules to be found in historic case law.

36. Under those rules, in order to be rateable, the occupation has to satisfy the fourfold test set out in decided cases. So, the occupation must be actual, beneficial, exclusive and not transient: John Laing & Son Ltd v Kingswood AAC [1949] 1 KB 344 at p350, approved in LCC v Wilkins (VO) [1957] AC 362 (HL). In this appeal, it is the requirement that occupation be "exclusive" that is central to the arguments.

37. An aspect of the requirement for exclusive occupation is that two parties cannot be in occupation of one hereditament unless they are jointly occupying the whole.

38. This principle was identified in Allchurch v Hendon [1891] 2 QB 493 (CA). That case concerned a house with two floors and each floor was let to a separate tenant. Lord Esher MR observed at pp.441-442 (with my underlined emphasis):

> "What do each of these people occupy? The one occupies rooms on the ground floor of a house and occupies them separately. It cannot be doubted that occupation is a separate one, because nobody else has any right to interfere with his occupation of that part. The other occupies another part of the house, and his occupation is a separate occupation, and nobody has a right to interfere with it. Therefore you have each of them occupying a separate part of something, whether it is a separate part of a house signifies not. If it were a field it would be a separate occupation of a part of a field. They are to be rated in respect of their occupation. How can each of them be rated as the occupier of something into which he has no right to go, in respect of which he has no beneficial right at all, in fact, in respect of something with which he has nothing to do, and with which if he attempts to do anything he is a trespasser? The occupation is as clearly separate as can be. It is a misuse of terms - not only a misuse but an untrue use of terms - to say that they jointly occupy this house."

39. Kay LJ concurring at p.443 noted the "great injustice" that would occur if the occupiers of separate parts of the building were to be jointly liable for the rates on the whole.

40. The distinction between joint and separate occupation was reaffirmed in NICV v Fermanagh Protestant Board of Education [1969] 1 WLR 1708 (HL) by Lord Diplock at p1728 (my underlined emphasis):

> "Parliament cannot have intended to impose separate and independent liabilities to pay the rates for the same hereditament upon more than one person except where their legal right of occupation is a joint right, as in the case of joint tenants. In English law, therefore, although there may be a joint occupation of a single hereditament, there cannot be rateable occupation by

> more than one occupier whose use of the premises is made under separate and several legal (or equitable) rights."

41. To the same effect, in In re Briant Colour Printing Co. Ltd [1977] 1 WLR 942 (CA), Buckley LJ explained at pp952-953:

> "There cannot, I think, be two occupiers for rating purposes at one time of one hereditament. If a state of affairs arises in which two persons are in occupation of what is listed as one hereditament for rating purposes, each entitled to exclusive use for a particular purpose, the list must be amended to show two hereditaments in order to enable the rating authority to assess both occupiers."

42. These legal principles have been applied in the context of disputes about who is liable to pay rates. Verrall v Hackney LBC [1983] QB 445 (CA) concerned the offices of the National Front (Excalibur House), an unincorporated association of which the defendant Mr Verrall was a member. That case was decided under the previous legislative framework set out in the General Rate Act 1967, and under which pursuant to s16 an occupier of property of certain descriptions "shall be liable to be assessed to rates in respect of the hereditament or hereditaments comprising that property according to the rateable value or respective rateable values of that hereditament or those hereditaments determined in accordance with the provisions of this Act".

43. The Court of Appeal held that it was permissible for the recipient of a summons for distress to dispute occupation of the hereditament as a defence: p458H. It then went on to consider whether the defendant was in fact in rateable occupation of Excalibur House or not. It is important to note (for the purposes of identifying the *ratio* of this case) that occupation was disputed in part on the basis that "the National Front had not been the paramount occupier of the premises, but that there had been a number of occupiers of different parts" (p459H).

44. The Master of the Rolls (giving the judgment of the Court of Appeal in Verrall) explained that the "first and real question for the magistrate was who had been in rateable occupation of the material hereditament over the relevant period" (p462C). In that context the Master of the Rolls observed:

> "Further, the second well-established ingredient of the concept of rateable occupation is that the actual occupation or possession must be exclusive for the purpose of the possession. Consideration of this ingredient is important in cases such as the present where there may have been more than one legal person using parts of the premises at times during the period for which rates are sought to be charged. In *Ryde on Rating*, 13th ed., p. 120 the editors give this warning:

> "The occupation of land can be joint, and it is important to distinguish the case of a building in the hands of joint occupiers from that of a building of which the parts are let separately to several persons, each of whom is the occupier of the part let to him, and of that part only … If the whole building is rated, under one entry in the valuation list, and in the rate, as one indivisible rateable hereditament, no one tenant is liable for the rate on the whole, because he is not the occupier of the whole, nor can he be compelled to pay the rate on the part which he occupies, because there is nothing in the rate, or in the valuation list on which it is based, to show what is the value of that part."
>
> [The Master of the Rolls then referred In re Briant Colour Printing that I have set out above at paragraph [41]), and continued].
>
> In the instant appeal the whole building, Excalibur House, was rated under one entry in the valuation list and in the rate as one indivisible hereditament… we do not think that it is possible to hold that [the defendant] was throughout the occupier or one of a number of joint occupiers of the single hereditament comprised in the one entry in the valuation list and the rate."

45. Accordingly, the defendant was found not liable to pay the rates on the basis that he was not in rateable occupation. In my judgment, an aspect of the *ratio* of the case was that it is necessary to find *one* occupier or a number of *joint* occupiers of the relevant hereditament before there can be rateable occupation, and therefore, before any liability to rates can arise.

46. In other words, "occupation" of a part of the hereditament when other parts are occupied by other parties does not give rise to rateable occupation of the hereditament.

47. In Ford v Burnley [1995] RA 205, a Divisional Court (Pill LJ and Keene J) had to consider whether that part of the ratio of Verrall had been disturbed by the change to the statutory scheme brought about by regulations made under LGFA 1988. Mr Ford contended that he was not in occupation of a quarry hereditament because different entities occupied different parts of the quarry.

48. Pill LJ identified the following question for consideration (p209):

> "whether the finding that Mr Ford was an occupier of part of the hereditament justifies a liability order against him on the ground that his occupation of a part is in the light of the 1990 regulations an occupation of the whole."

49. It was common ground, on the basis of the passages from Verrall I have cited above, that Mr Ford could not be made subject to a liability order in respect of the quarry

hereditament, unless the law had been changed by LGFA 1988 and attendant regulations. The regulations in question were the Non-Domestic Rating (Collection and Enforcement) (Miscellaneous Provisions) Regulations 1990, which by regulation 3 applied "in any case where (apart from this regulation) there would at a particular time be more than one occupier of a hereditament".

50. The Divisional Court accepted the argument advanced by Mr Ford that the regulations in question applied only to cases of joint occupation (pp211-2, per Pill LJ):

> "The general law which determines who is the rateable occupier survives the 1990 regulations. The regulations apply only to persons who are in occupation of a non-domestic hereditament. They do not alter the way in which such occupation is to be determined. They deal only with a situation where there is in law a joint occupation of a hereditament or part of [a] hereditament at a particular time. The general principle as stated in Verrall is still the law and is not affected by the 1990 regulations. I find that argument irresistible."

51. Keene J, concurring, remarked as to the "bizarre" results that would follow if the situation were otherwise. In relation to the finding of the magistrates that Mr Ford was liable to pay the whole rate for a hereditament which he only partially occupied, Keene J said) (p.212):

> "…that cannot be right…were the Justices approach to be right, a bizarre result would follow. If the occupier of part of a hereditament which was occupied in a number of parts or in a number of floors of a building by various persons could be made liable for the non-domestic rates in respect of the whole hereditament."

52. London Borough of Croydon v Maxon System Inc Ltd [1999] RA 286 was a similar case to Ford v Burnley. It concerned a hereditament consisting of the second and third floors of Bensham House. It was common ground that the alleged ratepayer was in exclusive possession of only parts of those floors. The issue for the High Court on case stated was:

> "…whether, in order for the respondent to be liable for the rates claimed, it is enough that it was in exclusive possession of part only of the hereditament… or whether… there has to be exclusive occupation of the whole…"

53. It was argued that s43(1) had changed the law as stated in Verrall such that part-exclusive occupation was now sufficient to be rateable. In support of this contention the billing authority referred to the fact that it had no right to make a proposal to

reconstitute a hereditament in the list. The argument was rejected by Jowitt J: "I do not feel myself at liberty to come to the conclusion that section 43(1) has changed the law" (p292).

54. I note that Jowitt J went on to explain that one rationale for the reference to occupation of "part of the hereditament" would relate to a situation whereby the hereditament was physically occupied in part only but was otherwise vacant (pp292-3). That state of affairs can be distinguished from the situation (demonstrated by the facts of Verrall, Ford and Maxon System and indeed the facts before me), where there are different "occupiers" of different parts of a single hereditament.

55. These authorities seem to me to be clear in establishing that in such a case none of the "occupiers" is in rateable occupation, because none has exclusive occupation.

56. Against this, and as I have outlined above, the Council argues that the answer to this appeal lies not in the above case law, but in the Manchester Overseers v Headlam (1888) 21 QBD 96. In my view, that case does not on analysis assist.

57. In my judgment Headlam is in fact further general authority for the proposition at paragraph [54] above. This case concerned property identified in the 'rate book' "by words of general description, viz., 'offices and land with rails'" (p98). It emerged from evidence extrinsic to the rate book itself that the valuation of the 'offices and land with rails' had taken in areas not in the occupation of the alleged ratepayer. The court identified the applicable legal principle in the following terms (Wills and Grantham JJ) at p.98:

> "It is undoubted law that a poor-rate made upon a person in respect of property which he does not occupy, although unappealed against, will not support a distress made upon that person in respect of the property which he does not occupy : and it may be conceded on the authority of the London and North Western Ry Co v Buckmaster that if one entire assessment be made in terms upon property which he does occupy, and upon other property which he does not occupy, so that upon the true state of facts being ascertained it is impossible to satisfy the description in the rate-book without including property which he does not occupy, the rate will be bad and ought not to be enforced."

58. I accept the submission of Counsel for Atos that this prefigures the modern position under LGFA 1988, as explained in Ford and Maxon with reference to Verrall (in which, Headlam was also cited to the Court of Appeal). I note in particular that on the facts of Headlam itself, it was held that "the property actually occupied by the persons rated fulfils the description appearing upon the rate-book" (p98). That is, the "general description" of "office and land with rails".

59. Headlam was applied in a different context in Camden LBC v Herwald [1978] 1 QB 626. Substantial reliance has been placed by the Council on the judgment of Robert Goff in the Divisional Court in that case. Mr Herwald was in occupation of parts of a

hereditament included in the list. It is important to note that there was no finding of fact that any other party was also in occupation (639F), and it appears likely that the other parts of the property were in fact empty or 'void' (p643D). Unlike the Court of Appeal in the later case of Verrall, therefore, the court in Herwald did not have to and did not consider the question of 'exclusive' occupation at all.

60. In that context, the Court of Appeal in Herwald endorsed the summary of the law based on Headlam set out by Robert Goff J in the Divisional Court below:

> "The position is therefore as follows. If the person rated is in occupation of premises which fulfil the description in the valuation list, that is sufficient for the issue of a warrant: but if the description in the valuation list cannot be satisfied without including property which the person rated does not occupy, the rate cannot be enforced against him and a distress warrant should not be issued."

(I note this general statement was also endorsed in the later case of Hailbury Investments Ltd v Westminster CC [1986] 1 WLR 1232 (HL) at p1244-5, per Lord Bridge).

61. The Court of Appeal in Herwald stressed therefore that "each case must depend on its own facts and on the construction of the particular entry in the list" (p643D); and on the facts of that case it found liability was not established because the portion in occupation did not fulfil the description in the valuation list.

62. Having considered the case law cited to me, I consider that the summary of the legal position set out in *Ryde on Rating* at [B243] is accurate in encapsulating the relevant principle. That text is in the essentially the same terms as that cited with apparent approval in Verrall and is as follows:

> "The occupation of land can be joint, and it is important to distinguish the case of a building in the hands of joint occupiers from that of a building of which the parts are let separately to several persons, each of whom is the occupier of the part let to him, and of that part only… If the whole building is entered in the rating list as one rateable hereditament, no one tenant is liable for the rate on the whole, because he is not the occupier of the whole, nor can he be compelled to pay the rate on the part which he occupies, because there is nothing in the rate, or in the rating list on which it is based, to show what is the value of that part."

63. For completeness, I should record that in my judgment, the Judge was right (Judgment, paragraphs 32-34) to describe Headlam and Herwald as cases principally concerned with a more basic question as to whether the descriptions in the rate books in issue were generic and sufficient (Headlam) or specific and precise (Herwald).

64. This concludes my review of the case law to which particular reference was made. I however need to complete my summary of certain other aspects of the current statutory regime which are relevant to additional grounds of appeal concerning remedies and jurisdiction in respect of claimed overpayments.

65. LGFA s62 and schedule 9 provide for administration of the tax by the making of regulations, namely the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 ("the 1989 C&E Regulations").

66. The broad scheme of these regulations is as follows:

    i) Part II (reg 3-9) governs 'billing'; Part III (reg 10-23) governs 'enforcement';

    ii) The "amount payable" is defined for the purposes of Part II as follows:

        "the amount payable" for a chargeable financial year or part of a chargeable financial year in relation to a ratepayer, a billing authority and a hereditament means – (a) the amount the ratepayer is liable to pay to the authority as regards the hereditament in respect of the year or part under—(i) section 43 or 45 of [LGFA]";

    iii) The billing authority (here, the Appellant Council) is required to serve a "demand notice" on every ratepayer for every chargeable year: reg 4(1). This crystallises the ratepayer's liability into an obligation to pay the rates demanded: reg 7(6);

    iv) Where rates have been demanded and not paid then the billing authority may have recourse to the remedies in Part III, most often by making an application to a magistrates' court for a liability order (reg 12) followed if necessary by committal (reg 16-17) or insolvency (reg 18) proceedings;

    v) In such proceedings under Part III, it is not possible to raise "[a]ny matter which could be subject of an appeal under regulations under section 55 of [LGFA 1988]" (reg 23(1)). S55 of LGFA 1988 provides for challenges to the contents of the list. Accordingly, it is not possible to question the contents of the list in proceedings concerned with liability for rates;

    vi) Where a billing authority has demanded the wrong amount (which may be either too much or too little) there is a procedure in reg 9 for making adjustment. In the case of an underpayment, the billing authority may serve a fresh demand notice to recover the extra: reg 9(2)-(3). In the case of an overpayment, the ratepayer has an entitlement to a refund, enforceable if necessary in a court of competent jurisdiction: reg 9(4), reg 22. It was pursuant to this provision that the present proceedings were brought. It is common ground that such proceedings will be subject to the prohibition on challenging the contents of the list, as explained above.

67. Counsel for Atos referred me to the fact that there are parallels with the legislative scheme for administration of the council tax, but also important differences. Most significantly for present purposes, it was submitted that a taxpayer can appeal to a

valuation tribunal if he is aggrieved by a decision that he is liable to pay council tax: Local Government Finance Act 1992, s16. These matters cannot be raised in proceedings relating to the enforcement of liability to council tax or claims for repayment of council tax: Council Tax (Administration and Enforcement) Regulations 1992, reg 57(1). As such, a taxpayer who considers that he has made an overpayment of council tax must first attempt to convince the billing authority that he is not liable or, failing that, may appeal to a valuation tribunal which has exclusive jurisdiction. Civil proceedings may then be brought, if necessary, to enforce any repayment consequent on the tribunal's decision: see Lone v LB Hounslow [2019] EWCA Civ 2206 at [25], [43]-[45].

68. In the context of non-domestic rates, the Valuation Tribunal has no jurisdiction to consider questions of liability, and it was argued before me that there is consequently no prohibition on the court considering this issue for itself in a claim (such as the present) for a refund of an overpayment.

IV. Conclusion on the main issue

69. Although I will address each of the four grounds of appeal in detail below, in my judgment one can dispose of the main issue in the appeal (and the appeal itself) in a relatively straightforward manner.

70. The main issue between the parties is as to whether Atos was liable to pay the Disputed Sum by way of rates in respect of the Main Hereditament. That in turn depends on whether the requirements of s43(1) LGFA were satisfied, namely "(a) on the day the ratepayer is in occupation of all or part of the hereditament, and (b) the hereditament is shown for the day in a local non-domestic rating list in force for the year."

71. As to (b), the Main Hereditament was included in the list. It was included in terms which meant that it included areas in fact let to persons other than the Atos.

72. As to (a), Atos had a physical presence within the Main Hereditament during the Relevant Period. However, that is not sufficient to constitute "occupation" for the purpose of s43(1)(a) read together with s65(2) of LGFA.

73. It will be clear from what I have said above that such occupation of the unit had to be exclusive. It is common ground that Atos was not during the Relevant Period in exclusive occupation of the unit, the Main Hereditament, because parts of it were let to, and occupied by, third parties. Therefore, in my judgment, Atos was not in rateable occupation of the Main Hereditament at all.

74. That in my view is the start and the end of the case. It follows that Atos has overpaid rates to the Appellant Council in the amount of the Disputed Sum.

75. I now turn to the detailed arguments on each of the grounds which were forcefully and attractively developed by Counsel for the Appellant Council.

V. Ground 1

76. The Appellant Council argues that the first error of the Judge was that he read into the relevant statutory scheme a requirement that the occupier be the sole occupier of the hereditament shown in the list. It was submitted that the Judge misunderstood and misapplied the Headlam principle. In this regard, it was said that this error is clear from: (1) the mischaracterisation of Headlam at paragraph 17 of the Judgment where the Judge said "if the rate-payer occupies part of an hereditament but not another part of the hereditament the obligation to pay the rate does not arise"; and (2) the Judgment at paragraph 31 where the Judge said that "[t]he decided cases all suggest that occupation of part of the hereditament is not occupation of the hereditament and so not sufficient to give rise to a liability". It is said this is plainly inconsistent with Headlam.

77. It will be clear from what I have already said that I must reject these submissions. In my view, the Judge correctly construed s43(1) together with s65(2) as requiring rateable occupation as defined in the decided cases. As explained in **Section III** above, this includes a requirement that occupation, to be rateable, must be exclusive.

78. In short, the requirement that occupation be exclusive cannot be met where parts of the hereditament are let and occupied by a third party and Verrall is binding Court of Appeal authority for the proposition that it is necessary to find *one* occupier or a number of *joint* occupiers of the relevant hereditament before rateable occupation can arise. Ford and Maxon System are authority for the proposition that this remains the case under LGFA 1988.

79. It is clear to me that these were the general principles to which the Judge was making reference in the parts of the Judgment which are criticised in Ground 1 as I have summarised it above. The Judge identified that the principles of exclusive occupation explained in Verrall and the cases following it are entirely consistent with the reasoning and decision in Headlam (which I note is unsurprising given that Headlam was referred to by the Court of Appeal in Verrall). Herwald is not in point as it did not engage with the requirement of exclusive occupation, but even so it is consistent with the other cases.

80. In this regard I agree with Counsel for Atos in his powerful and convincing submissions that the result is the same even if those later cases are ignored, and the so-called "Headlam principle", as articulated by the Appellant Council is applied.

81. That principle is a form of construction or textual argument where one asks whether the person said to be liable was in occupation of premises which "fulfilled the description in the list". The Main Hereditament was described in the list as "Serco House, Ballam Road, Lytham St Anne's".

82. Applying the Headlam principle which the Council argues governs this appeal, Atos does not occupy the whole of Serco House, even when the breadth of the term 'Serco House' is read down so as to exclude those areas with their own separate entries in the list (as I have identified in **Section II** above, paragraph [15]).

83. As it was put in Headlam (p98), it is "impossible to satisfy the description in the rate-book without including property which he does not occupy" and so no liability to rates can arise. The Judge was right when he said (Judgment, paragraph 42) that in identifying the hereditament (Serco House) it is necessary to include land *not* occupied by Atos.

84. Further, I would add that the Appellant Council's submissions as I understood them would mean that Headlam had silently abrogated the requirement for exclusive occupation and that Verrall, Ford and Maxon System were all wrongly decided. Indeed, the Appellant Council appears to recognise this (in part at least) as it submitted in its skeleton and orally that Ford was decided *per incuriam*. It makes, and can make, no such argument in respect of Verrall, seeking instead to distinguish as being "a case about whether there was occupation at all". The present appeal is however concerned with exactly that issue.

85. The Appellant Council submitted that there is something "bizarre" about the requirement for exclusive occupation. It is correct, as the Appellant Council says, that the rates cannot be collected where there is no exclusive occupier. But in this situation the remedy for the taxing authorities is obvious: to alter the list so that it is correct.

86. I agree with Counsel for Atos that there is no onus on the taxpayer, statutory or otherwise, to maintain the list for them.

VI. Ground 2

87. The Appellant Council argues that the Judge "failed to appreciate that the County Court lacked jurisdiction" to order the re-payment alleged to be due. Reliance is placed on the fact that challenges by a ratepayer to the state of the list are to be made under section 55 of the 1998 Act, which, if successful, result in an alteration to the list. It is said that this is effectively what Atos' challenge was as a matter of substance. Accordingly, the Council submits that the County Court did not have jurisdiction to order the re-payment alleged to be due.

88. I reject this ground because it mischaracterises Atos' case. Its case in fact *relies* on the current state of the list. With the list in its current state, Atos has no liability whatsoever, as it was not in exclusive, and therefore rateable, occupation of the Main Hereditament during the Relevant Period.

89. Were the list to be corrected so that the Main Hereditament was modified to show only areas in Atos' occupation, it would have a liability to rates, albeit in a smaller amount than the Disputed Sum. Hence, the present proceedings (seeking a refund of the Disputed Sum in its entirety) are advanced on the basis that the list is *not* altered.

90. An alleged ratepayer may contend that he is not in occupation of a hereditament without advancing any challenge to the contents of the list.

VII. Ground 3

91. The Appellant Council argues that the Judge incorrectly characterised and assessed the powers and duties of the billing authorities. It is said that the Council, as a billing authority, is obliged to levy rates, where the conditions of s43(1) of LGFA are fulfilled: (1) the rate payer is in occupation of all or part of the hereditament; and (2) the hereditament in occupation is shown for the day in the current and in-force rating list. The complaint is made that the Judge found that the Council's obligation to levy rates

was different, namely it was "if the rate is due the rating authority is under an obligation to collect it". This analysis, it is argued, bypasses the Council's statutory obligation under section 43(1). Accordingly, it is said that in failing to have due regard to the statutory framework, the Judge erred in law.

92. There is no substance in this ground. On the state of the list as it now is, Atos was not liable for rates under s43 in respect of the Main Hereditament for the Relevant Period. At the risk of repetition, that is because it was not in exclusive, and therefore rateable, occupation of that hereditament.

93. In those circumstances, the Appellant Council was under no duty to collect the rates from Atos. The Judge correctly identified that the Appellant Council's duty to collect rates only arises when someone is in fact liable to pay those rates.

VIII. Ground 4

94. Under this final ground, the Appellant Council argues that the C&E Regulations 1989 cannot be relied upon as a source of a power to order repayment.

95. It says that Regulation 9(4) simply provides that if there has been an overpayment in any particular year that overpayment shall be "repaid if the ratepayer so requires"; and that this section does not found any jurisdiction to go behind the list nor oust or supplement the s55 appeal route to the Valuation Officer. Rather, argues the Council, it refers to the account between the local authority and the ratepayer outside of that wider question. It is said that this is reflected in the heading of section 9 – "Demand Notices: final adjustment." It says that Regulation 9(4) simply provides a local authority with the power to make a repayment of an overpayment, if necessary, pursuant to that account. It does not provide a wider jurisdiction to challenge liability to rates.

96. I agree with Atos that this ground appears to be yet another formulation of ground 2 in that it is premised on the idea that the present proceedings are a challenge to the state of the list. If they were such a challenge, then it is correct that they could not be brought by way of reg 9(4) and 22 of the 1989 Regulations. As they are not, they can be brought by that route.

97. Atos' construction of the regulations, adopted by the Judge (Judgment, paragraph 9), is that the 1989 C&E Regulations provide an entitlement to a refund of rates where there has been an overpayment. I consider the Judge was correct. Whether there is an "absolute entitlement" to a refund (as argued by Counsel for Atos) depends on whether the Council's defences (still to be tried) succeed (see below).

98. I would add that in contrast to the situation in council tax cases, no other tribunal has jurisdiction to consider whether Atos was in fact liable to pay the Disputed Sum or not, and the issue is therefore entirely within the court's jurisdiction, as the Judge correctly found. It would be an odd and striking situation that no judicial body is to have jurisdiction.

99. Before leaving this issue, I should refer to the fact that I sent a note to the parties in advance of the oral hearing of the appeal drawing their attention to certain cases and

raising the following question: whether (if there has in fact been overpayment) Atos has a right at common law to restitution based on the Woolwich principle, as recently summarised and applied in Vodafone Ltd v Ofcom [2020] EWCA Civ 183 (see the judgment of Sir Geoffrey Vos, Chancellor, paragraphs 48-58).

100. Although this issue had not been considered before (and was accordingly not addressed by the Judge), the parties are now in fact agreed that Atos would have such a right at common law (it requires only a minor amendment to the prayer in the Particulars of Claim, to which rightly no objection is made). On Atos' construction of the legislation, however, it is unnecessary to rely on that right. I have accepted that construction but it is common ground that at the next stage of the proceedings Atos will also be able to advance its case (if it so desires) on the basis of Woolwich Equitable Building Society v IRC [1993] AC 70. This is a classic case where the Woolwich principle would apply to the Disputed Sum.

101. The Circuit Judge will consider in due course whether the Council can resist payment of the Disputed Sum if claimed under statute and/or at common law under principles governing restitution of unjust enrichment.

102. That will also be the forum for any arguments as to the application of Vodafone Ltd v Ofcom [2020] EWCA Civ 183 (at paragraph 105, in particular) and the conclusions of the Court of Appeal on the facts of that case that the Woolwich principle cannot be disapplied or read down by reference to counterfactual scenarios. Atos has stated that it will seek to argue that there is no scope for the Council here to contend that the principle should be disapplied, or limited, on the basis that some other amount of tax could have been collected from the Atos if the Valuation Officer had amended the list (at Atos' instigation or otherwise) so as to show a hereditament of which the Atos was the rateable occupier.

103. There is force in Atos' submission that allowing the Council to make such arguments takes one into the forbidden realm of the counterfactual, but it will ultimately be a matter for the Circuit Judge to determine that matter.

IX. Disposal

104. For the reasons given above, the appeal is dismissed.