`UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 187 (LC)
LT Case Number: RA/4/2006
RA/7/2006

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – valuation – National Sports Centre – contractor's test – stage 5 allowance – improvement of facilities with £10m lottery grant – whether deduction to be made for grant – held no allowance to be made – site liable to flood – allowance for this – VO's appeal allowed in substantial part – ratepayer's cross-appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE BERKSHIRE VALUATION TRIBUNAL

BETWEEN **PAUL STUART ALLEN** **Appellant**
(Valuation Officer)

and

ENGLISH SPORTS COUNCIL/ **Respondent**
SPORTS COUNCIL TRUST COMPANY

Re: National Sports Centre Bisham Abbey,
Bisham Village,
Bisham, Marlow,
Buckinghamshire SL7 1RT

Before: The President and Mr A J Trott FRICS

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 15, 16 and 17 June 2009

Timothy Morshead, instructed by HM Revenue & Customs Solicitor's Office, for the appellant
Melanie McIntosh, instructed by Wilks Head & Eve LLP, chartered surveyors, for the respondent

The following cases are referred to in this decision:

Assessment Committee v Roberts [1922] AC 93
Orange PCS Ltd v Bradford (VO) [2004] RA 61
Metropolitan Water Board v Chertsey Union Assessment Committee [1916] 1 AC
Lavery (VO) v Leeds City Council [2002] RA 165
Willacre Ltd v Bond (VO) [1987] RA 199
Monsanto Plc v Farris (VO) [1998] RA 107
Leicester City Council v Nuffield Nursing Homes Trust [1979] RA 299
Cardiff Corporation v Williams (Valuation Officer) [1973] RA 46
Imperial College of Science and Technology v Ebdon (VO) [1986] RA 233
Hoare (VO) v National Trust [1998] RA 391
Dawkins (VO) v Royal Leamington Spa Corpn (1961) 8 RRC 241
Scottish Exhibition Centre Ltd v Strathclyde Region Assessor [1994] RA 209
Distillers Company (Bottling Services) Ltd v Fife Assessor [1983] RA 228

The following cases were also referred to in argument:

Ratford v Northavon District Council [1987] 1 QB 357
Robinson Brothers (Brewers) Limited v Assessment Committee for the No7 or Houghton and Chester-Le-Street area of the County of Durham [1937] 2 KB 445
Solihull Corpn v Gas Council [1961] 1 All ER 542
London County Council v Erith Parish (Churchwardens) and Dartford Union Assessment [1893] AC 562
Plymouth City Council v Hoare (VO) [1995] RA 69
Eastbourne Borough Council and Wealden District Council v Allen (VO) [2001] RA 273
Imperial Chemical Industries plc v Central Region Assessor [1989] RA 333
Railway Assessment Authority v Southern Rly Co Ltd [1936] AC 266
R v London School Board (1886) 17 QBD 738
Westminster City Council v Southern Rly Co Ltd [1936] AC 511
East Midlands Airport Joint Committee v Coppin (1971) 17 RRC 31
IRC v Gray [1994] STC 360
Co-operative Wholesale Society Ltd v National Westminster Bank plc [1995] 1 EGLR 97
Williams (VO) v Scottish & Newcastle Retail Ltd [2001] RA 41
Chiltern-Merryweather v Hunt [2008] RA 357

DECISION

Introduction

1. These appeals (by the valuation officer and the ratepayer respectively) concern the valuation for rating purposes of a hereditament known as the National Sports Centre at Bisham Abbey in Buckinghamshire. It is one of six national sports centres, the purpose of which is to provide facilities for elite athletes. Provision is also made for the use of the facilities by the wider community. It is common ground that the assessment should be on the contractor's basis. Prior to the works that have given rise to the present appeal the rateable value of the hereditament in the 2000 rating list was £360,000. The devaluation of this figure on the contractor's basis is now agreed.

2. In January 2004 works to build a new sports centre, replacing a smaller building, which was demolished, were completed. A new physiotherapy unit had been completed during 2003. Replacement tennis courts were built and other external works were carried out. The cost of the works was £10,222,416, and of this amount all but £622,716 (93.9%) was provided from an award of grant from lottery funds. On 4 June 2004 the valuation officer altered the list with effect from 1 April 2004 to £501,500 to reflect the increased value given to the hereditament by the works. The adjusted cost of the works as at the antecedent valuation date, and allowing for non-rateable items, is now agreed at £3,333,724 plus professional fees. Apart from any deduction to be made at stage 5 of the valuation it is agreed that the rateable value after stages 1 to 4 on the contractor's basis is £480,000.

3. The VO contends that no deduction at stage 5 is appropriate and that the assessment should therefore be £480,000. The ratepayer's contention is that adjustments need to be made to reflect the extent to which the new works were grant-funded and also the risk of flooding from the river Thames, which borders the site. Their valuer, Mr Roger Messenger, deducts 93.9% of the agreed adjusted cost of the works from the amount to be decapitalised at 5.5% to reflect the grant-funding, with a further deduction of £48,000 (10% of the agreed value at the end of stage 4) for the flood risk. This produces a value of £242,650 (some £117,350 less, therefore, than the rateable value of the hereditament before the works were carried out). The Berkshire Valuation Tribunal determined a rateable value of £410,000, and it is against this decision that both parties appeal.

The facts

4. There is an agreed statement of facts, the substance of which we will set out.

5. The relevant sport bodies to which reference is made are the English Sports Council (ESC), which has the brand name Sport England (SE); the Great Britain Sports Council (GBSC); the United Kingdom Sports Council (UKSC); Leisure Connections plc; and The Sports Council Trust Company Limited (SCTC). The ESC was established by Royal Charter on 19 September 1996 as one of two successor bodies to the GBSC (the other successor body being the UKSC). The GBSC was named under the provisions of the National Lottery Act

1993 as the Distributing Body for the lottery funds allocated for expenditure on or in connection with sport in England. That duty was transferred to the ESC upon its creation in October 1996 as the successor body to the GBSC as the lottery distributor for sport in England. The vast majority of ESC lottery funding is to local authorities and community sports organisations for the purpose of developing community sports. In addition ESC operates five National Sports Centres (including Bisham). These are currently managed by Leisure Connections plc as appointed contractors.

6. The ESC is principally funded by exchequer grant-in-aid paid by the Department for Culture and Media and Sport, under Funding Agreements. The land and buildings operating leases relating to the ESC are held in the name of the SCTC, but are paid for by the ESC. The annual commitments under these leases are therefore treated as those of the ESC.

7. The SCTC is a wholly owned subsidiary of the ESC and was incorporated on 27 June 1990 as a company limited by guarantee. The guarantor is the ESC. The ESC makes all nominations to the board for the appointment of chairman, directors and company secretary. The chairman of SCTC is appointed by the ESC. The chairman has authority for operational matters including finance. Currently the chairman has delegated these to the financial accountant of the ESC. The service level agreement between the ESC and the SCTC, which is renewed annually, sets out the arrangements between the two organisations. The SCTC is a registered charity. It employs no staff.

8. The main activity of the SCTC is the acquisition and maintenance of tangible fixed assets and facilities for physical recreation operated by SE, as SCTC's agent, for use by the public. It holds the freehold of SE's National Centres, including the appeal hereditament, other than Holme Pierrepont (of which it holds a lease) and Crystal Palace, and the freehold of the ESC's South Western Regional Office. The SCTC also makes grants to other bodies which are involved in sport and recreation.

9. The SCTC is funded by the ESC through transfer of capital assets in the form of property and equipment and through reimbursement of costs incurred through its property holdings. These transfers and reimbursements supplement SCTC's direct income from its investments and sales of fixed assets. Grants from the lottery sports fund are shown as income in SCTC's statement of financial activities during the year in which they are received. This income is treated as part of the company's restricted reserves. In the case of lottery grants received, they form part of the company's ESC lottery sports fund, and are depreciated over the life of the assets created by expenditure of the grant income.

10. The English Institute of Sports (EIS) was incorporated on 18 April 2002 with the ESC as the sole member, replacing, in England, the UK Sports Institute. On 1 April 2006 the EIS was transferred from the ESC to UK Sport as part of the Government's change in sports policy, whereby the UKSC assumed responsibility for the development of sport for elite athletes – across the UK. It runs a nationwide network of world class support services, designed to foster the talents of our elite athletes. Almost 2,000 competitors are currently in the EIS system. The EIS does not have one central base – support is delivered to Lottery funded athletes from a range of sports, through an evolving regional network of multi-sport hubsites and satellite

support centres. Each of the nine regions has a Regional Manager and a multi-disciplinary team of expertise. The EIS is not responsible for the building, funding, or management of facilities. It is based at key sites and locations throughout the country to reflect demand from sports and athletes. It does not 'run' any sports and works in partnerships with the National Governing Bodies of sport to provide sports medicine, sports science and performance lifestyle support to athletes. The EIS is not responsible for grass-roots funding of development programmes.

11. At Bisham the EIS uses facilities within parts of the new sports centre and the new physiotherapy centre, under an agreement between the SE and the EIS. This use is within the hours of 6.30 am and 10 pm from Monday to Sunday. The range of services supplied by the EIS spans sports science and sports medicine. Support includes applied physiology, biomechanics, medical consultation, medical screening, nutritional advice, performance analysis, psychology, podiatry, strength and conditioning coaching, sports massage and sports vision. The Performance Lifestyle programme provides supplementary career and education advice.

12. The EIS was, until 2006, funded by the Sport England Lottery Fund. In the first 3 years after the EIS was established, the ESC invested £22.5 million of revenue funding, through the Sport England Lottery Fund, into EIS. In addition though the Sport England Lottery Fund, ESC invested £120M of lottery funds into the development of capital facilities to support the training programme of elite athletes. This elite use is integrated with community use at each location to ensure there is a critical mass of sports use and to provide value for money from Lottery investment. This was the capital grant aid programme which financed the Bisham Abbey developments.

13. Funds received from the National Lottery operator are entered in a central maintained Fund, the National Lottery Distribution Fund, which is managed by the National Debt Commissioners on behalf of the Distributing Bodies. A fixed percentage of receipts entered in this Fund is allocated to sport in England, to be awarded by the ESC. That percentage was 13.89% from October 1997 until 1 July 1999 (except for the period 15 February 1999 to 16 May 1999 when it was reduced to 4.17%). From 1 July 1999 the percentage was reduced to 12.82%. On a monthly basis, funds are withdrawn from the National Lottery Distribution fund into the bank account of the Sport England Lottery Fund in order to meet payments falling due to suppliers and award recipients. In compliance with the 1993 Lottery Act, the Sport England Lottery Fund releases funds to award recipients retrospectively on receipt of suitable supporting documents to justify the expenses incurred.

14. The hereditament is situated within the village of Bisham, some 4 miles from the M4 (junction 8/9) and 5 miles from the M40 (Exit 4). The site has substantial frontage to the River Thames. The total site area is approximately 16.19 hectares. It lies within the Green Belt and also within a conservation area and Area of Great Landscape Value. The Abbey Buildings are a combination of structures dating from the 13 century with major extensions being added mainly during the 14th and 16th centuries. Further minor additions and alterations have been carried out in recent years to provide residential accommodation with associated facilities and conference amenities. The buildings are irregular in shape but the different construction periods are clearly evident when viewed externally. The buildings are generally brick with some areas of random and decorative stonework. Roofs are generally pitched with clay tile

covering. The complex provides conference facilities, seminar rooms, dining rooms, kitchens, common rooms and residential accommodation for 29 people. The complex is listed as a building of Special Architectural and Historic Interest as Grade I.

15. The new sport centre was opened in January 2004. It comprises at ground floor level, a judo hall, weightlifting gym, offices and changing rooms. On the first floor there is a fitness studio, two squash courts, social area/cafeteria and offices. The building abuts and inter-communicates with a tennis hall built in 1982 as a lofty purpose-built structure with car park underneath. To facilitate the building of this new sports centre an earlier sports hall/workshop completed in 1977 and extended in 1993 was demolished. The demolished buildings were of brick construction with flat roofs, as is the retained tennis hall. The new sports centre is of more modern construction, being timber clad.

16. The Hostel Blocks comprise a series of single and two storey-linked blocks constructed of brick with flat roofs and were constructed in 1977. The Stable Block comprises brick and stone external walls, with shiplap covered former windows to first floor level. The roof is pitched timber construction with clay tile covering. The building has a feature clock tower. The Maintenance Workshop is built on a concrete portal frame with painted block work in fill panels. The roof is pitched corrugated asbestos sheeting. The Boathouse single storey building fronting the river. Blockwork walls under a pitched asbestos roof.

17. The New Physiotherapy Unit is a new building of modern design built at the same time as the new sports centre but completed in 2003. It is situated near to the hockey pitch. The accommodation comprises treatment hall, offices and other associated treatment rooms. A privately operated sports clinic, the Abbey Clinic, operates from premises abutting this building. Since it is separately occupied, however, that clinic does not form part of this hereditament.

18. The outside facilities consist of three grass football pitches (originally four pitches, but one was converted to a car park when new leisure centre was built); a new water based Olympic sized pitch hockey pitch, replacing two sand based pitches, with two "D" practice pitches using the original surface; tennis courts (four new hard courts and three new clay courts replacing seven hard courts and three clay courts) and a 9-hole par 3 golf course.

19. The site is shown within the delineated area on the Environment Agency Flood Plan as being susceptible to flooding. There was an incident of flooding in 2006 and photographic evidence of two flooding occasions so far in 2008. The Environment Agency categorises probabilities of flooding as significant (1 in 75 or less) moderate (1 in 76-199) and low (1 in 200+). The Abbey and Golf Course are in the "significant" zone, the hostel in "moderate" and the site of the physiotherapy building and tennis centre in "low". The site of the new sports centre is also in the "significant" zone. This building has been raised well above ground level. The Environment Agency adds a proviso: "Flood mapping is a complex, detailed and extensive process which can never be completely accurate, but will always provide the best currently available information using national consistent data. The Flood Map gives a good indication of the areas at risk of flooding in England and Wales. However, it cannot provide details on individual properties."

20. In 2003, Grant funding of £9,599,700 was offered to the Sports Council Trust Company (SCTC) by the English Sports Council from its EIS Capital World Class Fund in its capacity as the distributor of Lottery funds to sport. The application for this grant by the Sports Council Trust Company was made on 25 April 2002. The funding applied for consisted of the majority of the cost of the project as then forecast, £9,948,500.

21. On 12 August 2002 Sport England completed an option appraisal of the project, which was submitted to the Department for Culture Media and Sport seeking approval for making the grant, and on 3 September 2002 the Chief Executive of Sport England Wrote to the National Lottery Distribution and Communities Division of the Department for Culture, Media and Sport asking the Secretary of State not to make an order under section 27 of the National Lottery Act 1993 prohibiting the payment of lottery monies to the SCTC. The Department, who undertook its own independent review of the application received from Sport England, wrote to Sport England on 29 October 2002. The Secretary of State took the view that (subject to any material change in the project) she should not make such an order, and approval for the grant was given.

22. The criteria which were considered by the English Sports Council in determining its response to the application for grant aid were: strategic context (the extent to which the application fits within the strategy set down in a document entitled "Investing for Our Sporting Future"); funding need (the extent to which grant is needed in order to provide the facilities, including the adequacy of partnership funding); value for money (in terms both of cost and the sporting outcome); fitness for purpose (in terms of planning, design and use); and sports policy context post 1999.

23. The percentage of total cost of that part of the hereditament for which the value is disputed which was met by grant was 93.88%. Grant also covered £40,000 of irrecoverable VAT. The balance of the cost not provided by grant (£622,716) was met by the sale of operational inventories to Leisure Connections plc, as part of its contract with the English Sports Council, the proceeds of which were gifted to the SCTC.

24. At the material date (1 April 2004) the appeal hereditament was operated as one of SE's National Sports Centres. It had been entered in the 2000 rating list at RV £540,000 with effect from 1 April 2000 with the description "Sports Centre and |Premises". The assessment was reduced by agreement between the appellant and Wilks Head & Eve as agents for the Sports Council Trust Company to RV £360,000. The agreed valuation is set out in Appendix 1.

25. To reflect the physical alterations to the hereditament effected by the works carried out in 2003 and 2004, the VO increased the assessment by notice dated 25 August 2004 to £501,500 RV with effect from 1 April 2004. On 20 September 2004 and 3 December 2004 proposals were made by Wilks Head & Eve as agents for SE as the named occupier of the appeal hereditament to reduce the assessment to £1 from 1 April 2004. The ground on which the first proposal was made was that: "The proposed assessment is incorrect and excessive." The second proposal was made on the ground that: "Part of the construction cost was provided through third party grant funding. This element should be reflected in the assessment." On 29 March 2005 Wilks Head & Eve made a third proposal to reduce the assessment to £1 from 1

April 2004 on behalf of the Sport England Trust Company as named occupier on the grounds that "The present assessment is incorrect excessive and bad in law. The extension was constructed using third party grant monies and that element should be reflected in a substantial reduction in the assessment." The resultant appeals from the proposals were heard together by the Berkshire Valuation Tribunal. In a decision dated 21 December 2005 the VT reduced the assessment to £410,000 RV.

26. It is agreed that the actual costs incurred required adjustment (sc at stage 1 of the valuation) to make allowance for non-rateable elements, elevation enhancements and additional site costs. The additional costs are for raising floor slabs, piling and flood compensation works. These and the elevation enhancements are design elements that do not contribute additional value but which are dictated either by the need for the appearance of the building to satisfy planning requirements or by the nature of the site. In addition the costs have to be converted to AVD (1 April 1998) levels. After making these adjustments, it is agreed that the total costs for the purpose of valuation is £3,333,773.

The issues

27. The parties identified the following as the issues in the appeals:

(a) Whether the occupier of the hereditament is the English Sports Council, as the VO contends, or the Sports Council Trust Company, as the respondent contends. The basis of the disagreement is as to which of these bodies exercises paramount control over the hereditament. The issue as to which is the occupier potentially affects the answer to the next issue.

(b) Whether or not an adjustment should be made at stage 5 of the valuation to reflect the fact that the works were grant funded; and, if so, what the size of that adjustment should be.

(c) Whether or not a deduction should be made at stage 5 to reflect any flood risk affecting the hereditament; and, if so, what the size of that deduction should be.

In the event we have concluded that the answer to issue (b) is not affected by the answer to (a). Although, therefore, we have set out the facts relating to the ESC and the SCTC, we have not thought it necessary to explore the question of occupation.

The VT decision

28. In its decision the VT, having recorded the parties' agreement that the hereditament fell to be valued on the contractor's basis, went on:

> "However, the contractor's test should not be seen as the method of valuing the property, it is only a way of giving an indication as to the rent the market would bear for the property. At its most simplistic, the hypothetical tenant is unlikely to pay in yearly rent, more than the annual cost of financing the building of an 'alternative' hereditament. We are convinced that the presence of grant aid can distort a value

arrived at by the contractor's test method. Again putting it somewhat simplistically, an hereditament could be built, because of the availability of grant aid, to a level, standard or size, or offering facilities of which there is little or no demand and that if valued just by 'Contractor's test' would result in a value more than the market could or would bear. In those circumstances the valuer when taking the final step of valuation, that is the 'step back and look', should conclude that the resultant assessment is too high and make an allowance to reflect the presence of grant aid. This appears to be a proposition accepted in some of the decisions referred to us, and also from the evidence given of extracts from the Valuation Officer's own website, finds some acceptance at the valuation office."

29. The VT went on to say that it did not accept that there could be any simple formulaic approach to the treatment of grant aid. It said that it did not accept that the risk of flooding would have other than a minor impact on the value of the golf course and was not sufficient to impact on the total investment. Its conclusion was expressed as follows:

> "We looked at various approaches to the valuation of the hereditament all of which could only be subjective. We formed an opinion as to a 'spot figure' that we believed the market would bear as an increased rent for the altered and improved hereditament. We looked at one allowance for a percentage of all of the grant aid applied overall. We looked at allowing the majority of the grant aid for the sports injury centre because of the nature of the hereditament and much less of the grant aid for the sports hall, again because of the nature of the hereditament and the fact that part of the cost was replacing the existing sports hall. All these approaches led us to values of a similar order. As such we have decided to adopt the spot figure; we are of the opinion that a rateable value of £410,000 would fairly and reasonably reflect the value of the hereditament. This is lower than that that would be supported by a contractor's test valuation to tone. The reason for this is in our opinion that the hereditament formed by the alterations and improvements to Bisham Abbey, the majority of which was funded by grant aid, has resulted in a hereditament whose value to tone could not be supported in the open market and, were it not for the grant aid, the hereditament would not have been altered in the way that it was."

The case for the VO

30. Laurence Michael Hatchwell MRICS, IRRV gave expert evidence on behalf of the Valuation Officer. Mr Hatchwell has worked for the Valuation Office of the Inland Revenue and latterly the Valuation Office Agency for over 33 years. Since 1990 he has specialised in rating valuation, particularly in classes of hereditaments for which no rental evidence is available. He is currently a member of the Rating Directorate within the Chief Executive's Office, being the lead specialist in civic, educational, healthcare and other miscellaneous properties.

31. Mr Hatchwell reviewed the use and occupation of the hereditament and concluded that neither the end users nor the EIS or Leisure Connections plc exercised the necessary degree of control to be in occupation of the hereditament or any part of it. The SCTC had no employees and was not in a position to have de facto control over the use and occupation of the

hereditament. It did not do so via contractual obligations imposed on SE because such obligations (contained in an Agency Agreement) were not onerous and fell short of necessary paramount control. He could not identify any stated objects of SE that fell outside those of the SCTC and he saw no reason why SE would operate the hereditament any differently from how it would operate if SE were not obliged to comply with the Agency Agreement. Indeed SE was left to its own devices to manage the hereditament because SCTC had no practical means to supervise it. Mr Hatchwell concluded that SE, and not SCTC, was in rateable occupation of the hereditament.

32. On the relevance of grant Mr Hatchwell said that the ratepayer's approach, which made a pound for pound adjustment at stage 5 for grant received, led to a reductio ad absurdum because if grant-aid had contributed not 93.88% but 100% of the cost then the argument adopted by the ratepayer would lead to a nil valuation for the grant-aided elements. The result of the ratepayer's approach was that the rateable value of the hereditament in its improved state was £117,350 less than its value in an unimproved state, a drop of almost a third and despite expenditure on improvements that the parties agreed represented over £3.33m in terms of the rateable elements at AVD levels. He did not think that this position was remotely tenable.

33. He noted that the relevant case law determined that grants could only properly be reflected in the decapitalisation rate and as that rate had been prescribed since 1990 it was no longer possible to vary it. Consequently, if the valuation effect of grant is confined to stage 4 as the case law suggests it could not now be reflected other than in the prescribed rate.

34. Mr Hatchwell accepted that the value of the hereditament could be found by considering the cost to the hypothetical tenant of providing an alternative hereditament. But he did not accept that it could be assumed that grant would be available to the hypothetical tenant in order to construct a notional substitute. That assumption would be extraordinary in the context of the rating hypothesis which assumed that the existing hereditament was vacant and to let for its existing mode and category of use, because it would involve an assumption of readiness on the part of SE to waste scarce grant resources on duplicating a facility that already existed. Even if he was wrong about this Mr Hatchwell said that it would be absurd to conclude that a nil rateable value would be appropriate for an occupier who derived very substantial benefits from a hereditament merely because of the availability of 100% grant for the construction of an alternative. Operating profit did not determine the extent of those benefits and hereditaments that were not operated for profit had an RV that was commensurate with the net benefits for which they were occupied. The theory of the hypothetical tenant's notional alternative provided a link between cost and value but where actual expenditure by the occupier was offset by grant it did not follow that the value would be abated.

35. It was possible that without grant funding the hereditament might not exist but that did not affect the rating hypothesis. Mr Hatchwell said that grant was not a relevant factor. It did not matter how the landlord funded the hereditament; the source of such funding was irrelevant. Even if the tenant knew that the hereditament had been grant aided that did not mean that the tenant would receive any share of the benefits. Tenants in the market did not argue about the source of a landlord's funding.

36. The principle of equality in rating, by which every hereditament can be measured in relation to every other hereditament, would not be achieved if grant was deducted in full in the valuation of every grant-aided hereditament. The occupation of the hereditament was not made less beneficial by the existence of grant-aid. The benefits of occupation were the same regardless of the amount of grant and grant-aid could not determine the rateable value of the hereditament. However, that did not mean that the existence of grant aid could be ignored. Mr Hatchwell said that the significance of grant-aid in rating valuation was that it put the valuer on notice that the value of the benefits of occupation might be less than the full cost of provision since the party providing the grant might have different priorities from those of the recipient.

37. If he was right that the identity of the occupier was SE then, since it had distributed grant-aid equalling 93.88% of the cost of the improvements and had contributed the remainder from the proceeds of asset disposals, there was no reason to doubt the equation of value and cost. If he was wrong then it was necessary to see whether the motives of SCTC as occupier and those of SE as the funder of the improvements were the same. Mr Hatchwell concluded that there was no indication that any of the objects of SE fell outside those of the SCTC and that therefore any scheme of provision of facilities promoted by SE would be within the objects of SCTC. Consequently, even if SCTC were the occupier there was no reason to suppose that the value of the hereditament to it was any less than it was to SE. Furthermore there was no reason to suppose that the objectives and targets of SE as a lottery distributor clashed with its objectives as set out in its Royal Charter. Mr Hatchwell concluded that, regardless of whether SE or SCTC was in rateable occupation, the contribution which those improvements made to rateable value would be equal to their cost (subject to the agreed adjustments). Therefore no reduction was required at stage 5 of the valuation in respect of grant-aid.

38. On flooding Mr Hatchwell said that the valuation of the hereditament that had been agreed with Messrs Wilks Head and Eve with effect from 1 April 2000 did not incorporate any allowance for flooding. There was no evidence to suggest that the flood risk to the appeal property had increased since the antecedent valuation date (1 April 1998). The proper valuation approach was to have regard to the perception of the flood risk as it was at the AVD and then to consider any changes that may have resulted from changes in the matters referred to in Schedule 6, paragraph 2(7) of the Local Government Finance Act 1988. The only such change that was relevant was the construction of flood compensation works which had altered the topography of the golf course. There was no indication in the Option Appraisal for the main scheme that any disadvantages were anticipated from these works and the Fact Sheet produced by SE indicated that if it was materially affected it was improved rather than impaired. No evidence had been produced to support Mr Messenger's assertion that the car park was also prone to flooding and Mr Hatchwell said he was unaware of the location, timing and severity of the alleged incident.

39. He concluded that just as it was not appropriate to make an allowance for the period 1 April 2000 to 31 March 2004, when the RV of the hereditament was previously agreed, it was not appropriate to make such an allowance for the period from 1 April 2004 to 31 March 2005. If he was wrong in this conclusion then Mr Hatchwell said that any allowance for flooding could not be large because its incidence was only known to have affected the golf course and therefore any allowance could not exceed the value contributed by that feature. The golf course was playable on most days of the year and a stage 5 adjustment could not be expected to

reduce its value by more than 5%. Within stages 1 to 4 the golf course contributed a little over £34,400 RV and therefore any stage 5 reduction for flood risk should be restricted to, say, £1,750 RV. He considered that Mr Messenger's allowance of £48,000 RV in respect of the flood risk, which was 10% of the result for stages 1 to 4, was unreasonable given the value of the golf course within the agreed valuation.

40. Mr Hatchwell also rejected the suggestion that the appeal hereditament would command a lower rent than one which was not prone to flooding. He said that a riparian site that was not subject to flooding would have to have a very special topography or else be protected by costly embankments. Such features would be reflected in stage 1 or 3 of the valuation and it was not necessary to make a stage 5 adjustment to ensure that the value of the appeal property would be lower than that of a "high and dry" alternative, which in any case did not exist.

The case for the ratepayer

41. David Payne MRTPI gave evidence about the relationship between the ESC and the SCTC in the context of National Lottery applications and procedures for grant aid, with special reference to the appeal property. He was a Board Director at SE from 1998 to 2005. Most recently he was Director of National Programmes and Projects. Since retiring from SE he has worked as an independent consultant in sports facilities planning.

42. Roger Messenger FRICS, IRRV, MCIArb gave expert valuation evidence on behalf of the ratepayer. He has been a partner at Wilks Head & Eve since 1993 and has extensive experience of the rating valuation of leisure centres and sports centres.

43. Mr Payne explained that the objectives of SCTC and SE were broadly the same but those of SE were wider and included the distribution of Lottery funds and consultation about the future use of playing fields. SE was responsible for all sports facilities, both for elite sportsmen and sportswomen and for community use. SCTC's involvement in sport was restricted solely to five national sports centres. Since the transfer of property ownership to SCTC the national centres had been operated by ESC as agent for SCTC. In relation to the appeal property the agency agreement was dated 14 November 2000. Mr Payne said that taking into account the arrangements under the agency agreement and also the service level agreement under which ESC provided administrative and financial services to SCTC, he considered that SCTC and ESC were separate and distinct bodies with SCTC retaining independence from ESC whereby it could exercise control in relation to the use and occupation of the national centres, including the appeal property.

44. Mr Messenger said that SCTC was in rateable occupation because, whilst it had entered into an agency agreement with SE to run some elements of day to day management, it nevertheless remained as the responsible body. The agency agreement was not a sham and was adhered to both in law and in practice. SCTC retained, and exercised, a duty to ensure that the objects of the trust were being met and that SE acted to achieve this.

45. On the relevance of grant Mr Messenger's evidence was that the grant was third party capital funding by the Lottery Fund and not self-grant. It was divorced from any revenue grant by the Exchequer to SE or SCTC and should be taken into account at stage 5. He said that the mere fact that the appeal hereditament would not have been provided at all apart from the grant indicated that there was no commercial viability to its provision and that therefore the existence of grant was a factor that should be taken into account. He invoked the principle of reality which meant that the assumptions to be used should, as far as possible, replicate the actual circumstances of the hereditament and the parties. He considered that the fact that the hereditament would not have been provided but for the grant was a real life event that should be taken into account when considering the bargain to be reached between the hypothetical parties. Without the real life grant there would have been no bargain at all.

46. If the landlord received the grant Mr Messenger thought that the tenant's bargaining position would be one of unwillingness to pay the landlord any form of return knowing that the landlord had borne none of the cost. He disagreed with the argument that the landlord would not accept a lower rent just because he had acquired the property at no cost and that therefore grant would not influence rateable value. The landlord would have to take into account all the circumstances including the fact that the hypothetical tenant was of limited means and that he would have no tenant at all apart from the grant that enabled him to build. The receipt of grant by the tenant would not enable him to fund the payment of rent because the grant was very specific and was only available to fund the physical provision of the hereditament.

47. The correct starting point for any deduction from the actual (adjusted) cost at stage 5 was the actual level of grant (93.88%). Mr Messenger noted the guidance about the effect of grant that was contained in the Valuation Office Agency's Rating Manual. In that guidance the VOA gave a table of suggested stage 5 allowances for recreational (and other) hereditaments that were constructed with grant. Where the level of grant was over 90% the suggested stage 5 allowance was 45% to 50%. Mr Messenger said that the VOA's suggested stage 5 allowances were entirely arbitrary and were not based on any evidence. The actual evidence in this appeal was the percentage grant of 93.88% without which the hereditament would not have been provided.

48. The VO's argument that adopting a pound for pound allowance would lead to a reductio ad absurdum where the grant was 100% was not convincing. The hereditament could not be provided without grant because there was no landlord willing to build it knowing that there was no tenant who was sufficiently revenue funded to be able to afford the rent. Under these circumstances Mr Messenger said that one should stand back and ask what was the rental value of something that had no viability unless it was provided for free and where the tenant had no ability to pay. He thought that it was reasonable to conclude, following a stage 5 adjustment, that the rent would be either a nominal amount or nil.

49. The works for which the grant was paid were not improvements but new buildings that formed additions to the hereditament. As such they created a fundamentally different hereditament to that which existed previously and a comparison of the RVs before and after the works needed to reflect that change.

50. Mr Messenger rejected Mr Hatchwell's argument that one cannot assume that the grant would be available to the hypothetical tenant in order to build a notional substitute. Anybody could apply to the grant funding bodies to construct an equivalent facility to that at the appeal property; it did not have to be SCTC.

51. On flooding it was agreed that parts of the hereditament were liable to flood. One hole of the golf course consistently flooded at times of high rainfall and the flooding of the construction site of the new buildings had led to a £50,000 insurance claim. Part of the car park was also liable to flood. The new buildings had been raised by a metre above normal levels to allow for potential flooding and the golf course had been re-landscaped to accommodate flood waters. Insurance companies were loath to insure properties where there was a known flood risk and the increased insurance costs, or even the need to self-insure, meant that the tenant would have less money for rent, apart from the loss of operational availability. The flooding risk affected the success of the whole hereditament and was not just restricted to the golf course. Mr Messenger also introduced new evidence at the hearing, namely that there was an insurance excess of £20,000 because of the flood risk and that the floods were an annual event. He said that a hypothetical tenant would reduce his rental bid for the whole hereditament by 10% as a result of the flooding.

Conclusions

52. In its decision the VT said that a hereditament could be built, because of the availability of grant aid, to a level, standard or size of facilities for which there was little or no demand; so that a contractor's basis valuation would produce a value that was more than the market could or would bear. It was on the basis of this reasoning that it made a stage 5 reduction.

53. We do not think that this reasoning is correct. It is not clear to what particular market the VT was referring. It was not suggested that there was any hypothetical tenant other than SE or its land-owning component, SCTC, or any potential hereditament for it to occupy other than the subject hereditament. As in the case of many hereditaments valued on the contractor's basis, there is no market in the general sense. That is the reason this method of valuation is used (as indeed Mr Messenger pointed out in his evidence). The contractor's basis seeks to determine the annual value of the occupier's occupation of the hereditament by reference to the effective capital value of the buildings upon it, reaching by this means the rent that the tenant and the landlord would agree upon in the hypothetical transaction. Reference to the rent that the market (as something distinct from the occupier of this hereditament) would bear as the basis for making a stage 5 deduction appears to us erroneous. There can be no justification for reducing the value so obtained on the basis that it is more than the market could or would bear, because there is no market in the general sense.

54. Of course, if the buildings have been built to a quality or size that go beyond what the tenant would see fit to pay for, that should be reflected at stage 1 of the valuation in determining what the substitute buildings would consist of. It is agreed (see paragraph 24 above) that a deduction should be made for the additional cost of design elements that did not add value to the hereditament. But apart from this the facts are emphatically against any suggestion that the newly constructed buildings are excessive. They were built to the

requirements of SE, and the grant was awarded under statutory procedures designed to ensure that the works proposed justify the award of the grant.

55. The purpose of the rating hypothesis is to determine the value of the occupier's occupation. The classic statement of this principle is in the speech of Lord Buckmaster in *Poplar Assessment Committee v Roberts* [1922] AC 93 at 98:

> "But although the tenant is imaginary, the conditions in which his rent is determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made. This was stated by this House in *Port of London Authority v Orsett Union Assessment Committee*, and I do not think that the language which I there used needs to be modified or explained; but those words related entirely to determining the value of the occupation to the occupier, excluding, of course, any element due to his skill, industry, or other strictly personal qualifications ... It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of the assessment."

56. *Poplar v Roberts* concerned the rating of a public house, the rent of which was restricted under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. It was held by the House of Lords, Lord Carson dissenting, that the statutory restriction was not material to the determination of rateable value. The principle stated by Lord Buckmaster was set out in the judgment of Thomas LJ in *Orange PCS Ltd v Bradford (VO)* [2004] RA 61. In that case the Court of Appeal upheld a decision of this Tribunal that the statutory right of a telecommunications operator to install apparatus in the highway without payment was to be left out of account in determining the rateable value of a telecommunications mast erected in the exercise of that right. It was the value of that right to the occupier that required to be assessed, and the amount agreed as being the value of the benefit to the operator in absence of the statutory powers was therefore the value to be entered in the rating list.

57. The same principle applies, in our judgment, where an occupier receives, by way of gift or grant, a subsidy towards the cost of his occupation of his hereditament, whether as a capital sum or an annual payment. Such financial benefit does not reduce the value that occupation has for him. The irrelevance of a gift to the occupier was made clear by Lord Atkinson in his speech in a leading contractor's basis case, *Metropolitan Water Board v Chertsey Union Assessment Committee* [1916] 1 AC at 355-6:

> "Where I disagree with the contention of the appellants on this point is that your are, in ascertaining this annual cost, not to take into account the annual market value of the capital sunk in the acquisition of the hereditament, that is, the usual rate of interest at which the owner can procure that capital. Were this not so, a public body, to whom some generous benefactor made a present of money to enable them to acquire land compulsorily for some philanthropic object of which the donor approved, would presumably be unwilling to pay any rent for the enjoyment and occupation of the land, as they could acquire it, in fee, for, in effect, nothing."

58. Lord Atkinson's example was of a gift. But we can see no reason in principle why different considerations should apply where the source of the money is not a generous benefactor but a public body providing a grant under statutory powers. The ratepayers certainly were unable to suggest any distinction. In *Lavery (VO) v Leeds City Council* [2002] RA 165 the Lands Tribunal (N J Rose FRICS) rejected the contention that, in valuing a court building occupied by the council the fact that the court building had been financed with an 80% government grant was not a matter to be taken into account in a contractor's basis valuation. The Member expressed his conclusions succinctly as follows:

> "70. In my judgment, the circumstances of this case certainly do not justify fixing a rent below the level indicated by that annualised cost, for three reasons. Firstly, the appeal property is entirely fit for the [Leeds District Magistrates' Courts Committee's] purposes. Secondly, it gives full value for money in physical, functional and technical terms. Thirdly, the funding parties have been prepared to bear 100% of the actual cost of the appeal property, which demonstrates that from their perspective the full cost represents the value of the public benefit derived from its occupation and use by the MCC in fulfilment of its statutory functions."

59. In one case this Tribunal has held that a grant towards the construction of the buildings being valued should be deducted from the cost of construction in a contractor's basis valuation. That was in *Willacre Ltd v Bond (VO)* [1987] RA 199, one of the two cases principally relied on by the ratepayers. *Willacre* concerned a commercial sports centre, which had been built a short time previously with the assistance of a Sports Council grant (amounting to just over 5% of the cost of construction). The Member (J H Emlyn Jones FRICS) held that the amount of the grant should be deducted from the construction cost. He said (at 205-206):

> "In considering a valuation on the contractor's basis the first question which arises, following the adoption of the agreed cost of construction as a starting point, is the effect if any to be given to the grant of £90,000 made by the Sports Council. The valuation officer considers that this sum is irrelevant and would form no part of the hypothetical tenancy negotiations. For the ratepayer company, Mr Gibson considered that this was an actual amount received by the occupiers and must properly form part of the value judgment to be made. I have come to the conclusion that Mr Gibson is right and that the figure of £90,000 should be deducted from the agreed construction costs. The valuation for rating purposes by way of the contractor's method is a theoretical exercise which is deemed to have taken place prior to the negotiations between a hypothetical landlord and a hypothetical tenant. In this case the actual occupier has received a grant and I consider it most probable that the hypothetical tenant in his place could reasonably expect such a grant and would have it in mind when considering what rent he could afford to pay. Thus the amount of the grant is in my opinion to be taken into account in estimating the deemed actual capital cost."

60. We also note that the Tribunal in *Monsanto Plc v Farris (VO)* [1998] RA 107, in rejecting a deduction for grant on the valuation of a large chemical works, drew a distinction between cases in which the actual hereditament had been constructed with the benefit of a grant and those in which no grant had been made. At 143 the Tribunal said.

> "The conclusion I reach is that where specifically targeted grants have in fact been recently paid in respect of, for example new buildings as in *Willacre*, or in relation to

> a new industrial complex or a significant part thereof, even though targeted at employment creation or the like, an apportioned and discounted sum, relative to instalments, is properly deducted before the finalisation of ECV at stage 3, because at the conclusion of that phase of the valuation the actual cost is deemed to have been converted to capital value.
>
> Where, as in these appeals, only a valuation is being undertaken the effect, if any, upon rental value is to be judged by reference to the impact of the grant regime upon the rental values of industrial or kindred hereditaments in the local market at the material date. In the likely absence of clear evidence as to the effect of the higgling of the market between landlord and tenant, the extent is for the judgement of the valuer and the conclusion should not exceed the maximum indicated above. I think that any allowance necessary to reflect the depression of the rental market in the locality falls to be made at stage 5 when the actuarial annual value of stage 4 is converted to the rental value of the rating hypothesis."

61. In an earlier decision *Leicester City Council v Nuffield Nursing Homes Trust* [1979] RA 299 Mr Emlyn Jones had had to consider the assessment of a modern purpose-built private clinic. About three-quarters of the capital cost incurred in building came from local benefactions. It appears to have been contended, as one of the reasons advanced by the ratepayers for taking a stage 4 rate of 4½% (rather than 6% adopted by the VO and the rating authority), that allowance should be made to reflect this reliance on benefaction. The Member dealt with the matter as follows (at 308):

> "I will deal next with the question of the appropriate rate per cent. In my opinion this should be 6% as suggested by the valuation officer and by Mr Wilks. The actual ratepayer incurred the actual costs. The building is modern and purpose built for their requirements. It is true that the greater part of the money needed for the building of the clinic was raised by subscription, but in the world of rating we are faced with the statutory requirement that the occupier must be deemed to be a tenant. He, thus, cannot be the owner and in this world of make believe it seems to me to follow as a necessary assumption that the benefaction is to be made available on an annual basis, for example, by deed of covenant, in which case it is quite clearly available to pay a rent. Counsel for the ratepayers submitted that in a case where there is only one hypothetical tenant the element of benefaction may show the non commercial nature of the case and, therefore, be relevant to the need of the hypothetical tenant 'to make both ends meet', (see the remarks of Lord Denning MR in *Cardiff Corporation v Williams (Valuation Officer)* [1973] RA 46, 50). In my opinion the facts in the present case show that funds are available on a large scale to enable the occupier of these premises to pay his way even though he does not set out to make a profit. I do not think that the hypothetical tenant would be successful in persuading the hypothetical landlord to let the hereditament to him on any sort of concessionary basis on the grounds that he, the tenant, was unable to make ends meet."

62. Two points deserve notice. The first is that the Tribunal considered that the rating hypothesis, with the occupier being assumed to be a tenant, compelled the assumption that the benefaction was to be made available on an annual basis. Secondly, the fact that there had been dependence on local benefactions to finance construction was advanced as a reason for

adopting a lower decapitalisation rate (rather than as justification for a stage 5 adjustment). That of course was the choice of the ratepayer in putting forward its case. But the final sentence of the passage, in which the Tribunal deals with the contention, suggests that, as a matter of conventional approach, it was at stage 4 that the negotiations between landlord and tenant were assumed to take place dealing with such matters as the tenant's ability to pay.

63. It may be that in *Willacre* the Member was not referred to his decision, eight years earlier, in the *Leicester* case. There is no reference to any authority in the part of the decision dealing with grant. It may also be that there was no substantial argument on the issue, on which a relatively small amount of value turned (the ratepayer's valuation was 60% below that of the VO). At all events we do not feel compelled to follow the decision in *Willacre*. In the *Leicester* case as we have said, it appears that the ratepayer's contention on grant was that it should be taken into account as a stage 4 factor. Where, as in that case and the present case, the availability of grant is advanced as a factor affecting the amount of rent that the ratepayer would be prepared, or would be able to pay, that must, in our view, be correct. Since the decapitalisation rate is now prescribed, the question arises whether, in such circumstances, prescription has excluded grant as relevant to a contractor's basis valuation at any stage. In our view it has done so.

64. The method of valuation comprised in the contractor's basis, the essence of which is to apply a decapitalisation rate to an adjusted cost of construction, is a matter of convention. The established approach recognises five stages, put shortly as follows:

Stage 1: estimate the replacement cost of substitute buildings.

Stage 2: adjust this cost to take account of the actual state of the buildings comprising the hereditament so as to reach "effective capital value".

Stage 3: add the capital value of the site comprising the hereditament.

Stage 4: apply a decapitalisation rate to the sum of the ECV and the value of the land so as to achieve an annual rental.

Stage 5: make any adjustment that is necessary in order to reflect particular characteristics of the hereditament that have not already been taken into account at an earlier stage.

Put more generally, at stage 5 the valuer is able to stand back and look at the figure resulting from the first four stages and to adjust it if necessary to ensure that it reflects the true rateable value of the hereditament.

65. The stages were stated in the way set out above by Glidewell LJ in *Imperial College of Science and Technology v Ebdon (VO)* [1986] RA 233 at 238 and it was said to be the approach "which is now generally adopted". This was the last Court of Appeal case on the contractor's basis before the 1988 Act and the prescription of the stage 4 decapitalisation rate in the 1989 regulations. The appeal followed an 18-day hearing in the Lands Tribunal [1984] RA 213 in which extensive economic and valuation evidence had been called on the issue of the stage 4 decapitalisation rate. The court upheld the Tribunal's decision, but said that the rate

adopted was not necessarily the correct rate for all contractor's basis valuations since each case depended on its particular facts and the evidence called ([1986] RA 233 at 242). It was, it appears, in consequence of this that the decapitalisation rate came to be prescribed.

66. Paragraph 2(8) of Schedule 6 to the Local Government Finance Act 1988 gave the Secretary of State power to make regulations providing that, in applying the preceding provisions of the paragraph (which prescribed the basis of valuation) in relation to a hereditament of a prescribed class, prescribed assumptions (as to the hereditament or otherwise) are to be made.

67. The Non-Domestic Rating (Miscellaneous Provisions) (No.2) Regulations 1989 prescribed "the appropriate rate" for certain classes of hereditament in the 1990 rating lists, the rateable value of which "is being ascertained by reference to the notional cost of construction or providing any part of it", and successive amendment regulations have added similar prescriptions in relation to the 1995, 2000 and 2005 rating lists. For the 2005 rating list the insertion made by the amending regulations uses the words "is being ascertained using the contractor's basis of valuation". There is no significance in the different wording, in our view. The regulations prescribe two decapitalisation rates, currently 3.33% for defence, educational and healthcare hereditaments and 5% in any other case.

68. The factors that might arise when converting capital to annual value in a contractor's basis valuation were considered by the Court of Appeal in *Cardiff Corporation v Williams (VO)* [1973] RA 46. The sole issue in the case was the decapitalisation rate to be applied in valuing Cardiff College of Education. At 51-2 Lord Denning MR said that in assessing what a hypothetical tenant would pay, there were many factors and he set out what he said were some of them. It is to be noted that the last factor that he noted was:

> "(v) The hypothetical tenant would, of course, have to consider the means at his disposal. If he was a government establishment, such as a local authority, supported entirely by Government grants and the rates, he would count the cost, but not perhaps so anxiously as a non-governmental establishment under a pressing necessity to make both ends meet."

69. It must be borne in mind that the contractor's basis is a matter of convention and is not itself prescribed by statute. Its elements are not rigidly defined. (Thus in *Imperial College of Science and Technology v Ebdon (VO)* [1984] RA 213 the Member (C R Mallett FRICS) felt able to add a stage 6 in his valuation.) What factors in a contractor's basis valuation have been subsumed in the prescribed decapitalisation rate cannot therefore be derived from the wording of the Act or the statutory instrument. But it seems to us quite clear, in the light of the generally recognised function of stage 4 and Lord Denning's identification of relevant factors in *Cardiff v Williams*, that matters bearing on the amount that the tenant would be prepared to pay are subsumed in the prescribed decapitalisation rate and cannot form the basis for any adjustment of the rateable value. This is a further, and conclusive, reason for rejecting the ratepayers' case on grant.

70. The ratepayers placed reliance on *Hoare (VO) v National Trust* [1998] RA 391, which emphasised the need to consider the amount of rent (if any) that the actual tenant, whether treated on the actual bidder in the hypothetical negotiations or as the model for the hypothetical bidder, would be willing to offer (see in particular Sir Richard Scott V-C at 424). The valuations in that case were not on the contractor's basis, and, given the conclusions we have reached on the relevance of grant in a contractor's basis valuation, factual matters of this sort do not arise. For completeness, however, we should make clear that we do not consider, on the facts, that grant would ever have entered into the hypothetical negotiations in the present case. The contractor's basis is founded on the concept that the tenant has an alternative to paying the rent demanded by the landlord for the subject hereditament, and that is to construct an equivalent building for himself, paying interest on the capital required instead of rent (see *Dawkins (VO) v Royal Leamington Spa Corpn* (1961) 8 RRC 241). On the facts in the present case it seems to us inconceivable that the tenant, having recently received a grant of millions of pounds to carry out the improvements at Bisham Abbey, could have expected to receive a further grant to enable him to construct another set of equivalent building; or, ignoring the recent grant, that a grant for the construction of such buildings would be given when premises entirely suited to the tenant's needs were available at Bisham Abbey for him to take on lease.

71. A further matter advanced by the ratepayer was that it has no access to revenue funding for the payment of rent and that the funds available to it by way of grant to finance capital projects would not have been available to it on some other basis to enable rent to be paid instead. Why in these circumstances it should have accepted a rateable value of £360,000 before the works were carried out and now be prepared to accept a rateable value of £242,650 for the altered hereditament is unexplained. But the substantive response to the contention is, in our view, twofold. Firstly, as pointed out by the Member (J H Emlyn Jones FRICS) in the *Leicester* case, applying his very great experience and understanding of rating valuation, it is implicit in the concept of the rating hypothesis of an annual tenancy of the hereditament that funds available to a ratepayer for the construction of the hereditament should be assumed to be available to it on an annual basis. Secondly, as we have already concluded, the ability of the ratepayer to urge his lack of resources on the landlord in the hypothetical negotiations is removed from him by prescription of the decapitalisation rate.

72. We received extensive evidence and submissions on the part of the ratepayers designed to establish that it was SCTC rather than SE that was in rateable occupation of the hereditament, with SE managing the hereditament as agent on behalf of SCTC. The purpose of this, as we understood it, was to support the case for a deduction for grant since it was SCTC rather than SE that was the recipient of the grant. We see no reason to explore the question of occupation because it does not seem to us that the rateable value depends upon it. We have concluded that no deduction for grant is to be made. There is moreover no basis for any contention that SCTC derives less benefit from the hereditament than SE and would accordingly not be prepared to pay so much rent. It was suggested that there was a distinction between them in terms of their purposes, but there does not appear to us to be any difference that would be material if the ratepayer were right about the relevance of grant. One matter that is to be noted, however, is that it is SE that it is the lottery distributor, and it can be assumed that it would not have awarded the grant unless in its view it represented value for money. Moreover the result of the section 27 process, under which the Secretary of State has power to prohibit a distributing body from distributing the grant, implies that the Secretary of State was of the same view.

73. We were invited to consider the Valuation Office Agency's Rating Manual which, in volume 4, section 7, appendix 2 sets out as guidance a statement of the effect of grant in a contractor's basis valuation. Mr Morshead said that the VOA now regarded what was said in it as out of date in the light of the *Orange* case, and we were asked to express our views on its contents. It begins:

> "Having regard to case law where a hereditament was constructed with grant it may be appropriate to make a Stage 5 allowance in the contractor's basis."

74. We inquired what the cases were that the draftsman of that sentence had in mind, and we were told they were *Scottish Exhibition Centre Ltd v Strathclyde Region Assessor* [1994] RA 209, *Willacre*, the *Leicester* case, and decisions of the Plymouth valuation tribunal in four cases reported in [1995] RA 69.

75. We have already considered *Willacre* and the *Leicester* case. We do not think that *Willacre* was correct in applying an adjustment to reflect grant at stage 1. The *Leicester* case, in treating it as potentially available at stage 4, has in our view been overtaken by the prescription of the decapitalisation rate. The Plymouth cases concerned a conference and leisure centre, a swimming pool and a leisure centre, and the VT made percentage allowances at stage 5 of 15% to reflect grants of 30% in three of the cases and 50% in the fourth. On the basis of this decision the appendix in the Rating Manual sets out a table of suggested stage 5 allowances for social, cultural and recreational hereditaments actually constructed with grant. The allowances are expressed as percentage ranges related to the percentage of the relevant capital sum. For the reasons that we have given we do not consider that it is correct in law to make such allowances. We find no assistance in the *Scottish Exhibition* case.

76. We would add that grant may become relevant if the grant regime has an impact on the rental values in the local market of the category of hereditament under consideration: see *Monsanto* (above) and *Distillers Company (Bottling Services) Ltd v Fife Assessor* [1983] RA 228. But no question of that sort arises in the present case.

77. Our conclusion, therefore, that it is not in general open to a ratepayer in a contractor's basis valuation to claim that the availability of a grant would have enabled him to construct the tenant's alternative at a lower net cost to himself or bargain with the landlord for a reduced rent. And we conclude, in any event, on the facts in the present case, that the grant that the ratepayer seeks to rely on would not have been available to it for the purpose of building the tenant's alternative. We would emphasise again that the facts and valuations in the present case do in our view expose the error of the ratepayer's contention. Before the works were carried out in 2003-4 the hereditament was in the list at £360,000 rateable value. The result of the expenditure of over £10m (£3.33m when adjusted for the purposes of the valuation) with the fine new facilities that it has produced is, according to the ratepayers, that its rateable value, the annual rent that it would command, has been reduced to £242,650. The ratepayer finds itself able to advance the case it does, it seems to us, by ignoring the ultimate purpose of rating valuation, which is to determine the value that occupation of the hereditament has for the occupier. By concentrating exclusively on hypothetical negotiations between tenant and landlord Mr Messenger finds himself reaching a result that seems to us to be self-evidently wrong. Moreover he makes the downwards adjustment from the £480,000 produced by stages 1 to 4 of the contractor's basis valuation at

stage 5, the very purpose of which is to enable the valuer to take a judgmental view of the stage 4 result and adjust it as he considers necessary to produce the value that the occupation of the hereditament has for the occupier. In any event, as we have said, Mr Messenger's concept of the way in which grant would feature in the hypothetical negotiations is essentially flawed, since there is no reason at all for thinking that the occupier who has received a grant for the improvement of the hereditament being valued could expect to receive a further grant to construct equivalent buildings for himself all over again.

78. As far as the issue of flooding is concerned, it is agreed that parts of the hereditament are liable to flood, although the extent of this is disputed. The raising of certain of the buildings to prevent flooding is already reflected in the construction costs and no further adjustment is necessary. The main effect of the flooding is on the golf course and it is agreed that at least one hole becomes unplayable when flooding occurs. The frequency with which this happens was not clearly established by the evidence. Whilst we accept that the golf course floods on occasions, we are not persuaded on the evidence that it floods every year nor that the car park is seriously affected when it does. We consider Mr Messenger's allowance of 10% of the agreed RV before any stage 5 allowance to be wholly disproportionate to the risks involved and to the tenant's likely reaction to them in terms of the rent that it would be prepared to pay. As Mr Morshead pointed out, the deduction that Mr Messenger makes for flooding is greater than the agreed annualised cost of the whole golf course, the consequence of which is that the tenant would effectively have the golf course rent free. We acknowledge the absurdity of that position.

79. We note that the agreed 2000 list assessment did not include any allowance for the flooding of the golf course but given the fact that the course is liable to flood we think that a small such allowance should be made. Mr Hatchwell's view was that an appropriate adjustment would be 5% of the contribution that the golf course made to the RV of the hereditament as a whole, or a figure of £1,750. We think this amount is reasonable and we adopt it.

80. Our conclusion, therefore, is that there should be no stage 5 adjustment for grant but that a minor reduction of £1,750 should be made to reflect the propensity of the golf course to flood. We therefore determine the rateable value of the appeal hereditament to be £478,250 with effect from 1 April 2004. The VO's appeal (RA/4/2006) therefore succeeds in (substantial) part and the ratepayer's appeal (RA/7/2006) is dismissed. The parties are now invited to make submissions on costs, and a letter relating to this accompanies this decision, which will become final when the question of costs has been determined.

Dated 25 September 2009

George Bartlett QC, President

A J Trott FRICS