IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 417 (LC)
Case No: RA/61/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – Hereditament – triple fronted shop – split into two assessments – split later reversed by merger – whether two units of assessment - whether parts in separate rateable occupation– whether leases "sham" agreements – appeal dismissed

BETWEEN :

MR ABRAR HUSSAIN **Appellant**

- and -

MR DAVID TURNER
(VALUATION OFFICER) **Respondent**

Re: 200 St Georges Road
Bolton
BL1 2PH

Before: P D McCrea FRICS

Sitting at Manchester Civil Justice Centre, Bridge Street West, Manchester
on
13 September 2017

Ishtiaq Ahmed, of AUUA Law, for the Appellant
Cain Ormondroyd, instructed by HMRC Solicitor, for the Respondent

The following cases are referred to in this Decision:

Woolway v Mazars [2015] UKSC 53
John Laing and Sons v Kingswood Assessment Committee [1949]1 KB 344
Westminster v Southern Railway [1936] AC 511
Brook (VO) v Greggs [1991] RA 61
Snook v London & West Riding Investments [1967] 2 QB 786
Wootton v Gill (VO) [2015] UKUT 548 (LC)

DECISION

Introduction

1. This is an appeal by Mr Abrar Hussain against a decision of the Valuation Tribunal for England ("the VTE") dated 22 June 2016, in which the VTE dismissed the appellant's proposal to reverse a Valuation Officer's decision to merge two rating assessments known as units 1A and 1B, 200 St Georges Road, Bolton, BL1 2PH, into one assessment - unit 1 ("the appeal property").

2. Mr Hussain gave evidence, and was represented by Mr Ishtiaq Ahmed of AUUA Law. The respondent Valuation Officer, Mr David Turner, was represented by Mr Cain Ormondroyd of counsel, who called three witnesses of fact: Mr Turner, Mr Tony Thompson, and Mrs Susan Burke, all of whom are employees of the Valuation Office Agency.

3. On 15 September 2017, I made an accompanied inspection of the appeal property.

Facts

4. From a brief statement of agreed facts, the evidence and my inspection, I find the following facts.

5. Mr Hussain is a Director of Dreamleader Ltd ("the Company"), which owns many properties in the Bolton area. The other director and company secretary is his wife, Mrs Yasmin Hussain. 75% of the shares in the company are owned by Mrs Hussain, the remaining 25% by a Mr Mohammed Saleem, who is a family member.

6. In 1999, the Company bought 200 St Georges Road, Bolton. St Georges Road is a main road, running north-west from the town centre. The building is a corner block, with a front elevation to St Georges Road, and a right-hand return elevation to Ruth Street. The company converted the building to form four ground floor commercial units, with eight flats above.

7. It is necessary at this point to explain the layout and topography of the ground floor of the building in some detail. Unit 1, the appeal property, is a triple-fronted ground floor shop, situated in the front right-hand corner of the block, with a return frontage to Ruth Street. The entrance is on the front right hand corner. Unit 2 is a small retail unit to the left of unit 1, having a separate access from St Georges Road. Since St Georges Road slopes upwards from right to left, both unit 2 and a section of unit 1 have a higher floor level than the rest of unit 1. Within unit 1 there is an area of raised floor in the front left hand corner, extending backwards for approximately three quarters of the shop depth, and having a width of just over one third of the width of the unit. The floor level of the remainder of unit 1, to the right and rear of this raised area, is level with the front right hand access door. The raised element has three steps down along its right-hand and rear sides. The right-hand steps are divided by a chimney breast,

located approximately one metre from the shop front, and perpendicular to it. It is likely that at some point the original internal wall, which would have run along the line of the steps, was removed, leaving only the chimney breast in place for structural reasons. Accordingly, the physical demarcation of this raised area, when viewed front to back from St Georges Road comprises steps between the shop front and the chimney breast, then the chimney breast, then a continuation of the steps, before the steps turn 90 degrees to be parallel with the shop front, and meet the left-hand wall of unit 1.

8. When viewed from St Georges Road, the left-hand raised floor area is narrower than the right-hand lower floor area. Thus, a notional centre line of unit 1, which would be equidistant from the unit's left-hand wall and right-hand window to Ruth Street, would lie not on the line of the steps between the raised and lower areas, but well within the lower floor area. The line of the steps/chimney breast is noticeably to the left of this notional centre line.

9. For completeness, although of little relevance to this appeal, units 3 and 4 are motor-related workshop-type properties to the rear, with access from Ruth Street. Units 1 – 4 all share w.c. accommodation and an alarm system.

10. In the compiled 2010 rating list, the ground floor of the block was shown as two assessments: 200, and Unit 2 200A, St Georges Road. On 13 July 2010, the Valuation Officer (VO) served a notice of alteration, effective 1 April 2010, to split 200 St Georges Road into three assessments: Unit 1 – shop and premises; Unit 3, workshop; and Unit 4 – workshop, showroom and premises. Unit 2, 200A, was unaffected.

11. On 28 February 2014 following discussions with Mr Hussain, the billing authority, Bolton Council, asked the VO to investigate whether unit 1 should itself be split into two. The events that subsequently unfolded are disputed, but on 26 March 2014 unit 1 was split into the following assessments, with effect from 11 January 2014:

Unit 1A, 200 St Georges Road RV £7,000

Unit 1B, 200 St Georges Road RV £6,900.

12. On 11 January 2014, the Company granted two leases – the first to Mrs Hussain and the second to Mr Hussain. Each had a term of five years, at a commencing rent of £2,600 per annum, with three yearly rent reviews commencing after 12 months.

13. In the lease to Mrs Hussain, she was described as being "of Auto Sport mobile", and the demised premises were identified only as: "Auto Sport Mobile, Half Show Room of 200-Saint Georges Road, Bolton…". The permitted use was "Alloy Wheel (Only certain Makes) which the both tenant agreed between them" (sic).

14. The second lease noted that "New tenant is Mr Ibrar Hussain Osman [there is no dispute that this is the appellant] Half the Showroom Trade Name "Auto Sport" Both tenant agreed to sell the certain makes of the Alloy Wheels". The demised premises were identified only as: "Auto Sport" Half Show Room - 200 Saint Georges Road, Bolton…".

15. Neither lease had a plan attached, nor any further description of the extent of the respective demises.

16. By September 2014, the billing authority's view had changed, and it raised the issue of the split with the Valuation Office, on the basis that the two hereditaments, which had not physically separated, were occupied by husband and wife. Again, there was contact between the Valuation Office and the appellant, the substance of which is disputed, but on 30 January 2015 the two assessments were merged, with effect from 11 January 2014, as:

Unit 1, 200 St Georges Road RV £12,000.

17. On 2 March 2015, the appellant made a proposal against the merger, seeking a reinstatement of the two separate assessments. The VO did not consider this proposal to be well founded, and the subsequent appeal was heard by the VTE on 9 June 2016. Before the VTE, Mr Hussain maintained that there should be two units of assessment with, in effect, the raised floor area being one unit of assessment, and the lower floor area being the other.

18. It should be noted that there was no proposal against the individual assessments themselves, the appellant's proposal was simply that the merged assessment should be divided.

19. In its decision dated 22 June 2016 the VTE dismissed the appeal on the basis that it was unpersuaded that the appellant had shown sufficient reasons why the assessment should be split.

20. The appellant's Notice of Appeal against the VTE's decision stated that "the whole issue in this matter" was that Mrs Burke changed her mind and merged the two assessments having agreed to split them. The other grounds of appeal can briefly be summarised as follows.

a. Mr Thompson said he had met Mr Hussain at the property but Mr Hussain maintained that Mr Thompson had not visited.

b. The layout and physical degree of separation between units 1A and 1B was sufficient for there to be two assessments.

c. That the leases were between connected parties was irrelevant.

Evidence

Mr Hussain

21. Mr Hussain expanded on his brief witness statement in his oral evidence. He said that the Company found it difficult to attract long term tenants for the appeal property, and that at a meeting with a Mr Maggs of Bolton Council, Mr Hussain was told that if the VOA agreed to split Unit 1 into two, the Council would not resist this.

22. A former tenant of Unit 1, Mr Bashir, had traded as Autosport Direct, selling alloy wheels for cars. Mr Bashir's business entered into voluntary liquidation in 2009 and the company took possession of the unit and its stock of alloy car wheels of various sizes. These were stored in the basement. Unit 1 was then let to a series of tenants, each of whom fell into arrears of rent and, Mr Hussain understood, business rates. Mr Hussain spoke to a Mrs Best at Bolton Council, and proposed splitting the unit into two to enable the two halves to be let at more affordable rents. He was not prepared to do so until he had the Council's agreement, even though this was not really required. The Company put the unit on the market to let, without success, and it was decided that Mr and Mrs Hussain would occupy the unit themselves, in two halves, with each selling different sizes of the alloy wheels which the Company had found in the basement.

23. In his oral evidence, Mr Hussain explained that it was intended that new tenants would take over the two halves of the property, but that in the meantime he and his wife would operate as two separate businesses. In around December 2013, a Mr Maggs from the Council visited Mr Hussain at the property, and agreed that the unit could be split into two assessments, if the Valuation Office was prepared to agree.

24. Mr Hussain said that Mrs Burke visited the property on 15 January 2014, and indicated that she would agree to unit 1 being split into two assessments. His evidence was that Mrs Burke was aware of the background to his request, and that he was a director of the Company, and intended occupying one half of the unit. In March 2014, the unit was split into two assessments with effect from 11 January 2014. Having received that reassurance, the Company granted two leases, as detailed above.

25. Mr Hussain said that Mrs Burke visited again in September 2014, without an appointment. She said that the Council was unhappy with the split, and had requested a re-merger. This was a surprise to Mr Hussain, as the council had indicated that it was content. However, Mrs Burke took no action to merge the two assessments – which she confirmed in a follow up letter.

26. In January 2015, Mrs Burke visited again, indicating that the Council was pressing for the assessments to be merged. Mrs Burke said that she had decided on merger, and left Mr Hussain some forms to enable him to appeal that decision. Mr Hussain's evidence was that at no point in any of the meetings did he propose or agree to building a dividing wall between the two units as a condition of the split of the assessment, and he was not told that the basis of the re-merger was that he hadn't built a wall.

27. Mr Ormondroyd asked Mr Hussain a series of questions about companies and trading names. In unit 1B, on the raised area, Mrs Hussain is the tenant, but a company called AutoSport Direct Limited, of which she is the sole director and shareholder, trades from that part under the name "AutoSport Mobile".

28. Mr Hussain, in his personal capacity, trades from unit 1A under the style of "Autosport Direct" (confusingly, this is different from the limited company of the same name). Alloy

wheels are sold from both parts of unit 1, but "AutoSport Mobile" sells alloy wheels that are general larger and of higher quality and price than those sold by "AutoSport Direct".

29. Mr Hussain accepted that during a meeting at the property on 15 August 2016, he had told Mr Turner and Mr Thompson that Autosport Direct sold alloy wheels of 14-18" and Autosport Mobile sold different makes of alloy wheels, 18" to 22". Mr Ormondroyd took Mr Hussain to an extract from the website of "AutoSportDirect", which appeared to offer alloy wheels of up to 20". Mr Hussain then said that the differentiation between the wheels sold by the two businesses was not based on size, but on type and price.

30. Mr Hussain accepted that no plans were attached to the leases, and no provision was made for sharing counter facilities. He said that the facility for shared w.c. accommodation and counter was an unwritten understanding between the tenants.

31. As regards who would sell which size of alloy wheels, Mr Hussain said that this was a joint decision between him and Mrs Hussain. Mr Ormondroyd put to Mr Hussain that Mrs Hussain was not at the property during any of the VO's visits, had not given evidence at the VTE nor before me, and was listed as a "housewife" on the 2016 Companies House return for Dreamleader Ltd. Mr Hussain said that his wife was uncomfortable in coming to court. Mr Ormondroyd suggested to Mr Hussain that he and his wife did not intend to give Mrs Hussain exclusive control over part of the building. Mr Hussain said that Mrs Hussain had 100% control of unit 1B, but he accepted that she was not present to confirm that.

32. Mr Ormondroyd put to Mr Hussain that the reality was that the motive behind the decision to create the two businesses was simply to secure a reduction in business rates through small business rates relief ("SBRR"). Mr Hussain denied this, saying the purpose was to create two small units which would be more affordable to new tenants.

33. In answer to questions from me, Mr Hussain said that neither he nor Mrs Hussain paid business rates elsewhere in Bolton. They would be eligible for business rates relief, but had not claimed any relief – his evidence was unequivocal on the point. Mr Ormondroyd asked Mr Hussain why he and his wife had not claimed any relief. Mr Hussain said that one might put it down to laziness, but they had not done so.

34. In contrast to his earlier evidence, Mr Hussain said that he thought that the correct split should be a straight line along that of the steps/chimney breast, including the lower floor area to the rear of the raised area.

Mrs Susan Burke

35. Mrs Burke has been employed by the VOA since January 1993, and has worked as a referencer since July 1993. She is based in the Manchester office.

36. Mrs Burke said that she had met Mr Hussain at 200 St Georges Road in the past, when the VO had carried out alterations to the rating list. On 28 February 2014, the VOA had received a

billing authority report ("BAR") requesting that unit 1 be split into two assessments. Mrs Burke handed up a printout of the VOA's record of this matter. For 3rd March 2014, there was the following note, entered by a Wendy Geldard (Mr Turner said that Ms Geldard worked at the VOA's Preston office):

> "The two occupiers are Mrs Yasmin Hussain and Mr Ibrar Hussain Osman. Mr Osman was very reluctant to give us answers to questions and kept changing the subject. We got the impression that we were a nuisance to him.
>
> Mr Ibrar Hussain Osman occupies the part of the shop that sells smaller alloy wheels and Yasmin Hussain sells larger makes. Mr Osman says that the two leases relate to the showroom where the two different people sell different kinds of alloy wheels using the same property. There is an imaginary line down the middle of the showroom which separates the two occupiers.
>
> Mr Osman wouldn't provide a home address for either occupier. We got the impression that Mr Osman was the person in charge of all the property, and Yasmin Hussain was nowhere to be seen. We have since discovered that both are directors of Dreamleader Ltd and both live at 2 Woodland Grove, Egerton, Bolton, BL7 9UH."

37. Mrs Burke said that when she inspected unit 1 on 19 March 2014, Mr Hussain gave her a copy of the two leases and told her that a wall was to be erected as soon as possible. In hindsight she should have waited for this to happen before enacting the split, but said that she trusted Mr Hussain to carry out the work. She said that she always had a good relationship with him. She measured the unit and calculated the areas of the two parts. Appended to Mrs Burke's witness statement was a copy of her plan, and her calculations of one half. These showed a retail area totalling 58.3 sqm, with a "zone A"[1] area of 35.2 sqm, and "zone B" of 23.1 sqm. In answer to a series of questions from me, Mrs Burke said that in carrying out the split of the unit, she simply divided the width of the unit by two. The line which she drew on the VO's survey note (which was to the right of the notional centre line of the shop) was arbitrary, but she said that I should take her measurements as being correct, rather than relying on the line on the plan.

38. Mrs Burke deleted the existing assessment, and entered two new assessments in the rating list with effect from 11 January 2014: unit 1A at £7,000 RV; and unit 1B at £6,900 RV.

39. The VOA's record has the following entry for 26 March 2014:

> "Split – two separate leases on this property, separate access and a wall will eventually go up. 11/1/14 split into 2. Copies of leases in EDRM".
>
> (my emphasis)

[1] In common with normal valuation practice, the VOA splits retail space into zones, with the space within the front 6.1m of shop depth forming zone A, to which a rate per sqm is applied. The space within the next 6.1m forms zone B, which generally attracts a rate of 50% of that of zone A, subject to any adjustments.

40. Mrs Burke lives in Bolton, and regularly drives past 200 St Georges Road. On a number of occasions over the next six months, she called in when passing to see if the wall had been erected. She wasn't entirely sure how many times she had gone into the unit, and had not made notes.

41. The VOA's record takes up the story:

> "BAR 2449003 received 22nd September 2014 – Bolton Council query split – "Re-merger/undo of merger required as per recent meeting with the VOA, Lynda James and Robin Gibbons (both Bolton Council). Reliable info that these are husband and wife."

42. Mrs Burke visited on 24 September 2014. Her evidence was that she told Mr Hussain that he must erect a wall if the units were to remain separate, and gave him another three months to do so. On 30 September she wrote to Mrs Hussain to say that following her recent inspection there would not be a change in the rateable values and that "no further action is required", but that if there was a change in circumstances Mrs Burke would contact her again. She accepted that she did not write to Mr or Mrs Hussain to say that if the wall was not erected then the units would be re-merged, nor did she alert the billing authority to her concerns. She said that she was giving Mr Hussain the benefit of the doubt.

43. Mrs Burke's decision was evidenced in the VOA file thus:

> 24th September 2014 – Sue Burke no actions this BAR:
>
> "This property is a large shop divided into 2 units, sep let for each one as rest of building, I have told occupier to extend the wall through centre. This is a Bolton mbc problem over payment, but the fact is they have given the 2 occupiers a small amount of sbrr even though they don't believe him. I have told the council I have had another look, and have explained what he needs to do. No action required. Bolton council informed".

44. The next entry in the VOA file is as follows:

> BAR 24921522 received 12 January 2015 – Bolton council now demand re-merger – "Please undo this merger (sic – presumably should be "split") as this should never have been merged (sic) in the first place. There still isn't a dividing wall in the property and he has had ample time to get this sorted and still hasn't.

45. Mrs Burke re-inspected on 30 January 2015, when she explained to Mr Hussain that since the work to divide the property had not been carried out, the two assessments would be merged. She left some forms with him to use if he disputed the VO's decision to merge the assessments. But she told him that if that was to be effective, he should build some form of wall.

46. Mrs Burke accepted in cross-examination that there was no document, letter or email that she could rely on to show that she asked Mr Hussain to build a wall, and that it was effectively her word against his.

47. The final relevant note from the VOA file is this:

> "30 January 2015 – Sue Burke:
>
> "Merger undone, incorrect and should never have been merged the owner never did the work to split. Inspected and owner informed. Have informed Mr Hussain of the re-merger and left IPP form, also remeasured as originally had incorrect areas and property on sloping site and no wc"."

Mr Tony Thompson and Mr David Turner

48. Mr Thompson and Mr Turner gave brief evidence of fact. Mr Thompson has been employed by the VOA since January 1977, and is currently an appeal caseworker based at the Manchester office. He is an associate member of RICS, and represented the respondent at the VTE. His involvement with this case began as a result of Mr Hussain's proposal to re-split unit 1. Mr Thompson said that the VO's decision in March 2014 to split the unit 1 into two was clearly an error, since there was no physical separation of the two areas, and the parties to the leases were connected. He would not have done so based on the information available to Ms Burke.

49. When he visited the property in May 2015, Mr Thompson met Mr Hussain but Mrs Hussain was not present. Mr Hussain initially denied that this meeting had taken place, but when Mr Ormondroyd took Mr Hussain to an email of that date which Mr Hussain had sent to Mr Thompson in which he referred to the meeting, Mr Hussain accepted that he might have forgotten that the meeting did take place. During that visit, Mr Hussain told Mr Thompson that the raised area was in separate occupation. Mr Thompson measured this area and had included a copy of his survey note in his witness statement. Mr Thompson said there was no physical or operational indication of two separate occupiers. In answer to a question from me, Mr Thompson thought that the original split of the assessment, in March 2014, would have had regard to the leases referring to half of the unit, and would have been based simply on dividing the width of the unit by two.

50. Mr Turner is a chartered surveyor, and has been employed by the VOA since 2003. He said that the original split of the assessment was based upon Mrs Burke's measurements, with each half having an equal width.

Submissions

Mr Ormondroyd

51. Mr Ormondroyd submitted that the split which Mr Hussain now proposed was different from the split that was in place prior to the merger. Relying upon Mrs Burke's site plan, her survey notes, and the valuations included in the Notices of Alteration, Mr Ormondroyd submitted that the original split was based upon a notional dividing line, which equally bisected the unit. What was now proposed by the appellant was a split along the line of the steps. Accordingly, even if the appellant succeeded on all other grounds, the appeal should fail, because on the appellant's own evidence the original split was based upon an equal split – consistent with the leases each demising half of unit 1.

52. Mr Hussain had given three different accounts of the correct split. He told Mrs Burke that the correct apportionment should be an equal split. He told Mr Thompson that only the raised area was occupied separately, and at the hearing he was proposing a straight line, including the lower till area behind the raised area.

53. In the alternative, Mr Ormondroyd submitted that the main contention of the appellant appeared to be that the Valuation Officer had changed his mind. Even if there was initial confusion, Mr Hussain contributed to it by indicating that a wall was to be constructed. However, that was beside the point, and what must be considered was whether the VO was correct to merge the assessments, notwithstanding the previous decision to split the original.

54. Mr Ormondroyd, relying on the Supreme Court's decision in *Woolway v Mazars* [2015] UKSC 53, submitted that where distinct spaces were in one rateable occupation, the primary test for whether they were to be treated as one hereditament was a geographical one, and since the two halves of the unit clearly intercommunicate, that test had been met. The only basis on which the unit could comprise two hereditaments, therefore, was if they were in separate rateable occupation.

55. The four ingredients of rateable occupation were summarised in *John Laing and Sons v Kingswood Assessment Committee* [1949]1 KB 344 as being: actual occupation, exclusive for the purpose of the occupier, to whom it must be of some value or benefit, and must not be for too transient a period. The requirement of exclusive possession had been considered at length by the House of Lords in *Westminster v Southern Railway* [1936] AC 511. In *Brook (VO) v Greggs* [1991] RA 61, the Lands Tribunal had differentiated between market stallholders, who were held to be in separate rateable occupation, and franchisees within department stores, who were not.

56. Mr Ormondroyd submitted that, additionally, a hereditament must have defined boundaries, relying on *Peak (VO) v Burley Golf Club* [1960] 1 WLR 568, a case to which the VTE also had regard. In this case, an attempt had been made to delineate a section of the unit, by notionally assigning the small raised area (at least before Mr Hussain's oral evidence) to Mrs Hussain or AutosportMobile, but this had been unsuccessful both practically and legally. All staff use the corner entrance within "1A"; there is only the smallest degree of physical separation between "1A" and "1B"; sales for both businesses are conducted at the till within "1A"; to get to vital facilities within the building staff working within "1B" must cross "1A"; and to get to "1B" customers must cross "1A".

57. The leases, even if taken at face value, did not assist the appellant. Neither contained a plan or other clear indication of the area demised, simply referring to "half showroom", nor did either lease include any provision for the sharing of, for example, w.c. facilities. Arguably, the leases were void because the premises purportedly demised were uncertain.

58. Moreover, Mr Ormondroyd suggested, the leases should not be taken at face value, as they were "sham" agreements. They were intended to give to a third party – in this case the billing authority – the appearance of creating between the parties' legal rights and obligations different from those that were actually the case (*Snook v London & West Riding Investments* [1967] 2 QB 786). There was no intention of creating a separate area of exclusive occupation within unit 1.

The supposed tenants were husband and wife; they are also co-directors of the landlord company; there is a high degree of shared occupation, making it unfeasible for parties who were unconnected to share occupation on the basis set out in the leases; and despite allegedly running a business from unit 1B, Mrs Hussain was conspicuous by her absence from the proceedings - not present or represented on any of the site visits, nor in discussions. The sham arrangements were simply a device to claim small business rate relief. During his closing submissions, Mr Ormondroyd accepted that Mr Hussain had said, under oath, that he had not claimed any business rate relief, and accordingly perhaps less weight could be placed on this line of argument, although he was not prepared to abandon it entirely.

Mr Ahmed

59. Mr Ahmed stressed Mr Hussain's evidence, given on oath, that the reason the unit was split into two was to create two manageable units, he and his wife having attempted unsuccessfully to attract a prospective tenant for the whole.

60. Mr Ahmed submitted that Mrs Burke could have agreed with Mr Hussain a plan showing where the line of division should be. The line would not have been, at any point, where Mrs Burke now said it was. Mr Hussain said that the line should be along that of the chimney breast and the steps. The chimney breast was about 2.6m in length, according to Mr Thompson, next to which there was a line of at least two seats at the top of the steps. These, together with the signage in the shop, were more indicative of the proper line of division. Mr Ahmed, upon instructions, said that the original split was in fact along this line, and not where Mrs Burke said it was.

61. As far as the leases were concerned, there was no reason for there to be provision for access to facilities, as this was an understanding between the tenants. The area comprising the tills was the only area to which there was not exclusive occupation. In his closing submission, Mr Ahmed said that it was only a small part of the area to the rear of the raised area, enough to comprise one till, that was shared.

62. Mr Ahmed stressed Mr Hussain's oral evidence that the purpose of the split was not to claim small business rate relief, despite having a period of around 12 months to do so. The intention was to make the two elements more attractive to small tenants to whom the company might let in the future.

63. He was critical of Mrs Burke's evidence, which he said was very unclear. She attended the property on four occasions, at least, and between the first and third occasion she had formed an opinion that if Mr Hussain had not built a wall, and that she was going to re-merge the assessments, but this was not done. Mr Hussain was unaware of any requirement to build a wall, a position which he maintained throughout.

Post-hearing evidence

64. On 2 October 2017, I requested a copy of Mr Hussain's proposal to alter the 2010 rating list dated 17 February 2015, which had been referred to in the evidence but had not been included

in the hearing bundle. I received it from the HMRC solicitor the same day. The proposal was supported by a covering letter in which Mr Hussain had referred to applications for small business rate relief and to a further 202 pages of correspondence; I also asked to see these and received them on 6 October. The additional material included copies of the proposal form, correspondence between Mr Hussain and the VOA and billing authority, applications for SBRR on both unit 1A and 1B, copies of cheques from the billing authority after the application of SBRR to the rating bills, and sets of bank statements for the accounts of Mr Hussain T/A Autosport, and Mrs Hussain, Autosport Mobile.

65. I provided the parties with an opportunity to make further comment on this material. The appellant did not make any further submissions. On behalf of the respondent, HMRC solicitor said that the disclosure of these documents raised a serious issue regarding the reliability of Mr Hussain's evidence, since under oath he had clearly stated that he had not made any small business rate relief applications, and the possibility of obtaining such relief had no bearing on his decision to split unit 1 into two separate units of assessment. These statements were demonstrably untrue. His proposal confirmed that the payment of small business rates for the two units had been refunded "after the application of a small business rates relief". Small business rate relief applications had been made for both unit 1A and 1B. Any shred of credibility that may have been attached to Mr Hussain's evidence on other matters must now be discarded, as it is also likely to be have been inaccurate.

Discussion

66. There were a number of inconsistencies in Mr Hussain's evidence. He is a director of a company which he said owned 50-60 properties in the area. He is familiar with the business rates system as it affects commercial property. Mr Hussain's oral evidence was that neither he nor his wife had ever applied for SBRR, a point emphasised by Mr Ahmed in his closing submissions. However, the post-hearing material told a rather different story, as there was clear evidence that SBRR applications had been made for both units 1A and 1B, and there was extensive correspondence between Mr Hussain and the billing authority on this subject.

67. A further discrepancy was Mr Hussain's insistence that Mr Thompson had not visited the property in May 2015, which he retracted only when he was taken to an email that he had sent to Mr Turner referring to their meeting.

68. It might be that the reason for the inconsistencies between Mr Hussain's oral statements and the written evidence is that he is forgetful, especially in relation to Mr Thompson's visit. It is less likely, having regard to the extent of the correspondence relating to SBRR that was disclosed in the post-hearing evidence, that Mr Hussain forgot that he made any applications. I consider his evidence in this regard to have been untruthful. However, whether he had forgotten or was deliberately misleading, either basis would render Mr Hussain's evidence unreliable, and I have not placed any weight on it unless it is supported by other material.

69. The basis of this appeal was unconventionally framed, with substantial points only really emerging as a response to the respondent's statement of case. The main ground of appeal, or "whole issue in this matter" as the appellant put it, was that Mrs Burke changed her mind, and decided to merge the assessments that she had previously agreed to split.

70. Mrs Burke's evidence was that Mr Hussain agreed to build an internal wall, and after giving him several chances to do so she had no alternative but to re-merge the two assessments. Mr Hussain maintains that no such agreement was made. I prefer Mrs Burke's evidence on this issue for several reasons. First, I have already decided to place no weight on Mr Hussain's evidence unless it was supported by other material. Secondly, Mrs Burke's evidence was corroborated by the internal notes on the VOA computer for 26 March 2014, shortly after the inspection at which she is said to have discussed the intended wall with Mr Hussain. Thirdly, if Mrs Burke was not checking whether Mr Hussain had started to build an internal wall, there was no reason for her to visit the property on several occasions during 2014, as I accept she did.

71. In any event, an argument that the valuation officer has acted inconsistently seldom succeeds, even where a change of tack disadvantages the ratepayer, as the VO is under a statutory duty to maintain an accurate rating list, including by correcting earlier errors.

72. Mrs Burke's actions were subject to lengthy criticism from Mr Ahmed, but in my judgment that was largely unfounded. The high water mark for the appellant on this point was Mrs Burke's acceptance that she was wrong to split the compiled list assessment before Mr Hussain had started to make any physical alterations to divide the unit in two. Mr Thompson, albeit with the benefit of hindsight, said that he would not have done so. I have some sympathy for Mrs Burke, who I found to be a credible and honest witness. In the end, she was caught between the billing authority's "insistence" on a re-merger, and trying to give Mr Hussain every opportunity to carry out the work - I have no doubt he had said that he would do. But as I have indicated, having split the assessment in error, the VO was under an obligation to correct this, when she formed the view that there was only one unit of assessment. In my judgment, the main point of appeal is without merit.

73. It is convenient to consider the remaining points of appeal by reference to the respondent's challenge to them. The first issue is whether the leases entered into by the Company and Mr and Mrs Hussain were sham arrangements. By stigmatising the leases as a sham Mr Ormondroyd meant that the documents were not executed to bring into existence a genuine legal relationship of landlord and tenant, but were fabricated, when no such relationship existed, simply in order to obtain a financial advantage in the form of SBRR. This is a serious allegation, tantamount to an allegation of dishonesty, and was raised at an early stage in the respondent's statement of case. However, like any allegation of dishonesty, it is necessary that the allegation be put in terms to the witness in cross examination, and whilst Mr Ormondroyd suggested to Mr Hussain that the two businesses were set up to secure a reduction in business rate liability, a specific allegation of dishonesty was not put, nor was Mr Hussain given the opportunity to respond to the suggestion that he and his wife had concocted the leases to create a false impression.

74. It is also necessary to remember that there is nothing dishonest in organising one's affairs in such a way as to minimise one's liability for tax, including business rates, provided the arrangements are genuine. The mere fact that one does something unusual with a view to securing a relief is not evidence of dishonesty – see for example the decision of the Tribunal (Martin Rodger QC, Deputy President) in *Wootton v Gill (VO)* [2015] UKUT 0548 (LC) at [40].

75. As the allegation that the leases were not genuine, but were a sham designed deliberately to create a false impression was not specifically put to Mr Hussain in cross examination it is not open to me to conclude that the leases were shams, and I decline to do so.

76. The second issue is whether in any event the leases were void. For a lease to come into existence the property to be comprised in the lease must be capable of identification with certainty (see Woodfall: *Landlord and Tenant* at paras 4.016 and 5.019). Mr Ormondroyd submitted that the arrangements in this case failed that requirement. The boundary between the two units was not defined on a plan or by any description other than "half the showroom". That need not have been fatal if, at the time the lease was granted, the parties to the agreement had settled between themselves where the dividing line was to be.

77. Mr Hussain's evidence on where the boundary lay changed over time, including during the hearing. In his original evidence, he said that unit 1B comprised the raised area only. In his oral evidence to me, this was changed to also encompass the portion of the lower floor behind the raised area. During Mr Ahmed's closing submissions, this was changed again (on Mr Hussain's instructions) to allow access for the till belonging to unit 1A. The reality is that Mr Hussain had no clear idea where the area of which he had exclusive possession stopped and his wife's area began. Given the absence of any sufficient delineation in the leases that ambiguity is sufficient to prevent the creation of a legal estate.

78. Of course, the existence of a legal estate in land is not essential to the recognition of a hereditament. What is required is a "unit of property" which is clearly defined, and the precise legal basis of its occupation is of secondary significance. Having inspected the appeal property, I do not accept that any of the areas identified by Mr Ahmed was delineated by a sufficiently clear boundary to be capable of amounting to a separate unit of assessment. The only permanent structure is the chimney breast, which in my opinion is insufficient, since the steps either side of it are entirely open. Whilst steps are often reflected in rating assessments by way of allowances, they do not (at least without some clear agreement) constitute a boundary. Mr Ahmed made submissions to the effect that a row of chairs was evidence of a boundary, but with the greatest respect to him (whom I should add did his best with a poor case), that is not an argument that one would normally encounter in rating appeals, and I reject it.

79. The third issue is whether the two units were in separate rateable occupation. To determine this, it is necessary to consider what was happening in reality. There was no suggestion from either party that the layout of the unit had altered to any degree since the material day, and I have had the benefit of inspecting it. There was some signage indicating "Autosport Mobile" as opposed to "Autosport Direct", but in my judgment, any customer would not differentiate between two businesses. They would form the impression that this was simply one shop selling alloy wheels of varying sizes as it had during the previous tenant's occupation. I am not persuaded that the small internal signage, nor the location of chairs makes any difference. I accept that a customer looking at the website would see wheels of all sizes, but that is irrelevant to this determination.

80. As *Mazars* reminds us (at [20] and [32]) the way in which a particular occupier chooses to use a property is irrelevant to the identification of a hereditament. In *Mazars* the point Lord

Sumption made was that geographically separate premises should not be valued as one hereditament simply because a ratepayer chooses to link his use of one with the use of the other. The converse in this case is equally valid – the fact that Mr and Mrs Hussain operated two bank accounts and tills from units 1A and 1B does not cause them to be two hereditaments.

81. There is no doubt in my mind that the two halves of the unit amount to one unit of property, in one rateable occupation, and accordingly I find the appeal is without merit.

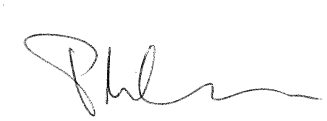
82. Finally, there is a further point which I raised with the parties at the start of the hearing, although owing to my findings above, it is perhaps of interest only to rating enthusiasts. Mrs Burke placed a notional dividing line in a position equidistant between the walls of unit 1. There is no dispute that this line was notably to the right of *any* of the locations that Mr Hussain contended was the boundary between the two units. Mr Hussain's proposal was against the VO's decision to merge. Had his appeal been successful, what would have been the effect? Since there were no proposals against the individual assessments, the merger would have been reversed, leaving two units of assessment as originally valued by Mrs Burke. Even on Mr Hussain's evidence, the tenant of unit 1A would have been trading partly from 1B, and even had there been two rateable occupiers, they would not have been occupying the units of assessment contended for by the appellant.

83. I did not receive detailed submissions on how constrained I would have been to determine the merits of the merger itself, rather than the implications of the merger being invalid, when that would have put back into the Rating List two assessments which would have been a nonsense but against which there were no proposals. The point will have to be argued in a future case, if it arises.

Determination

84. The appeal is dismissed. This decision is final on all matters other than costs. The parties may now make submissions on costs, and a letter giving directions for the exchange of submissions accompanies this decision.

Dated: 23 October 2017



P D McCrea FRICS

Addendum

85. I have now received submissions on costs from HMRC solicitor for the respondent. The appellant has not made a costs submission, nor replied to that of the respondent.

The Tribunal's Rules and Practice Directions

86. In order to put the respondent's submissions into context, it is helpful to first outline the relevant Tribunal Rules and Practice Directions.

87. The Tribunal's jurisdiction to award costs derives from section 29 of the Tribunals Courts and Enforcement Act 2007 which, so far as relevant, provides that:

> "(1) The costs of and incidental to –
>
> (a) …
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules".

88. The Tribunal Procedure Rules referred to are the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010, as amended, and in particular Rule 10, which in three circumstances are relevant to this application: first, in any appeal from a decision of the Valuation Tribunal for England (rule 10(6)(d)); secondly, under section 29(4) of the 2007 Act (wasted costs) (rule 10(3)(a)); and thirdly, if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings (rule 10(3)(b)). In considering making an order for costs under rule 10(6) the Tribunal must have regard to the size and nature of the matters in dispute.

89. When considering the appropriate basis of assessment regard must also be had to the Tribunal's Practice Directions (November 2010), in which paragraph 12 provides as follows:

> "12.2 Exercise of discretion in awarding costs
>
> Costs are in the discretion of the Tribunal…[which] will usually be exercised in accordance with the principles applied in the High Court and county courts. Accordingly, the Tribunal will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct of a party will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which a party has conducted their case; [and] whether or not they have exaggerated their claim….
>
> 12.3 The general rule for costs
>
> 1) The general rule is that the successful party ought to receive their costs…..

…

12.4. Standard basis and indemnity basis

The Tribunal will normally award costs on the standard basis. On this basis, costs will only be allowed to the extent that they are reasonable and proportionate to the matters in issue, and any doubt as to whether costs were reasonably incurred or reasonable and proportionate in amount will be resolved in favour of the paying person. Exceptionally the Tribunal may award costs on the indemnity basis. On this basis, the receiving party will receive all their costs, except for those which have been unreasonably incurred or which are unreasonable in amount, and any doubt as to whether the costs were reasonably incurred or are reasonable in amount will be resolved in favour of the receiving party."

The Respondent's submissions

90. The respondent submits that the appellant should pay the respondent's costs, and that those costs should be assessed on the indemnity basis.

91. As regards the basic costs award, the respondent submits that under the general rule (Practice Direction 12.3) the successful respondent should receive his costs. The main point of the appeal, as termed by the applicant (that Mrs Burke changed her mind) was found to be without merit and the appeal was dismissed.

92. As regards indemnity costs, the respondent submits that whilst Practice Direction 12.4 does not give guidance on the circumstances in which costs might be awarded on the indemnity basis, Rule 10(3) contains the power to make an order for wasted costs *and* the power to make a costs order where it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. Given the gravity of a wasted costs order, it would seem that the reference within the same sub-paragraph to a power to award costs where there has been unreasonable conduct is a reference to circumstances in which indemnity costs might be awarded.

93. The respondent submits that the circumstances of this case are of the type of exceptional circumstances referred to in the Practice Direction where an indemnity costs order is appropriate, because:

a. In relation to whether it was reasonable to bring the proceedings, the argument that the raised floor area was a separate unit of assessment failed before the VTE, and failed at the Tribunal. The best evidence offered was by reference to a row of chairs, which the decision noted to be a poor case.

b. The main ground of appeal, or "whole issue in this case" as the appellant termed it, was that Mrs Burke changed her mind regarding the wall. The appellant almost certainly knew when he brought the appeal that there had been no agreement [to split the assessment in the absence of a wall] and in any event, as the decision noted, that this type of argument seldom succeeds. Had the appellant given proper consideration to the appeal, or taken advice from a rating specialist, the hopelessness of his case would have become clear. If he did take advice and ignored it, that is all the more reason why he should bear the respondent's costs on an indemnity basis.

c. As regards the appellant's conduct during the proceedings, the substantial issues of dispute only emerged once the appellant had seen the respondent's statement of case – as the decision

noted in paragraph 69. This was indicative of the appellant's conduct throughout. It was unclear up to the start of the hearing what case the respondent was being asked to meet. At the hearing itself, the appellant's oral evidence took an entire morning – he failed to answer questions put to him professing not to understand, yet as the post-hearing evidence shows he was entirely familiar with the system of business rates. A further significant amount of time was take up in the cross-examination of Mrs Burke, the purpose of which was to discredit her evidence, yet the appellant knew, or ought to have known, perfectly well that her evidence was an honest reflection of events. This was borne out by the decision.

d. As outlined in paragraphs 64 and 65, the post-hearing evidence showed that Mr Hussain's oral evidence, upon which Mr Ahmed placed great reliance, had been partly untruthful, and Mr Hussain had a track record of giving inaccurate evidence to the VTE as regards Mr Thompson's visit. Whilst the Tribunal's finding of untruthfulness only went as far as Mr Hussain's evidence in relation to small business rates relief, the weight subsequently placed on the rest of his evidence fundamentally undermined the main basis of appeal – that Mrs Burke had changed her mind. Had he accepted the version of events recorded in the decision, the appeal would never have been brought.

94. The respondent submits that it is unusual for such an overwhelmingly bad case to come on appeal to the Tribunal, which when taken with the way in which the Appellant conducted himself, gives a clear basis for costs to be awarded to the respondent on the indemnity basis.

Discussion and conclusions

95. As the respondent has identified, the general rule in appeals from the VTE is that the successful party is entitled to his costs unless there is reason to make a different order. No submissions have been received from the appellant to suggest that there should be a departure from the general rule.

96. Accordingly, I am satisfied that the respondent should be awarded his costs. However, as the respondent noted in a footnote to its submission, the Tribunal's Order of 22 August 2017 directed that the costs of the respondent's application to rely upon expert evidence shall not be recovered from the appellant. The Order directed that the costs of that application shall be the appellant's costs in the appeal, but as indicated, the appellant has not made any application or costs submission. The respondent shall therefore be awarded costs, but not those of the application to submit expert evidence.

97. I now turn to the basis of assessment of costs. As regards the respondent's submissions as to the time taken in the hearing, these are of little merit. Both sides indicated that the hearing would last one day, and that was not exceeded. Mr Ahmed was quite entitled to question Mrs Burke in the way he chose, and Mr Hussain's evidence, whilst evasive, was in my view not untypical of that of a layperson unfamiliar with appearing in a court or tribunal. This line of argument does not lead anywhere. Neither, in a de novo hearing, does conduct before the VTE.

98. Secondly, regarding the general merits of the appellant's case, I am not persuaded that this is a reason to award costs on an indemnity basis. The Tribunal often finds an appeal from a decision of the VTE to be wholly meritorious, or conversely wholly devoid of merit, without that overwhelming finding resulting in the sanction of indemnity costs. Ratepayers, or indeed the valuation officer, are quite entitled to submit an appeal against a decision of the VTE, and should not be discouraged from

doing so. It should be remembered that in this Tribunal indemnity costs are awarded only in exceptional circumstances – a significant hurdle which is seldom cleared.

99. Finally, there is Mr Hussain's conduct, and my finding of his untruthfulness. I am not persuaded that this in itself is worthy of an indemnity costs award. Whilst it affected the weight which I placed upon Mr Hussain's evidence, as I indicated in paragraph 68 I would have equally placed little weight upon it if he had forgotten that he had made small business rate applications. And as the respondent accepts, that finding was only in relation to a small part of Mr Hussain's case.

100. In summary, I do not consider that any of the grounds upon which the respondent argues that costs should be awarded on the indemnity basis are sustainable.

Disposal

101. The appellant shall pay the respondent's costs, save for the costs of the application to submit expert evidence; in the absence of agreement as to quantum these shall be the subject of assessment by the Registrar on the standard basis.

19 December 2017
P D McCrea FRICS