UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – OCCUPATION – extent of hereditament – "white space" in a data hall, whether capable of beneficial occupation – rule 38(7), Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 – late change of case by the Valuation Officer

AN APPEAL AGAINST A DECISION OF
THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:
ANDREW RICKETTS
(VALUATION OFFICER)

Appellant

-and-

CYXTERA TECHNOLOGY UK LIMITED
(FORMERLY SAVVIS UK LTD)

Respondent

Re: 628-630 Ajax Avenue,
Slough,
SL1 4DG

Upper Tribunal Judge Elizabeth Cooke and Mark Higgin FRICS

Royal Courts of Justice

14-15 September 2021

Mr Tim Mould QC and Mr Hugh Flanagan for the appellant, instructed by HMRC Solicitors.
Mr Daniel Kolinsky QC for the respondent, instructed by Mills & Reeve LLP

The following cases are referred to in this decision:

Porter (VO) v Trustees of Gladman SIPPS [2011] UKUT 204 (LC)

Post Office v Nottingham City Council [1976] 1 WLR 624

Introduction

1. This is an appeal by the Valuation Office Agency ("the VOA") from a decision of the Valuation Tribunal for England relating to a series of proposals to alter the 2010 Rating List in respect of the respondent's data centre in Slough. A data centre is a building in which IT equipment is housed and operated, and it includes one or more data halls for that equipment as well as office space, plant rooms and other facilities. The principal issue in the appeal is whether "white space" in a data hall, not yet adapted for the use of customers, is part of the hereditament by virtue of being capable of beneficial occupation for the purpose for which the hereditament is intended.

2. We heard the appeal at the Royal Courts of Justice on 14 and 15 September 2021. The appellant was represented by Mr Tim Mould QC and Mr Hugh Flanagan of counsel, and the respondent, Cyxtera, by Mr Daniel Kolinsky QC; we are grateful to them all for their helpful arguments.

3. In the paragraphs that follow we describe data centres and the different spaces within them in a retail colocation business model. We will then look at the factual and procedural background to the appeal and finally consider the arguments made in the appeal and explain our decision.

Background

Data halls and retail colocation

4. We have been greatly assisted in our understanding of the context of this appeal by the evidence of fact given by Mr Giuseppe Borgia, Site Manager for the respondent Cyxtera Technology UK Limited ("Cyxtera") and by Mr Andrew Finch, Cyxtera's Data Centre Operations Area Director, and by the expert evidence given for the appellant by Dr Jason Liggins, Managing Director of Jasam Technology Ltd. Mr Borgia accompanied us on a site visit on 13 September 2021 and we are most grateful to him and to Cyxtera for facilitating that visit which we found invaluable.

5. The respondent is a subsidiary of Cyxtera Technologies Inc which operates 62 data centres worldwide. Mr Borgia describes a data centre as "a dedicated space which is used to house computer and networking systems, equipment and associated components" (paragraph 3.1 of his witness statement). The hereditament that is the subject of this appeal is Cyxtera's data centre at 630-631 Ajax Avenue, Slough, where space is offered to customers on a retail colocation basis. Customers pay for space in the data halls where their equipment is accommodated in rows of racks sharing power and cool air. Some customers have their equipment in a secure cage, but all benefit from the security of the compound, the building and the hall itself. Retail colocation can be contrasted with wholesale colocation where one customer takes the whole, or almost all, of the space in a hall.

6. As well as the vast data halls, the data centre includes office space that can be licensed to customers. Cyxtera also has its own office space and machine rooms, and a rear yard where

generators, chillers and transformers are installed. Within the data halls Cyxtera provides secure space, power, cooling and fire protection. Cyxtera's business model is to find customers, to identify their requirements in terms of space and IT facilities and to adapt space within the data hall to meet those needs. We will return in more detail to this process of adaptation later in the decision.

7. The basis of charge for customers is closely related to the power capacity that the customer is allocated, and the provider will enter into a contract to supply power to a predefined level without interruption. Access to a controlled and secure environment with the attendant infrastructure (power, cooling and security) is advantageous to the customer in comparison with incurring the cost of locating their equipment in their own premises. Data centre customers seek very high levels of continuity of service together with access to a wide spectrum of network, cloud and service providers. The data centre operator's role is to adapt space in a data hall to the customer's requirements and then, once the customer's equipment is installed, to maintain the power and cooling necessary to ensure that continuity in a secure and clean environment.

White space and its adaptation for customers

8. We refer to space in a data hall that has not yet been adapted for customers as "white space".[1] This can be contrasted with "fallow space", which in this context is an area to which nothing at all has been done, and with "customised white space" which has been adapted for a customer's requirements.

9. White space is a recognised industry term and refers to a standard of data hall fitting out with a raised floor and suspended ceiling together with the Power Distribution Units ("PDU") and the Computer Room Air Handling Units ("CRAH"). A PDU (also known as a distribution board) divides an electrical power feed into subsidiary circuits with a protective fuse for each circuit. The CRAH conditions air to the desired temperature and humidity. White space will also have fully functioning lighting, security and fire protection systems, a node or 'meet me' room where customers can connect to telecommunications providers, and a machine room where the uninterrupted power supply equipment is located.

10. Data centres are significant consumers of electrical power and more efficient use of that energy can be secured by creating cold aisle containment systems. This involves configuring the customer racks to enable cold air to be pushed at pressure through the floor and then into the racks so that the equipment is kept at the correct operating temperature. Contained cold aisles are enclosed by a door and a Perspex roof between rows of racks. Hot aisles, which are not contained, alternate with cold aisles; cold air from under the floor passes into the cold aisle through vented floor tiles, through the customers' equipment, out into the hot aisle and thence into the ceiling through vented tiles.

11. The entire data hall initially comprises white space before any customers are installed; the installation of the raised floor and ceiling ensures that work generating dust has been finished

[1] Cyxtera's witnesses have referred to it as "Category A" or "Cat A space", by contrast with "Cat B space" which is adapted for customers. We prefer to use the terms "white space" and "customised white space" to avoid confusion with terminology used in the context of offices.

before customers' IT equipment arrives. The air conditioning is in operation, as is the security system. Parts of a data hall will remain white space until the hall is full of customers' equipment. When a customer leaves and its equipment is removed the aisles that it occupied revert to white space, ready for the next customer.

12. Having established what white space is, we now turn to the works undertaken to install customer equipment so that it becomes customised white space.

13. Once one or more aisles are licensed to a customer, cables are installed to bring power from the PDU and data cables to connect the equipment to the Node Room. Both types of cables run in underfloor containment - usually a wire tray or basket secured beneath the raised floor. Power cables normally terminate in a 'commando socket', a device with a row of outlets into which the power leads from the equipment in the racks are plugged and which pass from the underfloor void through a 'Koldlok' brushed access port in the floor which keeps the cold air in the floor void and thence to the equipment.

14. The floor itself is made up of tiles that can be lifted and repositioned using a hand-held suction lifter, which Mr Borgia demonstrated for us. The tiles are either solid or vented, giving the operator complete flexibility over where cold aisles are created. Some customers also require the installation of underfloor security bars to prevent penetration of the customer's environment from under the floor.

15. Similarly, the ceiling tiles can be moved to receive hot air from customer areas. The lighting units and the solid and vented tiles are capable of being moved to the desired position, as are the ceiling mounted temperature sensors and security cameras.

16. To summarise: when a customer's needs for space and power have been ascertained, space in the data hall is allocated to it; racks are installed, and hot and cold aisles created on either side of the racks by the provision of vented floor tiles and containment for the cold air. Some customers require bespoke security equipment such as caged areas with CCTV and biometric or card readers.

17. Mr Borgia confirmed at the hearing that in all cases Cyxtera's operations team fit the cabling and undertake all the installation work up to the point where the customer puts their equipment in the racks. Cyxtera also undertakes the testing of all the electrical installations, and the security and emergency systems.

18. Because Cyxtera licenses space to multiple customers, the data hall which began as entirely white space is adapted gradually as more customers arrive. The extent of the white space gets smaller as more and more aisles are licensed to customers and become customised white space. However, white space may remain even when the data hall is full to capacity. This is because the IT capacity of the data hall depends upon both its power supply and its cooling capacity, and a customer's use of both is not necessarily proportional to the space it occupies. So, it is possible for a customer or group of customers to use up all the available power and cooling capacity in a data hall yet leave 15% to 20% of the floorspace unoccupied, according to Mr Finch. But that was not the situation on any of the dates material to this appeal.

19. On our site visit our impression of the data halls was of a vast area, very clean, very noisy because of the air conditioning, and quite busy because of the work in train converting from white space to customised white space, for new customers, and back again where customers had left.

The appeal property and its development

20. The appeal property comprises two linked two-storey buildings, 630 and 631 Ajax Avenue, occupying their own compound and located within the Slough Trading Estate. 630 was built in 2007/8 and was described in the 2010 Rating List as 628-630 Ajax Avenue. 631 was built next to 630 in 2012/13 and linked to 630 by connecting corridors. Both units were built as steel framed warehouses and were in that condition when Cyxtera took 20-year leases of each building (630 in 2007, 631 in 2013).

21. The site is approximately 200 metres north of the A4 Bath Road at the junction of Ajax Avenue and Galvin Road, and about 2 km (1.25 miles) west of Slough town centre.

22. The property is separated from public roads by fencing at the front of the site (North) and panel walling to the rear of the site (South). It has electronic gates and video intercom to permit access to a common carpark at the front of the property. To the rear there are two entrances, again with electronic gates to two yards (one for each building) which have been partially built upon to accommodate plant.

23. 630 Ajax Avenue opened for business in 2008, by which time Cyxtera's landlord had installed a first floor. A data hall had been created on the first floor and fitted out as white space, and there were plant rooms, offices on the ground and first floor, stores and a secure reception on the ground floor, and a steel platform in the rear yard to house plant and machinery. A large part of the ground floor was fallow space, intended to be used as a data hall later.

24. By April 2010 there were customers installed in the first floor data hall at 630 but it was not full to capacity. More customers arrived during the summer of 2010. By the end of September more machine rooms had been created on the ground floor, more machinery was installed in the yard, and the ground floor data hall had been fitted out as white space and contained 77 customer rack installations.

25. Cyxtera took on the lease of 631 in 2013. Its contractor installed a mezzanine floor, and the building was joined to 630 by connecting corridors and a first floor bridge link. A data hall was fitted out as white space on the first floor; plant and machinery were installed in machine rooms and in the rear yard. The first floor data hall was fitted out to only half its power and air cooling capacity. Practical completion of the building and fitting out works took place on 15 March 2013; until that date 631 was in the hands of the contractor.

The legal and procedural background to the appeal

26. We now turn to the non-domestic rating context. Paragraph 2(1) of Schedule 6 to the Local Government and Finance Act 1988 ("the 1988 Act") provides that the rateable value of a

hereditament: "shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to be let from year to year."

30. That rent is calculated by reference to the assumptions that the tenancy begins on the day by reference to which the determination is made, that the hereditament is in a state of reasonable repair, and that the tenant pays for rates, taxes, repairs and insurance. The "date by reference to which the determination is made" in this case was 1 April 2008, being the antecedent valuation date for the 2010 rating list, compiled on 1 April 2010.

31. The following Rateable Values were shown in the 2010 Rating List for Cyxtera's data centre, first at 630 only and then, from 2013, for 630 and 631 as a single hereditament**:**

    a. £790,000 from 1 April 2010

    b. £890,000 from 22 July 2010

    c. £1,520,000 from 30 September 2010

    d. £2,230,000 from 13 March 2013

32. The appeal relates to four proposals submitted by Knight Frank LLP to alter the 2010 list on each of those dates to show a rateable value of £1, on the conventional grounds that the assessment was "incorrect, excessive and bad in law".

33. As we have seen, during the period from 2008 to 2013 the data centre was gradually extending its capacity. In April 2010 there was only one data hall; by September 2010 there were two; but neither of those data halls was operating at full capacity. Parts of each remained white space. Cyxtera argued before the Valuation Tribunal that white space (by contrast with customised white space) was not capable of beneficial occupation for the purpose for which the building was intended and so did not form part of the hereditament; in other words, the argument was about the extent of the hereditament and not about its value per square metre. Moreover, on 13 March 2013 631 remained in the hands of contractors and Cyxtera argued that it therefore could not form part of the hereditament.

34. The Valuation Tribunal agreed. It also decided an issue about plant and machinery which does not arise on the appeal. In its decisions dated 25 and 27 November 2019 the Valuation Tribunal determined that the following revised assessments should be entered in to the 2010 Rating List:

    e. £480,000 effective from 1 April 2010

    f. £480,000 effective from 22 July 2020

    g. £900,000 effective from 30th September 2010

h. £1,300,000 effective from 13th March 2013.

The issues in the appeal

35. There are now two issues in the appeal.

36. One is whether white space forms part of the hereditament; this is the only issue between the parties so far as the three 2010 dates are concerned.

37. The other issue relates to the fourth date, 13 March 2013; the VOA values the hereditament at that date on the basis that 631 formed part of it, whereas Cyxtera argues that it did not because it was still in the hands of the building contractors. It is now accepted by the VOA that 631 did not form part of the hereditament at 13 March; but it was argued at the hearing that the Tribunal could nevertheless decide that it had become part of the hereditament by 1 July 2013.

The first issue: white space

The legal principles

38. The dispute has arisen because a structure built as a warehouse has been transformed into a data centre; the issue is how much of it should be entered in the rating list on the dates in question.

39. When a building is under construction or re-construction and is finished or nearly so, the point at which it is going to be entered on the rating list can be crystallised by the service of a completion notice by the billing authority specifying a date not more than three months after service by which the building can reasonably be expected to be completed (section 46A and Schedule 4A to the Local Government Finance Act 1988). That procedure was not followed in this case. Cyxtera has suggested that the service of one or more completion notices would have prevented the dispute that has now arisen, but we do not think that it would since it would have been open to Cyxtera to challenge a completion notice on the same basis as that on which it has proposed to alter the list.

40. In the absence of a completion notice the Tribunal has to decide the extent of the hereditament on the dates in issue. There is no dispute between the parties about the legal principles applicable to the issue. Both Mr Mould QC and Mr Kolinsky QC take as their starting point paragraph 66 of the Tribunal's decision in Porter (VO) v Trustees of Gladman SIPPS [2011] UKUT204 (LC), where the President, George Bartlett QC, and Mr Norman Rose FRICS said:

> "The authorities, in our judgment, establish the following. A building is only a hereditament if it is ready for occupation, and whether it is ready for occupation is to be assessed in light of the purpose for which it is designed to be occupied. If the building lacks features which will have to be provided before it can be occupied for that purpose and when provided will form part of the occupied hereditament and form the basis of its valuation it does not constitute a hereditament and so does

not fall to be shown in the rating list. There is in consequence no scope for including in the list a building which is nearly, even very nearly, ready for occupation unless the completion notice procedure has been followed."

41. So we have to determine how much of 630-631 Ajax Avenue was capable of beneficial occupation for the intended purpose of the building on the dates in question. There is no dispute that customised white space was so capable, and therefore on Cyxtera's own case part of the first-floor data hall was within the hereditament on 1 April 2010 and a larger area of it on 20 July 2010, whereas on the VOA's case the whole of that hall was within the hereditament on both dates (but not the ground floor fallow space not yet fitted out as white space). On 30 September 2010 on the VOA's case the whole of the first floor and ground floor data halls at 630 were within the hereditament, whereas Cyxtera argues that only the customised white space in each data hall was within the hereditament and that there was white space in each hall that was not.

42. The authorities relate to different buildings; and the question whether they were ready, or merely nearly ready, for beneficial occupation for their intended purpose was dependent upon what that intended purpose was. The empty shell of a building designed for use as a school might be useable for storage, but that does not satisfy the test of capability for use for its intended purpose. In Porter itself the appeal properties were units that were going to be let to tenants as offices. They were unoccupied because as yet there were no tenants; and the Tribunal found that the units were not capable of beneficial occupation because they were not ready for tenants and required further fitting out work including partitioning, tea points, the "small power system" (a ring main and power points) and upgraded air conditioning that each customer would need. These items would form part of the hereditament when complete.

43. The final words of paragraph 66 of the decision in Porter v Gladman SIPPS - "no scope for including in the list a building which is nearly, even very nearly, ready for occupation" – imply that there is no de minimis margin and that the building must be completely ready; but the decision followed that of the Court of Appeal in the Post Office v Nottingham City Council [1976] 1 WLR 624 which distinguished between the building itself and the furniture and equipment needed for immediate occupation. The building in question was a purpose-built telephone exchange. The Court of Appeal found that it was not yet capable of beneficial occupation because it lacked electrical wiring and a transformer. The absence of a ventilation system would also have prevented beneficial occupation for its intended purpose, whereas the absence of kitchen equipment and of the telephone equipment itself did not. Bridge LJ warned against the introduction of "highly technical problems of when articles brought on to land do or do not become part of the freehold" (page 635H). Instead, he said:

> "… a broader and common sense test must be applied. I think the test is: as a matter of fact and degree, is, or will the building, as a building, be ready for occupation, or capable of occupation, for the purpose for which it is intended".

44. At 636B he said:

> "The vital distinction, I think, is between the time when the building is ready for occupation as a building, and the subsequent installation in it of equipment and furniture which is necessary for its use for the purpose for which it is intended."

45. Cairns LJ added at 636G-H:

> "I cannot accept the proposition that a building intended for a telephone exchange is only complete when it is capable of immediate use as a telephone exchange. If that were the test, a house could not be said to be complete until it had been furnished, or a factory until the necessary tools for use in it were available. … If the building is, in the ordinary sense, complete so that it is ready to be equipped for the intended purpose by introducing some equipment which is not part of the building, then, in my opinion the building is ready for occupation for that purpose."

46. So we have to decide whether white space is capable of beneficial occupation for the purpose for which the building was intended. It does not have to be capable of immediate use, provided that what is lacking is – in common sense terms, as a matter of fact and degree – furniture or equipment rather than part of the building itself.

The evidence and argument about white space

The evidence

47. We have said that evidence of fact was given for Cyxtera by Mr Finch and Mr Borgia, whose detailed knowledge of Cyxtera's business was immensely useful. For the VOA, Dr Liggins gave helpful evidence about the way data centres operate; he was of course not involved in Cyxtera's business but his evidence supplemented the factual context offered by Mr Borgia and was consistent with it so far as the facts go.

48. However, there was no dispute about the facts. The dispute is about their interpretation and legal significance. Both Mr Borgia and Dr Liggins gave their views about this, but it is a legal question and it is for the Tribunal to determine on the basis of the factual evidence before it.

49. Expert valuation evidence was given for Cyxtera by Mr Blake Penfold FRICS, MCIArb and for the VOA by Mr Anthony Beadle BA(Hons) DipSurv MCMI MRICS. In their Joint Statement to the Tribunal they agreed alternative valuations for the hereditament on the basis first that Cyxtera's argument about the extent of the hereditament succeeded, and second that the VOA's argument succeeded, in exemplary compliance with paragraph 18.18 of the Tribunal's Practice Directions, issued on 19 October 2020 which reads:

> "An expert should explain whether and how the opinions expressed would change if facts alleged by a party other than one by whom the expert is instructed were assumed to be correct."

50. The values thus agreed are as follows:

Material Date	VO	Cyxtera
1 April 2010	£685,000	£475,000
22 July 2010	£685,000	£530,000
30 September 2010	£1,220,000	£780,000
13 March 2013	£1,880,000	£1,220,000

51. Those values are calculated using agreed values per square metre for the different kinds of space: £127.37 for offices, £77 for machine rooms and £110 for data halls (and it is specifically agreed that white space and customised white space have the same value; the issue is not the value of the white space but whether it forms part of the hereditament). The valuation experts also gave their opinion about the legal consequences of the agreed facts, but again the legal issue is for the Tribunal to determine.

The arguments for the appellant

52. Mr Mould QC takes as his starting point paragraph 66 of the decision in *Porter v Gladman SIPPS*, quoted above, and submits that the whole of the relevant data halls, white space as well as customised white space, were capable of occupation at the various material dates. Customer-specific work had yet to be carried out to make the white space ready for customers, but it is already fitted out to a high degree of readiness. On practical completion of the data hall, when it consists entirely of white space and before any customer equipment is installed, it is handed over from Cyxtera's construction team to its operational team. According to Mr Borgia, and as Dr Liggins observed in his witness statement, "Cyxtera operate the white space from handover from construction as if it contained customers". White space has in-built flexibility and adaptability so that the work required to customise it involves reconfiguring features of the data hall that are already present, for example floor tiles. Technical work has limited impact on the fabric of the building, for example the drilling of small holes to fix cable trays and partitioning the cold aisles. The whole data hall is "ready for Cyxtera's occupation as a provider of data hall space on a retail co-location model" and corresponds to the building in the *Post Office* case after the installation of the elements found to be lacking in that case and before the introduction of the telephone equipment itself.

53. Mr Mould QC points out that Cyxtera does not argue that any of its customers is or ever will be in rateable occupation of the data centre. Nor does it argue that its occupation of the hereditament, whether or not the hereditament is found to include white space, does not meet the tests for rateable occupation, namely that it is actual, exclusive, beneficial and not too transient.

The arguments for Cyxtera

54. Mr Kolinsky QC likewise started from paragraph 66 of the decision in *Porter v Gladman SIPPS*. But he argued that white space was incapable of beneficial occupation as a data centre because it was not ready for customers. Work was needed to get it into that state of readiness, and that work was not *de minimis*. The work of adaptation is "required for the data halls to be used by clients or at all as data halls."

55. Those works, he argues, are works "to the building" rather than "in the building". It is not a matter of placing equipment in it, comparable to the moving of telephone equipment into an exchange. Mr Kolinsky QC, and Cyxtera's witnesses, stressed the extent of the work required and the need to alter the floor and ceiling and to attach cables and cages to the floor.

56. Mr Kolinsky QC argued that to focus on Cyxtera's activities is to focus on the accidental nature of Cyxtera's particular operating model of retail colocation whereas the focus should be on the essential nature of the building namely a data centre. In any event, he says, a retail colocation data centre "still needs to function as a data centre and it cannot do that in cat A condition without further works."

Discussion and conclusion

57. We have to decide whether white space was ready for beneficial occupation for the intended purpose of the building. The authorities do not relate to data centres; they are about situations where there is only one type of occupier who could occupy the building for its intended purpose. The building in *Porter v Gladman SIPPS* was intended to be occupied by office tenants; the building in *Post Office* was intended for the freeholder to occupy as a telephone exchange. It was easy to see how the building was to be used and by whom. Here, by contrast, the purpose for which the building is designed to be used involves the active presence both of Cyxtera (managing, controlling and working on the white space) and of its customers. The situation therefore lends itself to being described in different ways. Mr Kolinsky QC sees the building as intended for the occupation and use of customers and their IT equipment whereas Mr Mould QC says:

> "The focus however must be the purpose for which the building is designed, which includes as a co-location facility for the Ratepayer's occupation and which serves the Ratepayer's purpose at the earlier stage of the fit-out."

58. Thus for the VO, white space is like the building in *Post Office v Nottingham City Council* at a stage later when it was all ready for occupation but for the telephone equipment; whereas for Cyxtera, white space is like the office units as they stood in *Porter v Gladman SIPPS*, not yet ready for occupation by the office tenants.

59. The hereditament in this appeal is not readily comparable to the office units in *Porter*. They were indeed designed for occupation by the tenants, not by the freeholder, and the issue was whether they were ready for those tenants to take up occupation. In *Post Office* the building was intended for occupation by the freeholder, and the issue was whether the building was ready for it to occupy as a telephone exchange. 630-631 Ajax Avenue, by contrast, is intended

for occupation by Cyxtera itself as well as for use by its customers (who it is agreed are not in rateable occupation); Cyxtera not only provides but also operates, actively maintains and constantly adapts the space in its data halls. It has done that ever since the data halls were handed over from the construction team to the operational team, with the air cooling system switched on, the lights on, the power connected and the security activated and under the control of Cyxtera's personnel, so that the white space is ready for adaptation for customers.

60. This is not to focus on the ratepayer's business model; in our judgment the answer would be the same if Cyxtera were operating a wholesale colocation business, or indeed if it were a company running a different business altogether and using the data centre only for its own IT equipment. A data hall, unlike a warehouse for example, is a special environment with a power supply, air conditioning, security, lighting and fire protection which all require active operation in the white space, even in the absence of IT equipment whether belonging to one customer, to many, or to the operator of the space.

61. Accordingly, the extent to which the white space is ready for customers is a red herring. Cyxtera's own beneficial occupation of the white space is what matters.

62. We would add, very much in parenthesis, that we disagree with Cyxtera's characterisation of the works needed to customise the white space. There is no alteration of the raised floor or the dropped ceiling; tiles are moved around, as they are designed to be; the process of removing a tile was demonstrated to us and is the work of a moment. Nothing is structurally changed. Cages may be attached beneath the raised floor to connect to power and to the node room, but in this context we regard that work as akin to the addition of furniture. It does not involve any alteration to the building itself. But in any event that is irrelevant because whilst the building is designed for the installation of customers' equipment it is also designed for the occupation of Cyxtera which is in control of and actively operating the white space from the point when it is handed over by the builders. It is not that the commando units and cold aisle containment are just furniture, although that is undoubtedly true. It is that they are not necessary for Cyxtera's beneficial occupation.

63. In fact at the earliest of the material dates the first floor data hall already had customers, as did the ground floor hall in September 2010. So at no point are we looking at a data hall comprising entirely white space with no customers present. Even if we had been, we would have regarded the white space as being capable of beneficial occupation by Cyxtera for the intended purpose of the building (namely a data centre actively managed and controlled by Cyxtera). So it was at the three material dates in issue; the whole of the data halls, white space and customised white space, were capable of occupation by Cyxtera for that purpose and in fact so occupied.

64. Mr Mould QC points out that any other conclusion would lead to the absurd result that the hereditament is constantly changing size. Every time a customer leaves and its space is dilapidated back to white space ready for the next customer, that area of white space be it one aisle or several would cease to be customised white space and would fall out of the hereditament necessitating frequent re-valuations. Mr Kolinsky QC says that that should not deter us from the result he seeks, but in our judgment the production of an absurd result would be an indication that a wrong turn has been taken. Mr Penfold seeks to avoid this result by

including within customised white space (which he describes as "white space where customers' equipment has been installed") areas that have been used by customers and have subsequently been dilapidated back to white space, even where no replacement customer has arrived; but we do not know why that would be the correct classification. If white space is not capable of beneficial occupation then it is not so capable whether it has always been white space or becomes white space at a later stage. In reality it is capable of beneficial occupation by Cyxtera for the intended purpose of the building, it has been so occupied from the point when the building contractors handed it over, and it remains so occupied when it is created afresh after a customer's departure.

65. Accordingly the appeal succeeds so far as the first issue is concerned and the rateable values on the first three material dates are those proposed by the VOA, in the first three rows of the table at paragraph 50 above.

The second issue: number 631 and the VOA's new case

66. We can deal with this relatively briefly because a great deal of argument is unnecessary now that the VOA has conceded that number 631 did not form part of the hereditament on 13 March 2013.

67. However, that is not the end of the matter. Mr Mould QC argues that it is open to the Tribunal to determine that 631 became part of the hereditament on a later date, and to order that the rating list should be altered at that date. That later date might be 15 March 2013, the date of practical completion, 26 March 2013 when all the items on the snagging list were closed, or 1 July 2013. That latter date is the point at which it is agreed that the first customer went into occupation of the first floor data hall at 631, and it is therefore the latest date at which it must be the case that the whole data hall was fitted out as white space (because the fact that part of it had been customised for a client must mean that the whole hall was fitted out as white space).

68. Mr Mould QC therefore asks the Tribunal to order the alteration of the list to reflect the addition of 631 to the hereditament as at 1 July 2013. He says that the Tribunal has power to make that order under regulation 38(7) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, and in the circumstances should exercise its discretion to do so since otherwise no rates will be paid in respect of 631 until the 2017 list comes into effect (since it is too late for the VOA to alter the 2010 list).

69. Regulation 38(7) reads:

> "(7) Where it appears that circumstances giving rise to an alteration ordered by the VTE have ceased to exist, the order may require the alteration to be made in respect of such period as appears to the VTE to reflect the duration of those circumstances."

70. That provision is generally used in situations where an alteration is required because building works have rendered the hereditament incapable of beneficial occupation, but later come to an end. An order by the VTE can therefore reflect the duration of the building works. Mr

Mould QC argues that it is equally apposite here because the circumstances giving rise to an alteration by the VTE in relation to 13 March 2013, namely the fact that 631 was incomplete, have ceased to exist. Accordingly, the Tribunal, exercising on appeal the VTE's jurisdiction, can order that the list be altered to reflect Cyxtera's valuation as at 13 March 2013, but that that alteration is to last only until 1 July 2013 at which point the VOA's valuation will be substituted.

71. Mr Kolinsky QC argues that the Tribunal does not have jurisdiction to do this because the circumstance giving rise to an alteration on 13 March 2013 is that the VOA made a mistake and entered the wrong value, and that circumstance has not changed.

72. We are not convinced by that argument. However, even if we have jurisdiction to make the order sought, we will not exercise our discretion to do so for two reasons.

73. First, the case for an alteration of the list on 1 July 2013 was not pleaded by the VOA. There was a suggestion in Mr Beadle's report that a later date might be considered if it was found that 631 was not ready for occupation by 13 March 2013, but there was no mention of such a possibility in the valuation experts' joint statement, nor any further mention until the filing of Mr Mould QC's skeleton argument and its introduction of regulation 38(7) the week before the hearing. At that stage the date was said to be one of three possible dates, and only at the hearing itself did Mr Mould QC commit to 1 July 2013 as the desired date. Up to that point the argument for the VOA remained that 631 formed part of the hereditament on 13 March 2013. There is no application to amend the VOA's statement of case, nor would such an application have been granted. Such a late change, and a major one at that, to the VOA's case is not acceptable.

74. Second, there is no valuation evidence before the Tribunal relating to the new date. Mr Mould QC asks the Tribunal to infer that the valuation put forward by Mr Beadle for 13 March 2013 would remain accurate nearly four months later, subject to one further factor which is that it is agreed that as at 1 July 2013 the data hall was fitted out to half of its full capacity in terms of power and air conditioning. Therefore the Tribunal "using its own expertise" as Mr Mould QC put it should apply a factor of 0.5 to the value put on the data hall (but not to other elements of the valuation such as the offices). We decline to use our expertise to indulge in guesswork. The VOA's argument on this second issue has no prospect of success.

Conclusion

75. Accordingly, the appeal succeeds so far as the first three material dates are concerned, but not in relation to 13 March 2013 and the Tribunal declines to substitute any other material date after that point. The list will be altered to reflect the values agreed by the parties, and set out in the table at paragraph 50 above, on the basis that the appeal succeeds in relation to the first three dates and fails in relation to the last (the VTE's figures are superseded because the parties have agreed revised measurements of the areas concerned). Therefore the rateable values are:

Material Date	Rateable Value
1 April 2010	£685,000
22 July 2010	£685,000
30 September 2010	£1,220,000
13 March 2013	£1,220,000

Judge Elizabeth Cooke Mark Higgin FRICS

Dated: 28 October 2021