UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2023] UKUT 36 (LC) UTLC

Case Number: LC-2018-000302

Location: Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – HEREDITAMENT – office building occupied by 'property guardians' while awaiting redevelopment – 'reality principle' at Material Day – mode and category of occupation – appeal dismissed

IN THE MATTER OF AN APPEAL FROM THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

LUDGATE HOUSE LIMITED

Appellant

-and-

(1) ANDREW RICKETTS (VALUATION OFFICER)
(2) LONDON BOROUGH OF SOUTHWARK

Respondents

Re: Ludgate House,
245 Blackfriars Road
London SE1 8NW

Mr Justice Edwin Johnson, The President and Mr PD McCrea FRICS FCIArb
Rolls Building
Heard on: 13-14 December 2022

Decision Date: 14 February 2023

David Forsdick KC and *Luke Wilcox* for the Appellant
Mark Westmoreland Smith for the First Respondent
Faisel Sadiq for the Second Respondent

The following cases are referred to in this decision:

Ludgate House Limited v Ricketts & L B Southwark [2019] UKUT 0278 (LC)
LB Southwark v Ludgate House Limited & Anor [2020] EWCA Civ 1637
SJ&J Monk v Newbigin [2017] UKSC 14 [2017] 1 WLR 851
RF Williams (Valuation Officer) v Scottish & Newcastle Retail Ltd [2001] EWCA Civ 185
Fir Mill v Royton UDC (1960) R.R.C. 171
Global 100 Ltd v Jimenez [2022] UKUT 50 (LC) [2022] HLR 25
Global 100 Ltd v Laleva [2021] EWCA Civ 1835
Kenya Aid Programme v Sheffield CC [2013] EWHC 45 (Admin)
Hewitt v Telereal Trillium Ltd [2019] UKSC 23 [2019] 1 WLR 3262
Lamb & Shirley Ltd v Bliss [2001] EWCA Civ 562.
Holland v Ong [1958] 1 QB 425
BMC Properties and Management Ltd v Jackson (VO) [2014] UKUT 0093 (LC)
Morelle Ltd v Wakeling [1955] 2 QB 379
Young v Bristol Aeroplane Co. Ltd [1944] KB 718
JA Pye v United Kingdom (2008) 46 E.H.R.R. 45
Air Canada v United Kingdom (1995) 20 E.H.R.R. 1
Jahn v Germany (2006) 42 E.H.R.R. 49.
Radchikov v Russia [2007] ECHR 65582/01
Gladysheva v Russia [2011] ECHR 7079/10
Gashi v Croatia [2007] ECHR 32457/05
Tunaitis v Lithuania [2015] 4297/08
R (Huitson) v HMRC [2011] EWCA Civ 893
R (Huitson) v HMRC [2010] EWHC 97 (Admin)
Rossendale Borough Council v Hurstwood Properties (A) Ltd [2021] UKSC 16 [2022] AC 690

Introduction

1. This is the further hearing of an appeal against a decision of the Valuation Tribunal for England (Ms Fiona Dickie, Vice President). By the relevant part of her decision (**"the VTE Decision"**) the Vice President dismissed certain appeals of the ratepayer, Ludgate House Limited (**"LHL"**), against the refusal of the Valuation Officer to act on two proposals made by LHL for the alteration of the 2010 non-domestic rating list in relation to a building known as Ludgate House. LHL has appealed against the relevant part of the decision.

2. The appeal of LHL to this Tribunal (**"the UT Appeal"**) was previously heard and determined by this Tribunal (Martin Rodger KC, Deputy Chamber President, and Mr McCrea FRICS) by a decision dated 18th September 2019. We will refer to this first decision, to which we shall be making extensive reference in this decision and which has the neutral citation number [2019] UKUT 278 (LC), as **"the First UT Decision"**.

3. The First UT Decision was the subject of an appeal by the London Borough of Southwark ("**Southwark")** to the Court of Appeal. The Court of Appeal handed down their decision on 4th December 2020. We will refer to the Court of Appeal decision, which has the neutral citation number [2020] EWCA Civ 1637, as **"the CA Decision"**. The Court of Appeal decided to allow the appeal. The consequence of allowing the appeal was that further issues arose for determination in the UT Appeal, which it had not been necessary to determine in the First UT Decision. In the result, and by an order made on 4th December 2020 the Court of Appeal allowed the appeal of Southwark and remitted the UT Appeal to this Tribunal for determination of these further issues. Thus it is that the UT Appeal has returned to us for this further hearing.

4. The UT Appeal concerns a former office building known as Ludgate House (**"the Building"**). By way of general introduction to what the UT Appeal is about, it is convenient to repeat the opening paragraphs of the First UT Decision.

5. Until its demolition in 2018 the Building was an office building of 173,633 sq ft at the southern end of Blackfriars Bridge in the London Borough of Southwark. Built in 1988 and formerly the home of Express Newspapers, its last tenants vacated the Building in March 2015. Between 1 July 2015 and May 2017, it was occupied by a number of licensees under arrangements made between the owner of the Building, LHL, and a property services company called VPS (UK) Ltd, (**"VPS"**) which specialises in the supply of so-called property guardians.

6. A property guardian is a private individual who, usually with others, occupies vacant premises as their residence under a temporary contractual licence until the building owner requires it for redevelopment. The arrangement provides the guardian with accommodation at a lower cost than in the conventional residential letting market, it provides the supplier with a fee for making the arrangements, and it provides the building owner with some protection against squatters and, more significantly, with the prospect of mitigating liability for non-domestic rates.

7. The main issue before the Tribunal at the previous hearing was the question of who was in rateable occupation of the Building, as between LHL and the licensees who were permitted to occupy the Building as property guardians (**"the Guardians"**). In the First UT Decision the Tribunal decided that the individual rooms in the Building occupied by the Guardians each constituted separate hereditaments, in the rateable occupation of the relevant Guardian occupying the relevant room. The Court of Appeal disagreed. They decided that LHL was in rateable occupation of the entirety of the Building, so that the Building constituted a single hereditament for rating purposes. The issues which we have to resolve arise out of the consequences of the CA Decision. We will not attempt to summarise these issues at this stage. They require careful definition, following an explanation of the relevant factual and legal background.

8. At this further hearing the Appellant, LHL, was represented by David Forsdick KC and Luke Wilcox. The First Respondent to the UT Appeal, the Valuation Officer, Andrew Ricketts (**"the VO"**) was represented by Mark Westmoreland Smith. Southwark, the Second Respondent to the UT Appeal, was represented by Faisel Sadiq. We are grateful to counsel for their written and oral submissions for this further hearing.

The evidence

9. At the first hearing of the UT Appeal, which was a rehearing, the position in terms of factual evidence was as follows. Oral evidence was given by Mr Devinda Jayawardene, a regional manager for VPS, Mr Clive Riding, a consultant for Native Land Ltd which was appointed by the parent company of LHL to act on behalf of LHL in connection with the development of Ludgate House, and Mrs Julie Drewett, a senior revenues officer for the London Borough of Southwark. The Tribunal was also invited to read witness statements prepared by Ms Alice Howard, Mr Gareth Breacher and Ms Angela Martin, each of whom had lived at the Building as licensees of VPS (Guardians as we are referring to them) but none of whom was available to be cross examined.

10. In terms of expert evidence each party called an expert valuer to give evidence on the rating valuation issues raised by the UT Appeal. LHL called the expert evidence of Mr John Blake Penfold FRICS, who provided an expert report and supplemental expert report. The VO called the expert evidence of Mr Jonathan Spooner MRICS, who also provided an expert report and supplemental expert report. Southwark called the expert evidence of Mr Alistair Townsend FRRV, who also provided an expert report. There was also a joint expert statement signed by all three experts. All three experts gave oral evidence and were cross examined.

11. On 7th March 2022 the Tribunal gave directions for the hearing of the remitted UT Appeal. In terms of factual evidence paragraphs 2 and 3 of these directions provided as follows (italics have been added to quotations in this judgment):

> *"2. The appeal will be determined on the basis of the findings of fact at paragraphs 33 to 75 of the Tribunal's decision of 18 September 2019.*
> *3. If any party wishes to rely on any additional facts they may refer for that purpose to the evidence (including witness statements) given at the hearing on*

23-25 July 2019 but witnesses of fact are not required to attend for cross-examination."

12. In terms of expert evidence paragraphs 6-9 of the directions provided as follows:

> *"6. The parties may rely upon the original reports of the expert witnesses on which they relied on at the hearing on 23-25 July 2019.*
> *7. The experts may file supplemental reports by 10 June 2022.*
> *8. Any questions addressed to the experts shall be served by 8 July 2022 and shall be responded to by 22 July 2022.*
> *9. The experts shall prepare a joint statement identifying the matters on which they agree and on which they disagree and concisely summarising the reasons for their disagreement which shall be served on the parties and filed with the Tribunal by 28 October 2022."*

13. The consequence of these directions was that we heard no further factual evidence in this further hearing. Instead we were referred to extracts from the witness statements of Mr Jayawardene, Mr. Riding and Ms Drewett. There was no transcript of the oral evidence of these witnesses at the first hearing which was made available to us.

14. Further supplemental expert reports for this further hearing were provided by Mr Penfold and Mr Spooner. There was also a second joint expert statement signed by Mr Penfold, Mr Spooner and Mr Townsend. Mr Townsend was not called to give oral evidence at this further hearing. Mr Penfold and Mr Spooner were called to give oral evidence, and were cross examined. In this context we are therefore concerned with the expert evidence of Mr Penfold and Mr Spooner. We will set out our assessment of the expert evidence of Mr Penfold and Mr Spooner later in this decision, when we come to the expert valuation issues.

Relevant factual background

15. By reason of paragraph 2 of the directions quoted above, both the relevant factual background and the relevant rating and procedural history are provided by paragraphs 33-75 of the First UT Decision. In these circumstances, and in order to avoid the need for reference back to the relevant part of the First UT Decision, we largely (and with gratitude) repeat paragraphs 33-61 of the First UT Decision, in setting out the relevant factual background. We also do the same (again with gratitude) in the next section of this decision, which deals with the rating and procedural history of this case, prior to the case reaching the VTE. Where necessary we bring out additional matters, which have become relevant to the issues in this further hearing. In doing so, we do not of course contradict any of the findings of fact in paragraphs 33-61.

16. In the remainder of this decision, for ease of reference, we will refer to specific paragraphs of the First UT Decision using the formula [UT/1] for paragraph 1, and so on.

17. In terms of legal references we shall, in the remainder of this decision, be making repeated reference to the provisions of the Local Government and Finance Act 1988 (**"the 1988 Act"**) and to The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (SI 2009 No. 2268) (**"the 2009 Regulations"**). For ease of reference,

all references to Sections and Schedules in the remainder of this decision are, unless otherwise indicated, references to the Sections of and Schedules to the 1988 Act. All references to Regulations are, unless otherwise indicated, references to the regulations in the 2009 Regulations. In each case references to these provisions are to the relevant provisions as they were in force at the relevant times.

18. It was and remains common ground that the material day for the purposes of the UT Appeal, within the meaning of paragraph 2(6) of Schedule 6, was 1st July 2015. We shall refer to this date as **"the Material Day"**.

19. Prior to its demolition in 2018, the Building stood on the South Bank between Blackfriars Road and Blackfriars Station. It comprised ground and lower ground floors with nine upper storeys. The upper floors were each of about 1765m^2, although the eighth was a little smaller and the ninth smaller still.

20. The lower ground floor housed plant and machinery rooms and other space ancillary to a large office building. The ground floor included a reception area and a café with kitchen. The first to seventh floors provided open plan office space with only limited partitioning; more cellular offices and less open plan space was provided on the eighth floor, while the smaller ninth floor was almost entirely partitioned into individual offices and board rooms.

21. LHL acquired the freehold in 2010, subject to a lease to commercial tenants. In 2013 planning permission was granted for a comprehensive redevelopment of the Building together with the adjoining Sampson House to create a large, mixed use office, residential and retail complex. The lease expired and the tenants vacated in March 2015.

22. On 18th June 2015, before demolition work had begun, VPS contacted LHL with a proposal to secure the Building against trespassers by arranging for occupation by property guardians under licences granted by VPS (**"the VPS Proposal"**). It was recommended that 32 property guardians be installed to provide *"a robust level of protection"*. LHL accepted the proposal and on 24th July 2015 an agreement (**"the VPS Agreement"**) was entered into, although by that time the parties had already begun to implement the proposal.

23. The relevant terms of the VPS Agreement provided that no relationship of landlord and tenant was created between them, and that VPS was not entitled to exclude LHL from the Building (clauses 2.7.1, 2.7.2). Nor was VPS to be LHL's agent for any purpose. VPS was not entitled to occupy the Building itself, and the rights of occupation to be granted by VPS were to be in the form of licences rather than tenancies (clause 2.4.2). The agreement was terminable on 30 days' notice, at the end of which the Building was to be vacant. LHL was to pay a fee for the services provided by VPS, but this was reduced by £200 per week for each licensee who took up occupation of the Building.

24. The terms of the licences to be granted by VPS to the individuals wishing to live in the Building were in a standard form. The First UT Decision records that no example of an executed licence was available at the first hearing, but the Tribunal were shown the form of licence used by VPS at that time.

25. In the First UT Decision the Tribunal found that the licence was clearly drafted with two objectives. The first and most prominent was to make it impossible for the Guardians, as licensees, to claim statutory security of tenure as tenants; the second was to guarantee a residential presence in the building at all times to maximise the chances of achieving rates mitigation and to ensure that any squatter who took up occupation without permission could be arrested for the criminal office of squatting in a residential building contrary to section 144, Legal Aid, Sentencing and Punishment of Offenders Act 2012.

26. The area over which the licensee was granted rights was referred to as the *"living space"*. This was defined as the area designated as available for occupation from time to time, which could be varied by VPS (clauses 1.1.4, 3.4) but in practice the living space extended to the whole of the Building excluding the plant rooms. The agreement conferred the right to occupy the living space and to share it with others granted the same right (3.1). It was specifically recorded that the licensee had no right to exclusive occupation of any part of the living space (4.1) and the licensee could be required to move to a different room. In practice, however, as Mr Jaywardene explained in his evidence, before each licence was signed the licensee would be shown the Building and would choose which room they wished to occupy. All those permitted to occupy the Building were entitled to share the whole of the living space and they were to agree amongst themselves how it was to be shared, but the express expectation was that each would have a room of their own.

27. Clause 8 contained a series of restrictions. Smoking, the use of heaters, permitting others to stay overnight, having more than two guests at any one time, changing locks, or causing nuisance or annoyance to others were all prohibited in much the same way as in most rented accommodation.

28. Clause 9 imposed obligations on the licensee. These included not sleeping overnight away from the Building without consent for more than two nights in seven (clause 9.1) and not leaving the Building unoccupied by at least one person (clause 9.3). The licensee was to report to VPS any person attempting to gain access to the Building without permission, and was *"politely but firmly [to] challenge"* any such person *"to determine their identity and purpose"* (clause 9.7).

29. The first VPS licensees (Guardians) moved into the Building on these terms on the Material Day (1st July 2015). Four individuals arrived on that day, and each chose a specific room on the second, eighth or ninth floors. Each paid a licence fee of about £500 a month.

30. No works had been carried out by VPS before the first Guardians moved in and the Building remained configured for office use with limited shower and kitchen facilities. Additional facilities were added in the next eight to ten weeks. Four shower pods were installed in the washrooms on the second, fourth, seventh and eighth floors. Cookers were added to some of the existing office kitchens, and on the fourth and eighth floors areas were set aside for use as kitchens with portable kitchen units, washing machines, sinks and cookers.

31. VPS did not obtain planning permission for the residential use of the Building, nor did it apply for a licence to operate a house in multiple occupation. Southwark was aware of the mode of occupation of the Building as a result of an inspection carried out by its officers in

January 2016 and it did not raise planning or licensing as an issue. The Tribunal were satisfied at the First Hearing that Ludgate House became an HMO once the Guardians moved in, as it then satisfied the standard test in Section 254(2) of the Housing Act 2004; see [UT/48]. The Tribunal also noted that it is a criminal offence to be in control of an unlicensed HMO (Section 72 of the 2004 Act).

32. A greater number of Guardians than the 32 originally agreed on moved into the Building, and by 17th August 2015 46 individuals had taken up occupation, each with their own separate licence. Although the terms of the licences permitted each licensee to occupy almost the whole of the Building as their living space they also provided for each to be allocated, or to select, a specific room. This was done in practice, although in a few cases Guardians occupied a less well-defined part of one of the open plan floors. A record was kept of the rooms in which each individual resided and the licence emphasised the importance of VPS being informed if anyone chose to move to a different room. Where a separate room was allocated to an individual, that room had a lockable door for which the Guardian was provided with a key, enabling them to keep it secure while they were absent.

33. Photographs show that each occupied room had the name of the resident on a card or notice fixed to the door. These name cards were not home-made items produced by the licensees themselves, but were pre-printed with the VPS logo and the words *"Guardian Room"* with space for a name and room number to be filled in.

34. The photographs also show parts of the open plan space separated by furniture or fabric to identify the living space of those residents who did not have their own rooms.

35. As well as having their own designated rooms or living area, each Guardian made use of the communal toilets, showers and kitchens.

36. The pattern of occupation established by 17th August 2015 had at least one Guardian on each floor of the Building. On five of the floors there was only one Guardian, on two floors there were two, and on each of the second and fourth floors there were seven. On the floors with the greatest number of cellular offices the population was highest, with 12 people living on the eighth floor and 11 on the ninth.

37. VPS's only presence in the Building was by its security guards, one of whom was on duty at the entrance at all times. The Tribunal recorded (UT/54) that it was not clear from the evidence whether the main entrance to the Building was always open, or whether it was locked with the licensees each having a key, but the only evidence of the security guard controlling access by the Guardians was on the first day, the Material Day (1st July 2015), when the initial group of four was admitted to the Building.

38. Although the terms of the standard license provided for VPS to be entitled to require a Guardian to move from one room to another, this rarely happened in practice. The only requests or instructions to move of which there is any record were given in October 2016 when two individuals were asked to relocate from the ground and lower ground floors to enable sufficient work to be done to enable it to be said that LHL's planning permission had been implemented. In each case the Guardian moved without objection, and in May 2017 all of the Guardians moved out when required to do so. Although Guardians were entitled to move to a different room, provided they identified it to VPS, there was no

evidence that this happened on any significant scale and most Guardians remained in the room they had chosen, or had allocated to them, throughout the period of their occupation.

39. The records which the Tribunal were shown at the first hearing suggested that the population of Guardians was stable, with most (including the first four settlers) being in occupation for most of the 22 months of the VPS Agreement. Typically, the Guardians were employed and the building was their only home, or at least their only home in London where they worked. Some were couples but most were individuals. No Guardian gave oral evidence at the first hearing, but the Tribunal accepted that the witness statements signed by three of them gave a first-hand description of the arrangements; see [UT/56].

40. Alice Howard, a paediatric nurse, lived in the Building from July 2015 until May 2017. Her husband joined her in January 2016. They occupied two rooms allocated to them by VPS, numbers 22a and 22b on the seventh floor, one of which they used as a bedroom and the other as a private living and dining area. The rooms were lockable and they kept valuable possessions there. For most of their period of occupation they used a communal kitchen on the same floor, and an adjacent room as a larder and store for cooking utensils. They used showers on different floors at different times, and washing machines supplied by other licensees. They also made use of the communal areas, including by erecting an eight-person tent for use as a spare room when friends or family came to stay. They enjoyed the lively social life of the building, which featured parties, gym sessions and film nights.

41. John Breacher, a pastry chef, also lived in the Building from July 2015 until May 2017. For all but the last month of this time he lived in two rooms on the ground floor, where he shared a communal kitchen with the security guards.

42. Angela Martin worked locally in a managerial role, and moved to the Building in December 2015, remaining until May 2017. She was allocated room 11 on the ninth floor, where she slept, and made use of the communal kitchen and washing facilities on the same floor. Because of the number of people living on the ninth floor there was limited communal space, but the lift lobby area was used collectively for storage.

43. The Tribunal found ([UT/60]) that the photographs of the Building taken during the Guardians' occupation corroborated these witness statements and showed that Guardians who occupied their own separate rooms also made use of the open plan office floors, either for the storage of their belongings or as part of their living space. Gym equipment, table tennis and pool tables, desks, tables, chairs, lamps, washing lines, boxes, bags and other items could all be seen in the open areas. Most of the photographs were of the communal space, with only a few showing inside individual rooms. Ms Drewitt explained, in her evidence at the first hearing, that during her visit in January 2016 she had been trying to take photographs showing the extent of the unoccupied space. She had also entered rooms where residents were present and confirmed that they contained beds, tables, desks and chairs, but she had not taken photographs out of respect for the privacy of the occupiers.

44. It was put to Mr Jaywardene at the first hearing, and he agreed, that it was not possible to identify the boundaries of each Guardian's occupation; see [UT/61]. That clearly did not mean however, so the Tribunal found, that it was not possible to identify the individual

rooms occupied by the four Guardians present by midnight on the Material Day, or those who arrived by 17th August 2015 and chose to take a specific room rather than live in the open plan space. The parties agreed which individual rooms were allocated and occupied by specific Guardians as their own private space. The Tribunal found that what was not possible to identify with any precision was the full extent of the additional space, outside their own room, which any Guardian made use of for storage or recreation.

Relevant background – the rating and procedural history

45. At the start of the period under consideration the Building appeared in the 2010 Rating List (**"the 2010 List"**) as two separate hereditaments, the first identified as *"Ludgate House (inc part 2nd floor South)"*, with a rateable value of £3,870,000, the second as *"Pt second floor (North), Ludgate House"*, with a value of £327,000. The separate entries reflected the presence of two separate occupiers of parts of the Building before it was vacated in March 2015.

46. On 9th September 2015, LHL made a first proposal seeking the deletion of these entries from the 2010 List, on the basis, in reliance upon the presence of the Guardians, that the use of the whole of the Building was now domestic.

47. On 27th November 2015, having inspected the building two days earlier, the VO accepted LHL's proposal as well founded, and deleted the two hereditaments from the 2010 List with effect from 25th June 2015 (for the larger hereditament) and 3rd December 2015 (for the smaller hereditament). Possibly because of the lapse of time before this decision was made, the original proposal was formally referred to the Valuation Tribunal for England (**"the VTE"**) as an appeal by LHL. This was the first of what would become a series of six appeals to the VTE. We will refer to the deletions made on 27th November 2015 as **"the November 2015 Deletions"**.

48. Following the deletion of the Building from the non-domestic rating list (the 2010 List), each floor of the Building was entered in the valuation list as a separate dwelling for Council Tax purposes.

49. Southwark (the London Borough of Southwark) is the local billing authority for the Building. When it became aware of the deletion it carried out its own inspection on 11th January 2016 and formed the view that the Building was *"essentially vacant"*. The inspection was undertaken with the knowledge and cooperation of LHL.

50. On 29th February 2016 Southwark made two proposals of its own, challenging the alterations made by the VO and seeking the re-instatement of the entries for Ludgate House as they had appeared in the non-domestic rating list before the valuation officer's decision of 27 November 2015, or alternatively to create a new entry covering the whole Building and recording it as a composite hereditament.

51. LHL became aware of Southwark's proposals in March 2016 and its solicitors raised objections.

52. Although there had been no change in the relevant facts since the November 2015 Deletions, the VO initially sought to resolve Southwark's proposals by agreement. It was suggested that the Building be entered in the list on the basis that parts were domestic (the eighth, ninth and part of the sixth floors) with the remainder as non-domestic offices. Southwark accepted that position, but LHL was not prepared to agree. LHL accepted that the eighth, ninth and part of the sixth floors were domestic and therefore subject to Council Tax, but it did not agree that the remainder of the building was non-domestic.

53. As a result of LHL's resistance to the VO's suggested compromise, no alteration could be made to the list under Regulation 12(2) nor could the VO give effect to Southwark's proposals. The two proposals from Southwark therefore became the subject of the second and third appeals, respectively, to the VTE. In August 2016 LHL applied to be joined and was admitted as an interested party to Southwark's appeals.

54. While these appeals were continuing, the VO decided to enter part of the Building (being all but the first and second floors) in the 2010 List as offices, with a rateable value of £3,390,000. This change was effected by a unilateral notice issued on 31st May 2017 (**"VON1"**). The effective date of alteration was recorded as 25th June 2015. The actual date of alteration was recorded as 24th May 2017. We will refer to this alteration, which was at the centre of the issues argued in this further hearing of the UT Appeal, as **"the VON1 Alteration"**.

55. The VO subsequently had second thoughts about the exclusion of the first and second floors from the new entry. He informed LHL's agent that their omission was a *"description error"*. On 16th August 2017 the error was corrected by a second unilateral notice (**"VON2"**) entering the whole Building in the 2010 List as a composite hereditament having the same rateable value of £3,390,000, with the first and second floors being recorded as domestic property. The effective date of alteration was again recorded as 25th June 2015. The actual date of alteration was recorded as 14th August 2017.

56. Two points should be stressed in relation to VON 2, which did not appear in the First UT Decision but which were relevant in this further hearing. First, VON2 did no more than notify a change of the address shown in the 2010 List for the Building. This was a minor alteration of the 2010 List, and it was not in dispute, at this further hearing, that the alteration did not strictly require a notification, and could and should strictly have been made as the correction of a clerical error, pursuant to Regulation 17(3). Second, we understood it to be common ground before us that the VON1 Alteration had the effect of entering the Building into the 2010 List as a composite hereditament, within the meaning of Section 64(9). Entry as a composite hereditament was not something which occurred for the first time in relation to the alteration/correction notified by VON2.

57. On 24th August 2017, LHL made two further proposals against VON1. The first sought the deletion of the hereditament or, alternatively, that the rateable value attributed to the hereditament be reduced to £1, in each case on the basis that the whole of the Building was domestic property. The second proposal challenged the effective date of the alteration and proposed that it be 24th May 2017; that is to say the actual date of the VON1 Alteration. The significance of 24th May 2017 is that it was a date after the 2010 List had closed, with the consequence that if the VON1 Alteration only took effect on that date, the Building should not have been entered into the 2010 List at all. On that hypothesis the November

2015 Deletions would have stood, with the consequence that the former entries in the 2010 List for the two hereditaments which formerly comprised the Building would have remained deleted from the 2010 List, with effect from, respectively, 25th June 2015 and 3rd December 2015. This in turn would have achieved the objective (in rating terms) sought by LHL by the implementation of the property guardianship scheme; which was effectively to take the Building out of the scope of non-domestic rating.

58. These two further proposals of LHL were not accepted by the VO who referred them to the VTE as further appeals; that is to say as the fourth and fifth appeals which found their way to the VTE. The same occurred in relation to a further and final proposal, made by LHL on 27th September 2017, which proposed that the Building should be shown in the 2010 List as more than one entry. This was the fourth proposal made by LHL, and the sixth appeal to be referred to the VTE.

59. The overall result was that the six proposals concerning the Building, comprising two proposals by Southwark and four proposals by LHL, ended up as six appeals before the VTE. On 5th October 2017, the VTE directed that the six appeals be consolidated.

60. By the time the six appeals came on for hearing before the VTE the parties had agreed a unit rate of £320/m^2 as the rateable value of such parts of the Building as were properly to appear in the 2010 List as non-domestic property.

The VTE Decision

61. It is not necessary to go through the VTE Decision in detail. The following points are relevant to our decision.

62. First the Vice President, in contrast to this Tribunal, had the opportunity to inspect the Building. The inspection took place on 12th October 2017. By that time all of the Guardians had left and stripping out work had commenced. Nevertheless the Vice President found the inspection useful, and recorded her impressions of the Building in the following terms, at paragraph 18 of the VTE Decision:

> *"18. Despite it being well after the material day and in a position where it had been significantly stripped out, I inspected Ludgate House on the 12th October 2017 as I felt it was important to take the opportunity to do so before the building was demolished. Access was obtained to part of the areas where guardians had lived, including the basement, the first floor and one of the open plan floors. Notwithstanding the extent of the stripped out state, I found the inspection was useful in assisting me in putting the extent of the guardians' occupation in the physical context of the building. I gained an impression of the vast scale of the floors and the enormity of the open space, and the extent of that unadapted office space which would in practice have been unused by the number of guardians in occupation."*

To this, the Vice President added the following conclusions, at paragraph 22 of the VTE Decision.

"22. Under the contract with VPS, LHL would receive a rebate of £200 per week per guardian placed in Ludgate House and works to be carried out for the guardians to occupy were the provision of five shower pods and water heaters, 7 cookers and locks to existing partitioned offices. Such additions were temporary and designed to be easily removed when LHL no longer required property guardians at Ludgate House. However, for all intents and purposes, Ludgate House was still an office block: the presence of showers and cookers are not uncommon in office accommodation and these minor and, from the photographic evidence, clearly temporary installations, do not detract from that. While no application for planning permission for use of the building as residential or domestic accommodation was made and there was no attempt to obtain a licence as a house in multiple occupation, these matters, whilst part of the factual background against which the evidence and agreements came into existence, do not directly impact on the question of whether Ludgate House was wholly occupied for domestic purposes."

Second, and moving to the actual conclusions reached by the Vice President in the VTE Decision, it is necessary, in order to understand the issues in the UT Appeal, to spend a little time going through the principal conclusions of the Vice President.

63. Starting with the issue of rateable occupation, the Vice President stated the following conclusions, at paragraph 38 of the VTE Decision:

"38. The true position is that the guardians are in occupation on behalf of LHL. The question is one of fact and it is clear to me, with regard to the position and rights of the parties, that the occupation of LHL is paramount. VPS are specifically engaged to provide security services, and grant licences in order to do that, but are not given possession or occupation of the premises, and the guardians are not granted exclusive occupation of any part, nor is the extent of areas that may be occupied clearly defined. As such LHL are in possession of the whole building. There are no smaller separate hereditaments which are readily ascertainable either from the agreements or the evidence. In the circumstances I conclude that LHL is in rateable occupation of the whole of Ludgate House as a single hereditament."

64. The Vice President thus concluded that the Building was in rateable occupation as a single hereditament.

65. Further, at paragraphs 46 and 47 of the VTE Decision, the Vice President stated the following conclusions in relation to the use of the Building:

"46. While Mr Forsdick was technically correct to advance that proposition, there is a need to assess the extent of the use on the facts. Applying a broad consideration to the facts in this case, it is clearly not the case that the whole of Ludgate House, being the hereditament, or any part of it, is wholly in use as living accommodation.

47. In view of this, I am not satisfied that Ludgate House (or any part of it) was used wholly for the purposes of living accommodation. Consequently, Ludgate House cannot fall to be a domestic hereditament, and nor can it be a

composite hereditament. It only falls to be valued as a composite hereditament because, for reasons addressed below, that cannot be changed."

66. In terms of valuation the Vice President stated the following conclusion, at paragraph 52:

> *"52. I agree with the LBS primary argument that Ludgate House was all non-domestic, but that (owing to the issue of the effective date addressed below) the VO valuation for the composite hereditament must be adopted."*

67. Finally, the Vice President addressed the question of the effective date of the VON 1 Alteration. In this context, the Vice President stated the following conclusion, at paragraph 61 of the VTE Decision:

> *"62. The summary of my conclusions is that Ludgate House is wholly non-domestic with effect from the 1st July 2015."*

68. Third, and in terms of the actual disposal of the six appeals which were before the Vice President, the outcome was as follows:

(1) The Vice President dismissed the first of the appeals, namely LHL's first proposal seeking the deletion of the original entries in the 2010 List for the two former hereditaments which comprised the Building. The basis of this decision was that this proposal should be treated as historic; having been dealt with by the November 2015 Deletions.

(2) The Vice President dismissed the second and third appeals, namely the two proposals made by Southwark in the wake of the November 2015 Deletions. This was on the basis, recorded in paragraph 65 of the VTE Decision as an agreed basis between the parties, that these appeals, while not technically well-founded, were also now historic. We assume that this agreed position was reached in the light of the VON1 Alteration, and on the basis that these proposals had been dealt with by the VON1 Alteration.

(3) The Vice President dismissed the fourth appeal, namely the proposal by LHL either that the VON1 Alteration be reversed by the deletion of the single hereditament from the 2010 List or alternatively that the rateable value attributed to the hereditament be reduced to £1. This was on the basis that the fourth appeal had failed.

(4) The Vice President allowed in part the fifth appeal, namely the proposal by LHL for the effective date of the VON1 Alteration to be 24th May 2017. This fifth appeal was described as allowed in part because, in the light of the evidence, the VO decided that the effective date of the VON 1 Alteration should be shifted from 25th June 2015 to 1st July 2015. It is however important to keep in mind that this was, in effect, a dismissal of the fifth appeal because LHL was seeking, by the fifth appeal, to move the effective date of the VON1 Alteration to its actual date, namely 24th May 2017, after the 2010 List had closed. The moving of the effective date to 1st July 2015 did not achieve this objective.

(5) Paragraph 67 of the VTE Decision records that the parties sought jointly an adjournment of the sixth appeal; namely the final proposal made by LHL that the Building should be shown in the 2010 List as more than one entry. The Vice President adjourned the sixth appeal *"pending the conclusion of the proceedings*

on the remaining appeals". In theory therefore, the sixth appeal was not determined by the VTE Decision, and remains extant, at the level of the VTE.

The UT Appeal

69. The UT Appeal is not a general appeal against the VTE Decision. The UT Appeal is the appeal of LHL. The UT Appeal is an appeal against the VTE Decision only in so far as the Vice President decided (i) that the fourth appeal should be dismissed, and (ii) that the fifth appeal should be allowed in part which, as we have already explained, was an effective dismissal of the fifth appeal.

70. The issues which were raised by the UT Appeal can conveniently be divided into the following four issues:

    (1) The identification of the correct number of hereditaments at the Building on 1st July 2015. The Vice President concluded that LHL was in rateable occupation of the whole of the Building, so that the Building comprised a single hereditament. LHL disagreed, and contended that the rooms occupied by the licensees should be treated as separate hereditaments If the decision of the Vice President was wrong on this issue, and the Building comprised more than one hereditament on the Material Day, the parties were agreed that the VON1 Alteration should be deleted, thereby reverting the position to the November 2015 Deletions. We will call this issue **"the Hereditament Issue"**.
    (2) Assuming that the Building was a single composite hereditament on the Material Day, what is the proper approach to the valuation of the non-domestic part of the hereditament? We will call this issue, or more accurately the group of issues within this issue **"the Valuation Approach Issue"**.
    (3) The third issue is one which we find it convenient to separate out from the Valuation Approach Issue. Again assuming that the Building was a single composite hereditament on the Material Day, what is the correct figure for the valuation of the non-domestic part of the hereditament, on the basis of whatever is the correct approach to the valuation exercise? The antecedent valuation date for this purpose is 1st April 2008. We will call this issue **"the Valuation Figure Issue"**.
    (4) Again assuming that the Building was a single composite hereditament on the Material Day, what was the effective date of the VON1 Alteration? Was it 1st July 2015, as determined by the VTE Decision, or 24th May 2017? We have already explained the significance of this issue. If the effective date was 24th May 2017 this was after the 2010 List was closed, with the consequence that the VON1 Alteration was ineffective and the position reverts to the November 2015 Deletions. We will call this issue, or more accurately the group of issues within this issue **"the Effective Date Issue"**.

The First UT Decision

71. In the First UT Decision, at [UT/83-107], the Tribunal addressed themselves to the Hereditament Issue. The Tribunal concluded that the Building comprised more than one hereditament. The Tribunal stated this conclusion, and its consequence in the following terms, at [UT/106-107]:

"106. We are therefore satisfied not only that the licensees' individual rooms were separate hereditaments, but that the rateable occupier of each of those hereditaments was not LHL, but was the individual licensee whose temporary home it was. The rooms were used wholly for the purpose of living accommodation and the licensees were therefore not liable for non-domestic rates, but for Council Tax. Ludgate House was not a composite hereditament, because there was no single rateable occupier of the domestic and non-domestic space.

107. The parties agreed before the commencement of the appeal that if there was more than one hereditament at Ludgate House the valuation officer's unilateral notices, each of which was on the basis that there was a single composite hereditament, cannot be supported and the appeal must be allowed. The 2010 non-domestic rating list should therefore be restored to the state it was in before the unilateral notices, omitting Ludgate House from the list altogether."

72. The decision of the Tribunal on the Hereditament Issue was therefore sufficient to dispose of the UT Appeal, which was allowed. The Tribunal went on, at [UT/108-113] to set out some briefly expressed views on the Valuation Approach Issue and the Effective Date Issue. The Tribunal did not however decide either Issue.

The CA Decision

73. The appeal to the Court of Appeal against the First UT Decision was made by Southwark. Judgment on the appeal was delivered by Lewison LJ, with whom McCombe and Baker LJJ agreed. In his judgment Lewison LJ concentrated on the Hereditament Issue, which he described as *"the main issue on this appeal"*. For the reasons set out in his judgment Lewison LJ concluded that, on the Material Day, LHL was in rateable occupation of the entirety of the Building, and that the Guardians were not in rateable occupation of their individual rooms; see the judgment at [84]. On this basis the appeal was allowed and the decision of this Tribunal on the Hereditament Issue was set aside. The Court of Appeal did not express any views on the other arguments raised before them in the appeal.

74. LHL sought permission to appeal the decision of the Court of Appeal to the Supreme Court. Permission to appeal was refused by the Supreme Court on 13th December 2021.

75. As we analyse the position, the CA Decision has settled the Hereditament Issue. The Building was, on the Material Day, a single hereditament. Effectively, the Court of Appeal came to the same conclusion on the Hereditament Issue as the Vice President in the VTE Decision; see paragraph 38 of the VTE Decision (quoted above). This also meant that the CA Decision effectively restored the position to what it was following the VTE Decision.

76. In this further hearing the Respondents contended, in the context of the Valuation Approach Issue, that more could be taken from the CA Decision than the conclusion that the Building was a single hereditament on the Material Day. Whether and, if so, to what extent this contention is correct is a matter we will consider when we come to our discussion of the Valuation Approach Issue.

The matters we have to decide

77. In terms of our decision on the UT Appeal, the position seems to us to be as follows. The Hereditament Issue has been settled by the CA Decision. We must take the Building as a single hereditament on the Material Day. The Valuation Approach Issue, the Valuation Figure Issue and the Effective Date Issue remain outstanding, for us to determine. None of these Issues has been determined by the First UT Decision.

78. The Tribunal did express some brief views on these remaining Issues, at [UT/108-113], as we have noted above. It was not submitted to us that we were bound by these views in making our decision on the remaining Issues. Our analysis of the position is to the same effect. We do not consider ourselves to be bound by these views in making our decision on the remaining Issues. We do consider that we can take these views into account, to the extent we regard as appropriate, as part of the arguments and materials before us at this further hearing.

79. We turn therefore to the remaining Issues. We will take first the Valuation Approach and Valuation Figure Issues together and then the Effective Date Issue. Before taking each Issue, there are some additional points to be made on the Issues, as follows:

(1) In referring to the Valuation Approach Issue we have identified the relevant question as the proper approach to the valuation of the non-domestic part of the hereditament. The primary argument of the Respondents in this context is that the Building should be valued as wholly non-domestic. We shall consider the merits of this argument when we come to consider the Valuation Approach Issue.

(2) If LHL is right on the Effective Date Issue, then both the Valuation Approach Issue and the Valuation Figure Issue effectively become redundant. On that hypothesis the VON1 Alteration was ineffective, and the position reverts to what it was as a result of the November 2015 Deletions; that is to say with the two hereditaments which then comprised the Building deleted from the 2010 List. We consider however that we should determine all the remaining Issues, regardless of what our decision may be on the Effective Date Issue. We also consider that, as a matter of logic, our determination of the Valuation Approach and Valuation Figure Issues should come before our determination of the Effective Date Issue, which we have found it convenient to leave to last.

(3) One might wonder how it is that this Tribunal has jurisdiction to interfere with the rateable value of £3,390,000 determined by the VO in the VON1 Alteration. On the hypothesis that the Building was not wholly a domestic property, neither of the relevant proposals of LHL, at least as described above and as described in the VTE Decision and the First UT Decision, appears to raise any challenge to the rateable value determined by the VO. Mr Forsdick did however take us to the relevant proposal of LHL, and explained that it did include a challenge to the rateable value determined by the VO, on the hypothesis of the Building constituting a single composite hereditament. There was no challenge from the Respondents in this respect, and we are satisfied that we have jurisdiction, as part of the UT Appeal, to consider whether the VO was correct in his valuation of the rateable value in the sum of £3,390,000, and to correct that valuation if the true figure is lower than £3,390,000.

(4) As will become apparent when we come to the Valuation Figure Issue, for some of the hypotheses Mr Penfold and Mr Spooner spoke to, or agreed, rateable values in excess of £3,390,000. In these cases, the expert dispute or agreement over the relevant figure is strictly redundant, given that the rateable value figure cannot be increased above the figure of £3,390,000 determined by the VO in the VON1 Alteration.

(5) As we will explain, on the basis of our decision on the Valuation Approach Issue, the above is indeed the case, and the rateable value will therefore remain at £3,390,000, subject to our decision on the Effective Date Issue. For the sake of completeness however, we will also determine the rateable values on the basis of the other competing valuation hypotheses spoken to by the expert valuers.

The Valuation Approach Issue – the legal framework

80. As explained above, we begin with the Valuation Approach Issue. It is convenient to start by setting out the statutory framework which governs the valuation exercise.

81. As we have said, we understood it to be common ground between the parties that the entry, by the VON1 Alteration, of the Building into the 2010 List as a single hereditament was the entry of the Building as a composite hereditament. We should therefore commence with the definition of a composite hereditament, in Section 64(8) and (9), which is as follows:

> *"(8) A hereditament is non-domestic if either—*
> *(a) it consists entirely of property which is not domestic, or*
> *(b) it is a composite hereditament.*
> *(9) A hereditament is composite if part only of it consists of domestic property."*

82. Domestic property is defined in Section 66. The basic definition is in subsection (1), which is in the following terms:

> *"(1) Subject to subsections (2), (2B), (2BB) and 2E below, property is domestic if—*
> *(a) it is used wholly for the purposes of living accommodation,*
> *(b) it is a yard, garden, outhouse or other appurtenance belonging to or enjoyed with property falling within paragraph (a) above,*
> *(c) it is a private garage which either has a floor area of 25 square metres or less or is used wholly or mainly for the accommodation of a private motor vehicle, or*
> *(d) it is private storage premises used wholly or mainly for the storage of articles of domestic use."*

83. In this context we should also mention Section 66(5), which provides that *"Property not in use is domestic if it appears that when next in use it will be domestic."*.

84. Turning specifically to the statutory valuation provisions, the basic provisions are set out in paragraph 2(1) of Schedule 6 in the following terms:

"(1) The rateable value of a non-domestic hereditament none of which consists of domestic property and none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions—.

(a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;

(b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;

(c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above."

85. These provisions apply in the case of a non-domestic hereditament. They are however applied to a composite hereditament, such as the Building, by paragraph 2(1A) of Schedule 6, which provides as follows:

"(1A) The rateable value of a composite hereditament none of which is exempt from local non-domestic rating shall be taken to be an amount equal to the rent which, assuming such a letting of the hereditament as is required to be assumed for the purposes of sub-paragraph (1) above, would reasonably be attributable to the non-domestic use of property."

86. As can be seen, in the case of a composite hereditament, one is concerned to find the rent which, on the assumptions set out in paragraph 2(1), would reasonably be attributable to the non-domestic use of the relevant property.

87. In the case of an alteration in the list, such as the VON1 Alteration, paragraph 2(6) of Schedule 6 applies, which provides as follows:

"(6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day."

88. The matters to be taken into account on the material day are set out in paragraph 2(7) of Schedule 6, in the following terms:

"(7) The matters are—

(a) matters affecting the physical state or physical enjoyment of the hereditament,

(b) the mode or category of occupation of the hereditament,

(c) the quantity of minerals or other substances in or extracted from the hereditament,

(cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,

(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and

(e) the use or occupation of other premises situated in the locality of the hereditament."

89. There is also a considerable body of case law which sets out principles relevant to the valuation exercise. In particular, this case law addresses the question of how, in the valuation exercise, one applies the matters referred to in paragraphs (a) and (b) of paragraph 2(7) of Schedule 6; namely matters affecting the physical state or physical enjoyment of the relevant hereditament and the mode or category of occupation of the relevant hereditament.

90. It is an established principle of rating law that a hereditament is to be valued as it in fact existed at the material day. In *SJ&J Monk v Newbigin* [2017] UKSC 14 [2017] 1 WLR 851 Lord Hodge JSC explained the principle in the following terms, at [12]:

> *"12 For many years and long before Parliament enacted Schedule 6 to the 1988 Act, it had been an established principle of rating law that a hereditament is to be valued as it in fact existed at the material day. This principle, which in the past was described by the Latin phrase, rebus sic stantibus (i e as things stand), and is often referred to as "the principle of reality" or "the reality principle", was stated by Lord Buckmaster in Assessment Committee of the Metropolitan Borough of Poplar v Roberts[1922]2AC93,103,thus:*
>
> > *"although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made."*
>
> *Similarly, in Townley Mill Co (1919) Ltd v Oldham Assessment Committee [1937] AC 419, 437, Lord Maugham, when explaining the legal context in which the Rating and Valuation Act 1925was enacted, said:*
>
> > *"The hypothetical tenant was assumed to be a tenant from year to year with a reasonable prospect of continuing in occupation; but the hypothetical rent which the tenant could give was estimated with reference to the hereditament in its actual physical condition (rebus sic stantibus), and a continuance of the existing state of things was prima facie to be presumed."*

91. Also important is what Lord Hodge went on to say, at [13], citing an earlier exposition of *"the reality principle"*, by Lord Pearce and Lord Wilberforce:

> *"13 In Almond v Ash Brothers & Heaton Ltd [1969] 2AC 366, in which the House of Lords held that the Lands Tribunal had been correct to take account of an existing demolition order in assessing the hypothetical rent, Lord Pearce stated, at p 382:*
>
> > *"one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some*

estimate of what value should be attributed to a hereditament on the universal standard, namely a letting "from year to year". But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded in so far as they are accidental to the letting of a hereditament. They are acknowledged in so far as they are essential to the hereditament itself."

In the same case, Lord Wilberforce described the reality principle thus, at pp 385—386:

"The principle that the property must be valued as it exists at the relevant date is an old one . . . The principle was mainly devised to meet, and it does deal with, an obvious type of case where the character or condition of the property either has undergone a change or is about to do so: thus, a house in course of construction cannot be rated: nor can a building be rated by reference to changes which might be made in it either as to its structure or its use."

In this passage Lord Wilberforce referred to each of what is generally regarded as the two limbs of the reality principle, namely the physical state of the property and its use."

92. In explaining the continued importance of the reality principle, Lord Hodge also made reference, at [14], to the decision of the Court of Appeal in *RF Williams (Valuation Officer) v Scottish & Newcastle Retail Ltd* [2001] EWCA Civ 185:

> *"14 The reality principle continues to be a fundamental principle of rating and is manifested in Schedule 6 to the 1988 Act, in particular in paragraph 2(6)(7). In Scottish & Newcastle Retail Ltd v Williams [2001] LLR 732 the Court of Appeal upheld the decision of the Lands Tribunal that the reality principle meant that it was assumed that a hereditament was in the same physical state as upon the material day, save for minor alterations, and could be occupied only for a purpose within the same mode or category of purpose as that for which it was occupied on the material day. Thus in that case two public houses in a shopping centre had to be valued as public houses and not as retail units."*

93. *Scottish & Newcastle* was a decision of the Court of Appeal which was concerned with valuation, for rating purposes, of two units in a shopping centre. One of the units comprised a pub. The other comprised a pub and a licensed café-bar. The rents the units commanded, as licensed premises, were a good deal lower than would have achievable for shops in the same position. The valuation officer contended that the units should be valued by reference to their potential for more lucrative use as shops. The Court of Appeal upheld the decision of the Lands Tribunal (as it then was) that the units could not be valued, for rating purposes, by reference to their use as shops.

94. The only substantive judgment in the Court of Appeal was given by Robert Walker LJ (as he then was), with whom Hale and Aldous LJJ agreed. In relation to the assumption as to the mode or category of occupation of the relevant hereditament, as that expression is used in paragraph 2(7)(b) of Schedule 6, and after reviewing the authorities, Robert Walker LJ concluded as follows, at [68]-[70]:

> *"68. In my view the Lands Tribunal was plainly right in concluding that Parliament has, in paragraph 2(3) to (7) of Schedule 6 to the 1988 Act, recognised that "mode or category of occupation" is a material factor in valuation for rating purposes, so confirming that the rebus sic stantibus principle has a second limb, user, in addition to its first limb, physical condition. Indeed Mr Holgate did not dispute this.*
>
> *69. In my view the Lands Tribunal was also plainly right in rejecting the formulation in Midland Bank v Lanham ("all alternative uses to which the hereditament in its existing state could be put in the real world, and which would be in the minds of competing bidders in the market, are to be taken as being within the same mode or category ... "). That formulation is either self-contradictory, or at best reduces the second limb of the rule (recognised in para 2(7)(b) of Schedule 6) to a pale reflection of the first limb (recognised in para 2(7)(a)).*
>
> *70. Mr Holgate criticised the formulation in Fir Mill as unhelpful in that it was referring only to general categories of use. He urged the court not to treat its language ("a shop as a shop, but not as any particular kind of shop; a factory as a factory, but not any particular kind of factory") as if it were a statutory text. I would certainly not treat that as a statutory text. But Parliament's adoption of the expression "mode or category of occupation" must be taken as recognising that the formulation in Fir Mill is on the right lines, even if its precise scope has to be worked out on a case by case basis."*

95. Robert Walker LJ also gave useful guidance, at [71], on how far the second limb of the reality principle (user) goes, in terms of the width of what can be assumed in relation to mode or category of occupation:

> *"71. It may be useful to note some situations in which the second limb of the rule, understood in this way, does not assist a ratepayer in obtaining a lower valuation. It does not assist a ratepayer who leaves half of his business premises empty, or otherwise runs his business in an half-hearted or inefficient manner; that does not go to the category of the business occupation, but to the way the particular business is run. Nor does it cast any doubt whatsoever on the decision in Robinson Brothers (Brewers) [1937] 2 KB 445, that a brewer interested in acquiring a tied house should be regarded as in the market for an hypothetical tenancy of a free house; again, that goes not to the category of business for which the premises are occupied, but to the way the business is run."*

96. In relation to the first limb of the reality principle (physical condition), Robert Walker LJ also explained, at [74], what can be assumed, in terms of allowing for the possibility of minor alterations to the relevant hereditament:

> *"74. Turning to the first limb of the rule, I consider that the Lands Tribunal was clearly right, following Fir Mill, to allow for the possibility of minor alterations in the hereditament on the occasion of its hypothetical letting. The absurdity of any other view appears vividly from the circumstances of these appeals, with numerous very well-known retail chains seeking to establish*

their identities and brand loyalties by distinctive fascias and fittings installed in uniform, featureless units. The first limb cannot be applied so rigidly as to prevent (for instance) Burger King being considered as a possible bidder in competition with McDonald's (which occupies a large unit just opposite the City Fayre/City Duck)."

97. In this context we should also make reference to one of the authorities considered (and approved) by Robert Walker LJ in *Scottish & Newcastle*. The authority in question is *Fir Mill v Royton UDC* (1960) R.R.C. 171. The case was concerned with the valuation, for rating purposes, of five hereditaments which comprised two cotton spinning mills, a weaving mill and two parts of another very old weaving mill which was in four different occupations. The case was regarded as a test case for hundreds of similar cotton mills in Lancashire. The essential issue was whether each mill was to be valued as a cotton mill, disregarding the rent which a tenant might reasonably be expected to pay for the premises if put to some other use. The ratepayers contended that the reality principle, or the rebus sic stantibus rule as it used to be known, applied not only to the current physical condition of the relevant premises, but also to their current manner of use, and had the effect that the relevant premises should be valued on the basis that they could only be used as cotton mills. The primary argument of the valuation officers was that no restriction on use should be assumed, so that the premises could be valued on the basis of whatever was their most valuable use. The alternative argument of the valuation officers was that if a restriction on use should be assumed, the assumption should be that the properties were used for the same general purpose as the existing use on the material day. The Lands Tribunal accepted the alternative argument of the valuation officers. The Lands Tribunal decided that the correct assumption was that the relevant properties were to be valued as if they could be used as a factory, but that it did not have to be assumed that they were used as any particular kind of factory.

98. The Lands Tribunal summarised their conclusions on the correct application of what is now referred to as the reality principle in the following extract from their judgment, cited with approval by Robert Walker LJ in *Scottish & Newcastle*, at page 185 of the report:

"In our opinion only two assumptions are permitted. The first assumption is that the hereditament is vacant and to let - vacant in the physical sense and in the sense that the existing business has ended and any process machinery has been removed. The second assumption - and here we accept counsel for the respondents" second proposition - is that the mode or category of occupation by the hypothetical tenant must be conceived as the same mode or category as that of the actual occupier. A dwelling-house must be assessed as a dwelling-house; a shop as a shop, but not as any particular kind of shop; a factory as a factory, but not as any particular kind of factory. Some alteration to an hereditament may be, and often is, effected on a change of tenancy. Provided it is not so substantial as to change the mode or category of use, the possibility of making a minor alteration of a non-structural character, which the hypothetical tenant may be assumed to have in mind when making his rental bid, is a factor which may properly be taken into account without doing violence to the statute or to the inference we draw from the authorities."

99. In applying the statutory valuation provisions in Schedule 6 we take, in particular, the following general principles from the case law we have cited, and in particular from *Monk*:

(1) The reality principle, as it has been described, applies to the valuation exercise. There are two limbs to the reality principle; namely the physical state of the relevant hereditament and its use.
(2) So far as the first limb is concerned, the reality principle means that it must be assumed that the relevant hereditament is in the same physical state as it was on the material day, save for minor alterations.
(3) So far as the second limb is concerned, the reality principle means that it must be assumed that the relevant hereditament can be occupied only for a purpose within the same mode or category of purpose as that for which it was occupied on the material day.

The Valuation Approach Issue – the arguments of the parties

100. The issues engaged by the Valuation Approach Issue, as they emerged from the arguments of the parties, were broadly as follows:

(1) The first issue is whether the Building should be valued as wholly non-domestic, on the basis of the findings in the CA Decision. The Respondents argued that this was the effect of the CA Decision. If this argument is correct, it means that no part of the Building should be treated as domestic on the Material Day, and no part of the Building falls to be taken out of account, as domestic property, pursuant to paragraph 2(1A) of Schedule 6. Effectively, on this hypothesis, the Building falls to be valued as a vacant office block.
(2) The second issue arises if the Respondents are wrong on the first issue, and the units in the Building occupied by the Guardians fall to be treated as domestic property, within the meaning of Section 66(1). On this hypothesis the question which arises is whether one should treat the Guardians (i) as *"intermingled"*; that is to say occupying units on all the floors of the Building, as was in the fact the position by 17th August 2015, or (ii) as having been *"consolidated"* by the tenant of the Building into a single floor or floors of the Building, pursuant to the rights of relocation contained in the licences.
(3) The third issue also arises if the Respondents are wrong on the first issue, and is interlinked with the second issue. If one must assume occupation of the Building by property guardians on the Material Day, should one assume the occupation of 4 property guardians, being the number of Guardians occupying units within the Building by midnight on the Material Day, or 32 property guardians, being the number of Guardians proposed by the VPS Proposal? By way of reminder, the VPS Proposal is the letter dated 18th June 2015, sent by VPS to LHL, setting out the outline proposals for the occupation of the Building by property guardians.

101. We will consider the valuation consequences of these competing hypotheses when we come to the Valuation Figure Issues. It is however useful to have in mind, at this stage of the analysis and in general terms, the valuation consequences of these competing hypotheses, reminding ourselves that those higher than £3,390,000 would be redundant:

(1) If the Respondents are right on the first issue, and the Building falls to be valued as a single non-domestic hereditament, the expert valuers are agreed that the correct rateable value should be £4,240,000.

(2) Turning to the second and third issues it will be seen that, when they are put together, they produce four possible valuation hypotheses. The expert valuers have spoken to each of these valuation hypotheses. They are (i) 4 property guardians consolidated, (ii) 32 property guardians consolidated, (iii) 4 property guardians intermingled, and (iv) 32 property guardians intermingled. The position on the expert valuation evidence is as follows:
   (i) In relation to (i) and (iii) the expert valuers are agreed at valuations of £4,100,000 and £4,000,000 respectively..
   (ii) In relation to (ii) there is a considerable distance between the valuers, and only Mr Spooner is above £3,390,000; Mr Penfold is at £2,360,000, and Mr Spooner is at £3,620,000.
   (iii) In relation to (iv) there is also a considerable distance between the valuers, and both valuers are below £3,390,000; Mr Penfold is at £250,000 and Mr Spooner is at £3,280,000.
(3) Mr Spooner has also spoken to the two intermingled (4 property guardians and 32 property guardians) valuation hypotheses on the assumption of certain works, characterised by Mr Spooner as minor alterations, being carried out. Both the relevant figures are above £3,390,000.
(4) Mr Spooner has also provided a valuation which assumed that the hypothetical tenant could and would gain vacant possession by terminating the guardians' agreements on 28 days' notice, his figure again being above £3,390,000.

102. It is also important to note that all of these valuation hypotheses assume that the hypothetical tenant would be looking to use the Building as office premises. Thus, the intermingled basis of valuation assumes that the property guardians would be distributed around the Building, and would therefore be sharing, at least to some extent, floors of the Building with office users. Equally the consolidated basis of valuation assumes that the property guardians could be concentrated into a floor or floors of the Building, where the extent of their sharing floors with the office users of the Building would be reduced. Similarly, Mr Spooner's assumption of certain works being carried out, which Mr Spooner characterised as minor alterations, was geared to the hypothetical tenant achieving a greater separation between property guardians and office users than the existing configuration of the relevant parts of the Building. The central area of disagreement between the experts concerned the questions of (i) whether and, if so, to what extent separation of the property guardians from officer users could be achieved and (ii) the extent to which the presence of the property guardians would have a negative impact upon what the hypothetical tenant would pay by way of rent for those parts of the Building which would be available for office use.

<u>The Valuation Approach Issue – should the Building be valued as wholly non-domestic?</u>

103. We have already set out the definition of domestic property in Section 66(1). In the present case LHL contends that the units in the Building which were occupied by the Guardians qualify as property used wholly for the purposes of living accommodation, within the meaning of paragraph (a) of Section 66(1).

104. The Respondents contest this analysis, on the basis of the CA Decision. The essential argument of Mr Westmoreland Smith and Mr Sadiq, for the Respondents, was that, by reference to the CA Decision, living accommodation was only one of the purposes for

which the Guardians occupied the Building. In this context, and in support of the Respondents' argument, our attention was drawn, in particular, to what was said by Lewison LJ at [71]:

> *"71. At [99] the UT held that it was the particular purposes of the "possessor" that was of importance i.e. the purpose of the licensee. Based on that appreciation, it went on at [100] to consider the purpose of the guardians in taking the accommodation without regard to any wider purpose. But that would be true of every lodger in a lodging-house; and would also have been true from the perspective of any bank which placed an ATM in a retail supermarket. In a case like this, in my judgment, the purpose of the guardian on the one hand and VPS/LHL on the other were complementary and mutually reinforcing. To borrow a phrase from Lord Carnwath in Cardtronics SC at [43], the purpose of the guardians in living in the building was "to facilitate" VPS' operation of providing property guardianship services to LHL. VPS needed the guardians to fulfil its obligation to provide property guardianship services to LHL; and the guardians knew (because the licence agreement told them) that that was so. They had also gone through an induction programme to ensure that they understood their responsibilities. Both the recitals, and the terms on which they were permitted to live in Ludgate House, were entirely consistent with and supportive of that mutual purpose. Indeed, the agreement between them and VPS calls them "the Guardian" throughout. Labels like these are not chosen at random."*

105. As Lewison LJ pointed out, the question of the purpose of the occupation of the Guardians had to be looked at from the perspective not only of the Guardians, but also from the perspective of VPS/LHL. Once one did this, one could see that the purpose of the Guardians' occupation was not simply to provide them with somewhere to live, but also to provide property guardianship services to LHL. As such, and bearing in mind the contractual arrangements between the parties and the control of the Building retained by LHL, the Guardians could not be said to be in rateable occupation of the particular units within the Building which they occupied.

106. This reasoning was however directed to the question of who was in rateable occupation of the Building. We are concerned with a different question, which is whether the units (meaning the self-contained rooms) within the Building which were occupied by Guardians were capable of qualifying as property used wholly for the purposes of living accommodation and, as such, as domestic property.

107. It seems to us that there are two difficulties with the Respondents' argument in this context.

108. The first difficulty may be said to be a technical point, but it still seems to us to be a substantive difficulty with the Respondents' argument. As we have already noted, the effect of the VON1 Alteration was to enter the Building into the 2010 List as a single hereditament which was a composite hereditament. The UT Appeal is the appeal of LHL seeking either to reduce the rateable value established by the VON1 Alteration or to render ineffective the VON1 Alteration and restore the November 2015 Deletions. The procedural position seems to us to be that there is no challenge by either of the Respondents to the entry of the Building in the 2010 List as a composite hereditament. We

have already set out the definition of a composite hereditament in subsections (8) and (9) of Section 64. A hereditament is composite if part only of it consists of domestic property. In these circumstances we have considerable difficulty in seeing how we can treat the Building as wholly non-domestic for valuation purposes.

109. The second difficulty is more fundamental, and applies whether or not we are right in our identification of the procedural difficulty with the Respondents' argument.

110. In his written and oral submissions Mr Forsdick contended that there is a distinction to be drawn, in the context of Section 66(1), between use and rateable occupation. The fact that the relevant units within the Building may have been occupied for the security purposes identified in the CA decision did not mean that they were not used wholly for living accommodation. Mr Forsdick gave the example of a caretaker's flat within a school. The school would be in rateable occupation of the flat for its education and security purposes, but the caretaker's actual use of the flat would be wholly non-domestic.

111. In this context Mr Forsdick referred us to the decision of this Tribunal (Martin Rodger KC, the Deputy Chamber President) in *Global 100 Ltd v Jimenez* [2022] UKUT 50 (LC) [2022] HLR 25. In this case the question before the Tribunal was whether premises occupied by property guardians qualified as an HMO, within the relevant definition in the Housing Act 2004, and thus required to be licensed. The Tribunal decided that the premises did qualify as an HMO. Significantly, the decision was made after the CA Decision, which was taken into account by the Tribunal in its reasoning. The decision was also made after another decision of the Court of Appeal in relation to property guardians, namely *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835, which was also considered by the Tribunal. In *Laleva* the question was whether the relevant property guardians could be said to have exclusive possession of the parts of the building which they occupied. The Court of Appeal decided that they were licensees who were not entitled to exclusive possession of any part of the building.

112. In *Jimenez* the Tribunal was pressed with the argument, by counsel for the appellant party, which was responsible for the management of the relevant premises, that the guardians occupied the premises for the purposes of providing services as a guardian. In support of this argument counsel cited both the CA Decision and *Laleva*. In rejecting this argument, the Tribunal said as follows, at [41]:

> *"41 Mr Pettit's objective in equating "use" with "purpose" was to enable him to appropriate dicta from Lewison LJ's judgments in Ludgate House and Laleva and to deploy them in support of his argument. I did not find these linguistic gymnastics persuasive. In ordinary parlance "use" and "purpose" may sometimes be synonyms but the question in this case is whether the respondents' occupation of their living accommodation at the property constituted its only "use". Reframing the question to ask whether the respondents' occupation of the living accommodation was the only "purpose" for which it was being used does not advance the appellant's argument."*

113. It should be kept in mind that the above extract is only one part of the reasoning of the Tribunal in *Jimenez*, which rested principally upon the different statutory context (the test for an HMO under the Housing Act 2004) in which the question of use was being

considered. We accept however that what was said by the Tribunal at [41] supports the existence of distinction between use and occupation which Mr Forsdick seeks to draw in the present case.

114. We also bear in mind that the expression used in Section 66(1)(a) is *"used wholly for the purposes of living accommodation"*. Mr Forsdick drew our attention to various cases which demonstrate that a property may be regarded as wholly used for a particular purpose even if not all of it is used for that purpose; see by way of example Treacy LJ in *Kenya Aid Programme v Sheffield CC* [2013] EWHC 45 (Admin), at [35].

115. Ultimately, it seems to us that Mr Forsdick is correct to say that the CA Decision, which was concerned with the question of who was in rateable occupation of the different parts of the Building, does not determine the question of whether the particular units in the Building occupied by the Guardians can be described as having been used wholly for the purposes of living accommodation. As a matter of ordinary language it seems to us that the relevant units, when occupied by Guardians, were in use as living accommodation. We do not see that this conclusion is altered or affected either (i) by the fact that this use of the units for living accommodation also served the purpose of providing a security service for the Building or (ii) by the fact that the party which retained control of the units, being in sufficient control to amount to rateable occupation, was LHL.

116. We therefore reject this part of the Respondents' case. We conclude, on this first issue within the Valuation Approach Issue, that the Building should not be valued as a single non-domestic hereditament. It seems to us that the units within the Building which were occupied by Guardians did constitute property used wholly for the purposes of living accommodation, within the meaning of paragraph (a) of Section 66(1). For the sake of completeness the same applies to any units which can be brought within Section 66(5), which would allow a property to qualify as being in domestic use if, on the material day, it appeared that when next in use it would be domestic.

117. We should however also stress the limited nature of this conclusion. Those units within the Building which were occupied by Guardians or were intended to be occupied by Guardians are capable of being treated as domestic property, and are thus capable of being excluded from the valuation of the composite hereditament constituted by the Building. This is however relevant only in so far as the occupation or intended occupation of such units by Guardians falls to be taken into account in the valuation exercise. This brings us to the second and third issues within the Valuation Approach Issue.

<u>The Valuation Approach Issue – how many intermingled or consolidated property guardians?</u>

118. It is convenient to take the second and third issues together, as the arguments on these issues are interlinked.

119. In his oral submissions Mr Forsdick divided up the valuation exercise into the following three stages:
    (1) Identification of the extent of the hereditament. This depended upon the extent of the rateable occupation. In the present case this task, but only this task, had been carried out by the Court of Appeal in the CA Decision. The hereditament comprised the Building.

(2) Identification of the physical state and use of the relevant hereditament. In the present case this required establishing, on the Material Day and in accordance with the principle of reality, the physical state of the Building and its use.
(3) Valuation of the rent which the hypothetical tenant would pay for the Building, in its physical state on the Material Day and on the basis that the use of the Building would be the use which existed on the Material Day.

120. The critical point made by Mr Forsdick in this context was that at the second stage of the analysis one is not concerned with any hypothetical tenant or any hypothetical letting. One is simply concerned to establish, applying the principle of reality and by reference to objectively verifiable facts, the matters referred to in sub-paragraphs (a) and (b) of paragraph 2(7) of Schedule 6. Those matters are matters affecting the physical state or physical enjoyment of the hereditament and, in sub-paragraph (b), the mode or category of occupation of the hereditament. Mr Forsdick referred to the mode or category of occupation, as referred to in sub-paragraph (b), as **"the MCO"**. We will adopt the same expression.

121. As Mr Forsdick submitted, the MCO falls to be established at the second stage of the analysis. It is not affected, and cannot be affected by considerations, at the third stage of the analysis, of what a hypothetical tenant might do. Equally, at the third stage of the analysis, the MCO cannot be changed. It is fixed at the second stage of the analysis. To repeat what the Lands Tribunal said in *Fir Mill*, which we have quoted earlier in this decision:

> *"A dwelling-house must be assessed as a dwelling-house; a shop as a shop, but not as any particular kind of shop; a factory as a factory, but not as any particular kind of factory."*

122. These submissions provided the foundation for Mr Forsdick's argument as to the MCO which, on his submission, must be applied at the third stage of the valuation exercise in the present case. So far as the correct identification and application of this MCO was concerned, Mr Forsdick's argument was a simple one, and ran as follows:
(1) On the Material Day the Building was the subject of a scheme of occupation by property guardians, which was in the process of being rolled out.
(2) True it was that, by midnight on the Material Day, only four Guardians had moved into rooms in the Building, but it was then known, from the terms of the VPS Proposal, that up 32 Guardians could be placed throughout the Building.
(3) Accordingly the MCO of the Building, on the Material Day, was correctly identified as the use of the Building for a scheme of property guardianship, involving at least 32 property guardians, distributed throughout the Building. Mr Forsdick stressed that this result was reached without any need for resort to Section 66(5) and questions of subsequent use. 32 Guardians did not need to be present on the Material Day for the MCO, on the Material Day, to be occupation of the Building for a scheme of property guardianship, involving at least 32 property guardians. This was the use which already existed on the Material Day, because the scheme was already being put into implementation or, to use Mr Forsdick's expression, was already being *"unrolled"* on the Material Day.
(4) As such, and at the third, and hypothetical stage of the valuation exercise the use of the Building which had to be assumed was use for a scheme of property

guardianship. As such, the hypothetical tenant must be assumed to be taking the Building for the purposes of a scheme of property guardianship in the same way and with the same distribution as the scheme which was in fact in the process of being unrolled on the Material Day.

(5) We understood the valuation consequence of this argument to be that the Building should be valued on the basis of occupation by 32 property guardians, on an intermingled basis.

123. We accept the analysis on which the argument, which we have summarised in our previous paragraph, is based. We accept that, in the valuation exercise, it is first necessary to determine the relevant MCO, and then to apply that MCO in the separate hypothetical valuation process. We accept that, in the identification of the MCO, the reality principle applies, and operates to limit the uses which can be assumed in the hypothetical valuation process.

124. It seems to us that the problem with Mr Forsdick's submissions occurs when the above analysis comes to be applied to the reality of the present case. As we have said, Mr Forsdick's argument involves the identification of the MCO of the Building, on the Material Day, as being use for a scheme of property guardianship, of the kind which was being unrolled on the Material Day and involving the same numbers as those envisaged in the VPS Proposal. This argument however, far from respecting the reality principle, seems to us to involve disregarding a significant chunk of the reality on the Material Day. Putting the matter another way, the argument seems to us to pick and choose the reality to be taken into account in the identification of the MCO.

125. On the Material Day the Building comprised an office building. It is perfectly true that a scheme of property guardianship was being unrolled on the Material Day, but the whole point of that scheme was that it was temporary in nature. So far as the VPS Agreement was concerned, it was terminable on 30 days' notice. So far as the licences granted to the Guardians were concerned, they conferred no security of tenure. By reference to the template licence which we have seen, the licences granted to the Guardians could be terminated by the giving of 28 days written notice by VPS; see clause 5.3 of the template licence. Equally, the licences could be brought to an end if the VPS Agreement was terminated; see clause 5.2 of the template licence. At worst, court proceedings would be required to remove a Guardian who refused to vacate the Building when served with a notice to terminate their licence, but there is no reason to think that the relevant Guardian would have any defence to such proceedings, and in the event the Guardians all moved out when required to do so.

126. Equally, the property guardianship scheme which was being unrolled on the Material Day was not one which imposed a particular pattern of occupation by the Guardians. The Guardians could be moved around. While this only happened in two instances ([UT/55]), it is clear that this right of relocation existed, and could be exercised.

127. It is also important to keep in mind that the presence of the Guardians did not entail any material change in the state of the Building, or anything more than the limited addition of the facilities referred to in [UT/47]. In particular, what we have referred to as to the units which were occupied by the Guardians were not residential premises of any kind. They were simply parts of the office premises which had been partitioned off to create self-

contained office space. At the Tribunal noted, at [UT/53], the greatest number of Guardians were, by 17th August 2015, to be found on the upper floors because the upper floors contained the greatest number of cellular offices.

128. The argument that the MCO of the Building must be treated as being confined to a scheme of property guardianship seems to us to impose a limitation on the scope of sub-paragraph (b) of paragraph 2(7) of Schedule 6 which is not justified either by the language of sub-paragraph (b) or by the case law which we have cited earlier in this decision. Just as in *Fir Mill* the cotton mills were to be valued as factories, and just as in *Scottish & Newcastle* the pubs were to be valued as pubs, so it seems to us that the Building falls to be valued as an office building in the temporary occupation of licensees pursuant to a property guardian scheme which was, on the Material Day, in the process of being implemented or unrolled. It seems to us that, in terms of the MCO of the Building on the Material Day, it goes too far to say that the MCO must be taken, and must exclusively be taken as use for a scheme of property guardianship. This ignores the reality that the property guardianship scheme which was actually being implemented on the Material Day was a strictly temporary arrangement. In our judgment this is a reality which cannot be ignored in determining the MCO of the Building on the Material Day.

129. This point seemed to us to be borne out by the fact that both expert valuers in this case, including Mr Penfold for LHL, have in fact valued the Building on the basis that it would be put to office use by the hypothetical tenant. The essential argument between the valuers concerns whether and, if so, to what extent the presence of property guardians would, on the basis of the various competing valuation hypotheses, have an adverse effect on the rent which the hypothetical tenant would pay for office use. If however Mr Forsdick is right, it seems to us that the valuers should not be assuming any office use at all. If Mr Forsdick is right, one can only assume use of the Building for occupation by property guardians. Mr Forsdick did not shy away from this point. When the point was put to him by the Tribunal, in the course of the submissions, we understood him to accept that this was the logical consequence of his argument on the correct identification of the MCO of the Building. We accept that Mr Forsdick's argument is not necessarily shown to be wrong, simply because the valuers have incorporated office use into their valuations. We do think that the approach of the valuers points up the unreality of trying to put the MCO of the Building into the straitjacket of use for a property guardian scheme.

130. We can see that the position would be different if, say, the Respondents were contending that the Building should be valued by reference to its potential for use as a hotel or an art gallery or a theatre, or as a block of flats. Such a valuation would, on the authority of cases such as *First Mill* and *Scottish & Newcastle*, fall outside the legitimate limits of the MCO. Such examples do however serve to bring out the differences between valuing the Building for a use different to office use, and valuing the Building for use as offices while temporarily subject to a property guardianship scheme. Indeed, it seems to us very difficult, if not impossible, to separate out the concept of office use of the Building from the concept of use of the Building for a temporary property guardianship scheme. The whole purpose of the property guardianship scheme which was implemented in this case was to secure and preserve the Building in its existing state as an office building, pending redevelopment of the Building.

131. Another way of putting the same point is that the valuation approach contended for by LHL does not identify the mode or category of occupation of the Building on the Material Date, but instead concentrates on the particular business choice made by the owner of the Building, namely LHL, to subject the Building, while remaining a substantial office building, to a property guardianship scheme. As the case law makes clear, there is a distinction to be drawn, in the identification of the MCO of a particular hereditament, between the category of business for which a building is occupied, by reference to which the MCO is identified, and the way a business is run from the building, which is not the correct way to identify the MCO; see by way of example *Scottish & Newcastle* at [71], as quoted earlier in this decision. Going back to first principles, a valuation for rating purposes is based upon the concept of the value of the occupation; see Lord Carnwath JSC in *Hewitt v Telereal Trillium Ltd* [2019] UKSC 23 [2019] 1 WLR 3262, at [32]. A valuation of the Building, which was an office building on the Material Day, on the basis that its available use must be taken to be confined to use for a property guardianship scheme involving at least 32 property guardians seems to us to be inconsistent with this basic principle of rating valuation.

132. In response to these points Mr Forsdick argued that any change from the use of the Building for a property guardianship scheme would constitute a change in the MCO of the Building and a material change of circumstances for rating purposes, requiring an amendment of the assessment of the rateable value of the Building. As such, the MCO of the Building at the Material Day was to be taken to be use for a property guardianship scheme, and could not include what was contended by Mr Forsdick to be a change of use, to office premises, which would involve a change of circumstances for rating purposes. We think that this argument is circular or, putting the matter another way, assumes that which has to be demonstrated. On any view, on the Material Day this was an office building of just over 16,000 sqm, of which 4 rooms, totalling 320 sqm or 2%, were occupied by the Guardians. The argument that any change from the use of the Building for a property guardianship scheme would constitute a change in the MCO of the Building and a material change of circumstances for rating purposes assumes, as a starting point, that the MCO of the Building had become use for a property guardianship scheme, by virtue of the occupation of the Guardians. For the reasons which we have set out, we do not think that this is the correct starting point.

133. Mr Forsdick also drew our attention to what he submitted were the anomalous results which followed, in terms of council tax, if one assumed a valuation exercise where the occupation of the property guardians was treated as temporary and/or as being capable of being terminated or consolidated into particular parts of the Building. We cannot see that there is an issue here. Mr Westmoreland-Smith submitted that the relevant areas of the building can only be assessed on a reasonable attribution basis *either* as non-domestic space under paragraph 2(1A) of Schedule 6, *or* as domestic space under the Council Tax (Situation and Valuation of Dwellings) Regulations 1992, but not both. However, the point does not arise because we have rejected the Respondents' argument that the hereditament was wholly non-domestic, and instead we have adopted the valuation principles suggested by the valuation experts – those parts of the Building which at the material day were not in domestic use are valued by attributing to them a reasonable proportion of what would be the rateable value of the whole, allowing for various factors, and based on a floor area from which the area of the guardians' rooms has been removed. Double taxation is therefore avoided.

134. Mr Forsdick also argued that the temporary nature of the property guardian scheme cannot be taken into account in the identification of the MCO because this involves taking into account covenants in the licence agreements which fall to be disregarded in the valuation process. We do not agree. As explained in the case law, the statutory valuation hypothesis takes account of statutory restrictions on the use of the relevant hereditament, such as planning controls, but not of restrictions imposed by the covenants in a lease or by restrictive covenants affecting freehold property. The contractual terms of the licences granted to the Guardians (we are doubtful that they are correctly described as covenants) do not fall into the category of covenants restrictive of the use of the Building. They are simply part of the reality which is to be taken into account in the identification of the MCO of the Building on the Material Day. As we understand the position, four such licences had already been granted by the Material Day. The same analysis applies to the contractual terms of the VPS Agreement. If the property guardianship scheme is to be taken into account in the identification of the MCO Building, as part of the reality, it strikes us as bizarre that one cannot take account of the bundle of contractual rights and obligations which governed that property guardianship scheme. They are all part of the same reality or, to adopt Mr Forsdick's phrase, they are all part of the same objectively verifiable facts.

135. Drawing together all of the above discussion, the conclusion which we reach, in relation to the MCO of the Building on the Material Day, is that the MCO should not be taken to be restricted to use of the Building for occupation by property guardians pursuant to a scheme of property guardianship. Rather, the MCO is correctly identified as use of the Building for offices, subject to the temporary occupation of property guardians pursuant to a temporary scheme of property guardianship.

136. We do not think that Section 66(5) has any impact on this analysis. The relevant question in this context is as follows. So far as the Building was not in use on the Material Day, did it appear that the Building, when next in use, would be domestic; that is to say used wholly for the purposes of living accommodation? It follows from what we have said earlier in this decision that we accept that units which were occupied by Guardians could legitimately be described as used wholly for the purposes of living accommodation. In the present context however, the question is a different one, and concerns what appeared to be the case on the Material Day. The answer to this question is not, in our view, that it appeared that 32 units in the Building would be occupied by the Guardians. On the Material Day the Building presented itself as a very large office building, with no adaptation for residential use. There were four Guardians present by midnight on the Material Day, and the VPS Proposal envisaged 32 Guardians distributed around the Building, but these were temporary arrangements. Whether these arrangements would continue and, if so, for how long was an unknown quantity.

137. There is however a more important reason why Section 66(5) does not affect our analysis. If, as we have decided, the reality principle requires that account be taken of the temporary nature of the property guardian scheme which was being implemented on the Material Day, and if, as we have also decided, the reality principle requires that account be taken of terms of the VPS Agreement and the licences granted to the Guardians, it would have been open to a hypothetical tenant of the Building, just as it was open to LHL, either to terminate the property guardian scheme or to relocate the Guardians within the Building to

best financial advantage. If therefore the correct identification of the MCO includes occupation or anticipated occupation of the Building by a particular number of property guardians on the Material Day, we do not accept that it is correct to assume that those property guardians would be distributed around the Building, or would remain distributed around the Building.

138. The above analysis, in this section of our decision, allows us to return specifically to the second and third issues within the Valuation Approach Issue; namely the number of property guardians to be assumed to be in occupation of the Building and their assumed distribution within the Building.

139. In answering these questions, it is important to keep in mind that one is moving to the hypothetical stage of the valuation exercise. The question is what a hypothetical tenant would pay, by way of rent for the non-domestic parts of the Building, on the basis of the assumptions and disregards required by the statutory valuation hypothesis in Schedule 6 and by the relevant case law. The Building is assumed to be vacant, but the MCO includes the temporary occupation of the Building by property guardians pursuant to a property guardianship scheme.

140. On the Material Day the property guardianship scheme which was being implemented was a temporary arrangement. LHL had not, as at the Material Day, entered into the VPS Agreement with VPS. This did not occur until 24th July 2015. We understood it to be common ground between the parties that, in considering the position on the Material Day, it is permissible to view the situation as at midnight on the Material Day; thereby taking account of all events which occurred on the Material Day itself. Nevertheless, even looking at matters as they stood by midnight on the Material Day. only four Guardians had occupied units within the Building. We understand that licences had already been granted to these four Guardians, but these licences were easily terminable, and it must be at least doubtful whether they had any binding effect on LHL at all, given that the licences were granted by VPS.

141. Given this position, we cannot see that it is right either to assume occupation by 32 property guardians on the Material Day or to assume distribution of the property guardians around the Building. It seems to us that the correct assumption is that the hypothetical tenant is taking the Building as an office building, but subject to use as a temporary property guardianship scheme, with only four guardians having been granted licences. The hypothetical tenant has the same rights as existed in reality to terminate the scheme or to consolidate the occupation of the property guardians into a particular part or parts of the Building, in order to make the most efficient use of space within the Building. It follows that it would be a matter for the hypothetical tenant to decide whether to continue with the scheme and, if so, to decide how many property guardians should be permitted to occupy the Building, and in which locations.

142. Whether and, if so, to what extent the hypothetical tenant would engage in, or would need to engage in works of minor alterations in relation to the configuration of the Building is a matter we leave to our consideration of the Valuation Figure Issue.

143. It will be seen that our answer to the second and third issues within the Valuation Approach Issue does not precisely accord with any of the valuation hypotheses spoken to

by the expert valuers, as we have summarised those valuation hypotheses above. The closest valuation hypothesis to our answer is one which assumes the occupation of no more than four property guardians, on a consolidated basis, but with the opportunity for the hypothetical tenant, if so advised, also to terminate the scheme of property guardianship at a future point in time.

The Valuation Approach Issue – our conclusions

144. The overall question raised by the Valuation Approach Issue is the proper approach to the valuation of the non-domestic part of the relevant hereditament; namely the Building. In relation to the specific issues which we have had to consider in the context of this question, our conclusions can be summarised as follows.

(1) The Building falls to be valued as a composite hereditament.
(2) The Building does not fall to be valued as wholly non-domestic. Accordingly, the valuation is concerned with the rent which, assuming a letting on the assumptions required by paragraph 2 of Schedule 6, would reasonably be attributable to the non-domestic use of the Building.
(3) The MCO of the Building, on the Material Day, should not be taken to be restricted to use of the Building for occupation by property guardians pursuant to a scheme of property guardianship.
(4) The MCO of the Building, on the Material Day, is correctly identified as use of the Building as an office building, subject to the temporary occupation of property guardians pursuant to a temporary scheme of property guardianship.
(5) The physical state of the Building, on the Material Day, was an office building.
(6) The domestic part of the Building, on the Material Day, was limited to the four units occupied by the four Guardians who moved into those units on the Material Day.
(7) The hypothetical tenant should be assumed to be taking the Building as an office building, subject to the temporary use of the Building for a property guardianship scheme. The assumed state of this property guardianship scheme, as at the Material Day, is that its implementation had not been completed, with only four property guardians having been granted licences and with only four property guardians having moved into the Building.
(8) The hypothetical tenant has the same rights as existed in reality, pursuant to the VPS Agreement and the licences granted to the Guardians, to terminate the scheme or to consolidate the occupation of the property guardians into a particular part or parts of the Building, in order to make the most efficient use of the space within the Building. The hypothetical tenant is assumed also to have the ability to decide whether to continue with the scheme and, if so, to decide how many property guardians should be permitted to occupy the Building, and in which locations.

The Valuation Figure issue

145. The valuation experts agreed that the rateable value of the Building assuming the four Guardians present on the material day, was £4,000,000 if they remained on the second, eight and ninth floors, and £4,100,000 if their rooms were consolidated into a certain location. That being the case, given our findings on the Valuation Approach Issue, and for the reasons which we have given above, the rateable value of the Building, subject to the Effective Date Issue which we deal with below, will remain at £3,390,000.

146. For completeness, we now outline our findings on the assumption, which we have rejected, that there are 32 guardians, dealing first with the premise that their rooms are consolidated on the upper floors. We remind ourselves at this point that the task in hand, for a composite hereditament, is to ascertain the rent which would reasonably be attributable to the non-domestic elements of the Building.

147. It remained common ground that the headline rate for the office space, and therefore the starting point before any discounts were applied, was £320 per sqm. The valuers also agreed rates per sqm for the lower ground floor space, delivery area, and rates for the covered car parking spaces, and that a 15% end allowance for quantum should be applied to the aggregate figure to arrive at a rateable value.

32 guardians – 'consolidated'

148. The valuation experts agreed that for the purposes of non-domestic rateable value those floors of the Building in which the guardians' occupation had been consolidated would be valued at nil, and instead would be liable to council tax. There was a dispute as to how many floors would be needed, and whether there would be any valuation effect on the remaining floors to reflect the guardians' presence in the Building.

149. Mr Spooner assumed that the 32 guardians could be consolidated into the eighth and ninth floors, which he therefore valued at nil. In his view, no further discounts to the other floors were required, and adopting the remaining rates and factors outlined above, he arrived at a figure of £3,624,422, say £3,620,000 RV.

150. Mr Penfold assumed that the guardians would need to be accommodated over the seventh, eighth and ninth floors, which he valued at nil. To his resulting £3,145,000 or thereabouts he applied a 25% discount to the remainder of the Building to reflect the residential use on the upper floors. He therefore arrived at £2,360,451, say £2,360,000 RV.

151. We therefore must consider two elements. The first is the extent of the Building that would be required to accommodate 32 guardians if they were consolidated into discrete areas; the second is the effect on the remainder of the Building of the guardians' presence on the upper floors.

152. As to the first element, it was common ground that the first four Guardians' rooms, on the second, eighth and ninth floors, comprised 320 sqm – around 4% of the total of the Building and averaging 80 sqm each. But the first four Guardians took advantage of having the whole Building to choose from, and it must be right that 80 sqm is a very generous space allocation, given that it is not necessary to include kitchen or bathroom facilities within it. It is likely that, as the Building filled up, guardians would take smaller areas. We also note that by 17 August 2015, 23 Guardians were present on these floors, but eventually, as recorded on the tenancy schedule 35 Guardians were accommodated on the eighth and ninth floors. We are therefore satisfied that 32 guardians could be consolidated on the eighth and ninth floors, and in common with the valuers, attribute a nil value to these floors.

153. But there is also the question of the guardians' communal and shared facilities. Mr Spooner calculated that on the VPS ratio of 1:5, seven facilities would be required for 32 guardians. The eighth floor would allow four wc's and five shower pods. A shower had

been fitted to the ninth floor, and a shower could also be fitted in the lower ground floor. He considered the likely cost of this work to be sufficiently minimal to constitute minor work which would be allowed under the reality principle. In the valuers' statement of agreed facts, Mr Penfold accepted this.

154. Mr Spooner's approach seems to us to be reasonable, but we must next consider the adjustment, if any, that should be made to the lower ground to seventh floors to reflect the presence of guardians on the eighth and ninth floors, and the guardians' shared use of lifts, stairwells, and the entrance of the Building. Mr Spooner emphasised that most of the guardians would be out at work during the day. That might well be right, but the Guardians' actual agreements did not require this, and some guardians may have days off, work night shifts etc. It is not inconceivable that office occupiers might be sharing the lift or stairs with a guardian coming or going, or simply going from the top floors to the lower ground floor to use the shower.

155. We are to consider the rent which would be reasonably attributable to the lower ground to seventh floors, reflecting this shared use of the Building. We note that the guardians would not require access to the main office floors, but we agree with Mr Penfold that their presence in the common parts, lower ground, and access through the ground floors would affect the rent which the notional tenant would be prepared to pay. We do not consider that Mr Spooner's valuation, which makes no allowance for the guardians' presence within the Building, can be right.

156. Mr Penfold had looked across London in search of some sensible end allowances which would help in the task. He found some instances where the presence of guardians had resulted in a zero rateable value on the remaining space, or in one case where the rateable value was reduced to reflect only the value of some car parking spaces. As for how reduced privacy impacts on value, Mr Penfold found instances of between 5% and 17.5%, but in one case 30%, for hereditaments being overlooked by other properties. Of perhaps more use, he gave the example of the sixth floor of Compton House, Aldwych, where a 7.5% end allowance had been agreed for access being reserved by an adjacent property for fire escape purposes. His third group were allowances of 7.5%, 12.5% and 33% to reflect the effect on value of planning restrictions.

157. The 7.5% allowance for the reservation of a fire escape door is instructive, being the only example of a situation which might give rise to third parties having internal access over a hereditament. But it is, by definition, only exercisable in an emergency, and by a known adjoining commercial occupier.

158. Shared residential and commercial buildings are not uncommon across London, but here we have potentially 32 residential occupiers using the lifts and staircases, perhaps going out to work when the hypothetical tenant's employees are arriving. Mr Spooner has not accounted for this, or any, factor in making no allowance to the rent on the non-domestic elements of the Building.

159. In our judgment, an appropriate discount would be 20% on the lower ground to seventh floors. This would result in a rateable value of say £2,900,000 RV.

32 guardians – 'intermingled'

160. Mr Penfold relied upon a letter from Mr Stuart Fricker, a partner at Montagu Evans, who was the ratepayer's advisor. In Mr Fricker's view, the Building would in reality have been unlettable with 32 guardians intermingled throughout. Mr Penfold considered whether this should mean that the rateable value should be £0, as had been the case in other London buildings where guardians had been present. However, given the market conditions at the AVD, and the location and prominence of the Building which would, even allowing for 32 guardians, provide significant levels of usable space, Mr Penfold considered that some organisation, would make an opportunistic bid.

161. Rather than discounting from a commercial office rent, Mr Penfold thought it better to value the Building reflecting what this opportunistic bid would be. He thought a charity or non-governmental organisation would be prepared to bid say £5,000 a week to occupy the space. He therefore arrived at a notional rental value of £250,000.

162. Mr Spooner approached his valuations by assuming that the ground, first and lower ground floors would not be used (although he accepted that access would be required through the ground floor) which he therefore valued at 100% of the agreed office rate. There would be two guardians on each of the second to seventh floors, who he assumed could in each case be located in the northern end of each of those floors, and whose presence he reflected by discounting the office rate by 10% and applying that discounted rate per sqm to the net commercial floor space, the area occupied by the guardians having been deducted.

163. There would be ten guardians on each of the eighth and ninth floors. For the smaller ninth floor, he attributed no value to the remaining commercial space. For the eighth floor, he calculated that the ten guardians could be accommodated in some of the 16 or 17 lockable rooms that were present when he inspected the Building in May 2016, leaving 605.6 sqm of office space, to which he again applied a 10% discount from the main rate. The result of these various calculations was a rateable value of £3,280,000.

164. Alternatively, he assessed the rateable value on the assumption that minor works could be carried out without doing violence to the reality principle. These works were to create partitioning at the northern end of the second to seventh floors, and on this basis he made no allowance to the rate per sqm, instead valuing it at the agreed full office rate, before quantum, of £320 per sqm. This resulted in a rateable value of £3,570,000.

165. However, we find Mr Spooner's valuations to be too high. He accepted that even on his *'minor works'* basis, guardians would need to come out of their partitioned enclave, into the main open plan office space, before entering the north service core to use the lift or stairs. He sought to justify his valuation by contending that the guardians would be *'CRB'* (*sic)* checked, and he again made the point that they would be *'the occupier's guardians'* who in any event would likely to be out at work during the day, thus creating minimal disturbance.

166. Here, we assume 4 guardians on each of the second to seventh floors, and ten on each of the eighth and ninth, all of whom could, in theory, access all but the lower ground and first floors and, even on Mr Spooner's hypothesis, travel through the ground floor from the north core to enter and exit the Building through the main entrance.

167. The tension between reality, where guardians would only be in position when a building was vacant, and what we are required to assume here, is stark. We agree with Mr Penfold that very few occupiers would be prepared to find 32 guardians intermingled throughout the Building acceptable. But we are to assume a letting on this basis. We prefer Mr Penfold's "but say" approach to the valuation exercise. In our judgment, given the market conditions at the AVD and the location of the Building, it is not difficult to contemplate many organisations, in either the public or private sectors, who would wish to have the Building for the purposes of overflow, or perhaps emergency relocation space. However we think Mr Penfold's weekly figure is too low. In our view, a likely rent would be in the order of £10,000 per week, but say £500,000 RV.

The Effective Date Issue – the statutory framework

168. We come finally to the Effective Date Issue. We are here concerned with the 2009 Regulations. By way of reminder these are The Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (SI 2009 No. 2268). Specifically, we are concerned with Regulation 14.

169. Regulation 14 contains provisions which govern the time from which an alteration to a rating list is to have effect. Regulation 14(1) provides that Regulation 14 applies to alterations made on or after 1st October 2009 to a list compiled on or after 1st April 2005.

170. In terms of when the alteration is to have effect Regulation 14(2) provides as follows:

> *"(2) Subject to paragraphs (2A) to (7), where an alteration is made to correct any inaccuracy in the list on or after the day it is compiled, the alteration shall have effect—*
>
> *(a) from the day on which the circumstances giving rise to the alteration first occurred, if the alteration is made—*
>
> *(i) before 1st April 2016 otherwise than to give effect to a proposal;*
>
> *(ii) in order to give effect to a proposal served on the VO before 1st April 2015;*
>
> *(iii) on or after 1st April 2016 where the circumstances giving rise to the alteration first occurred on or after 1st April 2015 and the alteration is made otherwise than to give effect to a proposal;*
>
> *(iv) in order to give effect to a proposal served on the VO on or after 1st April 2015 where the circumstances giving rise to the alteration first occurred on or after that date;*
>
> *(b) from 1st April 2015 if the circumstances giving rise to the alteration first occurred before that date and the alteration is made on or after 1st April 2016 otherwise than to give effect to a proposal;*
>
> *(c) from 1st April 2015 if the alteration is made in order to give effect to a proposal served on the VO on or after that date and the circumstances giving rise to the alteration first occurred before that date."*

171. In the present case the VON1 Alteration was made on 24th May 2017. The circumstances giving rise to the VON1 Alteration first occurred on the Material Day; that is to say (as determined by the VTE Decision) on 1st July 2015. The VON1 Alteration was made by the VO on a unilateral basis. We did not understand it to be in dispute that the VON1

Alteration qualified as an alteration made to correct an inaccuracy in the 2010 List. The VON1 Alteration was not made to give effect to a proposal. As such, the VON1 Alteration falls within Regulation 14(2)(a)(iii) as (i) an alteration made after 1st April 2016, (ii) where the circumstances giving rise to the alteration first occurred after 1st April 2015, and (iii) where the VON1 Alteration was made otherwise than to give effect to a proposal.

172. Pausing at this point, the effect of Regulation 14(2) is that the VON1 Alteration has effect from 1st July 2015.

173. The dispute arises in relation to Regulation 14(7), which provides as follows:

> *"(7) An alteration made to correct an inaccuracy (other than one which has arisen by reason of an error or default on the part of a ratepayer)—*
> *(a) in the list on the day it was compiled; or*
> *(b) which arose in the course of making a previous alteration in connection with a matter mentioned in any of paragraphs (2) to (5),*
> *which increases the rateable value shown in the list for the hereditament to which the inaccuracy relates, shall have effect from the day on which the alteration is made."*

174. In overall terms the Effective Date Issue is whether the VON1 Alteration can be brought within the terms of Regulation 14(7), with the consequence that the effective date of the VON1 Alteration becomes the day on which the VON1 Alteration was actually made; that is to say 24th May 2017. As we have previously explained, if the effective date of the VON1 Alteration was 24th May 2017, this was after the 2010 List was closed, with the consequence that the VON1 Alteration was ineffective. On this hypothesis the position reverts to the November 2015 Deletions, with the Building removed from the 2010 List with effect from the dates specified by the VO.

The Effective Date Issue – the arguments of the parties

175. The Respondents contend that Regulation 14(7) cannot apply. Their argument concentrates on the final part of Regulation 14(7) which refers to an alteration *"which increases the rateable value shown in the list for the hereditament to which the inaccuracy relates"*. In the present case the VON1 Alteration entered the Building into the 2010 List as a single hereditament. Prior to the VON1 Alteration there was no such hereditament the rateable value of which could be increased, either because the Building formerly comprised two hereditaments in the 2010 List or because the Building was not in the 2010 List at all following the November 2015 Deletions. In support of the first of these arguments the Respondents rely upon the decision of the Court of Appeal in *Lamb & Shirley Ltd v Bliss* [2001] EWCA Civ 562.

176. LHL contends that we are not obliged to follow *Lamb v Bliss*, for three reasons. First, it is contended that the case was decided per incuriam. This is on the basis that the earlier decision of the Court of Appeal in *Holland v Ong* [1958] 1 QB 425, which is said to be directly on the point, was not cited in *Lamb v Bliss*. Second, it is said that *Lamb v Bliss* and *Holland v Ong* are inconsistent decisions of the Court of Appeal on the same point. As such, it is said that we are free to choose which authority to follow, and should follow

Holland v Ong. Third, and more fundamentally it is contended that the reversal, by the VON1 Alteration, of the November 2015 Alterations was the correction of an error made by the state, through the VO, for which the state was responsible and which caused substantial loss to an innocent ratepayer, namely LHL, which had no responsibility for the error. In these circumstances, and on the basis of the Human Rights Act 1998 and/or by reference to common law principles, Regulation 14(7) should be construed in such a way that it does apply in the present case. The Appellant also relies upon these state error/human rights arguments, which were not raised in *Lamb v Bliss*, as another reason for treating *Lamb v Bliss* as decided per incuriam.

The Effective Date Issue – discussion

177. It is convenient to start our discussion with *Lamb v Bliss*. The case was concerned with the operation of The Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 (**"the 1993 Regulations"**). The appeal to the Court of Appeal was brought, by way of case stated, by Lamb & Shirley Ltd, the rateable occupier of the relevant premises, against a decision of the Lands Tribunal. The appellant had been in rateable occupation of the relevant premises since February 1986. Prior to February 1986 the premises had been occupied as two separate units, but the appellant converted the premises into a single set of premises, which it occupied and used as a single unit.

178. In the local non−domestic rating list compiled by the Valuation Officer for Westminster City Council as at 1st April 1973 the relevant premises were shown as comprising two units, each with its own rateable value. The premises were similarly shown in the valuation list as at 1st April 1990, notwithstanding that, as at that latter date, the premises were and had for some time been occupied and used by the appellant as a single unit. The 1990 list was accordingly inaccurate in that respect. In about October 1994 the respondent (the Valuation Officer) proposed an alteration to the 1990 list by substituting a single entry for the premises in place of the two existing entries. The appellant appealed against that proposal. On 20th March 1995, while the appeal was pending, the respondent made the proposed alteration and assessed the rateable value of the premises (now shown as a single unit) in a sum which substantially exceeded the aggregate of the rateable values attributed to the two units which had previously appeared in the 1990 list. The alteration was expressed to take effect from 1st April 1990.

179. In August 1995 the appellant challenged the new entry in the 1990 list on the grounds that the assessment of rateable value was excessive, and that by virtue of the 1993 Regulations the effective date of the alteration should be 20th March 1995 (i.e. the day on which the alteration was made). The dispute was therefore concerned with whether the effective date of alteration should be the date on which the alteration was made, or the date on which the alteration was expressed to take effect. In support of its argument that the effective date should be 20th March 1995 the appellant relied upon Regulation 13(8A) of the 1993 Regulations, which at the material time provided as follows:

> *"(8A) An alteration made to correct an inaccuracy (other than one which has arisen by reason of an error or default on the part of a ratepayer) –*
> *(a) in a list on the day it was compiled; ...*
> *(b) .....*

which increases the rateable value shown in the list for the hereditament to which the inaccuracy relates shall have effect from the day on which the valuation is made."

180. The Lands Tribunal decided that the alteration did not fall within Regulation 13(8A), with the consequence that the alteration took effect from 1st April 1990. The issue in the Court of Appeal was whether this decision was correct. In his judgment, with which the other members of the Court of Appeal agreed, Jonathan Parker LJ described the point at issue in the following terms, at [31]-[33] (underlining also added):

> *"31. In order to determine whether an alteration to correct an inaccuracy in a list "increases the rateable value shown in the list for the hereditament to which the inaccuracy relates " one has to compare the rateable value for the hereditament as shown following the alteration with the rateable value, if any, previously shown "for the hereditament to which the inaccuracy relates ". The first question, therefore, is what is "the hereditament to which the inaccuracy relates " in the context of the instant case: is it the (new) single hereditament which is shown post−alteration, or is it the two separate hereditaments shown pre−alteration? The next question is: What are the rateable values (if any) shown in the 1990 list pre−alteration and post−alteration for the relevant hereditament or hereditaments? If a rateable value was shown for a hereditament pre−alteration which was less than the rateable value for that hereditament post−alteration, then regulation 13(8A) will apply in respect of that alteration."*
>
> *32. As to the first question, both sides accept that in the context of an alteration to correct an inaccuracy the expression "the hereditament to which the inaccuracy relates" in paragraph (8A) must refer to the hereditament as shown post−alteration, that is to say in the instant case the single hereditament comprising the entirety of the Premises.*
>
> *33. Thus the central question, which the President of the Lands Tribunal addressed in his Decision, is whether the 1990 list showed a rateable value for that hereditament: that is to say, whether the sum of the rateable values shown for the two separate hereditaments pre−alteration falls to be treated as the rateable value of the single hereditament shown post−alteration, in order to ascertain whether there has been an increase in rateable value for that single hereditament within the meaning and for the purposes of regulation 13(8A)."*

181. The answer given by Jonathan Parker LJ to this *"central question"* was short, and clear, at [34] and [35]:

> *"34. In my judgment, and without intending any disrespect to Mr Mole's submissions, it is impossible to construe paragraph (8A) in such a way as to reach the result for which he contends. I have no difficulty in accepting his submission that the reference to "rateable value " in paragraph (8A) includes a rateable value calculated on an incorrect basis; but it does not follow from that proposition that in the instant case the two rateable values shown pre−alteration, taken together, constitute the rateable value shown in the list for the single hereditament as shown post−alteration for the purposes of paragraph (8A). In my judgment they plainly do not. They do not purport to be*

rateable values for that hereditament; whether correctly calculated or not, they purport to be rateable values for the (different) hereditaments to which they are expressed to relate. In this respect, I accept Mr Holgate's submission that the fallacy underlying Mr Mole's argument is the failure to distinguish between property and hereditament, which in turn leads to the treatment of the two hereditaments shown pre−alteration as being parts of the single hereditament shown post−alteration. In my judgment the list pre−alteration showed no rateable value for that single hereditament.

35. Moreover, I confess that I can for my part see no logical basis for treating the aggregate of the rateable values of hereditaments consisting of the constituent parts of the Premises let as separate units as constituting the rateable value of a hereditament consisting of the entirety of the Premises when let as a single unit: indeed, to do so would to my mind be not only illogical but unreal. As the President of the Lands Tribunal rightly pointed out, and as Mr Holgate has echoed in argument, such a process would run contrary to the everyday experience of valuers in this field. Thus there is in my judgment no warrant for taking the rateable values of the separate units shown pre−alteration, adding them together, and treating them as the rateable value of the single hereditament shown post−alteration so as to establish that the alteration has had the effect of increasing the rateable value of that single hereditament."

182. The 1993 Regulations were the predecessor regulations (but one) to the 2009 Regulations. As can be seen, Regulation 13(8A) was in materially the same terms as Regulation 14(7). In the present case the factual position is on all fours with *Lamb v Bliss*. The Building comprised two hereditaments prior to its entry into the 2010 List as a single hereditament. As such, and on the authority of *Lamb v Bliss*, Regulation 14(7) is not available in the present case. Prior to the VON1 Alteration, and putting aside for present purposes the argument of the Respondents based on the November 2015 Deletions, there was no hereditament shown in the 2010 List the rateable value of which was increased by the VON1 Alteration. Instead there were two hereditaments, which are not capable of constituting the hereditament referred to in the final part of Regulation 14(7).

183. Although the issues were not quite the same as in the present case, we think that Mr Sadiq was right, in his submissions, also to point us to the decision of this Tribunal (Martin Rodger KC, the Deputy Chamber President) in *BMC Properties and Management Ltd v Jackson (VO)* [2014] UKUT 0093 (LC) as further indorsement of the construction of Regulation 14(7) in *Lamb v Bliss;* see in particular [14] and [29] in *BMC*. In this context we have also considered the decision of the Court of Appeal in *BMC*, which dismissed an appeal against the decision of the Tribunal, but we have not found anything in the judgment of Patten LJ, who gave the substantive judgment in the Court of Appeal, which seems to us to bear directly on the particular issue we are considering.

184. If therefore we are bound to follow *Lamb v Bliss*, it seems to us that the decision in *Lamb v Bliss* binds us to accept the first argument of the Respondents in this context, which is that Regulation 14(7) cannot apply because, prior to the VON1 Alteration (and disregarding the November 2015 Deletions for this purpose), there was no single hereditament, but rather two hereditaments.

185. There is also the second argument of the Respondents in this context, which is that Regulation 14(7) cannot apply because, prior to the VON1 Alteration, there was nothing entered in the 2010 List, by way of a hereditament or hereditaments on which Regulation 14(7) could bite. The previous entry of the two hereditaments which formerly comprised the Building was removed from the 2010 List by the November 2015 Deletions. We will however put that argument to one side, while we consider the various arguments of the Appellant to the effect that we should not follow *Lamb v Bliss*.

186. We start with the argument that *Lamb v Bliss* was decided per incuriam because of the non-citation of *Holland v Ong*. Cases which can be regarded as decided per incuriam fall into a relatively narrow category. In *Morelle Ltd v Wakeling* [1955] 2 QB 379 Lord Evershed MR explained the position in the following terms, at page 406:

> *"We have been unable to accept this argument. As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.E., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case."*

187. With this test in mind we turn to *Holland v Ong*. The case concerned a flat and garage which had formerly been assessed for rating purposes as one hereditament, with a rateable value of £76. The flat was let to a tenant who made a proposal for separate valuations of the flat and garage. This resulted in an alteration of the valuation list, which was effected before 7th November 1956, with the flat and garage entered as separate hereditaments. The gross and net rateable values of the flat were, respectively, £50 and £40. The significance of this was that Section 11 of the Rent Act 1957 released from control dwelling-houses in London of which, on 7th November 1956, the rateable value exceeded £40. Thus it was that the flat remained within the control imposed by the Rent Act 1957.

188. The landlord applied to the county court for an apportionment of the rateable value of the flat pursuant to the provisions of paragraph 1 of Schedule 5 to the Rent Act 1977. The object of this exercise, which the tenant opposed, was to try to secure an apportionment of the former figure of £76, being the rateable value of what had been the single hereditament comprising the flat and garage, so as to produce an apportioned figure for the rateable value of the flat which exceeded £40, thereby releasing the flat from the control imposed by the Rent Act 1957.

189. At this point it is necessary to set out the relevant parts of paragraph 1, and paragraph 2 of Schedule 5 to the Rent Act 1957:

"1. In relation to any premises in England or Wales, any reference in this Act to the rateable value on a particular date (hereinafter referred to as the "date of ascertainment") shall subject to the following provisions of this Part of this Schedule be construed—(a) if the premises are a hereditament for which a rateable value is then shown in the valuation list, as a reference to the rateable value of the hereditament, or where that value differs from the net annual value, the net annual thereof, as shown in the valuation list on that date; (b) if the premises form part only of such a hereditament, as a reference to such proportion of the said rateable value or net annual value as may be agreed in writing between the landlord and tenant or determined by the county court. .. ."

"2(1) The following provision shall have effect for the purposes of subsection (1) of section eleven of this Act or an order made under subsection (3) thereof, that is to say, where after the date of ascertainment the valuation list is altered so as to vary the rateable value of a hereditament, and the alteration has effect from a date not later than the date of ascertainment and is made in pursuance of a proposal to which this paragraph applies, the rateable value on the date of ascertainment of any dwelling-house consisting of or wholly or partly comprised in that hereditament shall be ascertained as if the amount of the rateable, or as the case may be net annual, value of that hereditament shown in the valuation list on the date of ascertainment had been the amount of that value shown in the list as altered. . . ."

190. The county court judge held that there was no jurisdiction to apportion the original rateable value of £76, because the alteration of the list, splitting the original single hereditament and assessing the flat at a rateable value of £40 and the garage at a rateable value of £44, had retrospective effect to the date of ascertainment. This was on the basis that the provisions of paragraph 2(1) of Schedule 5 applied to the alteration, so that the alteration had retrospective effect, with the further consequence that the apportionment provisions in paragraph 1(b) could not apply. There was, on this basis, a separate rateable value for the flat on the date of ascertainment. The question before the Court of Appeal was whether paragraph 2(1) did apply to the alteration. This depended upon whether the provisions of paragraph 2(1) were apt to apply to a situation where what had been a single hereditament had been split into two. This in turn raised a question of the construction of paragraph 2(1), which was whether the flat could qualify as a hereditament for which a rateable value was *"shown in the valuation list on the date of ascertainment"*, when the flat had previously been shown as part of a larger hereditament.

191. Hodson LJ, with whose judgment the other members of the Court of Appeal, answered this question in the affirmative. At pages 429-430 Hodson LJ said this:

"To fulfil the definition is not enough, however, for, in order that the paragraph may operate, the flat must be a hereditament shown in the valuation list. What was shown in the valuation list before alteration was the flat plus garage, according to the description which I read from the notice of the decision, and it was not until after alteration that the flat was separately shown. The question is: Can the flat be said to be shown in the valuation list when it is shown, not as a separate entity, but as part of a composite hereditament? It was part of a larger hereditament, and although its rateable value was not actually shown and would therefore only be ascertained by apportionment, it can, I think, properly be said to be shown without unduly straining the language of the section."

192. Hodson LJ cited, in support of this conclusion, an earlier decision of the Court of Appeal on similar provisions in the Rent Act 1939 where the relevant wording, equivalent to that in paragraph 2(1) of Schedule 5 to the Rent Act 1957, made reference to the date on which a dwelling-house was first assessed. Hodson LJ then concluded his discussion of this earlier case in the following terms, at 430-431:

> *"In deciding when the dwelling-house was first assessed the court came to the conclusion that it was so assessed when the assessment was made upon the composite whole of which the particular item formed part although no separate assessment was made upon it until a later date. Mr. Megarry pointed out on behalf of the landlord that " shown " is not the same as " assessed," and contended that though it may be quite right to say that a part may be said to be assessed when the complex of which it forms part is assessed, yet you cannot produce the result that this flat was ever shown on the valuation list before the list was altered. While recognizing the force of this submission, I reject it. The flat was certainly shown in the list even though not separately included, and the whole of which it formed part was shown by description with a rateable value which covered both component parts. So that, so far as that part of the submission on behalf of the landlord is concerned, I agree with the registrar and with the county court judge that the landlord's submission fails."*

193. Finally, at page 431, Hodson LJ dealt with, and rejected the further submission of the landlord that the list had not been altered so as to vary the rateable value of the Flat:

> *"There is a further submission on behalf of the landlord that, even if the flat is shown in the valuation list, the list had not been altered so as to vary its rateable value. It seems to me that he would have to argue, so as effectively to exclude the operation of the section, that it could not be altered so as to vary the rateable value; but it is unnecessary to determine that, because it is sufficient for the purpose of this case to say that I agree with the court below that there can be said here to have been a variation from the original assessment of £76, and although I concede that there is difficulty in regarding the known figure of £40 as an alteration from an unknown figure, part of the £76, notionally to be attributed to the flat, yet the alteration of the assessment of the premises as a whole from £76 to two separate assessments of £40 for the flat and £44 for the garage may, in my opinion, fairly be regarded as by itself an alteration varying the rateable value of the hereditament, that is to say, of the flat."*

194. It seems to us that there are two related difficulties with applying the decision in *Ong v Holland* to the construction of Regulation 14(7). First, paragraph 2(1) of Schedule 5 to the Rent Act 1957 is not in the same terms as Regulation 14(7). Regulation 14(7) simply refers to an increase in *"the rateable value shown in the list for the hereditament to which the inaccuracy relates"*. The wording of paragraph 2(1) is materially different. Second, and more specifically, paragraph 2(1) contemplated the possibility that the relevant dwelling-house might, on date of ascertainment, be a dwelling-house "*consisting of or wholly or partly comprised in that hereditament"*. While we acknowledge that this was not a point which was the subject of express reference in the reasoning of Hodson LJ, it seems to us that this provision made it difficult to construe the reference to *"that*

hereditament" in the final part of paragraph 2(1) as precluding reference to a dwelling-house comprising part of that hereditament.

195. *Holland v Ong* was not cited in *Lamb v Bliss*, but in order to be satisfied that *Lamb v Bliss* was, for that reason, decided per incuriam, we would have to be satisfied (i) that the decision in *Holland v Ong* was binding on the Court of Appeal deciding *Lamb v Bliss*, (ii) that the decision in *Lamb v Bliss* was given in ignorance or forgetfulness of *Holland v Ong*, and (iii) that this had the result that the reasoning in *Lamb v Bliss* was demonstrably wrong. We do not think that (i) or (iii) can possibly be said to be established. For the reasons set out in our previous paragraph we consider that the decision in *Holland v Ong* can be distinguished, in relation to the decision in *Lamb v Bliss*. As such we do not consider that *Holland v Ong* was anywhere near a decision binding upon the Court of Appeal in *Lamb v Bliss*. Nor do we consider that the decision in *Lamb v Bliss* can be said to be wrong, let alone demonstrably wrong, as a consequence of the non-citation of *Holland v Ong*. So far as (ii) is concerned, there is no evidence that *Holland v Ong* was cited or thought about in *Lamb v Bliss*, but whether this is properly described as ignorance or forgetfulness on the part of the Court of Appeal seems to us to beg the question of whether *Holland v Ong* was a binding decision which needed to be cited in *Lamb v Bliss*. We do not consider that it was a binding decision which needed to be so cited.

196. We therefore conclude that *Lamb v Bliss* was not, on the basis of non-citation of *Ong v Holland*, decided per incuriam. This then leaves the question, in this context, of whether the situation is one where we are faced with inconsistent decisions of the Court of Appeal, in respect of which we are entitled to decide which decision to follow; see *Young v Bristol Aeroplane Co. Ltd* [1944] KB 718. It follows from the discussion above that we do not regard *Ong v Holland* and *Lamb v Bliss* as inconsistent decisions. As we have said we consider the decision in *Ong v Holland* to be distinguishable in relation to *Lamb v Bliss*. We should however make it clear that if the position was that the two decisions are properly seen as inconsistent, we would follow *Lamb v Bliss*. In our respectful view, and subject to the state error/human rights arguments which we have yet to consider, *Lamb v Bliss* was correctly decided.

197. This therefore brings us to the state error/human rights arguments deployed by LHL. The elements of these argument can be summarised as follows:

    (1) The November 2015 Deletions constituted an error on the part of the VO, and thus the state.
    (2) By the VON1 Alteration the VO, and thus the state seeks to correct that error.
    (3) If however Regulation 14(7) is not available in the present case, LHL claims that the correction of what it characterises as the state error has left it significantly worse off. This is not a case, so it is said, where LHL is merely being required to pay rates which it would have been required to pay in any event, but for the original error of the November 2015 Deletions. If the November Deletions had not been made, so it is claimed, LHL would not have lulled into a false sense of security, but would have taken alternative steps to mitigate its rates liability in respect of the empty Building. Following the correction of the state error, by the VON1 Alteration, those alternative steps are no longer available.
    (4) By virtue of Section 3 of the Human Rights Act 1998 this Tribunal is bound to give effect to Regulation 14(7) in a way which is compatible with Convention rights. In

the present case the relevant right is the right to protection of property contained in Article 1 of the First Protocol to the Convention (**"Article 1"**), as contained in Part II of Schedule 1 to the Human Rights Act. As such, Regulation 14(7) should be construed in such a way as to apply in the present case.

(5) The same result can be reached by the application of common law principles. Regulation 14(7) should be construed in a purposive fashion, which avoids what are said to be the capricious results which follow from the application of *Lamb v Bliss*.

198. In considering these arguments, the starting point is that by Section 55 (of the 1988 Act) Parliament has conferred a power on the Secretary of State to make regulations about the alteration of the rating lists by valuation officers. As part of this rule making power Parliament has expressly conferred on the Secretary of State, by Section 55(6), power to make authorised alterations to the list retrospective in their effect. Regulation 14(2) is an example of the exercise of this rule making power.

199. The next step is to consider the scope of Article 1. Article 1 is in the following terms:

i. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

200. In *JA Pye v United Kingdom* (2008) 46 E.H.R.R. 45 the European Court of Human Rights (Grand Chamber) reiterated the three distinct, but connected rules contained in Article 1, in the following terms at [53-55]:

"53 In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Art.1, an interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

54 A taking of property under the second sentence of the first paragraph of Art.1 without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Art.1. The provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value.

55 In respect of interferences which fall under the second paragraph of Art.1 of Protocol No.1, with its specific reference to "[T]he right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .", there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect, States enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."

201. The margin of appreciation enjoyed by the state in relation to the application of the third rule identified above is a wide one; see Harris, O'Boyle and Warbrick, The Law of the European Convention, 4th Edition, at page 892, where the powers of the state in this respect are described as *"practically unlimited"*, and see the cases there footnoted, and see *Air Canada v United Kingdom* (1995) 20 E.H.R.R. 1, in particular at [40-44] and *Jahn v Germany* (2006) 42 E.H.R.R. 49, in particular at [109-117]. The latter two cases are cases which very much turned on their own particular circumstances, but both cases do illustrate the width of the powers of a state which can be exercised without engaging a breach of Article 1.

202. In support of what he referred to as the state error principle, Mr Forsdick cited the decision of the ECHR in *Radchikov v Russia* [2007] ECHR 65582/01 and, in particular, the following statement at [50]:

> *"The Court does not share the reasoning of the Presidium, namely that the preliminary investigation and the trial "were conducted in an incomplete and one-sided manner, without proper inquiry into incriminating and exculpatory circumstances." The Court considers that the mistakes or errors of the state authorities should serve to the benefit of the defendant. In other words, the risk of any mistake made by the prosecuting authority, or indeed a court, must be borne by the state and the errors must not be remedied at the expense of the individual concerned."*

203. The first two sentences of [50] were not included, in the citation of this extract from the judgment, in Mr Forsdick's skeleton argument for this hearing. We have included the first sentence because it brings out the point that the case was concerned with a breach of the applicant's right to a fair trial under Article 6. The court found that the quashing of the applicant's original acquittal in the case was not intended to correct a fundamental judicial error or a miscarriage of justice, but was used by the prosecution, and thus the state merely for the purpose of obtaining a rehearing and a fresh determination of the case. We do not think that the case establishes any general principle of state error, or provides any support for the argument, in the present case, that the state, in the person of the VO, is not entitled, pursuant to Regulation 14(2) to alter the 2010 List with retrospective effect. The same is true of the three other decisions of the ECHR relied upon by Mr Forsdick, each of which involved the relevant applicant being deprived of property without compensation as a result of the correction of an error by the state; see *Gladysheva v Russia* [2011] ECHR 7079/10, *Gashi v Croatia* [2007] ECHR 32457/05 and *Tunaitis v Lithuania* [2015] 4297/08. This is not the situation in the present case where, putting LHL's case at its highest, LHL has lost the opportunity, as a result of what is said to have been an error of the state, to mitigate the rates liability which it now faces.

204. In terms of domestic case law the courts have recognised that retrospective amendments to tax legislation are lawful; see *R (Huitson) v HMRC* [2011] EWCA Civ 893. In this case the Court of Appeal upheld the decision of Kenneth Parker J that retrospective legislation effected by Section 58 of the Finance Act 2008 was compatible with Article 1. Mummery LJ, with whose judgment Sullivan and Tomlinson LJJ agreed, summarised the position in the following terms, at [94-95]:

"94. In the circumstances of this case, the liability of the claimant under the retrospective legislation of s.58 to pay the UK income tax that he would have had to pay, if he had not participated in the tax avoidance scheme, is no more an unjustified interference with his enjoyment of his possessions than the ordinary liability that his fellow residents in the UK are under to contribute, by way of UK tax on their income, towards the costs of providing community and other benefits for the purposes of life in a civil society."

95. In summary, the crucial points on examination of all the relevant circumstances of this case are that the retrospective amendments were enacted pursuant to a justified fiscal policy that was within the State's area of appreciation and discretionary judgment in economic and social matters. The legislation achieves a fair balance between the interests of the general body of taxpayers and the right of the claimant to enjoyment of his possessions, without imposing an unreasonable economic burden on him. This outcome accords with the reasonable expectations of the taxation of residents in the State on the profits of their trade or profession. The legislation prevents the DTA tax relief provisions from being misused for a purpose different from their originally intended use. There has been no conduct on the part of the State fiscal authorities that has made the retrospective application of the amended legislation to his tax affairs an infringement of his Convention rights."

205. Turning to the decision at first instance in *Huitson*, which was upheld by the Court of Appeal, Mr Forsdick drew our attention to the judgment of Kenneth Parker J at [75]. After setting out Article 1, Kenneth Parker J summarised a series of general propositions concerning the operation of Article 1 in relation to the area of taxation. In particular, concerning retrospective tax legislation, the judge said this, at [75(v) and (vi)]:

"v) As regards retrospective legislation in particular:

"Retrospective legislation is not as such prohibited by [Article 1 of Protocol No 1]. The question to be answered is whether, in the applicants' specific circumstances, the retrospective application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved" (MA and 34 Others v Finland (2003) 37 E.H.R.R. CD 210)."

vi) The imposition of a tax is not devoid of reasonable foundation by reason only that it may have some retrospective effect: see, for example, R (on the application of Federation of Tour Operators, TUI UK Limited, Kuoni Travel Limited v Her Majesty's Treasury [2007] EWHC 2062 (Admin) at 149; affirmed [2008] EWCA Civ 752 , where Stanley Burnton J (as he then was) said in that context that "the hurdle for the Claimants on A1P1 is very high" [154]."

206. We accept the point made by Mr Forsdick that the facts of *Huitson* were not, on LHL's factual case, the same as the facts of the present case. On LHL's factual case it finds itself saddled with a rates liability which, had it not been for the error of the VO in making the November 2015 Deletions, it would have been able to mitigate. In *Huitson* the taxpayer entered into a tax avoidance scheme which turned out not to work. The retrospective legislation in question, namely Section 58 of the Finance Act 2008, confirmed that the scheme was ineffective, but by that time the efficacy of the scheme was already under attack by the Revenue, albeit on a belated basis. As such, the taxpayer acted at his own risk.

207. We are however not persuaded, even on LHL's case as to the factual position, that the position in the present case is such that the retrospective application of the VON1 Alteration imposes an unreasonable burden upon LHL, and fails to strike a fair balance between the various interests involved.

208. Equally, we are not persuaded that the operation of Regulation 14(7) operates in such a capricious fashion that it should be construed so as to apply in the present case. We were pressed with the argument by Mr Forsdick that there was a lack of logic in the working of Regulation 14(7). As we understood this argument, it was that Regulation 14(7), on the Respondents' construction, can apply where there is an increase in the rateable value of a hereditament shown in the list brought about by a retrospective alteration of the list, but cannot apply in the present case, where the retrospective alteration has not effected an increase in the rateable value of the same hereditament, but rather has effected the deletion of two hereditaments and the entry of the relevant property back into the list as a single hereditament. In our judgment the operation of Regulation 14(7), as a provision alleviating the financial effects of a certain category of retrospective alterations, is well within the wide margin of appreciation permitted to a state in that state's tax legislation.

209. Turning to the common law, we do not think that it provides a viable route to the construction of Regulation 14(7) sought by LHL. In this context LHL relies upon the decision of the Supreme Court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16 [2022] AC 690. The case concerned a scheme for the avoidance of non-domestic rates which involved the grant of leases of the relevant hereditaments by the defendant owners of the hereditaments to SPVs (special purpose vehicles), without any assets or business. The SPVs were then subject to voluntary winding up, so as to trigger the winding up exemption for non-domestic rates, or were allowed to be struck off the register, so that the leases and liability for rates passed to the Crown as bona vacantia. The claimant local authorities brought claims seeking recovery of non-domestic rates from the defendants, either on the basis that the relevant legislation should be given a purposive interpretation, such as to identify the defendants as the owners of the relevant hereditaments for the purposes of Section 45(1)(b) (of the 1988 Act), or on the basis that the court could pierce the corporate veil of the SPVs, so as to identify the defendants as the true owners of the relevant hereditaments. These claims were struck out by the Court of Appeal, but the Supreme Court reversed this decision. The Supreme Court accepted that the corporate veil could not be pierced, but considered that the relevant legislation could be construed in such a way as to render the defendants the owners of the relevant hereditaments within the meaning of Section 45(1)(b).

210. In a joint judgment, with which the other members of the Supreme Court agreed, Lord Briggs and Lord Leggatt JJSC explained the position in the following terms, at [48]-[49]:

> *"48 In the unusual circumstances of this case, however, identifying "the person entitled to possession" in section 65(1) of the 1988 Act as the person with the immediate legal right to possession of the property would defeat the purpose of the legislation. As we have explained, the schemes were designed in such a way as to ensure that the SPV to whom a lease was granted had no real or practical control over whether the property was occupied or not and that such control remained at all times with the landlord.*

49 In our view, Parliament cannot sensibly be taken to have intended that "the person entitled to possession" of an unoccupied property on whom the liability for rates is imposed should encompass a company which has no real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates. Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description."

211. Mr Forsdick relied upon this case as authority for his argument that Regulation 14(7) should be given a purposive reading, so as not to differentiate between a situation where the rateable value of a hereditament is increased by an alteration having retrospective effect, and a situation where a hereditament is reconstituted as a single hereditament. As Mr Forsdick argued, no policy rationale has been articulated for an approach which forbids retrospective liability in cases of rateable value increase, but permits retrospective liability in reconstitution cases. On a purposive reading, the provisions of Regulation 14(7) should be held to apply in any case where the alteration of a list results in an increase in the rates liability of a ratepayer. We cannot see however that the reasoning of Lord Briggs and Lord Leggatt JJSC in the particular circumstances of the *Rossendale* case, which their Lordships identified as unusual, can be applied in the present case, so as to achieve a fundamental re-writing of the provisions of Regulation 14(7). We have not heard argument on what the implications might be of extending the reach of Regulation 14(7) to all situations of reconstitution of a hereditament, but the situation seems to us to be very far from one where it can be inferred, either safely or at all, that Parliament cannot sensibly have intended to limit the reach of Regulation 14(7) to cases of rateable value increase involving the same hereditament.

212. Pausing at this point in our analysis, we are not persuaded that the construction of Regulation 14(7) sought by LHL can be achieved, either on the basis of Article 1 or on the basis of common law principles. It follows that, although such arguments do not appear to have been advanced in *Lamb v Bliss*, we cannot accept that *Lamb v Bliss* was decided per incuriam on this basis. The *Morelle* test is clearly not satisfied in this context. In addition to this, and following our consideration of the state error/human rights arguments which we have now considered, we remain of the view that *Lamb v Bliss* was correctly decided.

213. It should however be noted that, thus far in our analysis, we have assumed that the factual basis for these arguments is as asserted by LHL; that is to say on the basis that the VO was, by the November 2015 Deletions, responsible for a state error, the correction of which, by the VON1 Alteration, has been at the expense of LHL by imposing a rates liability on LHL which it would otherwise have been able to mitigate. Putting the matter more simply, it is said that the state is seeking to put itself in a position where it profits from its own error at the expense of an innocent ratepayer. There are however substantial difficulties in the way of accepting the factual basis, as alleged by LHL, for these arguments.

214. First, and looking at the matter from the point of view of the VO, we cannot accept that any error occurred in the present case of a kind comparable to the errors which were under consideration in the European case law to which we have been referred. We

accept and find that, when the VO decided to make the November 2015 Alterations, the VO had neither seen the VPS Agreement nor had the benefit of the CA Decision. Knowledge of either or both of these matters would substantially have changed the legal landscape in which the VO made the decision to make the November 2015 Deletions. We also accept a point made by the Vice-President, at paragraph 59 of the VTE Decision, namely that it is in the nature of the statutory rating scheme that another interested party, in this instance Southwark, was entitled to make its own proposal in response to the November 2015 Deletions. In summary, we are inclined to agree with the Vice President that the present case is not one of state error, at least in the sense in which state error has been identified in the relevant European case law. It seems to us that process involving the November 2015 Alterations and their correction by the VON1 Alteration is more accurately characterised as the simple working of the statutory rating scheme, as opposed to a state error.

215. Second, and looking at matters from the point of view of LHL, we cannot accept that LHL is in the position of an innocent ratepayer. The reality is that LHL sought to avoid its non-domestic rating liability for the Building by the implementation of a property guardianship scheme, on a very substantial scheme and in relation to a very substantial office building. Whether the scheme would work, and achieve the desired objective was very much up in the air. As with other tax avoidance schemes, it seems to us that LHL acted at its own risk.

216. The answer to this, so LHL contends, is that it would have taken other steps to mitigate its rates liability if what is alleged to have been the relevant state error, namely the making of the November 2015 Deletions, had not occurred. In this respect however we find the evidential position unsatisfactory. We were referred to the witness statement of Clive Riding, who is a consultant for Native Land Ltd which was appointed by the parent company of LHL to act on behalf of LHL in connection with the development of Ludgate House. It will be recalled that Mr Riding gave oral evidence at the first hearing. At paragraphs 35 and 36 of his witness statement Mr Riding said this:

> *"35. Due to the retrospective changes applied by the VTE's decision and the unexpected nature of these changes, LHL has lost the possibility of mitigating its rating liability for the period affected by the VON. Had LHL been aware in 2015 of the VO's assessment contained within the VON, it would have sought further advice from Montagu Evans LLP as to the alternative ways in which its rating liability could be mitigated.*
> *36. Had the Listing Officer not made the 2015 Assessment (with the result that the premises became subject to Council Tax instead of business rates) LHL would have taken steps to mitigate the rates liability. LHL would have considered a range of different options, for example, increasing the number of licences granted to Guardians, each with different possible financial consequences, but some of which could have resulted in significant savings for LHL, amounting to hundreds of thousands of pounds."*

217. Turning to the question of what advice would have been given by Montagu Evans, we were referred to the expert evidence of Mr Penfold, identifying rates mitigation strategies which would have been available to LHL if the decision to make the November 2015 Deletions had not been made. It is not necessary to go through all of this evidence, but

the position is summarised by Mr Penfold at paragraph 4.12 of his second supplemental expert report:

> *"4.12 Whilst there have been important changes in this area since my earlier comments (BP1: 7.14) on this issue, I conclude that, despite those changes, there are a series of effective strategies that could have been used by the ratepayer to mitigate rate liability in respect of the appeal property had the November 2015 decision not been taken, and which were closed off to the ratepayer by the time that that decision was reversed in May 2017. These included: stripping out, demolition, intermittent occupation, temporary lettings, and further proposals to alter the rating list."*

218. Mr Riding and Mr Penfold both gave oral evidence and were cross-examined at the first hearing. We were told by Mr Forsdick that the above evidence was unchallenged in the first hearing. We were unable to verify this for ourselves, because there was no transcript available of the oral evidence heard at the first hearing. There was however no challenge from either of the Respondents' counsel to what we were told by Mr Forsdick. We therefore consider that we must accept that the above evidence was unchallenged.

219. What was submitted, by both Mr Westmoreland Smith and Mr Sadiq, was that there were good grounds for doubting that LHL would have taken alternative measures if the November 2015 Deletions had not been made. In particular the Tribunal found, at [UT/68], that LHL had become aware of Southwark' proposals, challenging the November 2015 Deletions, by March 2016. The Tribunal also found, at [UT/66], that Southwark inspected the Building, with the knowledge and co-operation of LHL, in January 2016. As such, so it was submitted by counsel for the Respondents, LHL was well aware, by March 2016 at the latest or even by January 2016, that there was a risk of the November 2015 Deletions being the subject of a challenge and a subsequent correction. Notwithstanding this position and the knowledge of this risk, so it was argued, LHL took no action to implement any of the alternative rates mitigation schemes identified by Mr Penfold. As such, so the submission of the Respondent's counsel went, the reality was that LHL would not have implemented any alternative rates mitigation scheme if the November 2015 Deletions had not been made.

220. The evidential position in this respect was not satisfactory. It seems to us that the January 2016 inspection and/or the knowledge acquired by LHL in March 2016 provide good grounds for doubting the proposition that LHL would have implemented an alternative scheme or schemes for rates mitigation if the November 2015 Deletions had not been made. It also seems to us however that these matters, if they are to be relied upon by the Respondents as grounds for rejecting the evidence of Mr Riding, are matters which needed to be put, at the least, to Mr Riding in his cross-examination. Mr Penfold was giving evidence as an expert in this case, and not as a witness of fact, but we can also see that there were relevant questions which might have been directed to Mr Penfold in this respect, in cross-examination. In the absence of such cross-examination, we are doubtful that it is open to us to refuse to accept the relevant evidence given by Mr Riding and Mr Penfold.

221. We also take the view however that it is not necessary for us to resolve the difficulties which we have identified in our previous paragraph. The reason for this is that even if one takes what is said by Mr Riding and Mr Penfold in the relevant part of their written

evidence at face value, it seems to us to fall short of establishing that, but for the November 2015 Deletions, LHL could and would have implemented an alternative rates mitigation scheme or alternative rates mitigation schemes which could and would have achieved either the 66% mitigation asserted on the basis of Mr Penfold's evidence or any material mitigation. The written evidence of both Mr Riding and Mr Penfold seems to us to be too qualified to satisfy us in this respect. In particular we refer to paragraph 36 of Mr Riding's witness statement which states (underlining added) both that LHL "*would have taken steps to mitigate the rates liability"*, and that LHL *"would have considered a range of different options, for example, increasing the number of licences granted to Guardians, each with different possible financial consequences, but some of which could have resulted in significant savings for LHL, amounting to hundreds of thousands of pounds."*.

222. It is not clear to us what would have been achieved by increasing the number of Guardians in the Building, given the CA Decision and given our own decision. Independent of this, the language used by Mr Riding is equivocal. Evidence that LHL *"would have considered a range of different options"* is not evidence that LHL would have taken any of those options, and seems to us significantly to undermine the previous assertion that LHL *"would have taken"* other steps than those it did in fact take, to mitigate its rates liability. The position on the relevant evidence, taken at face value, seems to us to be somewhat speculative, both in terms of what LHL would or might have done, if the November 2015 Deletions had not been made, and in terms of the efficacy of those alternative options which LHL would have considered. In summary, we find that LHL has failed to discharge the evidential burden of establishing, on the balance of probabilities, that but for the November 2015 Deletions, it would have implemented an alternative rates mitigation scheme or alternative rates mitigations schemes which would have mitigated its rates liability in a material respect.

223. We also note, in this context, that LHL's case, even when put at its highest, is some distance from a case that, but for the November 2015 Deletions, LHL could have avoided all of the rates liability which it now faces as a consequence of the VON1 Alteration.

224. The net result is that we are not satisfied in the present case either that there was an error by the state of the kind which occurred in the European case law to which we have been referred. Nor are we satisfied that LHL can claim to be in the position of an innocent ratepayer, suffering an unjustified loss as a consequence of any such state error. As we have said, the reality seems to us to be that LHL sought to avoid its rating liability for the Building by the implementation of a guardianship scheme, on a very substantial scale. As was the position of the taxpayer in *Huitson*, it seems to us that LHL acted at its own risk.

225. For the reasons set out in this section of our decision, we have concluded that the arguments of LHL based upon state error/human rights fall to be rejected, even on the basis that LHL is right on the factual basis for its case. The reality is however, as we have found, that the factual basis for these arguments, as asserted by LHL, does not exist. This is therefore a further, and independent reason for rejecting LHL's case on state error/human rights.

226. In reaching the conclusions which we have reached in this section of our decision, we have put to one side the second argument of the Respondents in this context, which is that Regulation 14(7) cannot apply because, prior to the VON1 Alteration, there was nothing entered in the 2010 List, by way of a hereditament or hereditaments on which Regulation 14(7) could bite. The entry of the Building into the 2010 List by the VON1 Alteration was the new entry of a single hereditament, which did not engage any increase in the rateable value of the hereditament. We accept this argument, which seems to us to be correct, as a matter of the construction of Regulation 14(7). We doubt however that it adds much to the overall argument. We say this because this second argument seems to us to be essentially a variation of the first argument of the Respondents on the construction of Regulation 14(7), which we have considered above, at length. As such, it seems to us that the second argument essentially stands or falls with the first argument. We have decided that the first argument stands. As such, the same goes for the second argument.

227. Drawing together all of the discussion of this section of our decision we conclude that the various arguments of LHL on the Effective Date Issue fall to be rejected. There is no legal route which leads to the construction of Regulation 14(7) sought by LHL. The answer to the Effective Date Issue is that the effective date of the VON1 Alteration was 1st July 2015.

The Effective Date Issue – our conclusions

228. For the reasons set out in the previous section of this decision we conclude, in relation to the Effective Date Issue, that Regulation 14(7) does not apply to the VON1 Alteration. As such, and by reason of Regulation 14(2)(a)(iii), the VON1 Alteration took effect on 1st July 2015, and not on 24th May 2017. It follows that the position, in this respect, remains as determined by the VTE Decision.

229. Finally, we understand that it is LHL's case that, if the construction of Regulation 14(7) which it seeks cannot be achieved by a process of construction, then the consequence is that the Regulations are unlawful. We understand that this case is the subject of separate judicial review proceedings. Accordingly we say no more about it.

Disposal

230. For the reasons which we have set out in this decision, and by reference to our determination of the remaining issues in the UT Appeal, the overall outcome of the UT Appeal is as follows:
    (1) The VON1 Alteration stands as an alteration of the 2010 List.
    (2) The VON1 Alteration has effect from 1st July 2015.
    (3) The rateable value determined by the VO, namely £3,390,000, stands.

231. It follows that the UT Appeal, so far as not dealt with by the CA Decision, falls to be dismissed.

232. This decision is final on all matters other than costs. If an appropriate order cannot be agreed the parties may make submissions in writing on costs and a letter containing further directions accompanies this decision.

Mr Justice Edwin Johnson	P D McCrea FRICS FCIArb
The President	Member

14 February 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.