Neutral Citation Number: [2020] EWCA Civ 1637

Case No: C3/2019/3084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Martin Rodger QC, Deputy Chamber President & Mr P D McCrea FRICS
RA/56/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 December 2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE McCOMBE
and
LORD JUSTICE BAKER

- -

Between:

LONDON BOROUGH OF SOUTHWARK	**Appellant**
- and -	
(1) LUDGATE HOUSE LIMITED	**Respondents**
(2) MR ANDREW RICKETTS (VALUATION OFFICER)	

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RICHARD CLAYTON QC & FAISEL SADIQ (instructed by **Legal Services LB of Southwark**) for the **Appellant**
DAVID FORSDICK QC & LUKE WILCOX (instructed by Herbert Smith Freehills LLP) for the **1st Respondent**
MARK WESTMORELAND SMITH (instructed by the **Legal Department, HMRC**) for the **2nd Respondent**

Hearing dates : 24 & 25 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 4th December 2020.

Lord Justice Lewison:

Introduction

1. The main issue in this appeal is whether on 1 July 2015 ("the material day") Ludgate House, Southwark, was a single hereditament for rating purposes. The Upper Tribunal (Martin Rodger QC, Deputy President, and Mr PD McCrea FRICS) ("the UT"), on an appeal from the Valuation Tribunal for England ("the VTE"), held that it was not. Their decision is at [2019] UKUT 278 (LC), [2019] RA 423. In consequence of their decision, it is common ground that Ludgate House was required to be removed from the rating list. The billing authority, Southwark LBC, appeals.

2. The issue turns, in effect, on whether particular rooms in the building were in separate rateable occupation. The UT held that they were.

3. I can take the facts from the decision of the UT.

Background

4. Until its demolition in 2018 Ludgate House was an office building of 173,633 sq ft at the southern end of Blackfriars Bridge in the London Borough of Southwark. It stood on the South Bank between Blackfriars Road and Blackfriars Station. It was built in 1988 and was formerly the home of Express Newspapers. 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.

5. 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.

6. Ludgate House Ltd ("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 of Ludgate House expired and the tenants vacated in March 2015. At that point, possession of the building would have reverted to LHL.

7. On 18 June 2015, before demolition work had begun, a company called VPS (UK) Ltd ("VPS") contacted LHL with a proposal to secure the building against trespassers by arranging for occupation by property guardians under licences granted by VPS. A property guardian is a private individual who, usually with others, occupies vacant premises 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 with the prospect of mitigating liability for non-

domestic rates. VPS recommended that 32 guardians be installed to provide "a robust level of protection". Appendix 1 to the proposal described the "Guardian process". Among the points that it made were these:

> "[VPS] will place Guardians at the Site. These Guardians will occupy the premises as full time residents and their presence will assist with day-to-day management and protection of the buildings.
>
> [VPS] provide … Quality Guardians who are all screened, checked and in employment."

8. It went on to stress the quality of the Guardians and the thoroughness of the vetting procedure. It continued:

> "[VPS] then performs a thorough induction with the Guardians who pass the vetting procedure. The aim is to ensure that all Guardians are aware of their responsibilities under the terms of their licence."

9. Those responsibilities included: ensuring that they do not sleep away from the property for more than 2 nights out of 7; reporting any suspicious activity and not allowing any person who is not an approved Guardian to reside in the property.

10. LHL accepted the proposal and on 24 July 2015 an agreement was entered into, although by that time the parties had already begun to implement it.

11. There are two relevant agreements involved: one between LHL and VPS and the other between VPS and the individual guardians. It is not alleged that either was a sham, or did otherwise than accurately reflect the various parties' rights and obligations.

The agreement between LHL and VPS

12. The agreement between LHL and VPS recited that:

> "[VPS] provides property guardian services … in relation to vacant premises … to property owners and their agents. The Services are provided with a view to securing premises against trespassers and protecting them from damage."

13. Under the agreement, LHL appointed VPS as "the sole and exclusive provider" of the services (clause 2.1). The services were defined as the property guardian services described in the proposal. They included the provision of services intended to secure the property against trespassers and to protect it from damage, including guarding and caretaking. The agreement provided that VPS would "occupy the Property as a licensee"; that no relationship of landlord and tenant was created between it and LHL; that LHL "retains control, possession and management of the Property", 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 (clause 20.1). VPS agreed to use its reasonable endeavours to ensure that the Guardians fulfilled their obligations as contained in the licence (clause 4.1.4) Despite the terms of clause 2.7.2 (that VPS *would* "occupy the Property as a licensee"), clause 4.2.1 provided that VPS was *not*

entitled to occupy the building itself or by its servants or agents. The rights of occupation to be granted by it were to be in the form of licences rather than tenancies (clause 2.4.2). VPS agreed not to allow any Guardian to "take possession of the Property or any part of it" (clause 4.23.) 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. Finally the agreement provided that the services were "intended to provide a reasonable deterrent to unauthorised access or detect the presence of certain events" (clause 10.1).

The licence to guardians

14. These were in a standard form. The front sheet consisted of an "Important Note". That note stated:

> "You will not get a right to exclusive occupation of any part of the living space.
>
> The space will be shared with other individuals who [VPS] permits to share the space. You will have to agree with those other individuals how the space is to be used. The size and extent of this space may vary from time to time, as directed by [VPS]."

15. The note also explicitly referred to the decision of the House of Lords in *AG Securities Ltd v Vaughan* [1990] 1 AC 417 in which it was held that an arrangement of this kind did not amount to the grant of exclusive possession. It went on to say:

> "This agreement contains important rules about how the building is to be occupied and used, and your responsibilities as Guardian."

16. The background to the licence was recited in clause 2. Among other things it said that VPS "provides services to property owners to secure premises against trespassers and protect such premises from damage and has agreed to provide those services to the Owner in respect of the Property". It also said that VPS was not entitled to grant possession or exclusive occupation of "the property or any part of it to any person".

17. 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.

18. The licences provided:

   i) The guardians had no right to exclusive possession or occupation of any part of the Property (clause 2.2 and clause 4.1))

   ii) The guardians had permission to share occupation of the Property with such others as VPS might designate (clause 3.1)

iii) The size and extent of the living space available to the guardians might be varied at any time (clause 3.4)

iv) The guardians had no right to occupy any particular room at the Property. But the guardian was required to inform VPS of which room the guardian was sleeping in "to enable [VPS] to manage the Property in accordance with its obligations to the Owner". (clause 3.5 and clause 3.6)

v) They had no right of access to the Property other than the living space and/or communal areas (clause 3.8)

vi) VPS might require guardians to move to a different room within the living space. A request was expected to be made on a regular basis. (clause 4.3)

vii) There were restrictions on how the guardians might use or behave at the Property (clause 8) e.g. restrictions on what they could bring on to the Property (clause 8.4); a prohibition from interfering with the access to or use of the property by the owner, VPS or anyone acting with their authority (clause 8.2.9); the guardian was limited to having no more than two guests visit them at the Property (clause 8.7); the guardian was prohibited from having guests stay overnight (clause 8.6); the guardians were prohibited from having children at the Property (clause 8.11), the guardians were prohibited from allowing former guardians from attending the Property (clause 8.9); the guardians were prohibited from using equipment at the Property that did not belong to them without prior written permission from VPS (clause 8.16); the guardians were prohibited from making any alterations to the Property whether major or minor including putting up signs or posters without written permission of VPS (clauses 8.2 and 8.21);

viii) The guardians were obliged to report damage to the Property to VPS (clause 9.6);

ix) The guardians were not entitled to be away from the Property for more than two nights in any seven without VPS' prior written consent (clause 9.1); the guardian was obliged to do their best to ensure that they, or at least one other person, would be present in the Property for at least one hour in every 24 (clause 9.3) and

x) The guardians were obliged to politely but firmly challenge anyone who had unannounced access to the Property to determine their identity and purpose and if the guardian deemed it appropriate, they should contact the relevant authority (clause 9.7)

xi) The licence also provided that it would be a serious breach (entitling VPS to terminate the licence) if the guardian failed to occupy the property as their main abode within 24 hours of signing the agreement (clause 7.1.2).

What happened on the ground

19. The first guardians moved into the building on these terms on the material day, 1 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. 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.

20. A greater number of guardians than the 32 originally agreed on moved into the building, and by 17 August 2015 46 individuals had taken up occupation, each with their own separate licence. Although the terms of the licences permitted each guardian 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. As well as having their own designated rooms or living area, each guardian made use of the communal toilets, showers and kitchens.

21. Photographs showed 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 guardian 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. The photographs also showed 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. They also 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.

22. The pattern of occupation established by 17 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.

23. The UT accepted the evidence of a number of guardians. Alice Howard, a paediatric nurse, lived at Ludgate House 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 guardians. 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.

24. 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.

25. Angela Martin worked locally in a managerial role, and moved to Ludgate House 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.

26. The UT found that it was not possible to identify the boundaries of each guardian's occupation. But that did not mean that it was not possible to identify the individual rooms occupied by the four guardians present on 1 July, or those who arrived by 17 August 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 a specific guardian as their own private space. 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.

The legal framework

27. Tracing one's way back through the statutory instructions about what amounts to a hereditament, the inevitable conclusion is that the question is to be answered by reference to judge-made law. No doubt that is at least partly attributable to the fact that the rating system has now existed for over 400 years. There are two linked aspects to the question whether something is a hereditament: one geographical or cartographical, and the other how it is occupied: *Cardtronics Europe Ltd v Sykes* ("*Cardtronics SC*") [2020] UKSC 21, [2020] 1 WLR 2185 at [15]. In addition, as Lord Carnwath noted at [26] and [27] the core concepts have not proved susceptible to precise formulation; and there are some tensions and inconsistencies in many of the statements of principle. But those concepts have proved both resilient and adaptable to accommodate new developments.

28. The geographic or cartographic test entails deciding whether the putative hereditament has a visual or cartographic unity. In simple terms, this involves asking whether you can draw a continuous red line around it on a plan. Within the red line, the area must be self-contained; but only in the sense that all parts of it are physically accessible without having to go outside the red line. It is not necessary for a putative hereditament to have sharply defined physical boundaries on the ground. But it must be capable of being identified as a unit of property sufficiently defined by its own boundaries to be regarded as self-contained: *Woolway (Valuation Officer) v Mazars LLP* [2015] UKSC 53, [2015] AC 1862. Whether this test is satisfied is a factual or evaluative judgment: *Cardtronics Europe Ltd v Sykes* ("*Cardtronics CA*") [2018] EWCA Civ 2472, [2019] 1 WLR 2281 at [51] to [53]; approved in *Cardtronics SC* at [38].

29. In this case the UT decided that an individual room occupied by a guardian was sufficiently identifiable as a unit of property to be capable of being a hereditament. There is no appeal against that conclusion.

30. Nevertheless, the manner in which a putative hereditament is occupied may in some circumstances serve to control whether that red-lined area is to be regarded as, on the one hand, separate from or, on the other hand, part of a hereditament consisting of a larger area.

31. One of the key questions in resolving that issue is whether there is a person potentially in rateable occupation of the red-lined area. The "classic" statement of the ingredients of rateable occupation (*Cardtronics SC* at [13]) is that of Tucker LJ in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344. In that case Laing were building contractors who had been engaged under a contract with the Air Ministry to extend runways at an airfield in Gloucestershire. They erected temporary offices, garages, canteens, huts etc on the site. The question was whether they were in rateable occupation of them. Tucker LJ began his discussion by saying:

> "The decision in this case primarily depends on the proper construction to be put on the general conditions which form the contract between the parties."

32. In other words, who was in rateable occupation depended on the terms of the contract. He then set out the ingredients of rateable occupation in a passage that has been frequently cited and applied:

> "First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period. The primary question here is whether the plaintiffs are in actual occupation and exclusive occupation of these particular hereditaments."

33. It is to be noted that, in this passage, Tucker LJ did not distinguish between "occupation" on the one hand and "possession" on the other. The argument for Laing was that on examination of the contract it would be found that Laing were "not in exclusive possession" and that the true position was that Laing were "really in occupation on behalf of someone else, namely the Crown". Tucker LJ then went on to say:

> "For the purpose of solving this question it is necessary to look with care, and in some detail, at the contract."

34. Having carried out that exercise, he concluded:

> "If the contractors are occupying these hereditaments for the purposes and the sole purposes of their business, and if the measure of control retained by the Ministry is not such as to alter the character and quality of their occupation, then, in my view, they are in rateable occupation. I think it has been rightly stressed that what one has to determine is the quality of the occupation of the premises. The measure of control by the Ministry in carrying out the contract is a different thing from a

> control interfering with the exclusive occupation of the hereditament. *On reading the conditions in this contract*… the conclusion I have arrived at is that the Ministry had not in this case such control as to render the occupation of the contractors an occupation which is not rateable. In other words, I think the real control exercised by the Ministry was a control with regard to the performance of the contract and not a control which interfered with the exclusive occupation of these hereditaments for the purposes of their work by the contractors." (Emphasis added)

35. Asquith LJ agreed. Jenkins J added a judgment of his own in which he said:

> "I think that their possession was exclusive for the particular purposes for which they occupied the premises, namely, the carrying out of the contract."

36. The outcome of the case, then, turned on a close examination of the contract.

37. The question of possession was also discussed in *Cardtronics CA* and *Cardtronics SC*. In this court, Lindblom LJ said at [83] that the "most basic and enduring" principle was that:

> "… where the person in possession of premises has given another person possession of part of those premises he nevertheless remains in rateable possession of that part of the premises unless the other person has *exclusive possession*." (Emphasis added)

38. In the Supreme Court at [14] Lord Carnwath quoted with approval the dictum to which Lindblom LJ had referred:

> "Where a person already in possession has given to another possession of a part of his premises, *if that possession be not exclusive* he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense, in occupation, but the occupation of the landlord is paramount, that of the lodger subordinate." (Emphasis added)

39. In the course of his judgment Tucker LJ referred to the decision of the House of Lords in *Westminster Council v Southern Railway* [1936] AC 511. That case, which concerned shops, kiosks and showcases within Victoria Station, is the leading case on how to decide which out of two or more candidates is in rateable occupation. Lord Russell began his consideration of the issues by saying:

> "Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary

> holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact - namely, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate, but who is in paramount occupation of the particular premises in question."

40. There are a number of points to be made about this passage:

    i) "Occupation" must *include* "actual possession". It would appear to follow that if a putative occupier does not have possession, he will not be in rateable occupation.

    ii) If there is more than one candidate, who is in rateable occupation depends on "the position *and rights* of the parties in respect of the premises in question." If those rights depend on a contract, that necessarily means that the relevant tribunal must examine the terms of the contract, just as Tucker LJ did in *Laing*.

    iii) One further question that the tribunal must consider is "the purpose of the occupation of those premises". This is a point to which I will return.

    iv) The ultimate question, where there is more than one candidate for rateable occupation, is who is "in paramount occupation" of the putative hereditament.

41. Lord Russell went on to discuss the case of a lodger, who has always been considered not to be in rateable occupation of the room that he lives in. Although he thought that this was largely the product of practical considerations, he went on to consider its justification:

> "But it can I think be justified and explained when we remember that the landlord, who is the person held to be rateable, is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodgers' rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours, is essential to the lodger. The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in

> rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts."

42. He described this as the "landlord-control principle" which, he noted, had been applied in other business contexts. He continued at 532:

> "In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons."

43. Having regard to his earlier observations, I find it difficult to suppose that Lord Russell was saying that contractual rights and obligations were irrelevant if they had not been exercised. On the contrary in my opinion, he considered that the relevant question was whether, *if exercised*, those rights would interfere with the occupant's enjoyment of the premises. At 534, having considered the terms on which a bank occupied premises, he said:

> "I can find nothing in these provisions inconsistent with the bank having and enjoying the exclusive occupation and possession of the bank premises for the purposes for which they are occupied, namely, for the purposes of a bank."

44. It seems, then, that the critical point was the terms on which the putative hereditament was held.

45. In his concurring speech, Lord Wright MR having introduced the issues said at 544:

> "I must next examine the various agreements under which the premises at Victoria Station are held. Some are in the form of a demise or tenancy agreement, others purport to grant a licence. But substantially *their effect is the same* so far as concerns what is material in this appeal, that is the question whether there is or is not de facto occupation." (Emphasis added)

46. He then proceeded to examine in detail the contractual arrangements between the parties. He, too, referred to the position of a lodger at 552:

> "The position of a lodger for rating law has long been well established, but the same principle has been extended to cases where premises included in a larger whole have been let out to other persons, subject to such limitations of user and such control that these persons could not be regarded as having that sole and exclusive occupation which is the test of rateability in such cases. The premises were thus part of a larger

> hereditament "let out to a tenant but not so as to be capable of separate assessment"."

47. He went on to give further consideration to the terms of the agreements under which the various traders operated and concluded at 555:

> "I cannot find in the agreements in question any reason to hold that the tenants are not rateable."

48. Although all these passages suggest that the terms of any agreement are important factors in deciding the question of rateable occupation, they are not necessarily the be-all-and-end-all. Thus at 533 Lord Russell said:

> "In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."

49. I agree with the Upper Tribunal in *Esso Petroleum Co Ltd v Walker* [2013] UKUT 052 (LC), [2013] RA 355 at [81]:

> "When Lord Russell said, in *Southern Railway*, that it was "immaterial whether the title to occupy is attributable to a lease, a licence or an easement" he did not mean, in our opinion, that the nature of the title to occupy was irrelevant. That is made plain by the earlier paragraphs of his judgement. He said that the question of paramountcy is to be answered having regard to "the position and rights of the parties in respect of the premises in question." What he meant was that the "forms of the documents", in the sense of the names or classification of those documents, is not of significance. But the nature and attributes of the title to occupy which the documents of title grant is certainly very relevant…. An essential fact of occupation is the relative position of the parties and the rights under which each party occupies. That may well, in turn, depend on the "title" to occupy, however lawyers would label that title. In our view the respective rights of the occupying parties form an essential part of the factual setting."

50. In *Southern Railway* at 561-2 Lord Wright criticised the earlier case of *Smith v Lambeth Assessment Committee*:

> "It is obvious that what is considered here by the Court is merely the language of the agreement; yet it is clearly established, as I need not repeat, that what is material is not necessarily the terms of the grant, but the de facto occupation which may be greater or less than the terms convey. The question is not concluded by saying it is an easement, not a demise."

51. The acceptance that a lodger is not in rateable occupation seems to me to demonstrate another point as well. From the perspective of the lodger, their only purpose in securing lodgings is to have somewhere to live. But that is not determinative of the question of rateable occupation. There is also the landlord's purpose to be considered. In *Southern Railway* Lord Russell put it in neutral terms: "the purpose of the occupation of those premises". As he went on to explain, in the case of a lodging house the landlord's purpose is the business of letting lodgings; and it is that purpose that prevails. In *Cardtronics CA* at [83] Lindblom LJ put it thus:

> "Where actual occupation of land is shared between two persons, the question of who is in rateable occupation makes it necessary to establish which of those two occupiers is in paramount occupation. And in that exercise *the parties' respective rights and purposes* in occupying the site are relevant." (Emphasis added)

52. This observation shows that not only are contractual rights a relevant consideration, but also that an examination of "purpose" is not confined to the purpose of only one party to whatever the contractual arrangements are. On the facts of *Cardtronic* the location of ATMs within supermarkets and other shops was of benefit both to the bank whose ATM it was, and also to the retailer. As Lindblom LJ explained at [87]:

> "… where the "owner" has given up neither possession nor actual occupation of the site in question, where the purpose for which that site is occupied—in this instance, the operation of an ATM—is a common purpose with that of the other party in occupation and is of direct benefit to the "owner", and where the "owner" retains physical *or contractual control* over the site to realise that benefit and this can be demonstrated by objective evidence, the principle of "general control" applies, in the normal way. Rateable occupation is not resolved in such a case by weighing one party's "purpose" against another's. "General control" remains the decisive factor in establishing who is in rateable occupation of the site. There is no need for a further test to be imposed to gauge which of two purposes is the "dominant" or "primary" purpose, or for the "general control" principle to be subordinated or made subject to such an inquiry." (Emphasis added)

53. It seems to me to be clear from those observations that contractual control is enough.

54. Similarly, in the Supreme Court Lord Carnwath said at [46]:

> "The lodging house has always been treated as a single hereditament in the occupation of the landlord, even though his control of the premises does not interfere with, but rather supports, the enjoyment by the lodgers of their own rooms for their own purposes."

55. It follows that the fact that the lodgers are enjoying their own rooms "for their own purposes" is not enough to amount to rateable occupation.

56. At [49] he commented that the UT's finding that both parties (i.e. the retailer and the bank) derived a direct benefit from the use of the ATM site for the same purpose and shared the economic fruits of the activity was sufficient to support the conclusion that the retailers continued in rateable occupation of the ATM sites.

57. It is, of course, necessary to distinguish between "purpose" and "motive". That is illustrated by *Wimborne DC v Brayne Construction Co Ltd* [1985] RA 234. The owners of a fish farm wanted to extend the fish farm into an adjoining property. Accordingly, they entered into a contract with a firm of civil engineering and public works contractors, to excavate a number of lakes and ponds, and carry out associated landscaping work over an area of about 26 acres. The main contractor sub-let the excavation work to sub-contractors. The question for the court was whether the main contractors or the sub-contractors were in rateable occupation of a hereditament described as "sand and gravel pit and premises". The terms of the sub-contract provided that the sub-contractors would pay the contractors £1 per ton of all suitable material recovered from the excavation, which was estimated to be 250,000 tons. On the facts found, the sub-contractors had two purposes in extracting the gravel. One was to work the site as excavations for fish ponds. The other was to recover and sell the gravel. Lloyd LJ held that the same activity could have more than one purpose, and that either purpose could be capable of giving rise to rateable occupation. He held, therefore, that "the first of Tucker LJ's requirements" was satisfied. In other words, the sub-contractors were in actual occupation of the sand and gravel pits. His discussion of primary and secondary purposes was therefore concerned with whether the sub-contractors were in actual occupation, rather than with the question whether that occupation was exclusively for their own purposes. He then turned to consider whether that actual occupation was exclusive. At 241 he said:

> "Assuming I am right that [the sub-contractor] was in actual occupation, was that occupation exclusive for their particular purposes? Here, with respect, I would differ from Glidewell J. The primary findings of fact which are to be found in paragraph 4 are as follows: (v) The second respondent was excavating gravel *exclusive to all others* and as independent contractors, not as agents of the first respondent. (vi) The first respondent by virtue of its contract with Dorset Fish Farms had the *exclusive right* to excavate all materials. The second respondent had the *exclusive right* to excavate all materials afforded by its contract with the first respondent. (vii) The contract between Dorset Fish Farms Ltd and the first respondent gave the first respondent *the exclusive right* to dispose of all materials resulting from the excavation. The second respondent had *the exclusive right* to dispose of all excavations afforded by the first respondent except soil required by the first respondent for landscaping. (viii) The first respondent and the second respondent were restricted in the manner of excavating by being required to conform to the plan for the fish farm." (Emphasis added)

58. The question that Lloyd LJ posed was whether the factors in findings (i) to (vii) were negated by finding (viii). Findings (i) to (vii) were, of course, derived from the terms

of the contracts between the owner and the main contractor on the one hand; and the main contractor and the sub-contractor on the other. In order to answer that question, he examined the degree of control that the owner and the main contractor could exercise over the sub-contractor. At 244 he said:

> "But when one compares the control exercised in the present case with the control exercised by the *Southern Railway in Westminster City Council v Southern Railway Co Ltd* … over the tenements on Victoria Station, and in particular over WH Smith & Sons' bookstalls, or with the control exercised in *Laing v Kingswood Area Assessment Committee* over the building contractors in that case, I am satisfied that the control here was not such as to deprive [the sub-contractor] of exclusive occupation. The control, such as it was, was a control over the performance of the contract, as in *Laing*, not an interference with [the sub-contractor's] occupation. The quality of the occupation was unaffected."

59. This seems to me to involve an examination of the contractual relations between the main contractor and the sub-contractor which is, of course, exactly what Tucker LJ did in *Laing*.

60. Sir George Waller gave a concurring judgment. He also relied on the fact that the sub-contractor's right to excavate the gravel was exclusive and pointed out at 245 that:

> "They had the exclusive right to excavate the gravel, and they had the exclusive right to dispose of it. Neither [the main contractor] nor [the owner] could take gravel because the sole right had been given to [the sub-contractor]. It would be necessary to terminate [the sub-contractor's] contract before either party could do so. There is no doubt that the excavation of gravel may form part of a rateable hereditament."

61. It is to be noted that the exercise of anyone else's right to excavate the gravel could not arise during the subsistence of the sub-contract. He, too, went on to consider the question of control. He said at 246:

> "It is suggested that because there were some restrictions imposed by [the main contractor], those restrictions would prevent [the sub-contractor] from being in possession. This argument was put forward in *Westminster Corporation v Southern Railway Company* …. The restrictions in this case are minimal compared with the restrictions in that case, and the House of Lords held that the restrictions did not prevent WH Smith from being in sole occupation of their paper stall at Victoria Station. In my opinion the restrictions in this case, the power of [the main contractor] to determine where excavation should or should not be done, is the kind of provision that is to be expected in any similar grant, and does not prevent [the sub-contractor] from being in occupation of this hereditament."

62. In his view, too, the question turned on the terms of the contract between contractor and sub-contractor. In *Cardtronics SC* Lord Carnwath referred to *Wimborne* at [20] as an "illustration" of the principle of landlord-control. He does not appear to me to have treated it as laying down some different principle.

63. Mr Forsdick QC relied on that part of the agreement between LHL and VPS which stated that VPS was not the agent of LHL. But in the first place, agency "throws little light on rateable occupation" (*Solihull Corporation v Gas Council* [1962] RA 113, 117 per Lord Reid). Second as the Upper Tribunal said in *Esso Petroleum Co Ltd v Walker* at [88]:

> "It does not seem to us that there is any principle in the authorities that would prevent an occupant from exercising control for his purpose through an agent or separate contractor, if that is what he wishes to do. The true nature of the occupation must be examined."

64. In addition, the mere fact that someone lives in a unit of property around which a continuous red line can be drawn does not *necessarily* mean that he is in rateable occupation of it. That is illustrated by two lines of authority. The first relates to service occupiers. A person who lives in a house will not be in rateable occupation of it if either (a) if it is essential to the performance of his duties that he should occupy the particular house or a house within a particular perimeter; or (b) he is required by contract to occupy the house and by so doing he can better perform his duties to a material degree: *Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1704.

65. The second relates to caretakers. In *London County Council v Hackney BC* [1928] 2 KB 588 the LCC, as education authority, ran a school. The school closed down and they installed a caretaker in the building. The caretaker kept the place clean, answered the door, noted effects in the premises and generally looked after the property. He lived in two rooms at first; but was later joined by his family and he "made a home with them in what had been the infirmary". As Wright J pointed out, the LCC were "in visible occupation" by their caretaker. But that was not enough to amount to rateable occupation. The reason was that it did not amount to beneficial occupation by the LCC. Importantly, however, the caretaker was not in rateable occupation either: *Yates v Chorlton-on-Medlock Union* (1883) 47 JP 630; Halsbury's Laws of England (2018) vol 70 para 92.

66. Mr Forsdick submitted that these two lines of authority only applied where there was a relationship of employment between the occupier and the owner. I do not see why that should be so. This narrow view has been rejected by appellate courts both in Scotland (*IRC v Leckie* 1940 SC 343) and in Northern Ireland (*Commissioner for Valuation v Trustees of the Redemptorist Order* [1971] NI 114) both of which have applied the principle to analogous situations. The question is one of the true nature of the occupation. One of the services that VPS contracted to provide was that of caretaking.

67. In my judgment, the position of a guardian under the sort of arrangement with which this case is concerned, has analogies with both these types of occupation; as well as with the position of a lodger.

The VTE's decision

68. The VTE decided as follows:

> "[37] In the case of Ludgate House I am satisfied that whilst the guardians were physically present, their occupation was heavily restricted and under the control of, and on behalf of, LHL. It is clear to me that LHL, not the guardians, was in fact in paramount occupation of the whole of Ludgate House as a single hereditament. Though VPS were not agents for the purpose of contractual relations, that does not mean that LHL can avoid the actuality of being in control of these premises.
>
> [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."

The UT's decision on rateable occupation

69. The UT disagreed with the VTE. It is, I think, worth setting out the UT's decision on this question almost in full:

> "[98] The VTE considered that the licensees were not in actual occupation, but were in occupation on behalf of LHL. We disagree. The licensees were in no contractual relationship with LHL, they provided no service to it, other than as a by-product of their residence, and they could not be removed from the building except on notice given by VPS.
>
> [99] To be rateable, occupation must be "exclusive for the particular purposes of the possessor". There was a debate about the purpose for which the licensees were in occupation, it being suggested by the respondents that it was as much for the security of the building and the discouragement of squatters as it was for their own residential purposes. Just as the contractor, White's, purpose in occupying the site in *Wimborne* was its own purpose of extracting gravel, rather than its employer's purpose of creating fish ponds, it is the licensee's purpose which is important.

[100] We have no doubt that from the perspective of the licensees themselves the purpose of their occupation was to provide themselves with somewhere to live. Their occupation for that purpose was exclusive as no other person was entitled to use the individual rooms allocated to each licensee the space for the same or any other purpose. The clearest demonstration of the exclusivity of their occupation is the provision of a key to each licensee for their own room. It is true that in order to secure accommodation the licensees entered into agreements which obliged them to remain physically present in the building on a daily basis, and limited their absences. But those obligations were in no sense inconsistent with their residential use of the building, nor were the other terms of the licenses. It is certainly unusual to see an obligation to challenge intruders included in a contract for the occupation of residential property, but a residential occupier would expect to do the same out of self-interest rather than obligation.

[101] The occupation of the individual rooms was obviously of benefit to the licensees, and it was not transient, but endured for a period of 22 months. In summary, therefore, all four of the markers of rateable occupation was exhibited by the licensees.

[102] The respondents nevertheless submitted that because LHL had purposes of its own in arranging for the occupation of the building by the licensees, namely promoting the security of the building and mitigating its rates liability, and because the licensees were obliged by contract to further those purposes by their presence, the building was not "used wholly for the purposes of living accommodation" and therefore it was, or included, non-domestic property. We accept that the building as a whole was not wholly used for the purposes of living accommodation, but we do not agree that the individual rooms occupied by the licensees had any separate or concurrent use other than as living accommodation. The motive of rates mitigation was not a purpose of anyone's occupation (although it may have been a consequence of it). The presence of an employee providing security or caretaking is not beneficial occupation by the employer, and even less so is that of a licensee providing no other service than, merely by their presence, ensuring that squatters can be more effectively removed by others.

[103] The respondents also submitted that LHL was in paramount occupation of the building. Mr Clayton suggested that its general control of the building meant that there was no need to consider whether there was more than one hereditament, and that the appellant's reliance on *Mazars* was misconceived. That is clearly not the case, as *Southern Railway* demonstrates. No doubt the railway company was in general

control of Victoria Station, including by keeping it locked overnight denying access to the shop keepers, but that did not prevent the shops and kiosks from being in the rateable occupation of those same shopkeepers.

[104] There is no evidence from which general control by LHL of the individual rooms can be discerned. LHL had no presence in the rooms, and no need to enter them. The licensees had keys to their rooms and while the security guard or some other member of VPS's staff also had copies there is no suggestion that they ever entered uninvited. The licences could not be terminated except by four weeks' notice given by VPS, and after termination any attempt by LHL to recover possession of the building otherwise than by proceedings in court would not have been lawful by reason of section 3(2B), Protection from Eviction Act 1977. The right to require relocation to a different room was an additional draftsman's device to prevent the occupier claiming to have a tenancy and was not utilised in practice, other than in in the two exceptional cases where there was a good practical reason to do so.

[105] VPS controlled access to the building and was not entitled to keep LHL out, but there are numerous examples of such control being insufficient to render the owner's occupation of premises paramount…. There is also some limited evidence of VPS exercising a degree of control over the use of the common parts (Ms Howard was eventually told to remove the tent she had erected to provide private space for her guests). None of these examples undermine the exclusivity of the occupation by the licensees of their individual rooms.

[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."

Discussion

70. The UT's first point of disagreement with the VTE at [98] was on the question whether the guardians were in occupation on behalf of LHL. It gave two reasons for its conclusion: the first that there was no contractual relationship between an individual guardian and LHL; and the second that the guardians were providing no service to LHL. The first of those points is plainly right; but the second is far more questionable. LHL had engaged VPS for the specific purpose of providing property guardian services; and the guardians were the very means by which those services were provided. They could not have performed those services without living in the

building. The presence of the guardians on site was an essential component of that which LHL had bargained for. That is why the licence provided that it was a serious breach if a guardian did not make the property their abode.

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.

72. The UT went on to say that each guardian had exclusive occupation of their particular room, of which the clearest demonstration was the provision of a key. I do not consider that the UT were correct in regarding the provision of a key to an individual room as being of legal significance. A lodger is nonetheless a lodger even if they have a key to the individual room that they occupy (*Appah v Parncliffe Investments Ltd* [1964] 1 WLR 1064) or even to the front door of the lodging house as well (*Bradley v Baylis* (1881) 8 QBD 195). Even a hotel guest is given a key to their room. In this case the UT found that the guardians did not, however, have keys to the building itself; but had to be let in by a security guard. The sense in which an individual guardian had exclusive use of their room is no different from the exclusive use that a lodger has of their room. That was well described (in a rating context) by Blackburn J in *Allan v Liverpool Overseers* (1873-74) LR 9 QB 180, 192:

> "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending on the possession; and he is not rateable."

73. The UT also stated in that paragraph that the terms of the licence were not inconsistent with residential use. But that does not seem to me to be the right question. The question was whether the terms of the licence were inconsistent with

exclusive occupation by the guardians. As the lodger cases show, sole use is not necessarily the same as exclusive use. The terms of the licence proclaim several times that a guardian is not being granted exclusive occupation of any part of the building. The UT's decision did not, in my judgment, address this point at all. The UT made no finding that, in that respect, the agreement was a sham. If, as Blackburn J held, the test is whether a guardian would be entitled to maintain an action for trespass, it seems to me to be clear that the terms of the licence did not give them exclusive possession, which is the necessary foundation for an action in trespass.

74. In the same paragraph the UT referred to the guardians' obligation to challenge intruders; but discounted that positive obligation on the ground that a residential occupier would expect to do the same out of self-interest rather than obligation. While it is true that a residential occupier would no doubt challenge intruders into that part of the property that he personally occupies, the UT overlooked the point that the contractual obligation extended to the whole of the "Property" as defined (i.e. the *whole* of Ludgate House including those parts of it that were not comprised within the "living accommodation").

75. It is correct, as the UT noted at [102], that the presence of an employee providing security or caretaking (at least if the property is unfurnished) is not beneficial occupation by the employer. But on the other hand, neither is it rateable occupation by the caretaker. So I do not see that this point advances LHL's case, since the purpose of its case is to establish rateable occupation by the guardians. In the same paragraph the UT discounted LHL's purpose in having the guardians occupy the rooms. But it seems to me that this was a case of a common purpose or at least a complementary purpose, such that LHL's purpose ought not to have been discounted or ignored as the UT did.

76. At [103] to [104] the UT considered the question of "paramount occupation". As I have said, when the commercial tenants left the property in March 2015 possession reverted to LHL. The real question here, in my judgment, is that posed by Lindblom LJ in *Cardtronics CA* at [87]. LHL had not given up possession of any part of Ludgate House: its agreement with VPS made that clear. On the contrary, that agreement asserted that LHL retained both possession and control; and forbade VPS from occupying the property. No one has suggested that that agreement was a sham or pretence. The purpose for which the Ludgate House was occupied (including the rooms used by the guardians) was a common purpose which was of direct benefit to LHL and/or VPS. It was a case in which LHL and/or VPS retained at least *contractual* control over the building to realise that benefit, precisely because neither had parted with possession (or indeed occupation). The question is not, therefore, one of "paramount occupation;" but of "general control" which is the decisive factor in establishing who is in rateable occupation of the building.

77. At [104] the UT said that there was no *evidence* from which general control by LHL of the individual rooms can be discerned. They seem to have been looking for the *exercise* of rights which LHL had. But, in my judgment, they were wrong to have confined themselves to the actual exercise of rights, rather than assessing what effect the exercise would have had, if exercised. Moreover as the UT said in *Esso* at [89]:

> "A lack of constant interference in the day to day running of the business does not equate to lack of control. The best and most

> effective control may be where the person in control hardly needs to intervene at all, having established a stable and compliant system."

78. In other words, to use the old cliché, absence of evidence is not evidence of absence.

79. Moreover, at [104] the UT disparaged the right in the guardian's licence to require relocation as a "draftsman's device" even though that right had actually been exercised in two cases. There was no evidence (or at least none to which we have been referred) to back that assertion. It may simply have been the UT's own appreciation. Since it was not a sham, it ought to have weighed in the UT's appreciation of where control lay.

80. If, as Lord Russell said in *Southern Railway*, the question is whether the exercise of the retained right would interfere with the occupant's enjoyment of the premises he occupies for the purposes for which he occupies them (i.e. the use of a particular room as living accommodation) it seems to me that the exercise of a right to require a guardian to give up the room and move to another is very significant interference with the use of *that room* for living in. Nor is the exercise of that right purely theoretical. On the contrary, the UT found that it had in fact been exercised.

81. As Mr Forsdick acknowledged in his skeleton argument, it is difficult to think of a greater retention of general control over premises than the ability to require the occupier to vacate the premises without notice. He went on to argue that even so, a tenant at will is in rateable occupation. That is so, but in my judgment the analogy is a false one. First, while a tenancy at will endures, the tenant at will has exclusive possession of the land comprised in the tenancy: *Lynes v Snaith* [1899] 1 QB 486; *Goldsack v Shore* [1950] 1 KB 708. We are concerned with the anterior question: whether under the terms of occupation a guardian was entitled to exclusive occupation of a particular room in the first place. Second, if a tenancy at will is terminated, the relation of landlord and tenant itself is terminated. By contrast a right to require a guardian to move rooms is a right exercisable under the terms of the agreement while the agreement remains in force. I do not consider that *Wimborne* compels a different conclusion. As Sir George Waller pointed out, the termination of the whole contractual relationship would have been a necessary forerunner to the right of anyone other than the sub-contractor to excavate the gravel. That is not this case.

82. Nor, in my judgment, is the case of a squatter a persuasive analogy (see *Westminster CC v Tomlin* [1989] 1 WLR 1287); because a squatter will be in adverse *possession*, which must itself be exclusive possession. Moreover, on taking possession a squatter acquires title at common law, which is good against all the world, except someone with a better right to possession. As Lord Hoffmann put it in *Alan Wibberley Building Ltd v Insley* [1999] 1 W.L.R. 894:

> "Possession is in itself a good title against anyone who cannot show a prior and therefore better right to possession: *Asher v Whitlock* (1865) LR 1 QB 1."

83. The title acquired by possession is a freehold title. At common law, therefore, there may be a multiplicity of freehold interests in the same land: *Bell v General Accident Fire & Life Assurance Corpn* [1998] 1 EGLR 69.

84. The effect of the contract between VPS and the guardians is, as I see it, a question of law: see *Solihull BC v Gas Council* at 117. If the UT misappreciated the effect of the contract, this court is entitled to intervene. In my judgment, for the reasons I have given, the UT did misappreciate it. Based on its view of the effect of the contractual arrangements, it held that the guardians were in rateable occupation of their individual rooms. In my judgment, the UT was wrong in that conclusion.

85. I would allow the appeal on these grounds.

Illegality

86. Southwark raised another point by way of amendment to its grounds of appeal. That argument was that if Ludgate House was more than one hereditament as the result of the rateable occupation of the guardians in their individual rooms, the court should ignore that because the scheme under which they were permitted to occupy was an unlawful one. The suggested illegality was that the scheme involved the unlawful use of the building as an unlicensed house in multiple occupation.

87. Dingemans LJ gave Southwark permission to amend the grounds of appeal because it was an important point. So it is; but because of the way that the point arose in the UT, Mr Clayton QC accepted in the course of his reply that this was probably not a suitable case in which to deal with it. In addition, anything I say on that topic would be *obiter*; and would not bind any future court or tribunal.

88. As Mummery LJ said in *Housden v Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200, [2008] 1 WLR 1172 at [31]:

> "In general, it is unwise to deliver judgments on points that do not have to be decided. There is no point in cluttering up the law reports with *obiter dicta*, which could, in some cases, embarrass a court having to decide the issue later on."

89. Since, on the view that I take, this argument no longer arises, I prefer not to say anything about it.

The Respondent's Notice

90. LHL filed a Respondent's Notice raising two further issues that the UT did not decide. But Mr Forsdick did not press them in oral argument; and agreed that we need not consider them.

91. I therefore say no more about them.

Result

92. For the reasons I have given, I would allow the appeal.

Lord Justice McCombe:

93. I agree.

Lord Justice Baker:

94. I also agree.