Why this?

Key Cases and Issues

- *Merlin Entertainments v. Cox (VO)*
  (material change of circumstances);
- *Newbigin v. Monk (VO)*
  (repair);
- *UKI (Kingsway) Ltd v. Westminster Council*
  (service of completion notices);
- *Rossendale BC v. Hurstwood*; *Wigan Council v. PAG*
  (rates avoidance and piercing the corporate veil)
- *Cardtronics, Tesco, Sainsbury's & Co-op v. Sykes (VO)*
  (unit of assessment)

Merlin Entertainments v. Cox (VO)

Material Changes of Circumstances

Merlin: the facts

- *Merlin Entertainments v. Wayne Cox (VO)* [2018] UKUT 0406 (LC);

- Crash on the 'Smiler' rollercoaster at Alton Towers, resulting in serious injury, including leg amputations;

- Significant drop in annual number of visitors to Alton Towers following the crash;

- Proposal to alter RV on basis that "the crash on 2 June 2015 involving the Smiler ride within Alton Towers has resulted in a diminution in the value of the hereditament."

Material Change of Circumstances

- To alter RV part way through the list, must demonstrate an MCC has occurred causing the compilation RV to be inaccurate (proposal under Reg 4(1)(b) of the Non-Domestic (Alteration of Lists and Appeals) (England) Regulations 2009 (the “Regs”);

- MCC is defined as ‘a change in any of the matters mentioned in para 2(7) of Schedule 6 to the LGFA (see reg 3(1) of the Regs).

Relevant ‘matters’ in para 2(7) of Sch 6 to to the LGFA:

- (a) matters affecting the physical state or physical enjoyment of the hereditament (But rollercoaster was not part of the hereditament),

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

  (no change)

- […]
- (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 (drop in attendances?).

Issue for determination in Merlin:

"Whether the attitude of members of the public to thrill rides, and to thrill rides at Alton Towers in particular, as a result of the Smiler crash, was a matter which was physically manifest in the locality of the hereditament at the material day such that it falls within the Local Government Finance Act 1988 ("LGFA 1988"), sch.6 para 2(7)(d)."

Principle emphasized in Merlin:

"A "material change of circumstance" can only relate to a matter which, as a matter of law, could have been taken into account under para. 2(7)(d) when the list was compiled. In other words, the question is whether it would have fallen within the scope of the statutory reality principle, which identifies the subject-matter of the valuation, if it had subsisted on the date when the list was compiled?" (para 143)

Result in Merlin:

No MCC because:

- Rating hypothesis only has regard to matters that are intrinsic or essential characteristics of the hereditament or locality.

- Proposal NOT concerned with any intrinsic or essential characteristic of the hereditament or locality.

- Instead simply concerned with the way in which the occupier operated its business on the hereditament and the reaction of potential customers thereto.

- UT decision relies on common law 'reality principle' and law underlying rating hypothesis and valuation rather than wording of para 2(7)(d).

Other observations in Merlin:

Para 2(7)(d) matters

- must *themselves* be physically an obviously present in the locality;

- just because some economic or other intangible matter has caused or resulted in some physical change in the locality is not sufficient to make it a para 2(7)(d) matter (para 143);

- but such matters do not have to be discernible visually or by the senses; sufficient if can be measured or calculated (para 153)

What about football club relegation?

- Can relegation be an MCC?
- Change in mode or category of occupation?
- Change that is itself physically manifest?
- Note para 80 in *Merlin* that different considerations may apply where there is only one hypothetical tenant.
- Watch this space – appeal to UT in *Wigan Football v. Cox (VO)* due to be heard in October 2019.

NEWBIGIN (VO) v. MONK

REPAIR

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THE FACTS

First floor office suite in Avalon House in Sunderland

Subject to a scheme of works that would result in its reconstitution into three separate hereditaments

At the Material Day, the works were partly progressed but largely stalled. Cat B fit out only partially stripped out

Case turned on the tension between the repairing assumption and the reality of the situation (rebus)

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THE FACTS

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THE TENSION

The Repairing Assumption

- **LGFA 1988 Sch 6 para 2(1)(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

The Reality Principle

- **LGFA 1988 Sch 6 paras 6-7**
- the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day:

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

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

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THE HISTORY

The Good Old Days

- Clear distinction drawn between works of repair and works of improvement
- A practical approach, largely to dissuade ratepayers from engaging in constructive vandalism
- Where works (even those of simple repair) were required following an external event (eg. fire or flood) the repairing assumption was disregarded.
- In cases of straightforward disrepair (dereliction / passage of time etc), deletion only possible where the economic test was satisfied

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THE HISTORY

A moment of reflection

- For all its workability and expediency, was the approach taken to that point actually strictly correct?
- Should the repairing assumption be sacrosanct, regardless of the nature and cause of the disrepair? Too subjective?
- Was the statutory assumption the natural prior question?
- Do works of improvement have the effect of placing a property into a state of disrepair for all or part of the period of those works
- More fundamentally, was it proper or fair that a ratepayer should be responsible for a tax liability for a period where occupation of a property was manifestly impossible (in the understanding that rates are a tax on occupation).
- Was it too artificial, even for Rating

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THE HISTORY

Valuation Tribunal

- The property was simply an office building in disrepair. Any works of repair required to put the hereditament back into a prior state that would allow occupation were considered economic

Upper Tribunal

- Works undertaken, crucially to include the wholesale removal of certain items including A/C etc, took the position beyond the scope of repair - *assumption does not extend to the replacement of systems that had been completely removed*
- Unless there is a hereditament in the first instance that is capable of beneficial occupation, it is inappropriate to engage with Para 2b

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THE HISTORY

Court of Appeal

- In theory - a far simpler question: intention and causality is an irrelevance and a distraction
- The reality principle was subordinate to the repairing assumption
- The only requirement is to stand alongside the hereditament and ask whether it is in a state of disrepair and, if so, could it be economically repaired

- In practice – a minefield
- Gave rise to the notion of the "tipping point"
- A requirement to test the position every day and identify exactly when the economic test failed
- Taken to the extreme, creates a need to lodge successive proposals to protect your material day

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THE HISTORY

Supreme Court

- Preferred the UT rationale; but more nuanced
- Statutory provisions do not wholly displace the reality principle
- There remains a distinction between simple disrepair and active works that prevent beneficial occupation [perhaps…]
- Three successive steps:
  1. determine whether a property is capable of rateable occupation at all, and thus whether it is a hereditament;
  2. if it is a hereditament, to determine the mode or category of occupation; and
  3. then consider whether the property is in a reasonable state of repair for use consistent with that mode or category.

- In the case of the case of a building undergoing reconstruction, you don't get beyond the first step

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THE HISTORY

Supreme Court (cont'd)

- Whether the property is subject to works of reconstruction is an objective position – it must be essential and not accidental to the hereditament – it must be obvious to anyone coming fresh to the scene that this was the case at the material day
- Does not need to be structural in nature– "radical"
- Net result in the subject case being that the hereditament was undergoing works of reconstruction, that it was incapable of providing beneficial occupation and that it should be deleted from the List
- But the Court acknowledged the useful practice of adopting nominal value in the List instead of deletion

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DISCUSSION

- Is there an absolute requirement to have an active scheme of reconstruction underway or should one always ask whether property is capable of being occupied before engaging with Para 2b and where the answer is “no” simply stop

- Where works were underway but ceased or paused at the material day
  - Canary Wharf Group v. Connor (VO)
  - Ridgeford Dev’ts Ltd v. Jackson (VO)
  - Henderson Central London (VO) v. Jackson (VO)
  - Heronslea (Loom) Ltd v. Corkish (VO)

- Where works are limited to those of repair or lacking in “radical alteration”
  - HMC v. Roberts (VO)
  - SEGRO plc v. Ricketts (VO)
  - Aviva Investors v. Jackson (VO)

- Vandalism (constructive or otherwise)

- An uncomfortable but logical progression…?

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DISCUSSION

Deletion vs nominal value?

- Limited implications from a liability perspective
- Some potential interaction with the completion notice procedures
- A simple way to ensure the VO doesn't "lose" buildings
- But flexibility from the UKSC in favour of "useful practice" is actually unhelpful
  - Validity of Proposal
  - Administrative burden
  - Material Day regulations

    Deletion – the date of the circumstances giving rise

    Material Change – the date of proposal

What next?

Significant grey areas that will only be resolved by further litigation on nuanced issues

Monk – the case the keeps on giving

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UKI (Kingsway) Ltd v. Westminster City Council

Service of Completion Notices

Issue in UKI

- *UKI (Kingsway) Ltd v. Westminster CC* [2018] UKSC 67

- Issue: What are the requirements for valid "service" of a completion notice so as to bring a newly completed building within liability for non-domestic rates?

- Relevant provisions for completion notices: s.46A and Sch 4A LGFA 1988;

Facts in UKI

- Completion notice delivered by hand to the building, addressed to the “owner”;
- It was given to a receptionist employed by the company managing the building for the owner;
- Receptionist scanned and e-mailed copy to the owner;
- Electronic copy received by the owner.

Ratepayer's Argument

- No valid service under:

- Para 8 of Schedule 4A LGFA, or

- Section 233 Local Government Act 1972, or

- common law

Paragraph 8 of Schedule 4A

"Without prejudice to any other mode of service, a completion notice may be served on a person – (a) by sending it in a prepaid registered letter, or by the recorded delivery service, addressed to that person at his usual or last known place of abode or, in a case where an address for service has been given by that person, at that address; (b) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office or sending it in a prepaid registered letter, or by the recorded delivery service addressed to the secretary or clerk of the company or body at that office; or (c) where the name or address of that person cannot be ascertained after reasonable inquiry, by addressing it to him by the description of 'owner' of the building (describing it) to which the notice relates and by affixing it to some conspicuous part of the building."

Service under common law

- Serving or giving notice means 'causing a notice to be received' – *Sun Alliance and London Assurance Co Ltd v. Hayman* [1975] 1 WLR 177, at 185;

- Statutory provisions do not exclude other methods but are intended to protect the server from risk of non delivery;

- Indirect service, by the action of a third party, can still be proper service – *Townsends Carriers Ltd v. Pfizer Ltd* (1977) 33 P & CR 361.

Result

- Held that Notice had been effectively served, bringing the hereditament into the rating list (reversing the CA);
- Important that notice *in fact* reached the recipient, and
- That there was sufficient 'causation' between the authority's actions and the receipt of the notice by the recipient;
- Receptionist's actions and subsequent receipt by owner were natural consequences of the authority's actions.

Electronic Communications Point

- Communication by e-mail not excluded by the fact that a legislative power (under s. 8 Electronic Communications Act 2000) to provide for electronic communication had not been exercised;

- Common law already allowed for valid service by fax and no good reason to distinguish between fax and e-mail;

- No displacement of ordinary presumption that Parliament did not intend to change the common law.

- Expressly providing for specific legislative power therefore did not restrict use of electronic means without that provision.

NOTE OF CAUTION

"Nothing in this judgment should be taken as detracting from the good sense of the President's observation (Valuation Tribunal, para 43: "In practice, billing authorities would be well advised to secure the protection afforded by paragraph 8 and not serve outside those provisions unless confident that the circumstances are such that good service will be effected." (para 35)

Rossendale BC v. Hurstwood, Wigan Council v. PAG

Rates Avoidance and Piercing the Corporate Veil

Rates Avoidance and Piercing the Corporate Veil

- *Rossendale BC v. Hurstwood; Wigan Council v. PAG* [2019] EWCA Civ 364;

- Empty Property Rates avoidance scheme involving:
  - lease granted to SPV;
  - SPV goes into voluntary liquidation;
  - effective exemption from empty rates liability under s.45(1)(d) LGFA 1988 and regs 3 and 4(k) of Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008.

Procedural Parameters

- In *Re PAG Management Services Ltd* [2015] EWHC 2404 (Ch), Norris J ordered companies to be wound up as the schemes involved misuse of the insolvency legislation;

- But this did not result in recovery of rates for the billing authorities;

- Hence these test proceedings against landlords;

Basis of Claims by Billing Authorities

- "Leases are shams" – struck out by HC and no permission granted to appeal

- "*Pierce the corporate veil and ignore existence of SPVs"* – application to strike out failed but defendants granted permission to appeal

- "*Disregard leases by application of the Ramsay principles"* – struck out by HC and permission granted to appeal.

On Appeal (David Richards LJ, Henderson LJ and Baker LJ) (1):

Defendant's appeal seeking strike out of claim based on piercing the corporate veil -SUCCESSFUL

- Scheme did not relate to the avoidance of an existing, continuing or future liability because rates liability accrues on a day by day basis;
- Therefore 'evasion principle' (which allows piercing of corporate veil in very limited circumstances) cannot apply;
- Use of companies to avoid tax not 'rare or novel' so as to justify any extension of the evasion principle in *Prest.*

On Appeal (David Richards LJ, Henderson LJ and Baker LJ) (2):

Billing authorities' appeal against strike out of claim based on *Ramsay* principle - UNSUCCESSFUL

- *WT Ramsay Ltd v. IRC [1982] AC 300;*
- Principle in *Ramsay* not applicable as steps in the scheme were legal in nature;
- No ambiguity in words in statute;
- Tax avoidance motivation and artificiality of arrangements irrelevant as nothing to do with the relevant legal concept.

RESULT

- Billling authorities claims struck out in entirety;
- No rates recovery from landlords;
- Success for rates avoidance schemes.

CARDTRONICS EUROPE LTD, TESCO STORES LTD, SAINSBURY'S SUPERMARKETS LTD AND CO-OP GROUP V SYKES AND OTHERS (VO)

UNIT OF ASSESSMENT

Josh Myerson MRICS Dip Rating IRRV (Hons)

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THE ATM CASE

UNIT OF ASSESSMENT

Josh Myerson MRICS Dip Rating IRRV (Hons)

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THE FACTS

A number of automated teller machines (ATMs) found within and outwith various supermarket and similar premises

Historically, it had largely been accepted that these should be assessed as if they formed part of the supermarket hereditament in which they were situated

The VO reviewed their and approach and judged the ATMs to be in separate occupation and reconstituted the supermarket hereditaments, splitting out the ATM element into its own hereditament.

Crucially this often with no effect of value on the residual store assessment

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THE HISTORY

Valuation Tribunal

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Upper Tribunal

- Made a distinction between those ATMs found within the supermarket itself and those located externally
- Decided that those found within the supermarket should not be assessed separately.
- But those found on the outside, which were externally accessible by the public and where by their nature there had been some element of design or adaption to accommodate the ATM and allow for the distinct use, should form there own hereditament
- A healthy dose of pragmatism – a workable solution?

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THE HISTORY

Court of Appeal

- There were two questions before the Court:

1. Did the Upper Tribunal err in its approach to the identification of a hereditament?

2. Having decided the hereditament could be identified, did the Tribunal err in its approach to the rateable occupation of the ATM sites?

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THE HISTORY

Did the Upper Tribunal err in its approach to the identification of a hereditament?

- The extent of a separate hereditament must be capable of being identified and it must be a "self-contained unit of property" – see Mazars
- The Appellants sought to progress the argument that, if one were compelled to ignore the presence of the non-rateable plant and machinery when identifying the hereditament (Reg 2 of the Plant and Machinery Regs 2000) , then it was impossible to identify the extent and the ATM therefore failed the geographic test
- Regardless of its occupation, it could not be separately assessable
- The EWCA disagreed – the need to ignore any non-rateable P&M extended only to matters of valuation. It wasn't a logical prior question in identifying the hereditament itself

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THE HISTORY

Did the Tribunal err in its approach to the rateable occupation of the ATM sites?

- Having decided that there could be a separate hereditament, it becomes necessary to ask who is in rateable occupation of it.
- Only where there is a separate occupier would it be correct for that unit of property to be carved out from the host
- It was accepted that in each case there were two distinct parties potentially competing for occupation (to include, for example, Tesco Supermarkets and their affiliated banking operation)
- The question is one of control
- Where there are two parties, both with a right of occupation, one must have regard to whether there is general control exerted by one party over another sufficient to frustrate the second occupation – see Southern Railway

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THE HISTORY

Did the Tribunal err in its approach to the rateable occupation of the ATM sites?

- The test of general control applies where:

  (a) the “owner” has not given up possession or actual occupation of the site in question;

  (b) where the purpose of occupation (here 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

  (c) where the “owner” retains physical or contractual control over the site to realise that benefit and this can be demonstrated by objective evidence

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DISCUSSION

1. Did the Upper Tribunal err in its approach to the identification of a hereditament?

    - Fairly unobjectionable
    - Would have had the danger of creating some artificial scenarios or unintended consequences
    - Perhaps some tension *Wilkinson (VO) v Edmundson Electrical Ltd (2017) UKUT*

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DISCUSSION

2. Did the Tribunal err in its approach to the rateable occupation of the ATM sites?

- More problematic?
- Are there really two occupiers? – corporate veil – see Rossendale etc
- Has the host really not given up occupation or is this a fiction?
- Was too much reliance placed on the contractual arrangements rather than the facts on the ground – the right to place an ATM but ostensibly no certainty as to where it was / lift & shift etc – see Market stalls etc.
- Is it now possible to create artificial contractual arrangements?

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DISCUSSION

2. Did the Tribunal err in its approach to the rateable occupation of the ATM sites?

- Relies heavily on the principles set out in Southern Railway and makes out that there is no materiel conflict. But sets the bar too low?

- What happens when the scale of the let-out increases – kiosks, concessions, restaurants..?

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DISCUSSION

2. Did the Tribunal err in its approach to the rateable occupation of the ATM sites?

- Is it really a complimentary use?
- And is there really a difference between a supermarket and a Post Office. See Assessor for Central Scotland Joint Valuation Board v Bank of Ireland [2011] RA 195:

  In my opinion, the crucial difference in this case is that there is no direct link between the ATM site and the operation of the Sub Post Office. The ATM cannot reasonably be said to be one of the retail attractions provided in the Sub Post Office for its customers [15]

- and

  Within the Sub Post Office the site of it is in effect dead space. The ATM is intentionally provided for the use of the general public. For that purpose the building has been altered and adapted by the opening of an aperture in the glass frontage of the building in virtue of a planning permission and a building warrant. Furthermore, the usage of the ATM is entirely unrelated to the opening hours of the Sub Post Office [16]

- Also see North Eastern Railway Co v York Union (1900) 1 QB 733;
- Hyde Group of Companies v David George Hooper (VO) (1999) VT;
- National Trust v J C Chilcott (VO) (2004) VT

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