

THE VALUATION TRIBUNAL FOR ENGLAND



*Non-Domestic Rating Appeals; Advertising Rights within Railway premises;
Proposals sought a deletion of assessment; advertising rights not let out; used for
railway purposes; Central List (England) Regulations 2005; appeals allowed.*

Re: JCDecaux Digital Advertising Right (over Exit to Broadgate Circle), Liverpool
Street Station, London EC2M 7PY and JCDecaux Uk Digital Advertising Right above
Central Concourse, Victoria Station, London SW1E 5ND

APPEAL NUMBERS: CHG100706377 and CHG100706379

BETWEEN: Network Rail Infrastructure Limited (Appellant)

and

Karl List (Respondent)
(Valuation Officer)

PANEL: Lola Moses (Chair) and John Rogers

CLERK: David Slater (Registrar and Chief Clerk)

REMOTE HEARING HELD ON THURSDAY 11 MAY 2023

PARTIES PRESENT;

Daniel Kolinsky KC from Landmark Chambers (Appellant's Counsel)

Ian Tanner from Tanner Rose (Appellant's Expert Witness)

Steven Wood (Appellant's Senior Commercial Manager – Witness of fact)

Galina Ward KC from Landmark Chambers (Respondent's leading Counsel)

Hugh Flannagan from FTB Chambers (Respondent's Junior Counsel)

Summary of decision

1. The appeals were allowed as the panel found that the advertising rights formed part of the railway hereditament and therefore the Rating List entries should be deleted.

Introduction

2. Following a report received from the billing authority, Westminster City Council, the Valuation Officer decided to enter the two appeal hereditaments into the local rating list, both entries effective from 1 April 2017. The list alterations were undertaken on 9 December 2020 but no alteration was made to the appellant's assessment in the Central List and therefore the appellant argued it was double taxed.
3. The appellant challenged the new entries by way of two proposals served on the Valuation Officer on 5 July 2021. In both cases, the appellant sought a deletion of the entries. The Valuation Officer determined that both proposals were not well founded and issued final decision notices to that effect on 10 October 2022. The appellant subsequently appealed both decisions to this tribunal on 9 December 2022.
4. The appeal hereditaments were advertising rights situated within railway station premises which the appellant contended fell to be assessed within the Railway Hereditament and therefore should be reflected and, in fact already were, in the Central Rating List entry.
5. The material day was 1 April 2017 and if the appeals were successful that would also be the effective date for any list alterations.
6. These appeals were treated as complex by the tribunal under Practice Statement 3 of the VTE's Consolidated Practice Statement and heard by an experienced panel. The hearing was conducted remotely via Microsoft Teams.

7. This decision document is not and does not purport to be a full verbatim record of proceedings.

Issues in dispute

8. Whether or not the advertising rights should be shown as separate entries in the rating list or should be deleted from same, as they should be reflected in the Central List assessment for the appellant instead.

Evidence and submissions

9. The parties assisted the tribunal by agreeing a revised single paginated bundle produced by the appellant which included;
 - (a) copies of the respondent's challenge decision notices
 - (b) the appellant's appeal submission
 - (c) Appellant's submission in support of the challenge by Daniel Kolinsky KC
 - (d) Westminster City Council's submissions
 - (e) Network Rail's response to Westminster City Council's submissions
 - (f) Witness and supplementary statement of Steven Wood
 - (g) Rail Advertising Concession Agreement dated 17 December 2018
 - (h) Network Rail Practice Statement on the use of advertising space at Managed stations dated 28 June 2021
 - (i) Witness statement of Ian Tanner
 - (j) Witness statement of Eleanor Greszczuk
 - (k) VOA Rating Circular 180 – 1995 and 2000 Rating Lists Rateability of Advertising on Railtrack and British Railways' Board Land dated August 2000
10. The panel also received the skeleton legal arguments from the parties which were filed with the tribunal 7 days before the hearing.
11. The parties also provided an authorities bundle which included;
 - (a) *R v St Pancras Assessment Committee* [1877] 2 QB 581
 - (b) *Holywell Union Assessors v Halkyn* [1895] AC 117

- (c) *John Laing & Sons v Kingswood Assessment Committee* [1949] 1 KB 344
- (d) *Westminster City Council v Southern Railway Company* [1936] AC 511
- (e) *Peak (VO) v Henlys* [1959] 52 R & IT 305
- (f) *Imperial Tobacco Company v Pierson* [1960] 3 WLR 235
- (g) *O'Brien v Secker (VO)* [1996] RA 409
- (h) *Cardtronics Europe Ltd v Sykes (VO)* [2020] 1 WLR 2184
- (i) *Esso Petroleum Company v Walker (VO)* [2013] UKUT 052
- (j) *Woolway (VO) v Mazars LLP* [2015] AC 1862
- (k) *Ludgate House Ltd v Ricketts (VO)* [2021] 1 WLR 1750

Relevant law

12. The relevant law was contained in sections 52, 53, 64 and 65 of the Local Government Finance Act 1988 and Regulation 6 of the Central Rating List (England) Regulations 2005 which was as follows;

Central rating

52 Central rating lists

(1) In accordance with this Part the central valuation officer shall compile, and then maintain, lists (to be called central non-domestic rating lists).

(2) A list must be compiled on 1 April 1990 and on 1 April in every fifth year afterwards[, subject to subsection (2A)]

(2A) In the application of this section to England—

(a) subsection (2) does not require a list to be compiled on 1 April 2015 and on 1 April in every fifth year afterwards, and

(b) a list must instead be compiled on 1 April 2017, on 1 April 2023 and on 1 April in every fifth year afterwards.

(3) A list shall come into force on the day on which it is compiled and shall remain in force until the next one is compiled . . .

(4) Before a list is compiled the central valuation officer must take such steps as are reasonably practicable to ensure that it is accurately compiled on 1 April concerned.

(5) No later than 31 December preceding a day on which a list is to be compiled the central valuation officer shall send to the Secretary of State a copy of the list he proposes (on the information then before him) to compile.

(6) As soon as is reasonably practicable after receiving the copy the Secretary of State shall deposit it at his principal office.

(6A) As soon as is reasonably practicable after compiling a list the central valuation officer shall send a copy of it to the Secretary of State.

(6B) As soon as is reasonably practicable after receiving the copy the Secretary of State shall deposit it at his principal office.

(7) A list must be maintained for so long as is necessary for the purposes of this Part, so that the expiry of the . . . period for which it is in force does not detract from the duty to maintain it.

53 Contents of central lists

(1) With a view to securing the central rating en bloc of certain hereditaments, the Secretary of State may by regulations designate a person and prescribe in relation to him one or more descriptions of relevant non-domestic hereditament.

(2) Where the regulations so require, a central non-domestic rating list must show, for each day in each chargeable financial year for which it is in force, the name of the designated person and, against it, each hereditament (wherever situated) which on the day concerned—

(a) is occupied or (if unoccupied) owned by him, and

(b) falls within any description prescribed in relation to him.

(3) For each such day the list must also show against the name of the designated person the rateable value (as a whole) of the hereditaments so shown.

(4) Where regulations are for the time being in force under this section prescribing a description of non-domestic hereditament in relation to a person designated in the regulations (“the previously designated person”), amending regulations altering the designated person in relation to whom that description

of hereditament is prescribed may have effect from a date earlier than that on which the amending regulations are made.

(4A) Where, by virtue of subsection (4) above, the designated person in relation to any description of non-domestic hereditament is changed from a date earlier than the making of the regulations—

(a) any necessary alteration shall be made with effect from that date to a central non-domestic rating list on which any hereditament concerned is shown; and

(b) an order making the provision referred to in paragraph 3(2) of Schedule 6 below and specifying a description of hereditament by reference to the previously designated person shall be treated, with effect from that date, as referring to the person designated by the amending regulations.

(5) A central non-domestic rating list must also contain such information about hereditaments shown in it as may be prescribed by the Secretary of State by regulations.

Interpretation

64 Hereditaments

(1) A hereditament is anything which, by virtue of the definition of hereditament in section 115(1) of the 1967 Act, would have been a hereditament for the purposes of that Act had this Act not been passed.

(2) In addition, a right is a hereditament if it is a right to use any land for the purpose of exhibiting advertisements and—

(a) the right is let out or reserved to any person other than the occupier of the land, or

(b) where the land is not occupied for any other purpose, the right is let out or reserved to any person other than the owner of the land.

(2A).....

(3) The Secretary of State may make regulations providing that in prescribed cases—

(a) anything which would (apart from the regulations) be one hereditament shall be treated as more than one hereditament;

(b) anything which would (apart from the regulations) be more than one hereditament shall be treated as one hereditament.

65 Owners and occupiers

(1) The owner of a hereditament or land is the person entitled to possession of it.

(2) Whether a hereditament or land is occupied, and who is the occupier, shall be determined by reference to the rules which would have applied for the purposes of the 1967 Act had this Act not been passed (ignoring any express statutory rules such as those in sections 24 and 46A of that Act).

(3) Subsections (1) and (2) above shall have effect subject to the following provisions of this section.

(4) Regulations under section 64(3) above may include rules for ascertaining—

(a) whether the different hereditaments or the one hereditament (as the case may be) shall be treated as occupied or unoccupied;

(b) who shall be treated as the owner or occupier of the different hereditaments or the one hereditament (as the case may be).

(5) A hereditament which is not in use shall be treated as unoccupied if (apart from this subsection) it would be treated as occupied by reason only of there being kept in or on the hereditament plant, machinery or equipment—

(a) which was used in or on the hereditament when it was last in use, or

(b) which is intended for use in or on the hereditament.

(6) A hereditament shall be treated as unoccupied if (apart from this subsection) it would be treated as occupied by reason only of—

(a) the use of it for the holding of public meetings in furtherance of a person's candidature at a parliamentary or local government election, or

(b) if it is a house, the use of a room in it by a returning officer for the purpose of taking the poll in a parliamentary or local government election.

(7) In subsection (6) above “returning officer” shall be construed in accordance with section 24 or 35 of the Representation of the People Act 1983 (as the case may be).

(8) A right which is a hereditament by virtue of section 64(2) above shall be treated as occupied by the person for the time being entitled to the right.

(8A) In a case where—

(a) land consisting of a hereditament is used (permanently or temporarily) for the exhibition of advertisements or for the erection of a structure used for the exhibition of advertisements,

(b) section 64(2) above does not apply, and

(c) apart from this subsection, the hereditament is not occupied,

the hereditament shall be treated as occupied by the person permitting it to be so used or, if that person cannot be ascertained, its owner.

(9) . . .

Central List (England) Regulations 2005

6 Railway hereditaments

(1) Where either Network Rail Infrastructure Limited or the company bearing the name HS1 Limited on 1st May 2022—

(a) occupies or, if it is unoccupied, owns any hereditament; or

(b) lets or licenses a hereditament to—

(i) a licence holder or a licence exempt operator, other than a licence holder or licence exempt operator who is also a designated person under Parts 1 or 2 of the Schedule to these Regulations or under Part 2 of the Schedule to the Non-Domestic Rating (Communications and Light Railways) (England) Regulations 2005, and the lessee, licensee or British Transport Police Authority occupies, or, if unoccupied, owns the hereditament; or

(ii) the British Transport Police Authority, and it occupies, or, if unoccupied, owns the hereditament,

and if, apart from these Regulations, those hereditaments would be more than one hereditament, and each separate hereditament satisfies the conditions in

paragraph (3), those separate hereditaments shall be treated as one hereditament.

(2) Where London Underground Limited—

(a) occupies or, if it is unoccupied, owns any hereditament; or

(b) lets or licenses a hereditament to any person (other than a licence holder or licence exempt operator who is also a designated person under Parts 1 or 2 of the Schedule to these Regulations),

and if, apart from these Regulations, those hereditaments would be more than one hereditament, and provided each separate hereditament satisfies the conditions in paragraph (3), those separate hereditaments shall be treated as one hereditament.

(3) The conditions mentioned in paragraphs (1) and (2) are that the hereditament is—

(a) used wholly or mainly for—

(i) in the case of [the persons mentioned in paragraph (1)], railway purposes;

(ii) in the case of London Underground Limited, LUL purposes; and

(b) not an excepted hereditament.

(4) In this regulation—

“excepted hereditament” means a hereditament consisting of or comprising—

(a) premises used as a shop, hotel, museum or place of public refreshment;

(b) premises used wholly or mainly as office premises, where those premises are not situated on the operational land of—

(i) any person designated by regulation 3 and named in Part 1 of the Schedule;

(ii) a licence exempt operator or licence holder;

(c) premises or rights so let out as to be capable of separate assessment, other than those falling within paragraph (1)(b) or (2)(b); or

(d) premises (other than premises used in connection with the collection and delivery of parcels, goods or merchandise conveyed or to be conveyed by rail) used wholly or in part for purposes concerned with—

(i) the carriage of goods or passengers by road transport or sea transport; or

(ii) harbours,

or for purposes incidental to such purposes;

“licence exempt operator” and *“licence holder”* have the meanings given by section 10(6) and 83(1) respectively of the Railways Act 1993 [except that *“licence holder”* also includes a holder of a railway undertaking licence granted pursuant to the Railway (Licensing of Railway Undertakings) Regulations 2005.

. .

“railway purposes” means the purposes of providing railway services, within the meaning given by section 82(1) of the Railways Act 1993, or for purposes ancillary to those purposes (including the purposes of providing policing services or the exhibiting of advertisements).

(5) The hereditaments described in paragraphs (1) and (2) shall be treated as occupied by the relevant designated person.

Decision and reasons

13. In the determination of these appeals, the panel had the benefit of two highly skilled advocates whose eloquent arguments clearly set out the competing parties' approach to the legal issue in dispute, which was whether or not the advertising rights within the railway stations should be assessed as separate hereditaments and shown in the local rating list. Although the dispute involved technical legal arguments, there was a factual dispute relating to the concession agreement between the appellant and JCDecaux about whether

or not under the terms of that agreement the advertising rights had been let out and therefore no longer used for railway purposes. The issue between the parties was therefore whether the advertising rights formed part of the railway hereditament or formed separate hereditaments that should be shown in the rating list.

14. Ian Tanner from Tanner Rose appeared for the appellant as expert witness and his witness statement was taken as read. Mr Tanner explained how historically advertising rights within railway stations had always been deemed to be part of the railway assessment. This had been the accepted custom and practice for the last 30 years or so and the Valuation Office Agency's own guidance for its staff had reflected this approach.
15. Unfortunately, Mr Tanner was unable to assist the tribunal with how the terms of the concession agreement compared to a standard advertising agreement, where say the right was affixed to a wall of a property like a shop. A comparison between the two would have been helpful to the panel as it would have highlighted the degree of control, if any, exercised by the owner of the shop in relation to the advertising space that had been let out.
16. Mr Steven Wood, the Appellant's Senior Commercial Manager appeared as witness of fact and again his witness statement was also taken as read. Mr Wood confirmed the 2018 concession agreement was drafted in similar terms to the preceding concession agreement with JCDecaux which was in place on the material day. Mr Wood also confirmed that the advertising sites, to which the appeals related, had not been moved or altered since the material day.
17. In his witness statement, Mr Wood explained that Network Rail recognised that it did not have the same level of knowledge and expertise in managing the advertising for the benefit of the railway as companies who specialised in commercial advertising. Therefore, it had historically appointed third parties to exploit and manage the advertising rights to generate income streams that were reinvested into the railway.

18. Under the agreement with JCDecaux, the latter managed the advertising sites at 20 managed stations which were the largest and busiest ones. However, he stated that Network Rail retained ultimate control of the advertising sites. He said that Network Rail's commercial relationship with JCDecaux strove to achieve a shared goal which was the maximisation of revenue from advertising sites within Network Rail's managed stations which was then split between the two parties to the agreement with the majority share of the split in Network Rail's favour.
19. Although she did not appear before the panel, Eleanor Greszczuk, JCDecaux's Senior Partnership Manager provided a witness statement within which she confirmed that Mr Wood's analysis of the concession agreement was correct. She stated that Network Rail retained ultimate control of the advertising rights and that JCDecaux did not fetter that control and had no lawful means to do so either.
20. Whilst the appellant's case was supported by witness testimony, nobody appeared for the Valuation Officer. This meant that the appellant's Counsel and the panel were denied the opportunity of asking pertinent questions that they may have wished to ask. When the absence of any expert witness representative for the respondent was raised, Miss Ward explained that the respondent did not feel it necessary as the dispute between the parties was primarily a legal issue that the panel would have to grapple with. However, this response in defence of her client was not satisfactory because as the decision document will go on to explain there were fact finding issues to be determined and only one party had provided witness statements and witnesses for cross examination. The panel was therefore left to draw its own conclusions as to why no witness statements had been put forward and no expert witness appeared for cross examination to defend the Valuation Officer's approach. The fact that the Valuation Officer was not prepared to alter the Central List entry until the outcome of these appeals suggested he was unsure of the accuracy of the valuation approach that Miss Ward was advocating and defending. Either that or the Valuation Officer was of the

opinion that the appellant's case could not possibly succeed on the legal issue and therefore it was an open and shut case.

21. In making her submissions, on behalf of the respondent, Miss Ward was helpfully succinct. At the outset, she accepted that the Valuation Officer had changed his position with regard to how these advertising rights were treated for rating purposes. However, she said what the Valuation Officer had done previously and any past guidance that was issued to VOA staff should not dictate the outcome of these appeals. Miss Ward was undoubtedly correct that past practice should not necessarily be the main driver in the determination of these appeals, especially if it was considered flawed with the benefit of hindsight. If it was indeed flawed, a continuation of past mistakes would only achieve the wrong sort of consistent treatment, consistency of error. Nevertheless, the panel was of the opinion that it would have been helpful to understand why there was this significant change of approach, especially as it was initiated by a third party, in this case a billing authority, as opposed to a review of the Valuation Officer's own initiative or that of his technical staff.

22. In support of the Valuation Officer's revised approach, Miss Ward argued that the normal rating provisions do not apply to advertising rights because they are incorporeal. Sections 64 (2) and 65(8) of the 1988 Act provide a specific statutory framework for advertising rights. Therefore, the appellant's argument that Network Rail was in paramount control was misplaced. The rating approach for advertising rights was distinct from that which was more generally applicable to other types of property under section 64 (1) and 65 (2), where issues of paramountcy and landlord control over potential lodgers may come into play. She contended that as the advertising rights were let out to JCDecaux this meant they were separate hereditaments under section 64 (2) and by virtue of section 65 (8) JCDecaux was deemed to be in occupation of same, Therefore Regulation 6 of the Central Rating List (England) Regulations 2005 was not engaged as Network Rail did not occupy the advertising rights, JCDecaux did and therefore those rights could not be treated as forming part of Network Rail's hereditament and included in the

Central List. However, as the panel heard they were still included in the Central List assessment, despite the fact that the advertising rights had been entered into the local Rating List on 9 December 2020. Had the Valuation Officer appeared before the panel, he would have been in danger of having to make a statement that would have impugned the accuracy of the Central List.

23. Miss Ward was, however, prepared to concede that in theory it was conceivable that a host could have purported to have granted a right but retained such extensive control that the grant of any right was negated for the purposes of section 64 (2). However, having had regard to the concession agreement between Network Rail and JCDecaux she was satisfied that that was not the case here. In her opinion, none of the controls retained by Network Rail impeded JCDecaux's effective and beneficial use of the advertising space. Whilst Network Rail retained absolute discretion to withdraw any advertising space, obstruct or disturb any advertising site or dispose of same, she argued that this did not negate any benefit to JCDecaux before it was suspended or terminated. She also argued that Network Rail's reserved right to use the advertising space for special announcements, like service disruption, was limited to as and when those circumstances arose and did not interfere with JCDecaux's effective control of the advertising space at all other times.

24. On behalf of the appellant, Mr Kolinsky argued that the advertising space within the railway stations had not been separated from Network Rail's occupation of the station(s) and the use of same for railway purposes. In order to be a hereditament under section 64 (2) of the 1988 Act, an advertising right had to be let out to or reserved to someone other than Network Rail. However, he argued that the rights had not been let out because Network Rail remained in control of the advertising, which was managed on its behalf by JCDecaux.

25. Mr Kolinsky then went on to explain the history of how advertising rights within railway stations had been valued as part of the railway assessment. He

argued that the statutory history supported his view that exhibiting advertisements was deliberately included within the scope of railway purposes in the context of the applicable Central List regulations. This mirrored the advantageous position expressly provided for in the General Rate Act 1967 and Rating & Valuation (Miscellaneous Provisions) Act 1955.

26. Mr Kolinsky argued that the statutory scheme made it clear that section 64(2) of the 1988 Act had to be read together with the Central List provisions rather than isolation from it. He said this was clear from section 64 (3) which was one of the empowering provisions of the 2005 regulations.

27. He fundamentally disagreed with the Valuation Officer's new approach which asserted that an advertising right was created under section 64 (2) and therefore the principles of rateable occupation did not apply because section 65 (8) determined who was the rateable occupier of that right. This new approach was one that the Valuation Officer was, in Mr Kolinsky's words, seduced into undertaking by the billing authority and had reversed the consistent approach the Valuation Officer had undertaken over the last 30 years.

28. The analysis advocated under this new approach was flawed even if it was permissible to look at section 64 in isolation from the Central List provisions. He argued that it was still necessary to consider the statutory language of section 64 (2) in respect of the circumstances in which an advertising right could be created as a separate hereditament. The deeming provision under section 65 (8) for the identification of the rateable occupier did not arise unless and until there was a separate hereditament under section 64 (2). Otherwise, it would be like putting the cart before the horse.

29. The other problem with the Valuation Officer's approach was that he was using section 65 (8) to avoid Central List consideration.

30. Mr Kolinsky contended that the advertising rights under appeal were used for railway purposes, the statutory definition of which was contained in regulation 6 (4) of the Central List (England) Regulations 2005.

31. The correct analysis according to Mr Kolinsky was that;

- a. The advertising rights were not let out or reserved but rather managed on Network Rail's behalf. However, this was not done in a way which created a separation between the advertising space and the operational control of the station as a whole by Network Rail. This was clear from a close examination of the concession agreement with JCDecaux.
- b. The reality of the legal and practical arrangements was that Network Rail remained in control of the advertising.
- c. Network Rail was in rateable occupation of the station including the advertisements and ensured that they were managed in a way which was subservient to the operational requirements of the station. Therefore, the putative advertising rights were not separate from the occupation of the station, so even if section 64 of the 1988 Act was looked at in isolation, no separate advertising rights were created.
- d. As the putative (advertising) rights were not separate from the station(s) and used for railway purposes and were not excepted hereditaments, they formed part of the railway hereditaments shown in the Central List pursuant to regulation 6 of the 2005 Regulations. The appellant therefore sought the deletion of the two appealed entries from the local rating list.

32. Following the conclusion of the hearing, the panel initially reserved its decision.

33. Bearing in mind the wording of section 64 (2) of the 1988 Act, the panel had regard to the Railway Advertising Concession Agreement dated 17 December 2018 as the starting point for its deliberations. Section 64 (2) was as follows);

(2) In addition, a right is a hereditament if it is a right to use any land for the purpose of exhibiting advertisements and—

- (a) the right is let out or reserved to any person other than the occupier of the land, or
- (b) where the land is not occupied for any other purpose, the right is let out or reserved to any person other than the owner of the land.

34. Although the concession agreement post dated the material date for these appeals, it was accepted by the parties that this agreement superseded an earlier concession agreement that was made on similar terms. On behalf of the Valuation Officer, Miss Ward contended that it was clear from Clause 3.1. of the agreement that the advertising rights were let out and it could not be read in any other way. Clause 3.1 was as follows;

Subject to the provisions of this Agreement, Network Rail grants to the concessionaire from the Effective Date and thereafter during the Term, the exclusive right to manage, promote and exploit the sale of Advertising Space.

35. However, in cases of this nature, it was important to have regard to the agreement as a whole rather than focus in on a particular clause. The opening paragraphs to the agreement under the heading Background indicated that the agreement was very much a joint venture between Network Rail and JCDecaux with the former in paramount control because it enjoyed sole discretion to remove the advertising space or replace the commercial advertising with important updates or Network Rail safety announcements.

36. The background to the agreement was set out as follows;

- (A) Network Rail has within its possession and control spaces at railway stations and on land adjacent to tracks and railway stations which is, or may in due course be, available as advertising space.
- (B) Network Rail wishes to grant a concession to the concessionaire to manage, promote and exploit such advertising space.

37. In his witness statement, Mr Steven Wood informed the tribunal that Network Rail entered into a partnership working agreement with JCDecaux, in order to maximise revenue streams from advertising space. Revenue raised was then

reinvested into the railway. He, however, maintained that under the terms of the agreement Network Rail retained ultimate control of the advertising sites. His witness testimony was corroborated by the witness statement of Eleanor Greszczuk, Senior Partnership Manager for JCDecaux.

38. Within the evidence bundle was a Practice Statement which Mr Wood had helped to prepare to highlight how the agreement worked in practice. However, Miss Ward skilfully attempted to highlight a number of inaccuracies in the practice statement in her cross examination of Mr Wood, when she queried which clauses of the agreement were invoked when Network Rail exercised its discretion to temporarily remove or replace advertising space. The panel was of the opinion that any inaccuracies within the Practice Statement were not material to the issue in dispute that it had to decide. In any event, the Practice Statement which was drawn up on 28 June 2021 post dated the Concessionary agreement and was drafted to assist with this appeal.

39. What the panel found more compelling was the concessionary agreement itself as the document which when read as a whole clearly indicated that Network Rail was the master and JCDecaux its servant. This was evident from the following clauses in particular;

Clause 4.5

Subject to clause 4.9, Network Rail may by notice to the concessionaire at any time and from time to time in its absolute discretion, withdraw any advertising space (and Advertising Space shall be deemed to be withdrawn if Network Rail permanently disturbs or obstructs any structure, Ambient Advertising Media or site). The concessionaire shall cease to have any rights in respect of such Advertising Space from the date set out in the notice or the date such Advertising Space was disturbed or obstructed.

Clause 4.11

Network Rail shall be entitled at any time to temporarily disturb, remove or obstruct any Structure, Ambient Advertising Media or Site if in

Network Rail's opinion it would be necessary or desirable to do so, including but not limited in connection with;

4.11.1 The safety of any person or thing;

4.11.2 any emergency;

4.11.3 breach by the Concessionaire of an obligation which the Concessionaire is subject; or

4.11.4 the operation of Network Rail's undertaking,

and Network Rail shall provide as much notice as is reasonably necessary practicable to the Concessionaire of its intention to exercise any of its rights under Clause 4.11 (except in an emergency, when no notice shall be required).

Clause 4.12

Network Rail reserves the right to close any Managed Station or track at any time in its discretion for any operational reason including without limitation, the prevention of terrorism or industrial action or for any reason affecting the safety of passengers or other persons using the Railway network. Network Rail's employees or Network Rail's contractors' employees. Subject to Clause 4.13, in the event that Network Rail closes any Managed Station or track under Clause 4.12, the Concessionaire shall not be relieved from any obligation to make payment to Network Rail under this agreement.....

Clause 6.2

The Concessionaire shall operate the Concession;

6.2.1 in accordance with the standards;

6.2.2 in accordance with key performance indicators;

6.2.3 in a safe, thorough and professional manner exercising all due skill, care and diligence and to the standard to be expected of a reputable, prudent and responsible company experienced in the provision of services of a similar size, scope and complexity of the concession; and

6.2.4 in accordance with such reasonable instructions as may from time to time be given by Network Rail's representative.

Clause 6.16

Without prejudice to Network Rail's rights under Clauses 4.11 and 4.12 upon the occurrence of Major Disruption or Severe Disruption at any Managed Station, the Concessionaire shall;

6.16.1 permit Network Rail to use the Large Format Screens at the affected Managed Station(s) at no cost to Network Rail for the dissemination of customer information.

6.16.2 provide Network Rail with such access as it requires to the Concessionaire's systems in order to exercise its rights set out in Clause 6.16.1; and

otherwise use its best endeavours to facilitate Network Rail's use of Large Format Screens for the purposes set out in Clause 6.16.1

40. The above clauses within the concession agreement highlighted the fact that the advertising space was not let out in the conventional sense. Under normal circumstances, when a property was let out, the incoming tenant was very much left to their own devices to run their business as they saw fit with little or no interference from their landlord. Whilst it was customary for the landlord or their representative to make occasional visits to check the property, the average tenant would not expect the landlord to ensure that they achieve key performance targets and they certainly would not expect to have to surrender the use of the property to the landlord, whenever the latter saw the need to temporarily take it over for the purposes of the landlord's business.

41. With this in mind, the panel found that the discretionary powers retained and exercised by Network Rail meant that it was in a paramount control of the advertising space at all times. JCDecaux's occupation was clearly subordinate to Network Rail's as the latter could at any time disrupt, obstruct, remove or take over the advertising space to make customer announcements. Since around 2000, the advertising space was digital and relevant Network Rail staff had been given electronic access to the advertising media systems having been trained and been provided with login details for this purpose. When JCDecaux digital advertising was interrupted or interfered with by Network Rail's staff, although the former was

automatically made aware of the event(s), it had no power to object or to prevent Network Rail exercising control.

42. The panel therefore rejected the Valuation Officer's argument that issues relating to paramountcy were irrelevant in relation to the advertising rights in these appeals because they were incorporeal and different rules relating to rateability applied. It was of the opinion that here we had a landlord type lodger situation as in *Halkyn* and *Cardtronics*. It therefore upheld Mr Kolinsky's argument that section 64 should not be looked at in isolation from the Central List provisions. The approach to be undertaken was to look at the putative hereditament, then decide who was in rateable occupation which then would determine whether it should be separately assessed in the Rating List or form part of the Central List Railway hereditament.
43. In a normal situation where advertising space on the wall of a property, like a shop, or on the side of the road it was unlikely that the person letting out the advertising right would retain any form of control. Certainly, not in the form of controls that were reserved to and exercised on occasions by Network Rail. The degree of control, which Network Rail was entitled to yield at its discretion under the terms of the agreement had to be a relevant consideration. Although JCDecaux paid Network Rail a fee to exploit the advertising rights, the latter had the power which it exercised from time to time, at its discretion, to interrupt JCDecaux's commercial advertising for its own ends. The panel saw this as significant. Imagine if a shop was let out to a tenant but the landlord retained reserve powers under the tenancy agreement to enter and take over the shop at any time they saw fit and on occasions did just that. If such a situation occurred, the occupation of the landlord would be seen as paramount as the tenant's occupation would be clearly subordinate as the latter was denied the guarantee of the quiet enjoyment of the property, without interruption, throughout the tenancy term. Exclusiveness and paramountcy were therefore considered relevant factors and in this case because of the rights reserved to Network Rail, the advertising space had not been let out. The advertising space was also used for railway purposes because the whole point in engaging JCDecaux was to

maximise commercial income which would then be invested in the railway. The controls for the digital advertising boards were overridden by trained Network Rail staff, who had log in access, to display important Network Rail safety announcements and customer information. Therefore looking at the advertising space and how it was used, it was clear to the panel that it formed part of the railway hereditament and fell to be assessed as such in accordance with Regulation 6 of the Central List (England) Regulations 2005.

44. Moreover, given that the Supreme Court, in *Cardtronics*, had determined that sites for Automatic Teller Machines (cash points) which were effectively holes in a wall were not separately rateable from the host store, it was difficult to see, given the circumstances in play in these appeals, why the Valuation Officer had formed the view that the advertising rights were separately rateable. In *Cardtronics* although the retailers did not interfere with the operations of its banking arm, the Supreme Court held that the landlord/lodger principle as expressed in *Halkyn* was relevant. In paragraph 43 of its judgment it stated;

Here by contrast there is of course no “rivalry”, and no question of any control exercised by the retailer “interfering” with the operations of its banking arm in respect of the ATM machines, since they share a common interest in their success. Their purpose is rather to facilitate that operation. However, the underlying principle remains that stated by Lord Herschell in *Halkyn*: “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 ...” Thus in a case such as the present one starts from the position, as recognised by the unamended rating list, that the retailers were in exclusive occupation of their stores. One then asks how that has been affected by the transfer of operation to an associated company, and the limited possession given of the ATM sites, and whether nonetheless the occupation of the store owner remains “paramount” - a concept which Lord Herschell chose to illustrate by reference to the “familiar” case of a landlord and his lodger. The retailers argue that, like the landlord, the retailer retains control of the whole premises and the ATM remains part of the overall business.

45. In the past, the Valuation Officer had accepted that this form of advertising agreement between Network Rail and a third party did not affect rateability. This fact was conceded by Miss Ward and was reflected in VOA Rating

Circular 180 which was issued to all its offices in England and Wales and was entitled 1995 and 2000 Rating Lists – Rateability of Advertising on Railtrack and British Railways' Board Land which was dated August 2000 and signed off by Paul Sanderson, Director of Rating.

46. In section 5a of the VOA's Rating Manual, the relevance guidance was found in paragraphs 8.2.7 and 8.2.7.1

8.2.7 Advertising and railways

The position historically in respect of those railway hereditaments shown in Central Lists is that their advertising sites have been included in the valuations, and until recently no agreements were identified which have the effect of creating any rateable occupier other than the statutory operator.

Railtrack plc was created on 1st April 1994 and all land used for railway purposes was transferred to it from the British Railways Board (B.R.B.). Surplus property not required for Railtrack PLC's purposes continued to be held by British Railways Board. B.R.B. ceased to be a "designated person" in the 2000 Central List Regulations and their occupations are now individually assessed in the local lists with effect from 1 April 2000.

Following a period during which it was in administration, Railtrack PLC was renamed Network Rail Infrastructure Limited, and continues to be a designated person for the purposes of the 2000 and 2005 Rating Lists.

For the avoidance of doubt, advertising displays should be placed in local rating lists where they are either let out from land or stationed on land that is not in the occupation of a person designated to appear in Central Lists.

8.2.7.1 Advertisements on working railway property currently occupied by Network Rail Infrastructure Ltd

Included in the Central Rating List for Network Rail Infrastructure Limited are those advertising sites managed under its central management agreements that are situated on land associated with operational railways, which is being used wholly or mainly for the purposes of the carriage of goods or passengers by rail. As a result no separate assessment in Local Rating Lists falls to be made for such sites. It is understood that there may also be a number of similar agreements with other poster companies and, where situated on land occupied by for Network Rail Infrastructure Limited, these should be treated in the same way.

For the purposes of dealing with advertising displays, there is no distinction between “operational” and “non-operational” railway land, and the expression “operational land” should not be cited as a reason to distinguish between the way advertising on railway land is dealt with. Instead, the distinction is between;

a. land that is being used wholly or mainly for the purposes of the carriage of goods or passengers by rail, that is in the occupation of Network Rail Infrastructure Ltd, and b. land that is not being used wholly or mainly for the purposes of the carriage of goods or passengers by rail, (or “defunct” railway land) that is in the occupation of BRB (Residuary) Ltd.

For the avoidance of doubt, once it is established that Network Rail Infrastructure Ltd occupies the railway land in question, that is enough to satisfy the Central Valuation Officer that any advertising sites managed by them are to be placed in their Central List assessment.

47. The Valuation Officer’s approach in relation to these appeals, as highlighted by Mr Kolinsky, was clearly contrary to its previous practice and appeared to contradict the guidance of the VOA’s Rating Manual. If the Concession agreement in this case was materially different to those viewed previously, when the decision was taken not to value the advertising space separately, at the risk of repetition nobody appeared on behalf of the Valuation Officer to explain what was so different. Similarly, if the Valuation Officer had formed the opinion that his earlier valuation approach was wrong, it would have assisted the tribunal to understand the rationale behind the change of approach. The change in approach was initiated by Westminster City Council’s request for the advertising rights to be entered into the Rating List. However, if the billing authority was correct that these advertising rights should be separately rated and shown in the Rating List, it begged the question why the Central List assessment was not altered at the same time. Miss Ward’s explanation that the Valuation Officer would review the Central List assessment if necessary, following the panel’s determination of these appeals was unconvincing. Especially, as the Valuation Officer had a statutory duty to compile and then maintain a correct list. Whilst it could have been argued, but was not, that the Valuation Officer who was responsible for compiling and maintaining the local list was a different person to the individual who had responsibility for the Central List, the expectation was that the actions would be joined up and both lists would have been altered

simultaneously as and when necessary. It appeared anomalous that to avoid the same property being double rated the ratepayer had had to appeal and then await its outcome, before the Valuation Officer took any form of action to avoid a potential putative hereditament being double counted.

48. As the appellant's grounds of appeal were made out, it was entitled to a refund of its fee paid in accordance with regulation 13E(1)(a) of the Non-Domestic Rating (Alterations of Lists and Appeals) (England) Regulations 2009 (as amended).

49. The appeals were therefore allowed.

Order

50. Under the provisions of regulation 38(4) of The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, the Valuation Tribunal for England ordered the Valuation Officer to delete the appeal hereditaments from the Rating List with effect from 1 April 2017.

51. Under regulation 38(9), the Valuation Officer must comply with this Order within two weeks of its making.

Date: 1 June 2023

Appeal numbers: CHG100706377 and CHG100706379

Right of further appeal

Any party who is aggrieved by the Tribunal's decision, and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this decision notice.