Case Name: *Libra Textiles Ltd and Centric Assets Ltd v Ritchie Roberts and David Alford (VOs)* [2020] UKUT 0237 (LC) (31 July 2020)

Topic: (1) An application of the Cardtronics Supreme Court decision and (2) the validity of appeals to retrospectively amend the 2010 list, in reliance on the Rating (Property in Common Occupation) etc Act 2018 and associated regulations, allowing relevant merger proposals which had previously been ruled out by the *Mazars* Supreme Court decision.

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Summary: These conjoined appeals (relating to premises in Colne and Portsmouth respectively) against VTE decisions turned on the ability under the Rating (Property in Common Occupation) etc Act 2018 (the "2018 PICO Act") and associated regulations to retrospectively amend the 2010 list, which had closed on 31 March 2017. The proposals had sought to merge the respective hereditaments on the grounds that they were contiguous and interconnected. It was argued by the ratepayers that these proposals fell within the provisions of the 2018 PICO Act and regulations, which enabled late proposals to the 2010 list. Having disposed of an occupation issue in respect of the Colne premises, which was decided in favour of the ratepayer by application of the Cardtronics Supreme Court decision, the Tribunal rejected the appeals on the basis that the 2018 PICO Act (and regulations) related only to premises which were contiguous but not interconnected. In short, the proposals did not meet the criteria for validity.

Commentary: The Tribunal dealt first with whether the Colne premises (consisting of a retail outlet for the sale of discount clothing and an adjoining fish and chip restaurant) comprised a single hereditament, the two existing hereditaments being both contiguous and interconnected. Based on the control exercised by Libra Textiles (trading as Boundary Mills Stores) over the operation of the restaurant and by application of the *Cardtronics* decision, the Tribunal had no difficulty in determining that the two premises were capable of being one hereditament. They also made reference to the landlord and lodger principle in *Holywell v Halkyn* [1895] and distinguished the lesser degree of control in *Westminster Council v Southern Railway Co* [1936]. This is an early example of the application of the Supreme Court's determination in the Cardtronics case, based on the degree of control exercised by the retail outlet over the operations of the fish and chip restaurant akin to the supermarkets' general control over the ATMs.

The more complex aspects of this case turned on the interpretation of the 2018 addition (via the 2018 PICO Act) of sections 64 (3ZA) to (3ZD) of the 1988 Act. Both cases involved proposals (made in 2019) to merge two hereditaments into one, which could have successfully been made before 1 April 2017, but not thereafter due to the closure of the 2010 list. The appellants argued that the 2018 PICO Act amendments opened the door to their (otherwise out of time) proposals.

The purpose of the 2018 PICO Act was to restore VOA practice before the Supreme Court's decision in Mazars (which determined that contiguous premises which were not interconnected must be treated as separate hereditaments). Under the 2018 PICO Act contiguous premises with no interconnection and separated only by a common corridor or

other means of access to each would be treated (retrospectively under the 2010 list) as a single hereditament. "Contiguity" requires a shared fence, wall or other means of enclosure and includes premises vertically adjacent in a multi-occupied building. A classic example in the horizontal plane is that of two adjacent units in a shopping mall, each accessible via the common parts.

The crucial point in this case is that the 2018 PICO Act does not apply to premises which (as here) are both contiguous and interconnected. Both sets of premises were contiguous but were not separated by a common wall, fence or other enclosure (so they were interconnected). The 2009 appeal regulations were amended to admit as "relevant proposals" in respect of the 2010 list those which could only be made as a consequence of the enactment of sections 64(3ZA) or (3ZB) of the 1988 Act. The 2009 regulations were not amended so as to permit such proposals in respect of <u>all</u> mergers which would have been valid had they been made before 1 April 2017 (e.g. the proposals made by Libra and Centric). The Tribunal's reasoning was that the words used in Regulation 5 of the 2018 regulations (supplemental to the 2018 PICO Act) stated that in respect of a relevant proposal (only) the 2009 regulations shall be amended "as if" such a proposal could be made by service on the VO by 31 December 2019 (or, if later, within 6 months of an alteration to the list in respect of a hereditament of which the subject premises formed part before that alteration). It followed that the 2018 amendment to the 2009 regulations does not apply to any proposal which is not within the ambit of the 2018 PICO Act, namely a proposal where the premises in question are both contiguous and interconnected.

The Tribunal was critical of the convoluted nature of the drafting, which in truth is borne out of the stated intention of government to limit the 2018 change to restoring the pre-*Mazars* practice of the VOA in treating contiguous premises accessible by the same common parts (but not interconnected) as a single hereditament. The intention was that the door of opportunity should be opened just enough but no more.

The appellants' position was argued forcefully, but to no avail. Having considered in detail those arguments and the respondent's counter-arguments (both at the hearing and as set out in the statement of case, being different in material respects), the Tribunal was clear that (para 87) "there is no reason for the new provisions [in sections 64 (3ZA) to (3ZD)] to have opened the door to ratepayers unaffected by *Mazars*, and the new provisions are not to be read as a general licence to reopen the 2010 rating list in any situation where it is claimed that two or more hereditaments should be merged." This had been confirmed in the Explanatory Memorandum issued at the time of the 2018 Regulations by MHCLG, which can legitimately provide interpretative assistance (as Carnwath LJ, as he then was, stated in a 2010 case) where the explanatory material emanates from the Secretary of State directly responsible for making the instrument.

In conclusion, the Tribunal determined that all proposals in the conjoined appeals were made out of time and were, therefore, invalid as not falling within the extended window provided by the 2009 regulations, as amended. The appeals were dismissed.

Town Legal LLP